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Water: *PUD No. 1 of Jefferson County v. Washington Department of Ecology*: State Water Quality Certification of Federally Licensed Hydropower Projects

I. Introduction

The conflict between federal and state power in the United States is a conflict of epic proportions. Since the failure of the Articles of Confederation, the federal government has consistently asserted its preeminence over the states. Federal supremacy has been as evident in the field of hydropower facility regulation as it has been in any other area of governmental regulation. However, in *PUD No. 1 of Jefferson County v. Washington Department of Ecology*,¹ the Supreme Court of the United States found that the federal government relinquished to the states some of its control over the authority to license and relicense hydropower projects.

The Federal Energy Regulatory Commission (FERC) has general authority to issue licenses to operators of hydropower projects.² The states have consistently challenged the exclusivity of FERC's authority. The general result of these challenges has been judicial recognition of federal preemption of regulatory authority over hydropower projects. The seminal case in the debate over FERC's preemptive authority is *First Iowa Hydroelectric Cooperative v. Federal Power Commission*.³ *First Iowa* has generally been regarded as recognizing federal preemption of state regulatory authority over hydropower projects.

The Supreme Court did not overrule *First Iowa* in the *Jefferson County* decision. The Supreme Court did decide that the states have a substantial role to play in the federal licensing process as a result of the Clean Water Act (CWA). The effect of the Court's ruling is that the states have a broad veto power over the federal licensing and relicensing of hydropower projects.⁴

Section 401 of the CWA requires applicants for federal licenses conducting any activity which will result in a discharge into intrastate navigable waters to obtain water quality certification from the State before a federal license or permit may be issued.⁵ Section 401 applies to all federal licenses, but only hydropower licenses are at issue here. The section 401 certification is a prerequisite to federal licensing, and thereby allows the states to balance the benefits of hydropower production against the harm which will be caused to the local water resource. Because hydropower projects have their greatest effects, both positive and negative, at the

1. 114 S. Ct. 1900 (1994).

2. FERC's authority derives from the commerce clause of the Constitution. U.S. CONST. art. I, § 8, cl. 3. Water was held to be a commodity in and of itself in *Sporhase v. Nebraska*, 458 U.S. 941, 954 (1982), and therefore is interstate commerce subject to the regulatory authority of the federal government under the commerce clause.

3. 328 U.S. 152 (1946).

4. *Jefferson County*, 114 S. Ct. at 1910-11.

5. Clean Water Act § 401, 33 U.S.C. § 1341 (1988).

local and regional level, it is appropriate that states should have a prominent role in the licensing and relicensing process.

The decision in *Jefferson County* has far-reaching consequences. The operating licenses of over two hundred privately owned hydropower projects have recently expired.⁶ These projects are currently awaiting licensing reviews.⁷ In addition, many more licenses are due to expire over the next several years.⁸ Most of these projects received their original licenses when there was a perceived federal need for promotion of federal hydropower facilities during the New Deal Era. Since the original licensing of these projects, environmental concerns about protecting stream flows for fish, wildlife, recreation, or water quality purposes have come to the forefront of public consciousness. In addition, a renewed interest in states' rights has emerged.

These existing projects, and any new hydropower projects, will have to meet broad state water quality requirements in order to acquire the necessary license to operate. The nature of these state requirements should reflect the striking of a balance at the state rather than the federal level between the desire for affordable energy and the desire to preserve the environment.

II. History: Section 401 Certification of Hydropower Projects

Section 401 of the CWA provides for state water quality certification as a prerequisite to issuance of federal permits and licenses for hydropower projects.⁹ An applicant for a federal permit or license whose activities will result in a discharge into waters of the United States must obtain state water quality certification from the appropriate state administrative agency.¹⁰ The certification ensures compliance with state water quality requirements and with specific sections of the CWA, including section 303.¹¹

Section 303 of the CWA requires the states to institute comprehensive water quality standards which incorporate water quality goals for all intrastate waters.¹² These water quality standards consist of two different types of standards — designated uses and water quality criteria.¹³ The water quality criteria include specific numerical criteria, measuring such things as dissolved oxygen content, fecal coliform organisms, temperature, pH, dissolved gas, and turbidity. Water quality criteria also include narrative standards for concerns such as toxicity and aesthetic values. The designated uses may include such items as water supply, stock watering, salmonid habitat, wildlife habitat, recreation, commerce, and navigation.

