Increased Authority of States To Impose Conditions on Hydroelectric Projects under the Recent Supreme Court Decision in *Jefferson County PUD*

Peter Henner

Section 401 of the Clean Water Act requires a state to issue a water quality certification before the Federal Energy Regulatory Commission can issue a license for a hydroelectric facility. In Jefferson County PUD, *the Supreme Court held that a Section 401 certificate can address a wide range of issues pertaining to water quality, rather than only apply to limitations on the discharge of specific quantities of pollutants. The broader authority granted by this decision will mean that state governments will be able to impose a variety of conditions on hydroelectric facilities and other projects needing federal licenses. This increased authority will give interested parties an additional forum to litigate demands for hydroelectric facilities to comply with restrictive conditions and provide environmental mitigation projects.*

JEFFERSON COUNTY PUD: AN OVERVIEW

On May 31, 1994, the Supreme Court decided the case of *Public Utility District of Jefferson County and City of Tacoma v. Washington Department of Ecology.*[1] As a result of *Jefferson County PUD*, the authority of states to regulate hydroelectric facilities has been dramatically expanded.

Section 401 of the Clean Water Act[2] requires a hydroelectric facility to obtain a state certification that the facility will not adversely impact water quality. This state certificate is a prerequisite for the granting of a license by the Federal Energy Regulatory Commission (FERC). It has long been established that the federal government's regulation of hydroelectric power under the Federal Power Act preempts most state control over

***Peter Henner**, a 1980 graduate of Rutgers Law School, is a sole practitioner in Albany, New York. His practice includes citizen suits, administrative proceedings before federal and state agencies, and Superfund litigation. Mr. Henner is environmental counsel for the City of Cohoes, New York, the site of a major hydroelectric facility.*

CCC 1058-1367/95/040217-15

hydroelectric projects. Nevertheless, throughout the 1980s and early 1990s, states sought to utilize the Section 401 certification process to impose a variety of conditions on hydroelectric plants. The efforts of the states were resisted by developers, who generally argued that the authority given to the states by Section 401 was extremely limited. In *Jefferson County PUD*, the Supreme Court conclusively established that states have a broad authority to impose a wide range of conditions on hydroelectric facilities in the context of a Section 401 certification process.

Jefferson County PUD involved a regulation imposed by the State of Washington that required a hydroelectric facility to maintain a minimum stream flow for fish habitat. The Washington Supreme Court, in *State of Washington v. Public Utility District No. 1*, upheld the imposition of this condition on the grounds that the broad purposes of the Clean Water Act evidenced a congressional intent to empower states to consider "all state water quality related laws" in the context of Section 401 and the minimum flow condition was related to water quality.[3]

Jefferson County PUD involved a regulation imposed by the State of Washington that required a hydroelectric facility to maintain a minimum stream flow for fish habitat.

Several months later, New York's highest court, the Court of Appeals, in *Niagara Mohawk Power Corporation v. New York State Department of Environmental Conservation*,[4] explicitly refused to adopt the "broad" interpretation of Section 401 that had been adopted in *Washington* and in a 1986 Oregon case.[5] In *Niagara Mohawk*, the court held that a state's authority under Section 401 was limited to determining that numerical standards for water chemistry would not be impaired by a proposed hydroelectric facility.

The United States Supreme Court granted certiorari in both *Niagara Mohawk* and *Washington* "to resolve a conflict among the state courts of last resort." The court's decision in *Washington* was affirmed in *Jefferson County PUD*, and the Supreme Court implicitly reversed the narrow construction of Section 401 set forth in *Niagara Mohawk*.

The policy declaration of the Clean Water Act declares that "it is the policy of the Congress to recognize, preserve and protect the primary responsibilities and rights of states ... to plan the development and use of ... water resources ...." *Jefferson County PUD* discusses the general powers of states under the Clean Water Act and notes that states may impose more stringent water quality controls than are required by the federal government. The Court also recognized a strong role for states to play in enforcing the provisions of the Clean Water Act and in regulating hydroelectric facilities under Section 401 of the Clean Water Act. However, *Jefferson County PUD* directly contradicted earlier and well established rulings that the Federal Power Act preempts the ability of a state to regulate hydroelectric facilities.

Four years before *Jefferson County PUD*, the Supreme Court unanimously ruled, in *California v. FERC*, that Section 27 of the Federal Power Act preempted the ability of a state to set a minimum flow requirement for a hydroelectric facility.[6] In *California*, Justice O'Connor, who also wrote the majority opinion in *Jefferson County PUD*, overturned the precise type of state regulation which was ultimately sustained in *Jefferson County PUD*. However, *Jefferson County PUD* involved an interpretation of the Clean Water Act, where Congress has expressed an intention to "preserve"

the states' role in environmental regulation. In contrast, *California* was decided under the Federal Power Act. The doctrine of federal preemption under the Federal Power Act had been conclusively established in the early case of *First Iowa Hydroelectric Cooperative v. Federal Power Commission*.[7] The preemption doctrine had been consistently applied by courts for 44 years and Congress had not amended the Federal Power Act in response to the courts' rulings.

