Report of The Committee On The Environment

This report reviews selected developments in environmental law during the past year that affect energy interests. The articles focus particularly on litigation and agency action that will be of importance to potential users of scarce Western water.

I. COURT ACTION

A. National Wildlife Federation v. Gorsuch

The U.S. District Court for the District of Columbia has held that the Environmental Protection Agency must issue regulations designating dams as a point source category under §402 of the Clean Water Act. 33 U.S.C. § 1251 (1978). In her opinion in *National Wildlife Federation V. Gorsuch,* No. 79-0915 (D.D.C. January 29, 1982), Judge Joyce Hens Green ruled that certain water quality conditions associated with dams and reservoirs should be considered pollutants released into navigable waters by a point source under the Clean Water Act. 33 U.S.C. § 1326(14) (1978). EPA had taken the position, long held by the agency that water quality changes, such as low dissolved oxygen, cold, and supersaturation could not be pollutants subject to the National Pollutant Discharge Elimination System program. CWA §§ 301(a) and 402(a), 33 U.S.C. §§ 1311(a) and 1342(a) (1978). Judge Green rejected EPA's argument as inconsistent with the language of the statute and Congressional intent to make the NPDES program broadly applicable to a wide range of pollution problems. The court held that EPA violated a non-discretionary duty and acted arbitrarily and in excess of statutory authority by its failure to regulate dams as point sources of pollution. EPA was ordered to designate dams as a point source category under § 402 of the Clean Water Act and to establish effluent limitations for dams on a categorical basis.

In deciding whether dams are subject to the NPDES program, the question was whether dams "discharge pollutants" within the meaning of the Act. Three questions were relevant to that determination: (1) were the water quality factors at issue *pollutants* as defined by §§ 502(6) of the Act. 33 U.S.C. §1362(6) (1978), (2) if so, were they *added* to navigable waters from any point source. CWA § 502(12) (1978), (3) and finally, can dams be *point sources* under CWA § 502(14). 33 U.S.C. § 1362(14) (1978).

The court answered the first question concerning the definition of pollutants under the CWA by application of rules of statutory construction and by looking to Congressional intent. Believing there was a Congressional preference for the NPDES program as the most effective means of water pollution control, the court found EPA's strict interpretation of the CWA to be cramped. EPA argued that the NPDES program applied only to the pollutants listed in the Act. 33 U.S.C. § 1362(6) (1978). The court however agreed with plaintiff's broader view of Congressional intent, and ruled that the Act should be interpreted whenever reasonable to subject pollution sources to NPDES control. Among potential discharges covered by the court's decision were releases of water from the reservoir containing sediment and dissolved metals, releases of water low in dissolved oxygen, gas supersaturation caused

by spilling, and releases of water warmer or colder than would exist in the free-flowing stream.

Among the defenses urged was that dams do not add pollutants to navigable waters since the pollutants are already in the water before the dam releases the water downstream. Plaintiffs countered that dam/reservoir facilities add pollutants that would not exist but for the dam and reservoir. *South Carolina Wildlife Federation v. Alexander,* 477 F.Supp. 118 (D.S.C. 1978). The court thought the latter argument consistent with the common sense meaning of the statute. Thus, the district court found that dams can add pollutants to navigable waters as defined in § 502(12) of the Clean Water Act. 33 U.S.C. § 1362(12) (1978).

The court's analysis of whether dams are point sources was intertwined with the question of whether dams add pollutants to waters. The ruling appears to be that a dam is a point source only when it discharges pollutants created by the dam/reservoir facility into navigable waters. One example given by the court was accumulated sediment deposits at the bottom of the reservoir created by the dam construction and changes in the flow of the impounded waters. These substances are not subject to NPDES permitting unless there are releases downstream by the dam. The dam is not a point source until it releases pollutants which the dam/reservoir project caused. The court also held that reference to dams as a nonpoint source in § 304(f)(2)(F), and the preservation of state rights to allocate water quantity in § 101(g), did not negate the applicability of the NPDES permit program.