6. Melissa Healy, *States Can Mandate Dam Water Levels, Supreme Court Says*, L.A. TIMES, June 1, 1994, at A3.

7. *Id.*

8. *Id.*

9. Clean Water Act, § 401, 33 U.S.C. § 1341 (1988).

10. *Id.* § 401(a)(1).

11. *Id.*

12. *Id.* § 303.

13. *Id.* § 303(c)(2)(A).

In addition, section 303 contains an antidegradation policy which requires that state standards be sufficient to maintain existing beneficial uses of state waters without further degradation.¹⁴

The Court's decision in *Jefferson County* that ensuring compliance with section 303 is a proper function of the section 401 state certification process is the basis for extensive state regulatory authority under the CWA. Prior to *Jefferson County*, State courts had offered different interpretations of the extent and scope of state authority under section 401. Some decisions construed section 401 narrowly as applying only to the protection of specific numerical criteria. Other decisions construed section 401 broadly as allowing the state to condition certification on criteria which protect both numerical and narrative criteria as well as designated uses of the water.

The Vermont Supreme Court construed section 401 broadly in *Georgia-Pacific Corp. v. Vermont Department of Environmental Conservation*.¹⁵ The court held that under section 401 of the CWA, the State could condition the relicensing of a hydropower project on the requirement that the project operator maintain certain spillage flows over a dam during specific periods of the year.¹⁶ The portion of the river below the dam was designated a cold water fish habitat under the Vermont water quality standards, requiring a dissolved oxygen level of 6.2 mg/l.¹⁷ The Vermont Department of Environmental Conservation (DEC) determined that the project would need to release 210 cubic feet per second (cfs) over the dam between June 1 and October 15 to meet this criteria.¹⁸ In addition, the court found that this spillage flow rate would act to prevent aquatic habitat degradation, protect downstream water quality for fish (including Atlantic Salmon), and restore the aesthetic value of the downstream river.¹⁹

The private owner of the hydroelectric facility argued that DEC did not have the authority to set such broad conditions for state certification of the project under section 401. Nevertheless, the court utilized a broad interpretation of section 401, finding that the spillage flow rates required by the DEC were necessary to maintain state water quality standards.²⁰ Specifically, the flow rates were necessary to maintain the dissolved oxygen standards of the river. The court also found that these spillage flows were relevant to the aesthetic and recreational values of the river.²¹

The Court of Appeals of New York construed section 401 narrowly in *Power Authority of New York v. Williams*.²² The *Williams* court held that the state

14. *Id.* § 303(d)(4)(B).

15. 35 Env't Rep. Cas. (BNA) 2052 (Vt. 1992).

16. *Id.* at 2053.

17. *Georgia-Pacific Corp. v. Vermont Dep't of Env'tl. Conservation*, 35 Env't Rep. Cas. (BNA) 2046, 2050 (Vt. Super. Ct. 1992).

18. *Id.*

19. *Georgia-Pacific Corp. v. Vermont Dep't of Env'tl. Conservation*, 35 Env't Rep. Cas. (BNA) 2052, 2053 (Vt. 1992).

20. *Id.* at 2053-54.

21. *Id.* at 2054.

22. 457 N.E.2d 726 (N.Y. 1983).

regulatory authority could not grant or deny the certification based upon a balancing of the needs of the project against the adverse environmental impact.²³ The court found that section 401 of the CWA limited the state regulatory authority to determining whether the project met the state's numerical water quality standards.²⁴

The Supreme Court granted certiorari in *PUD No. 1 of Jefferson County v. Washington Department of Ecology* in order to resolve the conflict between the holdings in these two cases.²⁵ In *State Dept. of Ecology v. PUD No. 1*,²⁶ the Washington Supreme Court utilized a broad interpretation of section 401, holding that section 401(d) authorized the State to issue minimum stream flow requirements, and that the Federal Power Act (FPA) did not preempt the State's actions.²⁷ The Supreme Court affirmed the broad holding of the Washington Supreme Court.²⁸

III. *PUD No. 1 of Jefferson County v. Washington Department of Ecology*

A. Facts

Petitioners, the City of Tacoma, Washington and a local utility district, Public Utility District (PUD) No. 1 of Jefferson County, proposed the construction of the Elkhorn Hydroelectric Project on the Dosewallips River.²⁹ The project involved the construction of a diversion dam in the river. The dam would divert water into a tunnel, also known as a penstock, which would run along the stream for 1.2 miles.³⁰ The water in the tunnel would pass through two hydropowered generating units which would produce electricity. The diverted water would then be returned to the river at the tailrace.

