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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 May 15, 2006, the U.S. Supreme Court decided *S.D. Warren Co. v. Maine Board of Environmental Protection*, unanimously holding that states, through water quality certification under Section 401 of the Clean Water Act, can impose conditions on Federal Energy Regulatory Commission licensing (or relicensing) of hydropower facilities. The Court may have taken the case, involving a technical issue of statutory construction, to indulge its 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 had feared that an adverse decision in *S.D. Warren* would hinder the ability of states to require measures to ameliorate the harmful effects of hydropower dams on water quality and aquatic life.

On May 15, 2006, the U.S. Supreme Court decided *S.D. Warren Co. v. Maine Board of Environmental Protection*,¹ one of two important Clean Water Act (CWA) cases heard in its 2005-2006 term.² The decision addressed a fundamental issue as to the role of state water quality concerns in the licensing (or relicensing) of hydropower facilities by the Federal Energy Regulatory Commission (FERC). In brief, the Court held that the state where the hydropower facility is located, through water quality certification under CWA Section 401, can impose conditions on such licensing. Considered together with several

¹ 126 S. Ct. 1843 (2006).

² The other case was *Rapanos v. United States*, 126 S. Ct. 2208 (2006), involving the geographic scope of the Corps of Engineers' CWA permitting authority over wetlands.

recent decisions of the Court, the case also affirms the Court’s abiding interest in the allocation of state and federal authority over environmental matters.

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.”³ 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.⁴ 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: our second statute, the CWA.⁵ Under the CWA, 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.⁶ 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.⁷ 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.⁸ 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

³ *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.

⁴ 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).

⁵ 33 U.S.C. §§ 1251-1387.

⁶ CWA § 401(a), 33 U.S.C. § 1341(a).

⁷ 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).

⁸ CWA § 401(d), 33 U.S.C. § 1341(d).

“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 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 state 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.”⁹ 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.”¹⁰ 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, 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.

U.S. Supreme Court Decision

The Supreme Court unanimously affirmed the Maine Supreme Court. The water released from a hydropower dam, it held, constitutes a “discharge” within the meaning of CWA Section 401. Thus, FERC licensing of such dams is subject under that section to state conditions regarding water quality.

The Court’s rationale was different from the Maine High Court’s, however, not depending on the existence of an “addition” to the navigable waters as a prerequisite for a “discharge.” The Court found that lacking a statutory definition, “discharge” had to be interpreted in its everyday, dictionary sense as a “flowing or issuing out.” This is the sense of the word, it found, that it had assigned to the term in previous water cases, including its one previous case involving CWA Section 401.

All of S.D. Warren’s arguments that “discharge” as used in Section 401 should be read more narrowly were rejected. Most broadly, the Court noted that the CWA is not concerned only with the “addition” of pollutants, but more broadly with *any* adverse alteration in water quality. Such adverse alterations, it said, are “a risk inherent in limiting river flow and releasing water through turbines.” In particular, dams can cause

⁹ CWA § 502(16), 33 U.S.C. § 1362(16) (emphasis added).

¹⁰ CWA § 502(12), 33 U.S.C. § 1362(12) (emphasis added).

changes in the circulation of a river leading to less dissolved oxygen and other chemical modifications. Changes in a river like these, the Court found, “fall within a State’s legitimate legislative business.” It is the very reason, the Court concluded, that Congress provided the states in Section 401 with power to enforce state law.

Policy Implications

The *S.D. Warren Co.* case tested 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 National Pollutant Discharge Elimination System (NPDES) permits, authorized by CWA Section 402, 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 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 highlighted 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,¹¹ 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 across the nation that are regulated by FERC under the Federal Power Act. The Court’s ruling is believed to be especially significant for California, Oregon, Washington, and Idaho in the West; Michigan and Wisconsin in the Great Lakes region; Connecticut, New Hampshire, New York, Maine, and Vermont in New England; and Alabama and parts of North and South Carolina in the East. About two-thirds of these dams are due to be re-licensed over the 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.¹²

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 1997.¹³

¹¹ “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).

¹² 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.

¹³ 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.

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.

In the view of varied stakeholders, including the industry, states, and environmental organizations, the Court's unanimous decision will not change the way federally licensed hydropower dams operate, because it preserves states' opportunities to require certification that water protection laws will not be violated by the activity of such dams. How the decision might be extended beyond hydropower dams to apply to any federally licensed or permitted activity involving the Clean Water Act is an open question, since the ruling could be applied to projects involving irrigation and water supply systems, where questions of water quality standards also may arise.

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. As we speculated earlier, the Court's interest in the case might have been 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.¹⁴

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 were the brief filed by 34 states and that filed by the United States, each taking the side of Maine. Indeed, the United States was granted divided argument time in support of Maine. Parenthetically, the case was argued on February 21, 2006, the first day of hearing oral arguments for newly appointed Justice Samuel Alito.

The clear-cut nature of the *S.D. Warren* opinion, and its unanimity, suggest that the existence of a state certification prerequisite in connection with FERC hydropower licensing is unlikely to see further litigation. However, whether the *scope* of that certification authority will see further action in the courts remains to be seen.

¹⁴ 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 Agrosiences, LLC*, 544 U.S. 431 (2005) (Federal Insecticide, Fungicide and Rodenticide Act).