The court noted the potential effect of its ruling on the over 2,000,000 dams in the country. At the same time, the court pointed to administrative options available to EPA, such as categorical exemptions, area wide permits, and general permits, which could minimize the burdens. The court gave EPA ninety days in which to promulgate final rules covering dams into the NPDES system.

B. Continuing Legal Battles over §404 Dredge and Fill Permits

Intense legislative debate and sometimes heated litigation have characterized the battles over federal protection of the waters of the United States. The year 1981 was no different from previous years in terms of controversy surrounding the permitting authority of the Army Corps of Engineers. A fifth amendment claim of taking without due process of law was raised in the case of *Deltona Corp. v. United States.* In that case the United States Court of Claims found that a denial of a dredge and fill permit resulting in the diminution in the value of the litigant's property did not constitute a taking. In other court action, permit applicants have argued that they have a right to formal adjuducatory proceedings. Two district courts, in *Buttrey v. United States,* ____ F.Supp ____ (E.D. La. 1981) and in *Nofelco Realty Corp. v. United States,* 521 F.Supp. 458 (S.D. N.Y. 1981), have disagreed with the denied permittees, holding that applicants for dredge and fill permits are not entitled to formal administrative procedures. In additions to these and other court battles, note that the Department of the Army issued a notice in the Federal Register that it was again reviewing its permit program under the

Federal Water Pollution Control Act of 1972. 47 Fed. Reg. 1697 (1982.) Decisions on the reform actions needed are expected in early 1982.

The fifth amendment constitutional claim arose in a case whose origins date back to 1964, *Deltona Corp. v. United States,* 657 F.2d 1184 (Ct. Cl. 1981). In that year, Deltona corporation began its ambitious planned community known as the Marco Island project in Florida. Five construction areas, each requiring a separate permit, were contemplated for the coastal wetlands. The first two dredge and fill permits were issued almost routinely in 1964 and 1969. But before the Corps had processed the remaining three applications the permitting climate had changed considerably as a result of the 1972 Amendments to the FWPCA. The Corps denied two of the three permits in 1976 because completion of those stages of the project would cause destruction of almost 2000 acres of wetlands and underwater ecological systems. A federal district court upheld the permit denials. Deltona did not challenge that decision in the U.S. Court of Claims case, but rather argued that it suffered an uncompensated taking as a consequence of federal regulation in violation of the fifth amendment. The court agreed that the Corps action frustrated Deltona's "reasonable investment-backed expectations," and that the corpora- had been denied optimal economic use of its property. However, the dispositive question was whether the Corps action extinguished a fundamental attribute of ownership or deprived the owner of all economically viable use of the land. Because Deltona had received a permit for a third area of development, the Court concluded that denial of the other two permits was only a diminution of value. Such an injury, by itself, was held insufficient to establish a taking.

Some procedural requirements of §404 of the FWPCA have also been raised in litigation during the past year. In *Buttrey v. United States,* 11 ELR 20932, plaintiffs argued that the Corps was required to conduct formal adjudicatory hearings for dredge and fill permits. The plaintiffs were denied a permit to channelize the Gum Bayou in Louisiana. Their argument was based on language in tow sections of the FWPCA: §404 directs the corps to issue permits "after notice and opportunity for public hearings," 33 U.S.C. §1314(a), and §402 directs the EPA to issue natioinal pollutant discharge elimination system permits "after opportunity for public hearing". 33 U.S.C. §1342(a)(1). Adjudicatory hearings are required under section 402, so plaintiffs argued that use of similar language in section 404 indicated that formal procedures should also be required pursuant to that section. The district court disagreed with that argument, as well as with plaintiff's APA §554 and 556 claims. The court found no evidence in the legislative history of the FWPCA to indicate a Congressional intent to alter Corps tradition of informal, non-adversarial public hearings in its permitting procedure. The procedural requirements of the two sections could not be equated because the EPA was a new agency issuing new permits, while the Corps had been issuing permits since 1899. As for the APA claims, the court reviewed the administrative record and found no procedural violations. The Buttrey decision has been appealed to the Fifth Circuit and plaintiff's argument in this forum is that the 1972 Amendments to the FWPCA did not merely reaffirm the Corps existing permitting author-

ity. Brief for Appellant, *Buttrey v. United States,* No. 81-3234 (5th Cir., brief filed June 25, 1981).