The water flow in the bypass reach of the river, that portion between the diversion dam and the tailrace, ranges between 149 and 738 cfs.³¹ The project contemplates removing between 50 and 600 cfs. from the river's flow, depending upon the seasonal variations in the flow. Thus, roughly seventy-five percent of the

23. *Id.* at 727.

24. *Id.* at 729-30.

25. *Jefferson County*, 114 S. Ct. at 1908.

26. 849 P.2d 646 (Wash. 1993), *aff'd*, 114 S. Ct. 1900 (1994).

27. *Id.* at 659.

28. *Jefferson County*, 114 S. Ct. at 1914.

29. The Dosewallips River originates in the eastern Olympic Mountains of Washington state and flows east to Hood Canal in western Puget Sound. Brief for Respondents at 7, *PUD No. 1 of Jefferson County v. Washington Dep't of Ecology*, 114 S. Ct. 1900 (1994) (No. 92-1911).

In Justice O'Connor's majority opinion, the Supreme Court notes that the proposed construction site of the project is on federally owned land which is within the Olympic National Forest, and is just outside the Olympic National Park. *Jefferson County*, 114 S. Ct. at 1907.

30. The portion of the river beginning at the diversion dam and continuing downstream 1.2 miles to the tailrace is known as the by-pass reach. Brief for Petitioners at 12, *Jefferson County* (No. 92-1911).

The diversion dam is to be ten feet high and fifty feet across. The dam completely blocks the flow of the river, but does not create a reservoir. Brief for Respondents at 8, *Jefferson County* (No. 92-1911).

The project operates in a run-of-river mode which results in the diversion, but not the storage, of water. Brief for Petitioners at 12, *Jefferson County* (No. 92-1911).

31. *Jefferson County*, 114 S. Ct. at 1907.

river's flow would be diverted into the tunnel at the dam site.³² The remaining twenty-five percent of the water would be returned from the penstock to the bypass reach, through sluice gates or a fish ladder.³³

The upper portion of the Dosewallips River, where the project was to be located, supports populations of Coho and Chinook salmon, as well as Steelhead trout.³⁴ The State of Washington classifies the Dosewallips River as Class AA (extraordinary), the highest rating which can be given to a water body.³⁵ The migration, rearing, spawning, and harvesting of salmonid and other fish are characteristic uses of Class AA waters.³⁶

B. Prior History of the Case

The FPA authorizes the Federal Energy Regulatory Commission (FERC) to license new hydroelectric facilities and relicense existing facilities.³⁷ Section 401 of the CWA requires hydroelectric projects whose activities may result in discharges into navigable waters to obtain state certification as a condition of the federal license. Petitioners applied to the Washington State Department of Ecology for the section 401 certificate in 1983.³⁸

Petitioners, in conjunction with the Department of Ecology and other agencies, then conducted a two-year study of the prospective effects of the project on the fish habitat in the bypass reach of the river.³⁹ Following completion of this study, Petitioners proposed the maintenance of minimum instream flows between 65 cfs. and 155 cfs.⁴⁰ The Department of Ecology found these minimum instream flows inadequate and issued the section 401 certificate with the requirement that Petitioners maintain instream flows of between 100 cfs. and 200 cfs.⁴¹

Petitioners appealed the minimum instream flow requirements of the certificate to the Pollution Control Hearings Board (Board).⁴² The Board held that the Department of Ecology was acting within its authority in placing the minimum flow conditions in the section 401 certifications in order to preserve the fishery.⁴³ However, in a subsequent hearing, the Board held that the required minimum flows were intended to enhance, not merely preserve, the fishery.⁴⁴ As a result, the Board found that the Department of Ecology had exceeded its authority under state law.

32. *Id.* at 1908.

33. *Id.*

34. Brief for Respondents at 7, *Jefferson County* (No. 92-1911).

35. WASH. ADMIN. CODE §§ 173-201-010 to -120 (1990).

36. *Id.* § 173-201-045(1)(b)(iii).

37. Federal Power Act, ch. 285, 41 Stat. 1063 (1920) (codified as amended at 16 U.S.C. §§ 797(e), 799 (1988)).

38. *State Dep't of Ecology*, 849 P.2d at 649.

39. *Id.* These groups included the Washington State Departments of Fisheries and Wildlife Service, the National Marine Fisheries Service, and the Point No Point Treaty Council.

