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The State Role in the Federal Licensing of Hydropower Dams: *S.D. Warren Co. v. Maine Board of Environmental Protection*

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Summary

On February 21, 2006, the U.S. Supreme Court heard oral argument in the case of *S.D. Warren Co. v. Maine Board of Environmental Protection*. The case asks whether the states, through water quality certification under Section 401 of the Clean Water Act, can impose conditions on Federal Energy Regulatory Commission (FERC) licensing (or relicensing) of hydropower facilities — a matter long thought to have been resolved in the affirmative. The Court's interest in the case may stem from its apparent continuing interest in questions of federal-state allocation of authority under federal environmental statutes and elsewhere. States and environmental groups view Section 401 as an important tool for conditioning the construction and operation of federally licensed projects, and in this case, they fear that an adverse decision will hinder the ability of states to require measures to ameliorate the harmful effects of hydropower dams on water quality and aquatic life.

On February 21, 2006, the U.S. Supreme Court heard oral argument in *S.D. Warren Co. v. Maine Board of Environmental Protection*.¹ The case addresses a fundamental issue as to the role of state water quality concerns in the licensing (or relicensing) by the Federal Energy Regulatory Commission (FERC) of hydropower facilities. Considered together with several recent decisions of the Court, the case also affirms that body's abiding interest in the allocation of state and federal authority over environmental matters.

¹ *S.D. Warren Co. v. Bd. of Env'tl. Protection*, 868 A.2d 210 (Me. 2005), cert. granted, 73 U.S.L.W. 3686 (May 12, 2005) (No. 04-1527).

Statutory Background

This is a tale of two statutes. The first is the Federal Power Act, a 1920 enactment, since amended, that establishes “a broad federal role in the development and licensing of hydropower.”² The act requires a FERC-issued license for the construction, operation, and maintenance of hydropower dams located in any navigable water of the United States.³ Importantly here, the act mandates that FERC include a variety of environmental considerations in its licensing process.

FERC’s charge to balance the nation’s energy needs with environmental considerations is subject to a major constraint: the Clean Water Act (CWA).⁴ Under that statute, FERC may not license an activity involving a “discharge” into waters of the United States unless the applicant first obtains a certification or waiver from the state in which the discharge originates.⁵ Such certification, required by CWA Section 401 and known as “401 certification,” must among other things assure the federal agency that the proposed project will not cause violations of state water quality standards.⁶ The conditions and terms in the state’s certification, designed to assure such compliance with such standards, are to be incorporated as conditions in the FERC-issued license.⁷ Plainly, 401 certification is a powerful means by which states can affect the characteristics of FERC-licensed projects. And since FERC licenses may be issued for up to 50 years, the importance to the states of having input at the licensing stage is hardly surprising.

However, the application of the 401 certification requirement turns, as mentioned, on whether the proposed project will cause a “discharge” into federal jurisdictional waters. And therein lies the issue in *S.D. Warren Co.*: do the company’s hydropower dams — which impound water, pass it through turbines, and reintroduce it to the same waterway downstream of the dam — bring about a “discharge” within the meaning of Section 401?

Facts and State Supreme Court Decision

The S.D. Warren Co. owns five hydropower dams on the Presumpscot River in Maine, which generate electricity for the company’s paper mill. Each dam is operated in “run of river” mode, meaning that moment to moment, outflow from each dam is about equal to inflow. In seeking renewal of its FERC licenses for the dams, S.D. Warren filed applications for state water quality certification with the Maine Board of Environmental

² *California v. Federal Energy Regulatory Comm’n*, 495 U.S. 490, 496 (1990). The Federal Power Act is at 16 U.S.C. §§ 791a-828c.

³ Federal Power Act § 23(b), 16 U.S.C. § 817. FERC authority to issue such licenses is found in Federal Power Act § 4(e), 16 U.S.C. § 797(e).

⁴ 33 U.S.C. §§ 1251-1387.

⁵ CWA § 401(a), 33 U.S.C. § 1341(a).