REGULATION OF HYDROELECTRIC FACILITIES

As a result of the energy crisis in the 1970s, Congress encouraged the development of alternative forms of energy, including hydropower. In the 1980s, a large number of new hydroelectric facilities were proposed. The development of hydroelectric facilities was further encouraged in New York by requiring power companies to purchase hydroelectric power at the marginal cost of extra electricity.[8] Thus, states have faced a large number of applications for new hydroelectric facilities in recent years.

Furthermore, FERC licenses for such facilities are issued under the Federal Power Act for terms of 30-50 years. The holder of a license must obtain a Section 401 certificate upon the renewal of the license. Therefore, states must review existing hydroelectric facilities under Section 401, as well as new facilities. For example, 167 licenses expired in 1993 in the United States, and 158 of those license holders filed applications for license renewals.[9]

A number of important environmental issues are involved in hydroelectric facilities.

Although hydroelectric power is a relatively clean form of energy, a number of important environmental issues are involved in hydroelectric facilities. Water quality may be affected as a result of the facility's release of oxygen-depleted water from impoundment, or as a result of temperature changes due to the impoundment. Fish may be pulled into the turbines (impingement or entrainment), resulting in large-scale effects on the aquatic ecosystem. Furthermore, hydroelectric facilities are naturally located at waterfall sites, and the use of such waterfalls for the generation of electric power may impact recreational opportunities for the community. It was natural for state regulatory authorities to attempt to address these and other concerns by imposing conditions on both new and existing hydroelectric facilities under the authority granted to the states by section 401.

In the course of determining whether to grant certificates, states have: 1) sought to impose minimum flow requirements, either for fish passage or for aesthetic reasons, 2) required developers to provide recreational access, and 3) imposed miscellaneous other conditions. On one occasion, a state attempted to require a developer to pay $50,000 to the state, and to deed land to the state.[10] Developers, in response to the state regulators, have argued that the scope of Section 401 is limited to "water quality standards," and that "water quality standards" refers only to specific limitations and numerical criteria relating to identifiable discharges of pollutants.

At least seven state courts ruled on the proper scope of Section 401 certificates issued to hydroelectric facilities prior to the Supreme Court's ruling in *Jefferson County PUD*.[11] Most of these states had interpreted

Section 401 broadly and allowed considerable latitude to state regulatory bodies in imposing conditions. As of 1992, hydroelectric facility licensees were still able to argue that the authority of states under Section 401 was limited to the impacts that their "discharges" would have on water quality. These arguments were successful in at least New York and Pennsylvania; however, such arguments were conclusively rejected by *Jefferson County PUD*.

JEFFERSON COUNTY PUD'S INTERPRETATION OF SECTION 401

The scope of a state's authority under Section 401 is determined by Subsections 401(a)(1) and 401(d). Section 401(a), in relevant part, states: "any applicant for a federal license or permit to conduct any activity . . . which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the state in which the discharge originates or will originate . . . that any such *discharge* will comply with the applicable provisions of Sections 1311, 1312, 1313, 1316 and 1317 of this title" [i.e., Sections 301-303 and 306-307 of the Clean Water Act] (emphasis added). Section 401(d) provides, in relevant part, that "any certification provided under this section shall set forth any effluent limitations and other limitations, and monitoring requirements necessary to assure that any applicant . . . will comply with any applicable effluent limitations and other limitations, and *with any other appropriate requirement of state law* set forth in such certification, and shall become a condition on any Federal license . . ." (emphasis added). As discussed below, the phrase "any other appropriate requirement of state law" is crucial to the determination in *Jefferson County PUD*.

Definition of "Discharge"

In order to establish the power to regulate hydroelectric facilities, states must demonstrate that the activities of such facilities result in "discharges."

Section 401 only requires that a certificate be issued when an applicant's activities result in a "discharge." Thus, in order to establish the power to regulate hydroelectric facilities, states must demonstrate, as a threshold matter, that the activities of such facilities result in "discharges." The term "discharge" is defined in Section 502(16) of the Clean Water Act to include the discharge of a pollutant. "Discharge of a pollutant" is defined separately in Section 502(12). For the purposes of Section 402 of the Clean Water Act, which governs the National Pollutant Discharge Elimination System (NPDES), only discharges of pollutants are regulated. However, for the purposes of Section 401, certifications are necessary for *all* discharges.