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.*

Thus, the Board reversed the flow rates.⁴⁵

The parties appealed the Board's findings to the Thurston County Superior Court which reinstated the stream flow rates promulgated by the Department of Ecology.⁴⁶ The Petitioners appealed the decision of the Superior Court to the Supreme Court of Washington. The Washington Supreme Court held that the minimum instream flows were necessary for the project's compliance with state water quality standards, and that section 401(d) of the CWA authorized the states to require the minimum stream flows.⁴⁷ Petitioners appealed the decision of the Washington Supreme Court to the United States Supreme Court which granted certiorari.⁴⁸

C. Justice O'Connor's Majority Opinion

The Court stated the issue of the case as "whether the minimum stream flow requirement that the State imposed on the Elkhorn project is a permissible condition of a section 401 certification under the Clean Water Act."⁴⁹ This narrow statement of the issue allows the Court to reach a holding implicating broad conceptions of federalism without directly addressing the federal preemption that has generally been recognized in the hydroelectric power industry. The Court utilized a two step approach to resolve the question. First, the Court determined the scope of the State's authority under section 401. Second, the Court inquired as to whether the imposition of minimum stream flows was within the scope of the State's authority under section 401.

The Court determined that under section 401 the State has authority to condition certification on maintenance of state water quality standards adopted pursuant to section 303 of the CWA.⁵⁰ The Court further decided that the State could impose minimum stream flows as a means of protecting both specific criteria and designated uses, as well as to implement the State's antidegradation policy.

1. Scope of the State's Authority Under Section 401

The Court examined section 401(d) in order to determine the scope of the State's authority to condition federal licenses on state water quality standards. Section 401(d) provides:

Any certification provided under this section shall set forth any effluent limitations and *other limitations*, and monitoring requirements necessary to assure that *any applicant* for a Federal license or permit will comply with any applicable effluent limitations and *other limitations*, under section 1311 or 1312 of this title, standard of performance

45. *Id.*

46. *Id.*

47. *Id.* at 650, 653.

48. PUD No. 1 of Jefferson County v. Washington Dep't of Ecology, 114 S. Ct. 55 (1993) (granting certiorari).

49. PUD No. 1 of Jefferson County v. Washington Dep't of Ecology, 114 S. Ct. 1900, 1908 (1994).

50. *Id.* at 1912.

under section 1316 of this title, or prohibition, effluent standard, or pretreatment standard under section 1317 of this title, and with any other *appropriate requirement of State law* set forth in such certification, and shall become a condition on any Federal license or permit subject to the provisions of this section.⁵¹

The Court reasoned that because the text refers to the compliance of the applicant, rather than the discharge, this section authorizes the State to impose conditions on the certification of the project beyond specific limitations on discharges.⁵² "Section 401(d) thus allows the State to impose 'other limitations' on the project in general to assure compliance with various provisions of the Clean Water Act and with 'any other appropriate requirement of State law.'"⁵³

The State asserted that the minimum stream flow requirements were imposed to ensure compliance with the State's water quality standards. The Court found that state water quality standards adopted pursuant to section 303 are valid on two grounds: (1) as "other limitations" or (2) as "any other appropriate requirement of State law."⁵⁴ However, the Court limited this portion of its holding by stating that it was only determining the status of limitations imposed pursuant to state water quality standards adopted pursuant to section 303 and was not determining the status of any other state laws.⁵⁵ Therefore, while it is clear that federally mandated state laws may not be preempted by FERC, it is unclear whether other state laws relating to water quality may be included as conditions of section 401 certification. Therefore, after *Jefferson County*, it is questionable whether energy laws, land use regulations, dam construction regulations, and state environmental quality review regulations not included in section 303 will be preempted by FERC. Considering the results of *First Iowa* and *California v. FERC*,⁵⁶ both suggesting broad federal preemption of state authority, it appears unlikely that state regulations not mandated by federal law will be considered binding conditions of section 401 certification.

2. Minimum Stream Flow Conditions are Within the Scope of the State's Authority

Following the initial determination of the scope of the State's authority under section 401, the Court considered whether imposition of the minimum stream flow conditions was within the scope of the State's authority. The Court considered and rejected three important arguments which Petitioners offered against the minimum flows being within the State's authority. Prior to the decision in this case, each of

51. Clean Water Act § 401(d), 33 U.S.C. § 1341(d) (1988) (emphasis added).

52. *Jefferson County*, 114 S. Ct. at 1908, 1909.

53. *Id.* at 1909.

