

Ninth Circuit: Water-Quality Exceedences Tied to Existence of Federal Dams Is Not a Violation of Federal Clean Water Act

The Ninth Circuit U.S. Court of Appeals recently issued a significant opinion finding that the U.S. Army Corps of Engineers did not violate the Clean Water Act (CWA) requirement to comply with state water-quality standards in its operation of the four dams on the lower Snake River. The court's conclusion that the existence of the dams, and the resulting exceedences of state water-quality requirements for temperatures, were not a violation of the CWA has far-reaching consequences.

The dispute at issue in this case involved a challenge to the 2001 Record of Consultation and Statement of Decision (2001 ROD) issued by the U.S. Army Corps of Engineers (Corps) for the operation of four federal dams on the lower Snake River in Washington state. The National Wildlife Federation (NWF) and other groups challenged the 2001 ROD, arguing that it was arbitrary and capricious because it did not comply with the water-quality standards developed by the State of Washington to comply with the CWA. The state had set maximum water temperature requirements for the lower Snake River intended to protect designated uses for salmon and trout spawning, non-core rearing and migration. The CWA requires federal agencies to comply with state water-quality standards in conducting their activities. 33 U.S.C. §1323.

In the 2001 ROD, the Corps concluded that its operation of the lower Snake River dams in accordance with certain conditions recommended earlier by the National Marine Fisheries Service was not impacting water temperatures. The Corps stated that there were no additional operational changes that could be undertaken to decrease water temperatures in the Snake River or alleviate exceedences of the water-quality standards for temperature. The circuit court held that the Corps' conclusions were supported by the administrative record and were not arbitrary and capricious.

Ninth Circuit's Opinion

The Ninth Circuit first noted that the record supported the conclusion that a "natural river operation" alternative advanced by NWF and the other challengers was clearly not feasible, given the potential problems of increased sediment levels and conflicts in complying with other statutes. The court further found that modeling cited by NWF did not conclusively establish that the Corps' operation of the dams caused the temperature exceedences in the river. It noted that the conclusions in the model advanced by NWF "were all premised on a comparison between water temperatures with the dams in place and with the dams removed, and not based on a comparison

of various operational methods of the dams.” Citing statements in the modeling study comparing temperatures predicted by the recommended operations with predicted temperatures with the dams removed, the court found that the modeling study put forth by NWF “supports the contention that it is the existence of the dams that is causing the temperature exceedences.”

NWF argued in the alternative that even if the court concluded that the Corps’ operation of the dams was not definitively causing a violation of state water-quality standards, if it could be shown that the existence of the dams was the sole cause of the temperature exceedences, the Corps would still be in violation of the CWA because the Act did not distinguish between exceedences caused by the existence of dams and those caused by the operation of dams in its requirement that federal agencies comply with state water-quality standards. Significantly, in disagreeing with NWF’s contention, the Ninth Circuit stated that it did not “interpret the compliance provision of the CWA as requiring that the dams authorized by Congress be removed.”

The circuit court noted that the dams were authorized to be built by a specific congressional directive. The CWA, according to the court, did not function as a repeal of the Congressional legislation that authorized the construction of the dams. The court explained:

The CWA’s directive to federal agencies requiring compliance with state water standards must be construed *in pari materia* with the River Harbor Act’s directive that the dams be built in the first instance. We thus adhere to the maxim that “when two statutes are capable of coexistence, it is the duty of the courts . . . to regard each as effective.” Applying this reasoning, a more sensible interpretation of the CWA is that discretionary operations of the dams, consistent with the statutory regime established by Congress, should comply with state water law standards. Where the Corps has concluded reasonably that the sole cause of the temperature exceedences is the existence of the dams and not any discretionary method of operating the dams, we do not interpret the compliance provision of the CWA as requiring that the dams authorized by Congress be removed.

Court’s Conclusion

The Ninth Circuit concluded that “[i]t may be that the existence of the dams, with impoundment of water used to generate power and for irrigation, inescapably causes some temperature variation that exceeds Washington state law temperature standards.” Nonetheless, the court held that it could not “reasonably interpret the Clean Water Act to provide a remedy for such circumstance when the evidence in the Corps’s administrative record supports the Corps’s conclusion that its operations of the dams have not contributed to any exceedences, and the record also supports the Corps’s view that there are no additional feasible steps it could take to decrease water temperatures on the lower Snake River, consistent with the mandate of Congress to build the dams and Congress’s purposes for them.”

This decision is likely to impact efforts by the Corps and the U.S. Bureau of Reclamation to comply with CWA state water-quality requirements in the ongoing operation of dams throughout the country. Determinations regarding feasible measures to meet water-quality standards can now be expected to focus on operational aspects, rather than physical alterations, including dam removal. Many operators of non-federal dams licensed by FERC (Federal Regulatory Energy Commission) also face similar issues with respect to compliance with state water-quality standards, and the court's opinion also may be relevant in the analysis of the steps that must be taken at non-federal facilities to ensure compliance with state water-quality requirements. The Ninth Circuit appears to suggest that in incorporating any water-quality standards imposed by a state as part of a licensing action, FERC's decisions must also be consistent with the purposes of the Federal Power Act to encourage power generation and other uses of a waterway.

For Further Information

If you have questions about these new guidance documents and notices, including how they may affect your projects or activities, please contact **Tom Berliner** or **Karen Donovan** in San Francisco (415-371-2200) or any of the other members of Duane Morris' Energy, Water and Natural Resources Group (www.duanemorris.com) or the attorney in the firm with whom you are regularly in contact.