⁶ The setting of state water quality standards is governed by CWA sections 303 and 304(a), 33 U.S.C. §§ 1313, 1314(a) respectively. Achieving those standards is “one of the Act’s central objectives.” *Arkansas v. Oklahoma*, 503 U.S. 91, 106 (1992).

⁷ CWA § 401(d), 33 U.S.C. § 1341(d).

Protection (DEP), and in 2003, the DEP approved certification, subject to conditions. S.D. Warren then challenged the 401 certification requirement in a state trial court, arguing that its dams did not produce the requisite “discharge” under the CWA.

The trial court disagreed and the state Supreme Court affirmed: the reintroduction of the water downstream of the dams is indeed a “discharge,” the high court held, and thus 401 certification applied. The CWA does not define the term “discharge,” it reasoned, but merely says that “when used without qualification [it] *includes* a discharge of a pollutant, and a discharge of pollutants.”⁸ These latter phrases, however, *are* defined to mean “(A) any *addition* of any pollutant to navigable waters from any point source, [and] (B) any *addition* of any pollutant to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft.”⁹ Based on this definition, the court found that an “addition” is a key feature of any covered discharge. S.D. Warren’s dams resulted in such an “addition” because when removed from nature to pass through the dams — that is, when subjected to private control — the water loses its status as waters of the United States. Thus, when redeposited into the natural course of the river there occurs an “addition” to the waters of the United States.

Nor, said the state supreme court, can the CWA’s explanation of “discharge” be limited to discharge of pollutants, since the provision uses only the word “includes,” suggesting that the listed “addition of any pollutant(s)” examples do not exhaust the universe of covered discharges. Finally, the state supreme court endorsed a broad state authority to set whatever conditions it thinks necessary to ensure compliance with its water quality standards. This includes “reopeners”: permitting states to reopen the certification years after originally issued and amend the conditions.

In the U.S. Supreme Court

Petitioner S.D. Warren Co.’s main argument to the Court was that calling the reintroduction of dam water to the same waterway a “discharge” cannot be reconciled with the Court’s recent decision in *South Florida Water Management District v. Miccosukee Tribe*.¹⁰ *Miccosukee* addressed whether a pumping station that moves water from one area to another requires a NPDES permit under the CWA,¹¹ notwithstanding that the pumping station does not itself add any pollutant to the transferred water. The Court determined that a permit was required, since the requisite “addition” of a pollutant to the receiving water body did not demand that the pollutant be added *by the station*. Still, the Court stressed, there can be no addition unless the body of water from which the water is taken and that into which it is discharged are “meaningfully distinct.”¹² S.D. Warren argued in its case that the portion of a waterway upstream of its dams and the portion

⁸ CWA § 502(16), 33 U.S.C. § 1362(16) (emphasis added).

⁹ CWA § 502(12), 33 U.S.C. § 1362(12) (emphasis added).

¹⁰ 541 U.S. 95 (2004).

¹¹ “NPDES” is the popular acronym for the National Pollutant Discharge Elimination System created by the CWA. CWA section 402, 33 U.S.C. § 1342, requires a NPDES permit for the discharge of a pollutant into the waters of the United States by a point source.

¹² 541 U.S. 112 (2004).

downstream do not meet this “meaningfully distinct” standard. Thus, there is no “discharge,” and 401 certification does not apply.

Playing the federalism issue, S.D. Warren further argued that the Maine Supreme Court’s opinion conflicts with FERC’s comprehensive jurisdiction over hydropower licensing. Under the state’s broad interpretation of Section 401, the company contends, CWA certification becomes a vehicle for displacing FERC authority under the Federal Power Act. This is especially important, the argument continues, because FERC has no authority to reject conditions imposed by states as part of certification.¹³