In arriving at this conclusion the Court defers to the Environmental Protection Agency's (EPA) interpretation of § 401 as it is shown through EPA regulations implementing the section. Such deference to the EPA regulations occurs throughout the opinion, and is supported by the Court's holding in *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837 (1984).

54. *Jefferson County*, 114 S. Ct. at 1909.

55. *Id.* at 1910.

56. 497 U.S. 1040 (1990).

these three arguments was a point of contention with regard to section 401 certification.

a) The Project Must be Consistent with Both the Water Quality Criteria and the Designated Uses

First, Petitioners argued that the State may only protect designated uses through the implementation of specific criteria. The Court disagreed and held that a plain reading of section 303(c)(2)(A) of the CWA indicated that the project must satisfy both the designated uses and the water quality criteria.⁵⁷ The criteria act to protect all bodies of water located in the State by setting minimum specific numerical and narrative limitations on pollution. In many instances bodies of water have specific characteristics, such as being a spawning ground for salmonid, which are not properly protected by these general criteria. Therefore, states may designate certain uses as attendant to specific bodies of water. The requirement that the project not interfere with specific designated uses of a specific water body acts in concert with the more general criteria to more fully protect the particular attributes of that water body.⁵⁸ For example, in *Jefferson County* the State sought to protect the designated use of salmonid migration, rearing, spawning, and harvesting.

b) Diminishment of Water Quantity May Be Considered Pollution

Second, Petitioners argued that the CWA only applies to water "quality," and does not allow the State to regulate water "quantity." The Court held that the diminishment of water quantity can be considered water pollution.⁵⁹ This holding allows states to set minimum stream flow rates as a means of protecting state water quality standards. The ability to regulate water quantity effectively gives the states a broad regulatory authority over hydropower projects because the water flow is the essential element of hydropower production.

c) Minimum Flow Requirements Imposed Under Section 303 Do Not Interfere with FERC's Authority Under the FPA

Third, Petitioners argued that FERC's authority under the FPA preempts the State's authority to impose minimum stream flow requirements.⁶⁰ In *California v. FERC*,⁶¹ the Supreme Court held that minimum stream flow levels set by the California Water Resources Board were preempted to the extent that they conflicted with FERC's authority under the FPA.⁶² However, in the instant case, the Court found that there was no conflict with FERC under federal law because FERC had not yet issued a license. In essence, the CWA provides for state authorization of hydropower projects at the licensing and relicensing stages, but only at these stages.

57. *Jefferson County*, 114 S. Ct. at 1910.

58. *Id.* at 1911.

59. *Id.* at 1913.

60. *Id.* at 1914.

61. 495 U.S. 490 (1990).

62. *Id.* at 506.

The federal government thereby vests significant authorization in the states, but only allows exercise of the power at these specific stages. This is especially significant because licenses are issued for fifty-year periods.

d) The State's Minimum Stream Flow Conditions Are a Proper Application of State and Federal Antidegradation Regulations

After considering and rejecting the three arguments made by Petitioners, the Court considered and accepted the State's argument that implementation of minimum stream flows was necessary to implement the antidegradation policy found in section 303 of the CWA. The enactment of the CWA in 1972 provided for the incorporation of state antidegradation policies into federal law.⁶³ William Hines has followed the development of nondegradation policy and states that:

[i]n a nutshell, nondegradation policy requires that no significant deterioration be allowed in existing high quality air and water unless necessary to meet compelling social or economic needs. . . . Thus, the nondegradation policy serves to create a rebuttable presumption in favor of preservation of existing high quality air and water resources, and casts on the would be developer the burden of demonstrating either that the proposed enterprise will not significantly degrade ambient resources or, that if such degradation will occur, it is justified by the social and economic value of the activity.⁶⁴

The Court's recognition of the states' antidegradation policies is not necessarily a wholesale adoption of a federal antidegradation policy. A State may still be subject to pollution from one of its neighbors.⁶⁵ However, recognition of the policy does allow for a substantial level of environmental protection within those states who desire to maintain high ambient standards in their water bodies.

D. Justice Thomas' Dissent

Justice Thomas, joined by Justice Scalia, disagreed with the opinion of the majority on three grounds. First, the majority's interpretation of section 401 does not properly harmonize section 401(a)(1) and section 401(d) of the CWA. Second, the majority's interpretation gives states too much authority to impose conditions on hydropower projects. Third, the opinion disrupts the balance in federal and state powers which was created in *California v. FERC*.