It now takes an average of 130 days to process § 404 permit applications according to a *Washington Post* article of November 5, 1981, at A 27. A decision by the Fifth Circuit that section 404 does indeed require adjudicatory hearings would expand that time frame considerably. In addition to the Army Corps' recent notice of pending regulatory reform on permitting, the Congress is considering amendments to the FWPCA to limit the Corps' jurisdiction. S. 777, 97th Cong., 1st Sess. (March 14, 1981). The continuing turmoil over dredge and fill permitting procedures intensified during 1981, and there is little doubt that some very crucial developments will appear in 1982.

C. Nebraska v. Sporhase

A case with potentially far reaching consequences for irrigators and domestic and industrial water users in arid Western states is now on direct appeal to the U.S. Supreme Court from the Nebraska Supreme Court. In *Nebraska v. Sporhase,* 305 N.W. 2d. 614 (1981), the state of Nebraska sought to enjoin defendant from transporting Nebraska ground water into Colorado without a permit. The court affirmed the district court's holding that Nebraska's so-called water anti-export statute did not violate the commerce clause of the U.S. Constitution, Art. I, § 8, since under state law, water was not an article of commerce. For industry officials looking for water sources, the decision is heartening. Water is an especially precious commodity for oil shale operations and coal slurry pipelines, so affirmance of the Nebraska court's decision by the Supreme Court could help aleviate one of the major hurdles for Western energy development.

The appellants owned adjacent tracts of land in Chase County, Nebraska and in Phillips County, Colorado. A well in Nebraska pumped ground water for irrigation onto both tracts of land. Appellants had not applied to the Nebraska Department of Water Resources for a permit to transport ground water out of the state as required by Neb. Rev.St. § 46-613.01 (reissue 1978). The state sought to enjoin appellants from further out of state transfer of water.

The court first determined that ground water was not an article of commerce under Nebraska law. Review of legislative action, case law, and statutes revealed that the state never treated ground water as a market item freely transferable for value among private parties. The Nebraska Constitution declared water for irrigation purposes to be a natural want. State laws governing well registration, well spacing, and filling of abandoned wells showed the the state's interest in water allocation. In addition, legislative action was necessary to allow transfer of ground water off the overlying land. Since ground water was not an article of commerce, the commerce clause of the U.S. Constitution did not apply.

The court also noted that the statute requiring appellants to obtain a water transport permit was not contrary to the fifth and fourteenth amendments to the U.S. Constitution. Conditioning a landowner's right to transfer ground water did not deprive him of a property right since, under Nebraska

common law, ground water was not transferable off overlying land unless the public, owners of the water, granted the right. Appellants had no private property right in the water, so they could not be deprived of liberty or property.

Appellants argued that the reciprocity provision of the permit statute violated due process guarantees by delegating legislative authority to another state. Under the statute, the director of the Department of Water Resources could issue a permit if the receiving state granted reciprocal rights providing for transfer of ground water from that state to Nebraska. The court held that this was not a delegation of authority to the receiving state because that state had no power to determine Nebraska public policy by the statute. The reciprocal provision merely established one of the conditions to be satisfied before a permit could be issued.

Appellants' final argument that the statute violated the equal protection clause of the U.S. Constitution also met with defeat. Their contention was that the statute created an unreasonable classification (although the opinion does not fully explain what the classification was). The court held that the class upon which § 46-613.01 operated consisted of those citizens who wished to transport Nebraska ground water out of state for irrigation purposes, and that the statute treated each member of the class equally.