Prior to *Jefferson County PUD*, developers argued that the term "discharge" should be narrowly defined. Since a hydroelectric facility does not usually discharge wastewater containing pollutants, it was argued that the activities of a hydroelectric facility do not involve any "discharges" within the meaning of Section 401(a).[12] Therefore, hydroelectric facilities were not subject to regulation under Section 401. In 1990, a Pennsylvania court agreed, holding that Section 401 applied only when pollutants were discharged.[13] Furthermore, discharges from hydroelectric facilities have been held not to require NPDES permits under Section 402.[14]

Nevertheless, it appears that courts have applied a different standard

in determining what constitutes a discharge under Section 401 than the one that has been applied under Section 402. Courts generally have presumed a discharge in the context of Section 401, even when they are unwilling to conclude that a discharge has occurred in order to determine whether a NPDES permit would be required under Section 402 of the Clean Water Act.[15] Thus, a discharge by a hydroelectric facility has been presumed to occur when there is a release of water "over the dam and from the power house tailrace."[16]

Jefferson County PUD did not discuss whether a "discharge" occurred as a result of the operation of a hydroelectric facility; instead, the opinion seemed to assume it as a matter of course. Justice Thomas, writing in dissent, noted that the minimum stream flow requirement imposed by the state was a limitation on intake, and thus would not appear to be a "limitation on discharge."

The relevant question is whether a discharge will actually occur as a result of the operation of the facility since the existence of a "discharge" triggers the applicability of Section 401.

However, the question is not whether the condition at issue, a minimum flow requirement, is a limitation on discharges; rather, the relevant question is whether a discharge will actually occur as a result of the operation of the facility since the existence of a "discharge" triggers the applicability of Section 401. This triggering seems to occur even if the condition imposed by the state does not refer to the "discharge" itself.

The majority opinion in *Jefferson County PUD* did not explicitly address the issue, but it seems clear that the activities of a hydroelectric facility result in a discharge. The discharge need not be of a pollutant; it appears sufficient that water is discharged, as evidenced by the Court's willingness to assume that the hydroelectric facility was "discharging" without discussion. A hydroelectric plant must return the water that it uses to the stream after the water has passed through the turbines, and it appears that the return of such water itself constitutes a discharge (even if the water, upon return to the stream does not contain any foreign substances as a result of its diversion). Thus, for the purposes of Section 401, the operation of a hydroelectric facility apparently results in a discharge, and it is neccessary to ask whether the discharges from the facility will result in a violation of water quality standards.

Water Quality Standards

The literal language of Section 401 does not refer to water quality standards, but merely requires that the discharge comply with the applicable provisions of Sections 301-303 and 306-307 of the Clean Water Act. Section 303 discusses water quality standards and sets forth necessary state actions with respect to the adoption and enforcement of such standards. In order to determine whether or not an applicant's project will comply with Section 303, it is necessary to determine what requirements adopted by a state constitute "water quality standards" under Section 303. Section 401 then requires that these Section 303 standards cannot be contravened as a result of the applicant's discharges.

Prior to *Jefferson County PUD*, developers argued that water quality standards were limited to numerical criteria pertaining to water chemistry. This argument had been specifically adopted by the New York Court of Appeals in *Niagara Mohawk*, where the court had held that the authority

of the New York Department of Environmental Conservation was limited to assuring that the hydroelectric facility would not result in a contravention of such criteria.

One of the questions posed to the Court in *Jefferson County PUD* was whether or not a water quality standard included "the designated use of the navigable waters involved" as well as the "water quality criteria . . . based upon such uses." The petitioners had argued that water quality standards under Section 303 could not be defined to require them to operate their facility in a manner consistent with a designated use. Instead, petitioners maintained that "water quality standards" only referred to the specific numerical criteria regarding the discharge of specific pollutants.

Petitioners maintained that "water quality standards" only referred to the specific numerical criteria regarding the discharge of specific pollutants.

This argument was squarely rejected by the Court, which held that Section 303 "is most naturally read to require that a project be consistent with both components, namely the designated use and the water quality criteria." Thus, a state standard such as the one adopted by the state of Washington, that "aesthetic values shall not be impaired by the presence of materials or their effects, excluding those of natural origin, which offend the senses of sight, smell, touch or taste," is an enforceable standard. Under such a standard, a wide range of conditions can be imposed which arguably are necessary to protect the use of the receiving water. The Court also noted that Congress had "explicitly recognized the existence of an 'anti-degradation policy established under §303.'"[17] Although the Court did not state it explicitly, it appears clear that the Court recognized the anti-degradation policy as a water quality standard under Section 303, which is thus enforceable in the context of a Section 401 certificate. This result is very important because anti-degradation policies are extremely broad statements, and a state would appear to have considerable latitude in designing requirements to enforce such policies.

Section 401(d)

The *Jefferson County PUD* Court interpreted the language of Section 401(d) to refer to the overall compliance of the applicant, rather than simply referring to the question of whether the discharge complies with water quality standards. Because Section 401(d) requires compliance not only with water quality standards, but also with "any other appropriate requirement of state law," a question exists as to whether a state may utilize the Section 401 certification process to impose virtually any condition required by state law, so long as that condition is related to some activity of the applicant (even if the activity in question is not related to water quality).

