STATE AUTHORITY & HYDROPOWER

SUPREME COURT AFFIRMS STATE AUTHORITY
S. D. WARREN v. MAINE

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On May 15, 2005, a unanimous US Supreme Court held in S. D. Warren v. Maine Board of Environmental Protection, 547 US ___ (2006), that non-polluting hydroelectric projects are subject to Clean Water Act (CWA) § 401. The issue was whether water passing through dams that themselves add no pollutants, constitutes a “discharge” so that state certification is required under section 401.

CWA § 401(a)(1), 33 USC § 1341(a)(1), provides that any applicant for a federal permit to conduct any activity that “may result in any discharge into the navigable waters” must obtain certification from the state in which the discharge originates that the discharge will not violate water quality standards. Through this provision, the states are infused with federal authority. The extent of this authority, and the inherent conflict between state and federal power, has many times been tested in the context of hydroelectric power project licensing under the Federal Power Act (FPA). In First Iowa Hydro-Electric Cooperative v. Federal Power Com’n., 328 US 152 (1946), the Supreme Court held that the Federal Power Act confers upon the Federal Energy Regulatory Commission (“FERC”—formerly the Federal Power Commission) paramount authority over hydroelectric licensing, with narrow exceptions such as regulation of state water rights. States are pre-empted from imposing duplicative regulatory burdens on FERC applicants and licensees, which are already subject to a comprehensive environmental regulatory scheme under the FPA. (See Moon, TWR #12 for a general discussion of water quality certification under § 401 of the CWA.)

However, citing CWA § 401, the Court significantly expanded the range of water quality related matters subject to state regulation. In PUD No. 1 of Jefferson County v. Washington Dept. of Ecology, 511 US 700 (1994), the Court allowed imposition by the state of flow requirements that the Department of Ecology deemed integral to water quality. The question of what constitutes a “discharge” for purposes of § 401 jurisdiction was not addressed, as the fact of a discharge was not at issue in that case.

Courts have held that dams are not point sources that require National Pollution Discharge Elimination System (NPDES) permits under CWA § 402, 33 USC § 1342, solely because they “discharge” pollutants by passing upstream polluted water through or over the dam. National Wildlife Federation v. Gorsuch, 693 F2d 156 (DC Cir. 1982) and National Wildlife Federation v. Consumers Power Co., 862 F2d 580 (6th Cir. 1988). The courts noted that dams may alter the condition of a waterway, but absent the addition of a pollutant by dam operations were not subject to regulation:

... generally water quality changes caused by the existence of dams and other similar structures were intended by Congress to be regulated under the “nonpoint source” category of pollution.

Consumers Power at 588.