In response, Maine argued that the Section 401 language triggering the certification requirement — “any activity including, but not limited to, the construction or operation of facilities, which may result in any discharge into the navigable waters” — is written expansively. Maine further points to an arguable endorsement of the dams-constitute-discharges view by the Supreme Court in *PUD No. 1 of Jefferson County v. Washington Dep’t of Ecology*,¹⁴ a case involving the same sort of federal-state conflict over the scope of the state’s 401 conditioning authority as in *S.D. Warren Co.*

Finally, Maine took on petitioner’s *Miccosukee* argument. *Miccosukee*, it pointed out, arose under the CWA’s NPDES provision, which is triggered by the “discharge of a pollutant.” By contrast, state water quality certification is governed by a different CWA section, triggered by mere “discharge.” A careful reading of the CWA definitions of these two terms shows, Maine argued, that no “addition” is needed to trigger certification (disagreeing with the Maine Supreme Court). Thus, *Miccosukee*’s insistence on meaningfully distinct bodies of water simply is not relevant here.

Policy Implications

The *S.D. Warren Co.* case tests the legal question of what is a discharge for the purposes of Section 401. This seemingly narrow question has broad policy implications for the ability of states to control the water quality impacts of federally licensed or permitted facilities, particularly but not solely with respect to hydropower projects.

At the heart of the CWA is the concept of shared administration of water pollution control programs between the federal government and states. Congress established two different and complementary pathways to accomplish the ambitious objectives of the law: (1) federally promulgated technology-based effluent reduction limitations, administered through NPDES permits, which are aimed at discharges of pollutants; and (2) state water quality standards to regulate water pollution more generally. Water quality standards consist of criteria (narrative or numeric) that limit ambient concentrations of specific pollutants and designated beneficial uses (such as recreation or water supply). States are to protect existing and beneficial uses of water by enforcing their water quality standards.

Under Section 401, states must certify that a federally licensed activity complies with the applicable provisions of the CWA regarding effluent limitations, water quality

¹³ *American Rivers, Inc. v. FERC*, 129 F.3d 99 (2d Cir. 1997).

¹⁴ 511 U.S. 700, 711 (1994).

standards, standards of performance, toxic pollutant standards, or any other appropriate requirement of state law. It provides states with two distinct powers: one, the power indirectly to deny federal permits or licenses by withholding certification (if a state denies certification, the federal agency may not issue the license or permit); and two, the power to impose conditions upon federal permits by placing limitations on certification. Generally, Section 401 certification has been applied to hydropower projects seeking a license from FERC and for dredge-and-fill activities in wetlands and other waters that require permits from the Army Corps of Engineers under Section 404 of the CWA and Sections 9 and 10 of the Rivers and Harbors Act. It also is applied to permit requirements for industrial and municipal point source dischargers under Section 402 of the CWA, the NPDES permit requirement. In addition, it has the potential to be applied to other activities that could affect water quality, a point that has increasingly become an issue.

In recent years, some states have come to view Section 401 as an important tool in their overall programs to protect the physical and biological, in addition to the chemical, integrity of their waters. Some have begun using Section 401 to address a wide range of impacts to the quality of their waters, including impacts to aquatic habitat such as wetlands where issues of non-chemical impacts arise. In the 32 states that do not have independent wetlands regulatory programs, the water quality certification process may be the only way in which a state can exert any direct control over projects in or affecting wetlands that must obtain a Section 404 permit. Through Section 401, some states have addressed such impacts of a project as inadequate river flow, inundation of habitat, dissolved oxygen levels, and impacts on fish and other wildlife.

The *S.D. Warren Co.* case highlights these issues with respect to hydropower facilities. The Federal Power Act preempts states from independently regulating hydropower, thus making 401 certification critical to protecting water quality standards, states say. Hydropower projects contribute to water pollution, as that term is broadly defined in the CWA,¹⁵ in a number of ways, thus causing rivers to fail to meet water quality standards. Hydropower dams can harm the physical integrity of rivers by creating lakes, flooding upstream areas, and limiting downstream flow. They can harm biological integrity by changing conditions upstream and downstream, such as barring passage of fish to spawning areas. They can harm chemical integrity by resulting in discharge of water that is too warm or too cold for affected fish species, more or less turbid, or containing greater or lesser amounts of dissolved oxygen.