The Court ruled that "§401(d) is most reasonably read as authorizing additional conditions and limitations on the activity as a whole once the threshold condition, the existence of a discharge, is satisfied." In reaching this conclusion, the Court relied on EPA's interpretation that *activities*, not merely *discharges*, must comply with water quality standards. However, the Court, by its interpretation of Section 401(d), may have opened the door to state regulation going far beyond EPA's interpretation.

The Court ruled that the authority granted by Section 401(d) was "not unbounded." The Court's opinion does not interpret the phrase "any other

appropriate requirement of state law" and specifically refuses to "speculate on what additional state laws, if any, might be incorporated by this language." However, the Court holds that, "at a minimum, limitations imposed pursuant to state water quality standards . . . are 'appropriate' requirements of state law."

Nevertheless, even if the phrase "appropriate requirements of state law" is limited only to water quality standards, the Court's decision is still a major expansion of state authority. Water quality standards, according to the Court's decision in *Jefferson County PUD*, encompass the protection of the use of a waterway, and conditions designed to protect the use of the water need not be directly related to water quality standards. At the very least, it would appear that states have the authority to impose conditions such as: 1) public access to the site for recreational users, 2) the granting of easements, 3) the preservation of open space, and 4) traffic controls, which are related to the use of the waterway even though such conditions are not necessarily related to water quality.

Justice Thomas, in his dissent, claims that the Court's opinion will permit unbridled authority to states. He alleges, "once a State is allowed to impose conditions on §401 certifications to protect 'uses' in the abstract, §401(d) is limitless . . . In the end, it is difficult to conceive of a condition that would fall outside a State's §401(d) authority under the Court's approach." If Justice Thomas's dissent is correct, the regulation imposed by the state need not pertain to the discharge at all, nor have any impact on the enforcement of water quality standards, as long as the regulation somehow affects the activities of the licensee.

Water quality standards encompass the protection of the use of a waterway, and conditions designed to protect the use of the water need not be directly related to water quality standards.

The Court's interpretation of Section 401 also may subject an applicant for a hydroelectric license to a full-scale environmental review. For example, in New York, any agency, as a condition of performing "an action," must make a specific finding under the State Environmental Quality Review Act (SEQRA) that potential adverse environmental impacts have been minimized to the maximum extent practicable.[18] The issuance of a Section 401 certificate is an "action" within the meaning of SEQRA, and it thus would appear that New York can only issue a Section 401 certificate after making the requisite findings. Inasmuch as SEQRA provides for consideration of all possible environmental impacts before making the findings, the phrase "any other appropriate requirement of state law" appears to mean that the New York Department of Environmental Conservation must conduct a thorough environmental review, impose mitigation measures, and make the requisite findings under SEQRA before it can issue a Section 401 certificate.

Conflicts with FERC

Finally, the Court observed in *Jefferson County PUD*, that there was a possibility that a state Section 401 certificate could conflict with the authority of FERC, but declined to take any action with respect to such a "hypothetical" conflict. The Court held that the action of the state of Washington did not conflict with FERC licensing activity because FERC had not yet acted on the license application and "it is possible that FERC will eventually deny petitioner's application altogether." The Court distin-

guished *California v. FERC*, in which the state had imposed a minimum stream flow in conflict with the minimum stream flow contained in an existing FERC license. The Court did not address the question of what would happen should FERC, as part of its licensing process, impose a license condition in conflict with the minimum flow condition in the Washington state certificate.

This portion of the Court's ruling is puzzling. It seems clear, under *First Iowa* and *California*, that a state is preempted by the Federal Power Act from imposing any condition in the area of FERC's purview. Nevertheless, the Court appears to be saying that Section 401 gives the state the power to impose conditions, because the conditions have not yet been reviewed by FERC and no conflict exists until FERC, acting pursuant to the Federal Power Act, decides whether to grant a license. An obvious problem can and, as seen below, has already arisen when FERC does, in fact, refuse to adopt conditions of a Section 401 water quality certificate in its license approval.

CONFLICTS BETWEEN STATE SECTION 401 CERTIFICATES AND FERC LICENSES

The Supreme Court's determination that a state certification under Section 401 may require that a hydroelectric facility comply "with any other appropriate requirement of state law" raises the possibility that conditions imposed by a state certificate may conflict with conditions of a license which subsequently may be issued by FERC under the Federal Power Act.

A state should have the power to accept a project conditionally and have those conditions imposed on the applicant.

A state has the power to refuse to issue a Section 401 certificate, and if a certificate is not issued, a federal agency cannot issue a license.[19] If the state's refusal to issue a certificate can result in a denial of the license altogether, it would seem logical that a state should have the power to accept a project conditionally and have those conditions imposed on the applicant.

Although FERC has the power to impose permit conditions, Section 401(d) provides that a Section 401 certification "shall become a condition on any federal license or permit. . . ." Thus, it would appear that any condition legally imposed by a state will become a binding condition of a FERC license.