Oral arguments before the Supreme Court will probably be in March or April. The case has been docketed as No. 81-613. The final decision will no doubt interest agricultural and energy interests in the arid West.

D. Attorney Fees Awarded to Losing Plaintiffs in Citizen Suit to Protect the Environment

The United States District Court for the District of Columbia awarded attorney fees to unsuccessful plaintiffs in a lawsuit challenging the sale of oil and gas leases under the Endangered Species Act and the Outer Continental Shelf Lands Act. The parties stipulated to an award of fees at the conclusion of the case on the merits, but the Department of Interior later withdrew its asgreement. The court ruled that the important question on the fee issue was whether the suit was the type that Congress intended to encourage with the statutory citizen suit provisions. Since the suit was brought for protection of the environment under the ESA and OCSLA, it fell into the category of private actions Congress sought to encourage. Federal defendants were ordered to pay compensation for attorney's fees as stipulated at close of the case on the merits.

In *North Slope Borough v. Andrus,* 515 F.Supp. 961 (D.C.D.C. 1981), the court had to decide the propriety of attorney fee awards in the context of ESA and OCSLA litigation. Both statutes provide that the court may award the costs of litigation to any party as the court deems appropriate.* Following a U.S. Court of Appeals opinion interpreting an identical provision in the Clean Air Act, the court determined the relevant issues to be (1) whether Congress intended to encourage this type of litigation, and (2) if so, was an award of attorney's fees in the public interest.

*16 U.S.C. § 1504(g)(4) and 43 U.S.C. § 1349(a)(5) (1970).

The court recognized conflicting purposes in the OCSLA, but found that the citizen suit provision was specifically enacted to ensure that environmental factors were given appropriate weight. Survival of an endangered species, the bowhead whale, and the preservation of the North Slope environment were central to plaintiff's complaint.

Those concerns were directly addressed in the OCSLA and ESA citizen suit provisions, so the court answered the first of its two questions affirmatively. Congress did intend to encourage well founded suits such as the plaintiffs had filed.

As to whether the award was in the public interest, the court also answered in the affirmative. The defendants argued that the primary public interest served by OCSLA is expeditious exploitation of oil and gas reserves. They contended that plaintiffs disserved that purpose by bringing the suit, and therefore an award of attorney's fees to plaintiffs was not in the public interest. The court observed that such logic would lead to the conclusion that unless plaintiffs prevailed on the merits, they would be disserving the public interest. That result was deemed erroneous as a matter of law by the court, and the fees were awarded to the plaintiffs.

E. Expert Testimony on Hazardous Effect of High Voltage Transmission Lines

In recent years, state utility commissions, in exercising their transmission line siting authority, have been hearing from witnesses who opine that the electromagnetic fields of high voltage lines produce hazardous biological effects on humans. This has also spread into condemnation cases where witnesses testify on behalf of the landowners in an attempt to show substantial damages to the residue of land not taken.

In *in limine* challenge to such opinion evidence, a Colorado trial court ruled in December of 1981 that such opinion evidence could not go to a jury because it has not gained general acceptance in the scientific community, nor were the predictions of such experts based upon reasonable medical certainty or probability. *Public Service Co. v. Linnebur,* No. 79 CV 72 (1981). An appeal of the trial court's ruling has been taken to the Colorado Court of Appeals.

II. AGENCY ACTION

A. The FERC Amends Environmental Requirements for Major License Applications

In an effort to ease the burdens of preparing license applications for major unconstructed projects and major modified projects, the FERC issued sweeping amendments of its regulations on November 6, 1981. 46 Fed. Reg. 55926.* A timely application for rehearing was filed, and a Commission order of January 6, 1982 granted rehearing for purposes of further consideration.

* To be codified at 18 C.F.R. 2, 4, 5, 16 and 131.

What follows is a brief sketch of major changes in the Commission rules, specifically regarding new environmental provisions.