The expanded use of Section 401 is acknowledged and criticized by groups such as hydropower interests, electric utilities, and others. According to their view, in many states the 401 process has evolved from a focused review of compliance with state water quality standards to a much more expansive parallel state licensing or permitting scheme, often requiring attention to factors such as “aesthetic” flows, in-stream levels, fish passage, and recreational access. Some state agencies also assert authority to impose a broad range of procedural and substantive requirements under other state law. In the United States, there are more than 1,600 hydroelectric projects at over 2,000 dams that are regulated by FERC under the Federal Power Act. About two-thirds of these are due to be re-licensed over the

¹⁵ “The term ‘pollution’ means the man-made or man-induced alteration of the chemical, physical, biological, and radiological integrity of water.” Clean Water Act § 502(19); 33 U.S.C. § 1362(19).

next 12 to 15 years. The renewal process, which can take four or more years to complete, involves a reevaluation of a hydropower project's impact on local water resources and fish and wildlife species. A 2001 FERC staff report found that untimely issuance of 401 certification is a significant factor in most delayed licensing proceedings, adding costs and uncertain environmental or other public benefits.¹⁶

Because new licenses typically authorize operations for 30 to 50 years (original licenses were for terms up to 50 years and generally were issued prior to enactment of the CWA and other current federal environmental laws), states have a keen interest in ensuring that their water quality concerns are addressed during the re-licensing process. The full extent of this interest was expressed in congressional testimony in 1997.¹⁷

Restricting the ability of states to ensure that federally licensed uses of state waters do not violate state water policies threatens what is widely (and rightly) perceived as a core prerogative and obligation of state government. States use Section 401 to make sure that their citizens can swim, fish, boat on, drink and otherwise enjoy their waters as they wish....If there ever was a states' rights issue, this is it. States are committed to controlling water uses and quality within their borders, under both state law and the CWA. Section 401 conditioning is an important tool. It should not be weakened.

Legal Comments

Interestingly, the U.S. Supreme Court agreed to resolve the *S.D. Warren Co.* case in the face of a decades-old acceptance of the role of state water quality certification in federal hydropower licensing, and an absence of any split in the circuits on this point. One may speculate that the Court's interest in the case was at least in part provoked by the important question of federal-state power allocation it raises. Buttressing this possibility is the fact that in recent years, the Court has accepted a host of cases posing issues of environmental federalism, despite (in some cases) the seeming mundaneness of the statutory construction issues involved and/or the lack of a circuit split. Examples include decisions under several federal environmental statutes.¹⁸

In the U.S. Supreme Court, *S.D. Warren Co.* prompted the usual prodigious outpouring of amicus briefs one sees in important federalism cases. Particularly notable are the brief filed by 34 states and that filed by the United States, each taking the side of Maine. A decision by the Supreme Court is expected by June 2006.

¹⁶ Federal Energy Regulatory Commission. "Staff Report on Hydroelectric Licensing Policies, Procedures, and Regulations, Comprehensive Review and Recommendations Pursuant to Section 603 of the Energy Act of 2000." May 2001. p. 92.

¹⁷ Kassel, John B., Deputy Secretary, Vermont Agency of Natural Resources. In U.S. Congress. Senate. Committee on Energy and Natural Resources. Subcommittee on Water and Power. "FERC Hydroelectric Relicensing Procedures." Hearing, 105th Congress, 1st Session. Oct. 30, 1997. (S.Hrg. 105-381). pp.80-81.

¹⁸ See, e.g., *Alaska Dep't of Environmental Conservation v. EPA*, 540 U.S. 461 (2004) (Clean Air Act); *Engine Manufacturers Ass'n v. South Coast Air Quality Management District*, 541 U.S. 246 (2004) (same); *Bates v. Dow Agrosciences, LLC*, 544 U.S. 431 (2005) (Federal Insecticide, Fungicide and Rodenticide Act).