However, the authority of the state obviously is limited to what is permitted under Section 401. Although the Supreme Court now has broadened the determination of what requirements can be imposed by a state under Section 401, the action of a state with respect to a Section 401 certificate still must be authorized by law. In other words, a state does not have the authority to reject a developer's request for a Section 401 certificate because it does not like the project; instead, the state must demonstrate that the project will result in a contravention of water quality standards, or otherwise result in a violation of an "appropriate requirement of state law."

Section 401 is a federal statute, and the interpretation of the proper scope of a Section 401 certificate is a question of federal law. Nevertheless, the actions of a state with respect to the granting or denial of a Section 401 certificate are reviewable in state courts.[20]

The principle that actions of state agencies are reviewable in state rather than federal courts is in accord with the Eleventh Amendment prohibition against suing a state in federal court.[21] Although the scope of a Section 401 certificate should properly be determined in state court, it may happen that no challenge is ever raised to a certificate by any party to the state proceeding.

Once a state certificate is issued, FERC must determine whether to include the conditions of the certificate in the federal license. The question arises as to what FERC should do if it is confronted with a Section 401 certificate which FERC believes imposes conditions: (1) beyond the scope of Section 401, or (2) within the scope of Section 401, but conflict with conditions that FERC would impose. This situation has recently arisen with respect to two FERC orders, both issued on July 15, 1994, after the decision in *Jefferson County PUD*. They are *Tunbridge Mill Corporation*[22] and *Consumers Power Company*.[23] In *Tunbridge*, FERC rejected three conditions of a Section 401 certificate because the conditions were allegedly beyond the authority provided to the state under the Clean Water Act. In *Consumers Power*, FERC rejected several conditions which were either included in a Section 401 certificate or in an "Offer of Settlement" which was submitted by the applicant and various governmental agencies, including the state regulatory body.

FERC rejected three conditions contained in the Section 401 certificate issued by the State of Vermont.

Tunbridge Mill Corporation

In *Tunbridge*, FERC held that "in light of Congress' determination that the Commission should have the paramount role in the hydropower licensing process, whether certain state conditions are outside the scope of §401(d) is a federal question to be answered by the Commission." FERC therefore rejected three conditions contained in the Section 401 certificate issued by the State of Vermont. However, Vermont and a group of intervenors since have applied for a rehearing of FERC's order issuing the license in *Tunbridge* on the grounds that, inter alia, FERC does not have the jurisdiction to reject a Section 401 condition in a license.

Vermont argues that the Supreme Court, in *Escondido Mutual Water Company v. La Jolla Indians*, requires that a license issued by FERC is subject to conditions which were imposed pursuant to a certificate.[24] In *Escondido*, the Supreme Court ordered FERC to include conditions prescribed by the Secretary of the Interior under Section 4(e) of the Federal Power Act, which requires that a license issued by FERC is subject to conditions imposed by the Secretary. Vermont further argues that FERC cannot interfere with Section 401 certificate conditions because FERC is not charged with the implementation and enforcement of water quality standards and has no jurisdiction to administer the provisions of the Clean Water Act, inasmuch as such administration has been delegated to the state.

In *Tunbridge*, FERC noted that *Jefferson County PUD* did not address the question of how to resolve a conflict between a condition contained in a Section 401 certificate and a determination by FERC under the Federal Power Act. Such a conflict can arise in two ways: 1) a state condition may address an appropriate subject matter under Section 401, but the state

condition may conflict with FERC's determination of the public interest, or 2) the state condition can exceed the authority granted to the states under Section 401. *Jefferson County PUD* adopted, as discussed above, a broad view of the scope of authority under Section 401. However, FERC, in its opinion in *Tunbridge*, asserts that states may only impose conditions that relate to water quality. In making this assertion, FERC apparently ignores the phrase "any other appropriate requirement of state law" contained in Section 401(d) and the interpretation of this phrase in *Jefferson County PUD*.

In *Tunbridge*, FERC accepted 15 of the 18 conditions which were included in the Section 401 certificate. The conditions approved included flow requirements, erosion control, discharge prohibitions, site visits for state representatives, and public access for "utilization of public resources." It is significant that FERC approved conditions pertaining to minimum flows (the specific permit condition at issue in *Jefferson County PUD*) and pertaining to public access, even though such conditions arguably are not related to water quality. FERC noted that the conditions pertaining to fish passage facilities could conflict with requirements which might be established by the United States Secretaries of Commerce and/or the Interior and stated that further resolution of issues pertaining to fish passage might be necessary. Nevertheless, FERC included the certificate conditions pertaining to fish passage in the license.

Condition J, which FERC refused to include in the Tunbridge Mill license, required that the applicant submit any future significant changes to its project to the state of Vermont for approval. FERC held that this condition was beyond the state's authority under the Clean Water Act because it gave the state the opportunity to revisit its certification, even though modifications of a certification can only be initiated by the federal licensing agency under Section 401(a)(3). Similarly, FERC refused to include Condition P in the license because it purported to reserve the right to the state to alter the terms and conditions of a water quality certificate after its issuance.