The majority's interpretation of section 401(d) as giving broader authority to the states than that obtained in section 401(a)(1) effectively gives the states the power to set conditions which are unrelated to discharges. Justice Thomas states that "[t]he power to set conditions that are unrelated to discharges is, of course, nothing but a

63. *Jefferson County*, 114 S. Ct. at 1912.

64. N. William Hines, *A Decade of Nondegradation Policy in Congress and the Courts: The Erratic Pursuit of Clean Air and Clean Water*, 62 IOWA L. REV. 643, 645 (1977).

65. See, e.g., *Arkansas v. Oklahoma*, 503 U.S. 91 (1992).

conditional power to deny certification for reasons unrelated to discharges.⁶⁶ It is Thomas' view that this interpretation eviscerates section 401(a)(1). Justice Thomas would regard as appropriate only those conditions which relate to discharges, and discharges would be defined narrowly such that they would not include minimum stream flows.⁶⁷

Justice Thomas argues that the states' authority is further unjustifiably broadened by the majority's holding that designated uses are enforceable independent of the water quality criteria. Thus, the states could hypothetically impose conditions which are unrelated either to discharges or to specific water quality criteria. For example, the State could require minimum stream flow levels to accommodate recreational users if recreation were a designated use of the water under state water quality standards.

The final contention of the dissenting Justice is that the majority's interpretation of section 401 disrupts the balance of power between federal and state interests under the FPA. In *California v. FERC*, the Supreme Court held that minimum stream flow levels set by the California Water Resources Board were preempted to the extent that they conflicted with FERC's authority under the FPA. Justice Thomas reads *California v. FERC* as denying states a veto power over hydropower projects:

California v. FERC reaffirmed our decision in *First Iowa Hydro-Electric Cooperative v. FPC*, in which we warned against "vest[ing] in [state authorities] a veto power" over federal hydroelectric projects. Such authority, we concluded, could "destroy the effectiveness" of the FPA and "subordinate to the control of the State the 'comprehensive' planning" with which the administering agency (at that time the Federal Power Commission) was charged.

Today, the Court gives the States precisely the veto power over hydroelectric projects that we determined in *California v. FERC* and *First Iowa* they did not possess.⁶⁸

The broad veto power that the Court recognizes the states as holding over hydroelectric projects creates a substantial limitation on *California v. FERC*. The federal preemption of state law which was upheld in *California v. FERC* will only apply after FERC has issued a license. Since section 401 certification is a condition of issuance of such a license, the states will effectively have a veto power over hydropower projects at the licensing or relicensing stage.

66. *Jefferson County*, 114 S. Ct. at 1916 (Thomas, J., dissenting).

67. *Id.* at 1915. Justice Thomas states that "discharge" should be understood in its plain and ordinary meaning. However, the term discharge has been difficult to define in § 401 cases. Section 502(12) of the Clean Water Act defines the discharge of a pollutant as "any addition of any pollutant to navigable waters from any point source." See also Lisa M. Bogardus, *State Certification of Hydroelectric Facilities Under Section 401 of the Clean Water Act*, 12 VA. ENVTL. L.J. 43, 51 n.71 (1992).

68. *Jefferson County*, 114 S. Ct. at 1920 (Thomas, J., dissenting) (citation omitted).

E. The Effect of PUD No. 1 of Jefferson County v. Washington Department of Ecology on the Licensing of Federal Hydropower Projects

1. The Meaning of "Discharge"

The first step in determining whether section 401 applies to a hydropower project is to ask whether the project results in a discharge. The majority opinion does not address what constitutes a discharge, but notes that, "at a minimum, the project will result in two possible discharges — the release of dredged and fill material during the construction of the project, and the discharge of water at the end of the tailrace after the water has been used to generate electricity."⁶⁹ Generally, courts have presumed that a discharge exists in section 401 cases.⁷⁰

2. Protection of Designated Uses and State Water Quality Standards

Once the threshold requirement of the existence of a discharge is met, the next step is to determine whether the project will violate either a designated use or the numerical and narrative criteria of state water quality standards, or the state antidegradation policy. Courts have been indecisive about what a State may consider in determining whether to issue a section 401 certification.⁷¹ The majority opinion found that the State may impose any requirements which ensure compliance with the designated uses adopted pursuant to section 303.⁷² However, the Court expressly declined to delineate what other types of state laws would be deemed "appropriate" under section 401(d).⁷³ States may set broad criteria within section 303; however, it is unclear whether state laws which are not contemplated under section 303 will be appropriate. A future issue could be the delineation of what types of laws are and are not authorized by section 303.

