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permits were first created, no federal regulation required the Corps to conduct further analysis.

Fourth, Trout Unlimited alleged the Corps violated NEPA in failing to analyze the proposed construction projects using NEPA review. Again, the court dismissed the argument, holding NEPA review occurred at the time of the creation of the NWPs, with the Corps analyzing a relevant class of activities at the time it issued the permit. When applying an NWP to a proposed activity, NEPA does not require further review of the project.

Fifth, Trout Unlimited's claim under the FWCA alleged the Corps failed to address concerns about the projects' impacts on local trout species. The court first pointed out the FWCA does not include a private right of action for citizen suits, but addressed the issue to determine whether the Corps' actions were arbitrary and capricious, and thus in violation of the APA. The Corps' regulations require the agency to give "full consideration" to other agencies' concerns, yet under FWCA, requirements the Corps can rely on information from permit applicants in evaluating compliance with FWCA. The court found while the Fish and Wildlife Service initially expressed concern over the projects, the permit applicants addressed the concerns in an environmental assessment provided to the Corps. Thus, Trout Unlimited failed to meet its burden of proving the Corps acted in an arbitrary and capricious manner.

Finally, the court addressed Trout Unlimited's allegation the Corps' actions violated the NHPA by failing to evaluate possible impacts on historic properties. Under the NHPA, state historic preservation offices must assist federal agencies in the review processes. The Utah State Historic Preservation Office determined the proposed projects would not affect historic properties. The court found the Corps' reliance on such determination reasonable, and dismissed Trout Unlimited's claim under the NHPA.

The court thus denied Trout Unlimited's appeal and motion to remand agency action, and entered judgment for the Corps.

Katharine J. Ellison

United States v. Newdunn Assoc., 195 F. Supp. 2d 751 (E.D. Va. 2002) (holding the United States Army Corps of Engineers' 1986 regulations expanding the definition of "waters of the United States" and extending its jurisdiction over these waters exceeded the grant of authority to the Corps by Congress under the Clean Water Act).

On June 12, 2001, Newdunn Associates ("Newdunn") and its contractors began discharging fill material onto its property, grading its property, and excavating ditches on its property. Newdunn conducted these activities without a permit under section 404 of the

Clean Water Act ("CWA") or an individual or general Virginia Protection Permit under sections 62.1-44.15:5 and 62.1-44.5 of the Virginia Code. The United States filed suit against Newdunn in the United States District Court of the Eastern District of Virginia. The Virginia Department of Environmental Quality ("VDEQ") also filed suit against Newdunn in Virginia State Court for not obtaining state permits. The VDEQ's action was removed to the United States District Court and consolidated the two actions against Newdunn because it found VDEQ had relied on the Army Corps of Engineers ("Corps") assertion of jurisdiction to bring its claim. At issue was whether the Corps had jurisdiction over Newdunn's property under the CWA and its 1986 regulations interpreting the Act.

Newdunn owned a parcel of land in Newport News, Virginia. At times, run-off generated by rain exited the property through drainage ditches. The water ran through more than three miles of ditches and arms of non-navigable runs until it intersected with Stony Run, which was a navigable-in-fact watercourse. In September 1999, Newdunn requested and obtained a jurisdictional determination from the Corps. The determination confirmed Newdunn's property contained thirty-eight acres of non-tidal forested wetlands. Under the Corps' 1986 regulations, the Corps had jurisdiction under the CWA over wetlands that were sufficiently connected to "waters of the United States." The September 1999 jurisdictional determination confirmed the Corps had jurisdiction over the wetlands on Newdunn's property.

The district court, however, found this determination to be incorrect, holding that the Corps failed to meet its burden under its 1986 regulations of proving the wetlands on Newdunn's property were sufficiently connected to "waters of the United States" to fall within its jurisdiction. The Corps argued a "surface water" or "hydrological" connection existed between the wetlands on the property and "waters of the United States." However, the court rejected this argument because the 1986 regulations make no mention of such connections. The court also reasoned that upholding the Corps' argument would lead to arbitrary findings of jurisdiction.

The court found even if the Corps had met its burden, the 1986 regulations exceeded the 1972 Congressional grant of authority in light of the Supreme Court's decision in *Solid Waste Agency of N. Cook County v. United States Army Corps of Eng'rs.* The Corps first promulgated regulations for the CWA in 1974 under authority granted by Congress. The Corps revised its regulations in 1975, 1977, and 1986. These revisions continually expanded the definition of "waters of the United States" and consequently, expanded the CWA's jurisdiction over these waters. Prior to *SWANCC,* courts generally allowed the CWA's jurisdiction to expand under the Corps' regulations. However, *SWANCC* limited the Corps' jurisdiction under the CWA to actually navigable waters, their tributaries, and wetlands adjacent to each. This limitation is consistent with the Corps' original 1974 interpretation of its jurisdiction under the CWA. Thus, because

the wetlands on Newdunn's property were not adjacent to navigable waters, the court found the Corps had no jurisdiction over the property.

Lastly, the court found sections 61.1-44.5 and 62.1-44.15:15 of the Virginia Code were coextensive with the CWA because they based their state jurisdiction on that of the CWA and likewise defined "wetlands." Also, the VDEQ's actions indicate it consistently based its jurisdiction over Newdunn's property on the Corps' jurisdiction over the property. Therefore, since the Virginia statute and the CWA were coextensive, and because VDEQ relied on the Corps' jurisdiction for its own jurisdiction—given the court's finding the Corps had no jurisdiction over Newdunn's property—the court held VDEQ also had no jurisdiction over Newdunn's property. As such, the court entered judgment for Newdunn.

Kate Osborn

Lands Council v. Vaught, 198 F. Supp. 2d 1211 (E.D. Wash. 2002) (holding that absent a finding that injunctive relief would cause irreparable harm, a permanent injunction is the proper remedy for violation of the National Environmental Protection Act's procedural requirements).

In late 1998 and early 1999, the United States Forest Service ("Forest Service") prepared an Environmental Impact Statement to address a Douglas fir bark beetle outbreak and various ecosystem imbalances in the Colville National Forest ("CNF") and Idaho Panhandle National Forest ("IPNF"). The Forest Service released the Final Environmental Impact Statement ("FEIS") on June 14, 1999, and adopted some of its proposals. The resulting Douglas Fir Bark Beetle Project ("Project") would impact 19,000 acres of forested land in the IPNF and 4,300 acres in the CNF. The Project called for logging 145 million board-feet of trees.

The Lands Council administratively appealed a Forest Service's decision to implement the Project, however, the Appeal Deciding Officer denied it in September 1999. The Lands Council then brought suit against the Forest Service in the United States District Court for the Eastern District of Washington, alleging violations of the Administrative Procedures Act ("APA"), National Environmental Protection Act ("NEPA"), National Forest Management Act ("NFMA") and the Clean Water Act ("CWA"). The district court denied their two motions for preliminary injunction, but the Ninth Circuit Court of Appeals issued a temporary injunction pending appeal. The Lands Council then amended its original complaint, which is the subject in the instant case. The district court considered this amended complaint, ruling on cross motions for summary judgment brought by the Lands Council and the Forest Service Chief. The Lands Council