FERC ruled that the state had no authority to halt construction of the project after issuing its certification.

The Commission also rejected Condition L, which provided that construction could not commence until the state approved the applicant's plans with respect to flow requirements and erosion control. Although FERC included the flow requirements and erosion control conditions in the license, FERC ruled that the state had no authority to halt construction of the project after issuing its certification. As with Conditions J and P, FERC rejected Condition L because it maintained that, once a state issues its certification, it has no further role under Section 401 to control the timing of activities under the federal license.

Vermont has applied for reargument with respect to FERC's denial of Conditions J, L, and P. Vermont maintains that the FERC ruling is premature with respect to applications for future changes since these changes have not yet occurred. Vermont also argues that prohibition of the commencement of construction is "clearly related to water quality and thus within the scope of §401."

Although FERC has reserved the authority to reject conditions which are not related to water quality, it is significant that the only conditions

FERC rejected with respect to the *Tunbridge* application were conditions pertaining to the power to make future decisions concerning the project's progress. FERC did not reject any substantive conditions, even though some of these conditions did not pertain directly to water quality. In rejecting procedural conditions pertaining to future decisions, FERC was not relying on its assertion that Section 401 conditions must pertain to water quality, but was instead relying on Section 401(a)(3) of the Clean Water Act, which, according to FERC, precludes a state from future involvement in the licensing process after the issuance of a Section 401 certificate. This issue did not arise in *Jefferson County PUD*.

Thus, although FERC asserted the right in *Tunbridge* to reject Section 401 conditions which were not related to water quality, FERC did not actually exercise this claimed right. Therefore, regardless of the outcome of Vermont's application for reargument, it appears that the crucial question of whether FERC can reject a Section 401 certificate condition because it relates to "another appropriate requirement of state law" rather than directly to water quality, will not be resolved in this case.

The crucial question of whether FERC can reject a Section 401 certificate condition because it relates to "another appropriate requirement of state law" rather than directly to water quality, will not be resolved in this case.

Consumers Power Company

On the same date that FERC issued its order in *Tunbridge*, it issued an order with respect to 11 projects which were the subject of a proposed settlement between Consumers Power Company and various governmental agencies, including the Michigan Department of Natural Resources. In *Consumers Power*, FERC noted that "undertakings" by agencies and by the licensee "relate primarily to questions of procedure for consultation and dispute resolution ..." and that FERC would not "incorporate these undertakings into license articles. . ."

In *Consumers Power*, FERC was asked to approve a global settlement pertaining to 11 separate projects. The Section 401 Water Quality Certificates for these 11 projects were a part of this settlement, but a number of the requirements which were opposed in the settlement were not included in the Section 401 certificates. For example, the settlement contained comprehensive mitigation and enhancement measures which would provide for preservation of land, protection of threatened species, the payment of approximately $50 million over a 40-year license for mitigation measures, and the establishment of retirement trust funds to manage the project upon its retirement from power production. However, inasmuch as these wide ranging conditions were not included in the Section 401 certificate itself, FERC's decisions to approve the settlement with respect to these measures does not relate to the question of whether a state *could* have imposed such measures as part of a Section 401 certification process.

As with *Tunbridge*, FERC largely approved the nine conditions (with sub-parts) for each of the 11 certifications in *Consumers Power*, but declined to approve provisions pertaining to "reopener" provisions which would allow the state or the licensee to petition the state regulatory agency for a modification of the water quality certificate. FERC also reserved the right to disapprove conditions pertaining to dispute resolution, to the extent that such processes were inconsistent with Section 401(a)(3).

FERC explicitly refused to approve Condition 8, by which Michigan

attempted to reserve the right to require the applicant to pay for failure to comply with water quality limitations set forth in the certification. Similarly, FERC refused to approve provisions of the settlement (which were not included in the Section 401 certificate) that provided for the payment of liquidated damages for violations of the settlement agreement. It appears to be FERC's position, in both *Tunbridge* and *Consumers Power*, that questions of enforcement of a certificate are beyond the scope of Section 401, and therefore should not be included in a license. FERC's position would seem to be well grounded in Section 401(a)(3), which states, in effect, that the issuance of a Section 401 certificate by a state ends the state's role in the process pertaining to the issuance of a license to construct and/or operate a hydroelectric facility.

It does not appear that FERC, in *Consumers Power*, or *Tunbridge*, has invalidated any condition of a Section 401 certificate pertaining to the substance of what can be regulated by a state. Rather, in both of these cases, it appears that FERC has asserted its authority solely for the purpose of insuring its primary role in prospective enforcements of the licenses which it has issued. Thus, even though FERC, in *Tunbridge*, asserted the right to invalidate a state condition which it believes to be unrelated to water quality, or, in some manner, in conflict with FERC's determination as to the public interest, FERC has yet to actually exercise its authority with respect to such an issue.

