

1-1-2005

## Knott v. Fed. Energy Regulatory Comm'n, 386 F.3d 368 (1st Cir. 2004)

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Michael Graetz, Court Report, Knott v. Fed. Energy Regulatory Comm'n, 386 F.3d 368 (1st Cir. 2004), 8 U. Denv. Water L. Rev. 625 (2005).

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decision. The Corps interpreted these regulations as requiring it only to remind applicants that they must obtain proper property rights, not for the Corps to evaluate property disputes. The court concluded the Corps reasonably interpreted its regulations; therefore, the Corps was not required to evaluate Cape Wind's property interests before granting a permit.

Next, the court determined the Corps properly considered the various impacts of the data tower on federal property as negligible. Thus, the court rejected the Alliance's argument that erecting the data tower contradicted public interest.

The court then addressed whether the Corps' reliance on Cape Wind's affirmation that it would obtain the necessary property rights was capricious, in violation of the APA. The court declined to determine whether a permit alone sufficiently authorized building on the OCS; however, it concluded the construction of a single, temporary data tower could not be an infringement on any federal property ownership interest in the OCS. Therefore, the court held no additional Congressional authorization was required to proceed with the data tower's construction.

Finally, the court addressed whether the Corps provided sufficient notice and comment opportunities to review the proposed project. The Alliance argued the construction of the data tower was without precedent, therefore requiring the Corps to make a draft FONSI available for public comment. The court rejected this argument, stating that although this was the first data tower permit granted in these particular shoals, it was not the first physically similar structure permitted in Massachusetts waters. Thus, the court held the Corps complied with its requirements to engage the public in preparing the required environmental documents.

After rejecting each of the Alliance's claims, the court affirmed the district court's summary judgment in favor of the Corps.

*Julie M. Schmidt*

**Knott v. Fed. Energy Regulatory Comm'n, 386 F.3d 368 (1st Cir. 2004)**  
(denying petition for review when Federal Energy Regulatory Commission exercised proper authority over navigable watercourse, provided a hearing, and issued orders that were not arbitrary or capricious).

Riverdale Power & Electric Company and its owner, James Knott, (collectively "Knott") filed a petition with the United States Court of Appeals for the First Circuit to review three orders issued by the Federal Energy Regulatory Commission ("FERC") concerning Knott's hydroelectric project ("Project") that included a river dam and a water impoundment area. Knott operated the Project under a voluntary conditional license granted by FERC pursuant to the Federal Power Act ("FPA").

After receiving letters alleging extreme fluctuations in the Blackstone River below the Project and concerns from state agencies and conservation groups that these fluctuations arose from Knott's failure to allow a continuous stream flow, FERC issued compliance orders asserting mandatory licensing authority over the Project. Specifically, FERC ordered Knott to install gauges to measure stream flow at the Project, and directed Knott to submit Project design revisions on microfiche cards. Knott petitioned the court for review, claiming (1) FERC improperly asserted jurisdiction over the Project, (2) complying with FERC orders would affect an unconstitutional taking of property, (3) FERC denied Knott a hearing, and (4) the orders were unreasonable.

The court first assessed whether FERC possessed authority to assert jurisdiction. The FPA required FERC to apply mandatory licensing over projects located on navigable waters of the United States or located on a body of water regulated under Commerce Clause authority by Congress where project construction occurred after 1935 and the project affected interstate commerce. The court determined FERC properly concluded the Blackstone River was suitable for interstate use and, thus, was a navigable waterway subject to FERC jurisdiction.

The court next determined it lacked jurisdiction to hear Knott's Fifth Amendment takings claim. Specifically, the Tucker Act and the "Little Tucker Act" vested exclusive jurisdiction in the Court of Federal Claims, thereby barring the court from hearing the case.

On the issue of whether FERC denied Knott a hearing, the court concluded FERC provided Knott with a hearing in a manner common in utility and carrier regulation. In formulating its decision, FERC accepted extensive evidentiary submissions from both sides in the form of affidavits from experts, in addition to extensive written arguments. The court determined FERC's method was sufficient and noted a "true" hearing before an administrative law judge was unnecessary because genuine issues of material fact could be adequately resolved on the written record.

The court addressed Knott's claim that FERC acted unreasonably in demanding Knott file project drawings on microfilm. The court held FERC's order requiring Knott to submit records on microfilm to conform to FERC's existing record-keeping system was not overly burdensome. Moreover, the court determined FERC's request was not arbitrary or capricious in light of microfilm's durability and inexpensive cost.

The court rejected Knott's claim that FERC acted unreasonably in requiring him to install stream flow gauges in addition to other gauges that previously existed. The court concluded FERC's compliance order was reasonable because the other gauges were too distant to measure the Project's impacts.

The court held there were no errors in FERC's orders and accordingly denied Knott's petition for review.

*Michael Graetz*

## SECOND CIRCUIT

**Waterkeeper Alliance, Inc. v. United States Env'tl. Prot. Agency, 399 F.3d 486 (2d Cir. 2005)** (holding some provisions of the United States Environmental Protection Agency regulation regarding concentrated animal feeding operation violated the Clean Water Act).

Waterkeeper Alliance, Sierra Club, Natural Resources Defense Council, Inc. and American Littoral Society (collectively "Environmentalists") and American Farm Bureau Federation, National Chicken Council, and National Pork Producers Council (collectively "Farmers") challenged a regulation promulgated by the United States Environmental Protection Agency ("EPA") regarding water pollutants released from concentrated animal feeding operations ("CAFOs") in the Second Circuit Court of Appeals. The EPA regulation ("CAFO Rule") follows from the Clean Water Act ("CWA"), which proscribes the release of pollutants from any "point source" into navigable waters, unless otherwise authorized by permit. The Environmentalists and Farmers asserted the CAFO Rule violated, or failed to advance the CWA's goals concerning the permitting scheme, the types of discharges regulated, and the effluent limitation guidelines the CAFO Rule established.

The Environmentalists objected to the EPA's permitting scheme because the CAFO Rule allowed the EPA to issue permits without comprehensive review and without enough specified terms in the permits as to meet the CWA's requirements. They also objected to the duty to apply for a permit imposed on CAFOs outside the jurisdiction of the EPA. The CAFO Rule required large CAFOs to develop nutrient management plans. However, the Environmentalists argued this requirement alone failed to ensure the CAFOs followed through with the implementation of those plans. The court agreed with the Environmentalists' allegation concerning the lax standards of review for permit issuance, allowing CAFOs to possibly misrepresent their compliance. The court also determined the CAFO Rule violated the CWA by failing to require CAFOs to include the terms of the nutrient management plans in their permits. The CWA specified that effluent limitations, or any restrictions enforced by the State regarding quantities, rates, and concentration of discharge, must be included in the permit. The court reasoned that the nutrient management plans constituted effluent limitations and must be included in the permit in order to comply with the CWA. Finally, the Farmers argued the permitting scheme outlined in the CAFO Rule allowed the EPA power over CAFOs, or the ability to