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Raymond Proffitt Found. v. United States Army Corps of Eng'rs, 343 F.3d 199 (3d Cir. 2003)

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years. The court held that the provision in the Rule that allowed for the review of the performance of the technologies implemented and requiring additional or different design and construction technologies, if needed to minimize impingement and entrainment, was valid, since nothing in the statute forbids the EPA from re-evaluating these specific requirements, which are set on a case-by-case basis, during the re-permitting process. The court also held that the provision did not conflict with section 306(d), since the statute did not unambiguously compel the EPA to grandfather in new intake structures.

MISC finally contended that the below-threshold, state law, and re-permitting aspects of the Rule, which required case-by-case determinations, were inconsistent with the EPA's older regulations that did not address intake structures. The court held that the EPA's failure to formalize its approach until the promulgation of the Rule was irrelevant, since rulemaking is the process by which the EPA explains the rule as it enforces it.

Therefore, the Second Circuit granted in part and denied in part the Environmentalists' petition. The court denied UWAC's and MISC's petitions in full, and remanded to the EPA the provisions of the Rule that allows compliance through restoration measures.

Stacy Hochman

THIRD CIRCUIT

Raymond Proffitt Found. v. United States Army Corps of Eng'rs, 343 F.3d 199 (3d Cir. 2003) (holding that United States Army Corps of Engineers' alleged failure to comply with its duty under the Water Resources Development Act to include environmental protection as one of its primary missions was subject to judicial review, but its decision to generally reproduce natural flows in river was not arbitrary and capricious).

Raymond Proffitt Foundation and Lehigh River Stocking Association ("Foundation") brought an action against United States Army Corps of Engineers ("Corps") in the United States District Court for the Eastern District of Pennsylvania, asserting the Corps violated the Water Resources Development Act of 1990 ("WRDA") by not including environmental protection as one of the missions for the Walter Dam. The Foundation further asserted the Corps did not fulfill its environmental protection mission because it released large amounts of water during high flow periods, and failed to store water during high flow periods to release during low flow periods. The district court found that because WRDA did not provide any law to apply to the facts of the case, the Corps' actions were not subject to judicial review under the Administrative Procedure Act, and therefore granted

the Corps' motion for summary judgment. The Foundation appealed the decision to the United States Court of Appeals for the Third Circuit, which upheld the district court's decision, but for different reasons.

On appeal, the Third Circuit first noted that WRDA requires the Corps to include environmental protection as one of its primary purposes in operating and maintaining its water resource projects. The Foundation argued that the Corps violated this statute because the Corps emphasized flood control and not fishery management as the primary purpose of the Walter Dam Reservoir. However, the court found Congress did not give the Corps specific instructions to carry out this objective; therefore, the Corps retained a great deal of discretion to determine where, when, and how much of WRDA's environmental protection mission to implement at a given water resources project. After determining that the Corps' actions were indeed subject to judicial review, the court held that the Corps satisfactorily demonstrated that it made environmental protection a primary mission, and its actions were not arbitrary and capricious. The court then held that the Corps included environmental protection in its overall operation of its water resource projects, and more specifically, at the Walter Dam.

In sum, the Third Circuit held the district court erred in finding that the Corps' actions were not subject to judicial review. However, Congress gave the Corps a vast amount of discretion to implement environmental protection as one of the primary Corps' missions in regards to water resources projects. Therefore, that the Corps emphasized flood control and not fishery management as the primary objective of the Walter Dam Reservoir did not mean that it violated the WRDA. Thus, the court held the Corps' decision was subject to judicial review; however, it affirmed the district court's decision due to the discretion afforded the Corps.

Brett Johnson

FOURTH CIRCUIT

Treacy v. Newdunn Assocs., 344 F.3d 407 (4th Cir. 2003) (holding that, for purposes of the Clean Water Act, the United States Army Corps of Engineers had jurisdiction over wetlands adjacent to nonnavigable tributaries of navigable waters, and that a man-made ditch was a "tributary").

The United States Army Corps of Engineers ("Corps") brought an action against Newdunn Associates, Orion Associates, and Northwest Contractors (collectively "Newdunn") to enjoin them from draining certain lands in alleged violation of the wetlands provision of the Clean Water Act ("CWA"). The Virginia State Water Control Board