FERC refused to approve provisions of the settlement that provided for the payment of liquidated damages for violations of the settlement agreement.

The Section 401 Process in New York

In late 1991, Niagara Mohawk Power Corporation, which provides electricity to a service area in northeastern New York, filed an application for renewal of its FERC licenses for nine facilities whose licenses were to expire on December 31, 1993. At the same time, two other operators of hydroelectric facilities, Rochester Gas and Electric, and Finch-Pruyn, also filed applications for FERC licenses. These licenses all required Section 401 water quality certifications to be issued by the New York Department of Environmental Conservation (DEC).

According to DEC procedures, the applications for water quality certificates under Section 401 were referred to an administrative law judge (ALJ). The proceedings for all three applicants generally were handled together because of the common legal issues. A number of interested entities, including a consortium of environmental organizations led by New York Rivers United, and a number of local municipalities, formally intervened in the proceedings. DEC staff, after the decision in *Niagara Mohawk*, significantly amended the draft water quality certificates. The amended certificates removed requirements which pertained to issues other than impairment of water quality as a direct result of discharges. ALJ Andrew Pearlstein issued a decision on April 24, 1994, one month before the United States Supreme Court's decision in *Jefferson County PUD*. His decision, in accordance with *Niagara Mohawk*, held that DEC was limited to the enforcement of specified numerical water quality criteria.[25] Judge Pearlstein criticized the "general conditions," which DEC customarily included in a water quality certificate, pertaining to issues such as stop work orders and permit modifications. (These conditions were of the same

type that FERC later disallowed in *Tunbridge* and *Consumers Power*.) Judge Pearlstein addressed the special conditions included in the water quality certificates, and found that those conditions raised a factual issue for adjudication as to whether proposed conditions pertaining to downstream releases, monitoring, and minimum flows would impact water quality standards. Whether these conditions were necessary to preserve water quality standards constituted a factual issue, which was to have been determined in a formal hearing.

Both environmental organizations and facility operators appealed Judge Pearlstein's ruling to the DEC Commissioner. However, before the Commissioner could rule on the appeals, the Supreme Court handed down its decision in *Jefferson County PUD*. As a result of that decision, the applications for water quality certificates for Rochester Gas and Electric, Finch-Pruyn, and Niagara Mohawk were remanded to the ALJ for further proceedings. In the case of Finch-Pruyn, the applicant has chosen to vigorously litigate its rights. As part of that litigation, DEC staff has prepared a new water quality certification. This certification includes conditions pertaining to: 1) minimum flows, 2) impoundment elevation, 3) erosion control, and 4) recreational access. Finch-Pruyn maintains that the New York Court of Appeals decision in *Niagara Mohawk* was not reversed by *Jefferson County PUD* and that DEC still cannot impose any condition not strictly related to water chemistry standards. This position appears to be untenable, inasmuch as it seems beyond dispute that *Jefferson County PUD* overruled *Niagara Mohawk* and clearly establishes that DEC can legally impose conditions relating to "any other appropriate requirement of state law."

It would appear that the water quality certificates would resolve all issues pertaining to the relicensing process.

Rochester Gas and Electric and Niagara Mohawk have chosen to enter into negotiations with DEC and with all interested intervenors concerning suitable terms of a Section 401 certificate. If these negotiations are successful, it would appear that the water quality certificates would resolve all issues pertaining to the relicensing process. Certainly, it is in the interest of all of the parties to reach a final resolution of their differences in the context of one set of negotiations, and to present it to FERC as a completed package, rather than to negotiate one thing in a Section 401 certificate and then litigate the same issue again before FERC.

In the Niagara Mohawk negotiations process, the parties have made an effort to consult with FERC, and to reach a negotiated settlement which will be acceptable to FERC. Whether such a negotiated settlement is characterized as a "settlement," as in *Consumers Power*, or whether a Section 401 certificate is issued which addresses all prospective issues pertaining to the relicensing process, may ultimately be a matter primarily of academic interest. However, if the negotiations result in a Section 401 certificate that contains conditions FERC believes to be inappropriate under Section 401, a potential jurisdictional conflict may be avoided by characterizing the result as a "settlement" and by reaching an agreement to impose the same terms as FERC license conditions.

Regardless of how such a final settlement may be characterized (assuming that such a settlement actually is reached by all of the parties), it is important to stress the impact that the Supreme Court decision in

Jefferson County PUD has on these negotiations. If the Supreme Court had affirmed the New York Court of Appeals narrow interpretation rather than the broad interpretation of Section 401 adopted by the Washington Supreme Court, any Section 401 certificate issued by New York would be limited to the narrow range of issues permitted by Judge Pearlstein's ruling. Any environmental interest beyond these issues, whether asserted by the New York DEC, local municipalities, or by environmental organizations, would have had to have been litigated before FERC, rather than discussed and, if necessary, litigated before a DEC administrative law judge. Considering that, as a practical matter, it is far easier for local entities to be involved in a state administrative process, which is conducted locally, than to be involved in a process before FERC, where interested intervenors have a distinct advantage. This is especially true if the state regulatory body is sympathetic to their concerns.

