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Chippewa & Flambeau Improvement Co. v. FERC, 325 F.3d 353 (D.C. Cir. 2003)

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Chippewa & Flambeau Improvement Co. v. FERC, 325 F.3d 353 (D.C. Cir. 2003) (holding the Federal Energy Regulatory Commission (1) was not barred by issue preclusion from reexamining the status of non-navigable waters, (2) did not abuse discretion in determining that a reservoir was necessary and appropriate for the operation of other plants, and (3) reasonably treated four closest downstream plants as a "complete unit" for measuring the effect of a reservoir).

Chippewa and Flambeau Improvement Company ("Chippewa") owned a reservoir on the Flambeau River in northern Wisconsin. The Federal Energy Regulatory Commission ("FERC") decided that Chippewa must obtain a Federal Power Act ("FPA") license for its Turtle-Flambeau reservoir, although the specific reservoir was not electricity generating. The United States Court of Appeals for the District of Columbia Circuit denied Chippewa's petition for review. In 1924, FERC determined that the Flambeau River was not "navigable" under the FPA and that the reservoir in question would not otherwise affect interstate commerce. Although the reservoir did not generate electricity, seasonal releases increased electric generation downstream at other hydroelectric plants owned by Chippewa's shareholders. FERC determined that the operation of the Turtle-Flambeau reservoir increased the total generation at plants on the Flambeau River by five to six percent, and that the non-electricity generating reservoir was "necessary and appropriate" for the operation of the licensed power plants downstream and should be subject to licensing under the FPA. Chippewa petitioned the court for review of FERC determination.

First, the court examined Chippewa's issue preclusion argument as to whether FERC was bound by a previous determination that the reservoir was not subject to federal licensing requirements. The court first determined that FERC was free to reexamine its findings in order to take account of changes in findings and governing law. The court also held that issue preclusion is applicable only to issues actually litigated in a prior proceeding; FERC never considered whether the Turtle-Flambeau reservoir should be licensed. The court determined that the downstream river plants were changes in the river structure sufficient to justify FERC's reassessing the Turtle Flambeau reservoir.

Next, the court assessed Chippewa's contention that FERC's assertion of jurisdiction did not adequately identify how the reservoir is "necessary or appropriate" to the maintenance and operation of the electric generating plants. The court examined the impact from the reservoir on the electricity generating reservoir and determined that it was reasonable for FERC to deem the reservoir "necessary or appropriate" to the operation and maintenance of the other plants—the emphasis upon the effect on the power generation of other plants was consistent with the purpose of the FPA.

Finally, the court determined whether FERC arbitrarily limited its analysis to the top four plants closest to the reservoir, thereby inflating

the electricity-generating effect from the operation of the Turtle-Flambeau reservoir. The court first deduced that the most significant impacts of the reservoir were on the four of the eight units that FERC used in its findings. FERC used these four plants because they are "physically and operationally interrelated" with the Turtle-Flambeau reservoir. Because the Clean Water Act does not define the "complete unit" of development for FERC's finding, the court held that FERC's deference was not unreasonable. Concluding that the FPA supported the required license for Chippewa's non-electricity generating reservoir, the court denied Chippewa's petition for review.

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Friends of the Earth v. EPA, 333 F.3d 184 (D.C. Cir. 2003) (holding Circuit Courts of Appeals lack original jurisdiction under the Clean Water Act to review total maximum daily load decisions by the Environmental Protection Agency).

The District of Columbia ("District") developed water quality standards under the Clean Water Act ("CWA") for the Anacostia River addressing both dissolved oxygen and turbidity. Because the Anacostia violated these water quality standards, the District developed Total Maximum Daily Loads ("TMDLs") for the river pursuant to the CWA, which limited the maximum pollution input allowed into the water body. The Environmental Protection Agency ("EPA") approved the District's TMDL for dissolved oxygen in December 2001 and approved the TMDL for turbidity in March 2002. Following these decisions, Friends of the Earth ("FOE") filed suit in the District of Columbia Circuit Court of Appeals, claiming the standards were insufficient to protect water quality. The EPA moved to dismiss the suit, arguing that the court of appeals lacked subject matter jurisdiction to review TMDLs because they are governed by section 1313 of the CWA.

Section 1369(b)(1) does not expressly authorize courts of appeal to review TMDL determinations under section 1313. As a result, the EPA argued that the court could not review the decision, while FOE argued that approval of TMDLs fell within section 1369(b)(1)(E) of the CWA.

The court of appeals ultimately held it lacked original jurisdiction to review EPA approvals of TMDLs, dismissed the petition for review, and transferred the case to the district court for consideration of whether the action could be reviewed under the Administrative Procedure Act. In reaching its holding, the court of appeals looked at the plain language of the statute and held that 1369(b)(1) of the CWA governed the limited original jurisdiction of federal courts of appeal reviewing EPA actions. The court noted the statute explicitly authorized a court of appeal to review the approval of effluent limitations under sections 1311, 1312, 1316 or 1345 of the CWA, but was silent regarding the ability of a court of appeals to review approval