States seemingly have wide discretion in determining water quality standards for purposes of section 303. Federal courts have uniformly held that the proper forum for the review of section 401(d) conditions is in state court, where states are more likely to find ratification of such wide discretion.⁷⁴ The control which the federal government exercises over the state water quality decisions rests with the EPA, who must approve the standards before they go into effect.⁷⁵ Considering the contrasting

69. *Id.* at 1908.

70. Bogardus, *supra* note 67, at 52; *see also* National Wildlife Fed'n v. FERC, 912 F.2d 1471, 1483 (D.C. Cir. 1990) (indicating the location of the discharge, but failing to describe the nature of the discharge); De Rham v. Diamond, 295 N.E.2d 763 (N.Y. 1973) (the court does not address whether a discharge would be created by the project, but does consider § 401 certification).

71. Boardus, *supra* note 67, at 52.

72. *Jefferson County*, 114 S. Ct. at 1909.

73. *Id.*

74. *Id.* at 1920 (Thomas, J., dissenting); *see also* Roosevelt Campobello Int'l Park v. E.P.A., 684 F.2d 1041, 1056 (1st Cir. 1982) (stating that "the proper forum to review the appropriateness of a state's certification is the state court, and that federal courts and agencies are without authority to review the validity of requirements imposed under state law or in a state's certification"); *see also* Andrew H. Sawyer, *Rock Creek Revisited: State Water Quality Certification of Hydroelectric Projects in California*, 25 PAC. L.J. 973, 995 (1994).

75. Clean Water Act § 303(c)(3), 33 U.S.C. § 1313(c)(3) (1988).

natures of the EPA and FERC, it is logical to conclude that State water quality standards which afford increased protection to the environment will be more favorably received by the EPA than FERC.

The Court took note of some environment friendly sections of the Washington Administrative Code (WAC). For example, the WAC lists "aesthetic values" as one of its water quality criteria.⁷⁶ The WAC also lists such items as wildlife habitat and recreation as characteristic uses.⁷⁷ It appears that conditions such as minimum stream flows, protecting narrative criteria, and traditionally overlooked uses will be proper assertions of state authority under section 401.

3. *The State and Federal Antidegradation Policies*

The State's antidegradation policy is another avenue by which a State may justify protection of environmental resources under the section 401 certification. The Court found that Washington's imposition of minimum stream flows was a proper regulation in light of the state and federal antidegradation regulations.⁷⁸ In describing the federal policy, the majority stated:

These regulations require States to "develop and adopt a statewide antidegradation policy and identify the methods for implementing such policy." 40 CFR § 131.12 (1992). These "implementation methods shall, at a minimum, be consistent with the . . . [e]xisting instream water uses and the level of water quality necessary to protect the existing uses shall be maintained and protected." *Ibid.* EPA has explained that under its antidegradation regulation, "no activity is allowable . . . which could partially or completely eliminate any existing use."⁷⁹

The policy thereby establishes a minimum, but it does not control the extent to which a State might use the policy to exclude hydropower projects. The antidegradation policy is a federally mandated floor which all states must comply with in order to further the goals of the CWA, which are to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters."⁸⁰ To further advance these goals, the CWA allows states to take measures which are supplemental to those mandated by the federal act.⁸¹ As a result, states have the power to set state water quality standards which are so cost prohibitive that they make development of a hydropower project economically infeasible.

76. *Jefferson County*, 114 S. Ct. at 1911; *see* WASH. ADMIN. CODE § 173-201-045(c)(viii) (1990).

77. *Jefferson County*, 114 S. Ct. at 1911; *see* WASH. ADMIN. CODE § 173-201-045(b)(iv), (v) (1990).

78. *Jefferson County*, 114 S. Ct. at 1912.

79. *Id.*

80. Clean Water Act § 101(a).

81. *Id.* § 510.

4. Preemption Under the FPA

The result reached in *Jefferson County* appears to be in conflict with the result reached by the Court in *California v. FERC*.⁸² In *California v. FERC*, the Court held that under section 27 of the FPA, the regulatory authority of FERC superseded state minimum flow requirements which were in conflict with the federal permit, as evidenced by its permit requirements for minimum instream flows.⁸³ This case involved a hydropower project on Rock Creek in California. FERC issued a license to the project operator in 1983 and set interim minimum flow rates for the bypass reach. The project operator then submitted a report recommending that the interim minimum flow rates be adopted as the permanent minimum flow rates. FERC then adopted these interim rates as the permanent rates. In 1987, the state Water Resources Control Board (WRCB) issued a water permit to the project requiring it to maintain significantly higher minimum flow rates.