SUMMARY AND CONCLUSIONS

As a result of the Supreme Court decision in *Jefferson County PUD*, it now is clear that state regulatory authorities may impose a wide range of conditions on hydroelectric facilities under Section 401 of the Clean Water Act. Although the scope of this authority has not yet been delineated, it seems clear that the potential state authority will force the operators of hydroelectric facilities to engage in serious discussions with state regulatory authorities and with local and municipal intervenors regarding the environmental impacts of their proposed projects. State regulatory authorities may be able to obtain significant concessions from the hydroelectric facilities pertaining to aesthetic flow releases, environmental mitigation matters, and recreational access in the context of the Section 401 process. The ability to obtain such concessions represents a significant change from past practice, especially in states such as New York, which previously had adopted a narrow view of Section 401 of the Clean Water Act. ✪

NOTES

1. 511 U.S. ____, 114 S.Ct. 1900, 128 L.Ed.2d 716 (1994).

2. 33 U.S.C. 1341.

3. 849 P.2d 646, 651-653 (Wash. 1993).

4. 624 N.E.2d 146, 150 (N.Y. 1993).

5. *Arnold Irrigation District v. Department of Environmental Quality*, 717 P.2d 1274 (Ore. App. 1986).

6. 495 U.S. 490, 110 S.Ct. 2024, 109 L.Ed.2d 474 (1990).

7. 328 U.S. 152, 66 S.Ct. 906, 90 L.Ed. 1143 (1946).

8. Section 66-c of the N.Y. Public Service Law. This law was amended in 1992 to remove the requirement to purchase power at the higher rate; L.1992 c. 519.

9. Bogardus, "State Certification of Hydroelectric Facilities Under §401 of the Clean Water Act," *Virginia Environmental Law Journal*, 43,44 (Fall 1992).

10. *Id.* at 45, n.18.

11. Washington, (*State of Washington v. Public Utility District No. 1*), 849 P.2d 646 (1993); Oregon, *Arnold Irrigation District v. Department of Environmental Quality*, 717 P.2d 1274 (1986); Maine, *Bangor Hydro-electric v. Board of Environmental Protection*,

595 A.2d 438 (1991); Vermont, *Georgia Pacific et al. v. Vermont DEC et al.*, 35 Envt. Rep. Cases 2052 (1992); Montana, *Hi-Line Sportsmen Club v. Milk River Irrigation District*, 786 P.2d 13 (1990); New York, *Niagara Mohawk Power Corporation v. New York State Department of Environmental Conservation*, 624 N.E.2d 146 (1993); Pennsylvania, *Pennsylvania Department of Environmental Resources v. Harrisburg*, 578 A.2d 563 (1990). See also discussion of procedural issues pertaining to §401 certificates in *Summit Hydropower v. Commissioner of Environmental Protection*, 629 A.2d 367 (1993) (Connecticut) and in *Triska v. Department of Health and Environmental Control*, 355 S.E.2d 531 (1987) (South Carolina).

12. The case law pertaining to this issue is discussed at pages 51-67 in the Fall 1992 Virginia Environmental Law Journal article cited above in note 9.

13. *Pennsylvania Department of Environmental Resources v. Harrisburg*, 578 A.2d 563, 566 (Pa. Commw. Ct. 1990).

14. *National Wildlife Federation v. Gorsuch*, 693 F.2d 156 (D.C. Cir. 1982). *National Wildlife Federation v. Consumers Power Co.*, 862 F.2d 580 (6th Cir. 1988).

15. Cf. *National Wildlife Federation v. FERC*, 912 F.2d 1471 (D.C.Cir. 1990).

16. *City of Fort Smith, Arkansas*, 42 Fed. Ener. Reg. Comm'n. Rep. (CCH) ¶61, 362 at 62,047. See also *Power Authority of New York v. Williams*, 475 N.Y.S.2d 901, 904-905 (N.Y. App. Div. 1984).

17. §303 of the Clean Water Act requires that every state adopt an anti-degradation policy to prevent deterioration of water quality. Such policies must be submitted to EPA for approval. See 40 CFR 131.12.

18. New York Environmental Conservation Law 8-0109.

19. Last sentence of §401(a)(1).

20. *Roosevelt Campobello International Park Commission v. E.P.A.*, 684 F.2d 1041, 1056 (1st Cir. 1982).

21. Cf. *Pennhurst State School and Hospitals v. Halderman*, 465 U.S. 89, 100 (1984).

22. 68 FERC ¶61078 (Vermont).

23. 68 FERC ¶61077 (Michigan).

24. 466 U.S. 765, 776-777 (1984).

25. These criteria had been determined in *Niagara Mohawk* to be the water quality standards for New York, and are set forth in 6 New York Codes, Rules and Regulations ("NYCRR") 703-704.