One of the broadest changes in the application rules is the consolidation of requests for environmental data. All paragraphs and exhibits requesting information on environmental matters are embodied in the new Exhibit E environmental report. According to the Commission, the final rule does not require submittal of a greater variety of environmental information than that required under existing Commission regulations. 18 C.F.R. §§ 4.40, 4.41 (1981). Former exhibits R, S, V, and W and the environmental report required in Appendix A of Part 2 are now consolidated into a single report. The Commission maintains that Exhibit E is clearer and more specific in its data requests than prior equivalent exhibits, without imposing data gathering requirements that are unnecessary to the Commission's statutory duties. Environmental reports for major unconstructed and major modified projects will necessarily be more detailed than reports for projects with total generating capacity of 5 MW or less will be. The Commission emphasized that environmental data submitted by the applicant must be commensurate with the size and type of project for which the applicant seeks a license or with the scope of any proposed amendment to an existing license.

A requirement that the applicant consult with interested agencies *prior* to making application is a new wrinkle in the regulations. Some commenters oppose such a rule on the grounds that it represents an additional burden on the applicant. The Commission supports pre-application consultation as a means to start the ball rolling early in the licensing process. This early consultation is not intended to satisfy specific statutory requirements of the Fish and Wildlife Coordination Act or the Endangered Species Act, but is merely designed to provide a basis for analysis of the environmental problems relating to certain federal actions. The applicant is not required to wait indefinitely for agency comments after a request for consultation, but the new rules at least provide an opportunity for agencies and the applicant to confer during the first stages of the planning process.

Another section added to the existing regulations and incorporated into Exhibit E is a regulation addressing alternatives to the location and design of the project and to hydropower development itself. 8 C.F.R. § 4.41(f)(10) (1981). Consideration of environmental alternatives is required by NEPA, but this new section focuses on issues other than strictly environmental ones. For instance, alternative electrical energy sources, such as gas, oil, coal, and nuclear fueled power plants, should be addressed by the applicant. Use of purchased power or diversity exchange was also suggested by the Commission as a topic for this alternative section. The purpose of this provision is to allow the Commission to analyze the site selection process in relation to other available sites for possible developments.

The Commission hopes these new regulations will speed processing of license applications, but as some of the comments on the final rule indicate, not everyone agrees that will be the case. The above mentioned application for rehearing was filed on behalf of a group of municipal entities that have filed applications for preliminary permits and licenses at the FERC. One objection to the new rules was the requirement for socio-economic report to be

included in Exhibit E. The applicant for rehearing protested that the burden imposed on small applicants especially, was substantial and unwarranted by the history of NEPA and the statutes governing hydropower licensing. Despite the Commission's assertion that the socio-economic impact report would not add any data requests over and above those required under the former regulations, the applicant for rehearing indicated it found the Commission's stand difficult to believe in light of the actual wording of the rule.

The applicant for rehearing also commented on what it believed to be a deficiency in the FERC's compliance with the Regulatory Flexibility Act of 1980. The main concern was the additional paperwork burden the new regulations imposed on small entities seeking hydroelectric licenses. It charged that the Commission failed to adequately research alternatives to the Environmental report requirement, and that the benefits might not outweigh the additional burdens of Exhibit E. The Commission has granted a rehearing to consider these and other points surrounding the controversial new amendments to its licensing regulations.

B. Fish and Wildlife Service Final Redefinition of Harm

On November 4, 1981 the Department of Interior, Fish and Wildlife Service, issued a final rule redefining "harm" under § 9 of the Endangered Species Act, 50 CFR 17.3 (1980) 46 Fed. Reg. 54748. The action was taken in response to a perceived misconstruction of the former definition in judicial opinions that was inconsistent with the intent of Congress in the Act. Harm is redefined as any action, including habitat modification, which actually kills or injures wildlife. The former definition was read to preclude habitat modification or degradation, even where there was no injury to the listed endangered or threatened wildlife. Under the new rule, injury from habitat modification can be shown only if essential behavioral patterns of a listed species are significantly impaired. Thus, a harmful taking under § 9 will result from showing *actual* injury to a listed species caused by habitat modification.