The conflict between *Jefferson County* and *California v. FERC* is most clearly shown by the final sentence of Justice O'Connor's opinion in *California*: "[W]e agree that allowing California to impose the challenged requirements would be contrary to congressional intent regarding the Commission's licensing authority and would "constitute a veto of the *project that was approved and licensed by FERC*."⁸⁴ The distinction which Justice O'Connor recognizes in the *Jefferson County* opinion is that in *Jefferson County* the project had not yet been licensed by FERC, while in *California*, the project had already received its federal license.⁸⁵ Thus, in *PUD No. 1 of Jefferson County*, there was no conflict between federal and state rights because state certification is a prerequisite to federal licensing. The distinction is one of timing. The CWA has authorized states to affect the federal licensing process at either the licensing or relicensing stage, but not at any other stage.

It is also significant that in *California*, Justice O'Connor stressed the necessity of adhering to precedent, especially in cases involving statutory construction.⁸⁶ The relevant precedent is *First Iowa*, which established a broad federal regulatory role for FERC.⁸⁷ By focusing on the narrow issues surrounding the CWA, the majority in *Jefferson County* was able to execute an effective end-run around FERC's expansive authority under *First Iowa* and its progeny.

82. 495 U.S. 490 (1990).

83. *Id.* at 504; see *First Iowa Hydro-Elec. Coop. v. Federal Power Comm'n*, 328 U.S. 152 (1946) (holding that federal rights preempted state rights under § 27 of the FPA except to the extent the rights were "saved" to the states).

84. *California*, 495 U.S. at 498 (emphasis added) (quoting *First Iowa*, 66 S. Ct. at 911-12).

85. *Jefferson County*, 114 S. Ct. at 1914.

86. *California*, 495 U.S. at 505.

87. See Michael C. Blumm, *Federalism, Hydroelectric Licensing and the Future of Minimum Streamflows After California v. Federal Energy Regulatory Commission*, 21 ENVTL. L. 113, 120 (1991). Attempting to explain the Court's holding in *First Iowa*, the author concludes that "the best explanation of *First Iowa* may be an example of an activist Court's willingness to help promote the perceived federal interest in hydroelectric development." *Id.*

Justice Thomas is technically incorrect in stating that the majority's decision in *Jefferson County* "gives the States precisely the veto power over hydroelectric projects that we determined in *California v. FERC* and *First Iowa* they did not possess."⁸⁸ The veto power in *California v. FERC* and *First Iowa* contemplated vetoing a project after it has gained federal approval, whereas the veto power in *Jefferson County* allows a state to veto a project prior to federal licensing or relicensing.

Justice Thomas is correct in recognizing that the majority's decision recognizes a substantial state power over the licensing process of hydropower projects. In fact, his assertion that the State's mistake in *California* was that it did not hit upon the proper device to accomplish its objectives is correct.⁸⁹ Justice Thomas makes this assertion with a derogatory tone, aimed at the Court's interpretation of the CWA. This derogation would be better aimed at Congress for creating an overly complex and disorganized regulatory structure. Our relationship to water is highly complex because of its necessity and the many beneficial uses we make of it. This complexity is reflected in the regulatory competition which exists between federal agencies, and especially between FERC and state regulatory agencies.

IV. Conclusion

The Supreme Court's opinion in *Jefferson County* interprets the CWA as granting to the states a broad regulatory authority over hydroelectric projects. The federal standards create a baseline below which the states may not go. The states may then build upon this foundation to guarantee that specific state water policy concerns are met. This power allows the states to ensure that hydropower projects fit within their water management policies.

The decision allows states to control water quality within their boundaries. It is likely that hydropower projects will have to satisfy heightened environmental standards in many states compared to those promulgated by FERC in the past. Higher environmental standards at the state level will increase the costs of hydroelectric production. However, balanced against the increasing relative demands on natural resources for recreational, aesthetic, and conservation uses, this interpretation of the CWA provides the states with a means to utilize their natural resources in the manner they consider most beneficial.

T. Mike Blake, Jr.

88. *Jefferson County*, 114 S. Ct. at 1920 (Thomas, J., dissenting).

89. *Id.* (Thomas, J., dissenting).