Water Law Review

Volume 3 | Issue 2 Article 20

1-1-2000

Wisconsin v. Federal Energy Regulatory Comm'n, 192 F.3d 642 (7th Cir. 1999)

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first noted that to assert jurisdiction under the rule, the Corps had to first make a factual determination that a body of water provided a habitat for migratory birds. That is, the Corps had to establish that the water was not merely a place a bird might occupy momentarily, but rather that the water was the place where the species naturally lived. Additionally, recognizing the existence of several international treaties and conventions designed to protect migratory birds, the court found that the constitution's Supremacy Clause clearly gave precedence to federal law in the regulation of migratory bird species. The court reasoned that because it was within Congress's Commerce Clause power to permit regulation of waters based on the presence of migratory birds, the Corps could reasonably do the same.

Finally, by noting the distinction between the APA's procedural provisions pertaining to interpretative rules and policies as opposed to the notice and comment requirements applicable to legislative rules, the court classified the migratory bird rule as an agency interpretation and not a substantive rule. The notice and comment provisions of the APA were therefore inapplicable. Thus, the court concluded that the Corps reasonably and justifiably exercised jurisdiction over the isolated intrastate bodies of water based solely on the presence of migratory birds utilizing the water as habitat.

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Wisconsin v. Federal Energy Regulatory Comm'n, 192 F.3d 642 (7th Cir. 1999) (holding that Wisconsin did not have standing under the Federal Power Act to challenge the Federal Energy Regulatory Commission's granting of six licenses for hydroelectric power projects proposed on the Flambeau River).

Section 4(e) of the Federal Power Act ("FPA") authorized the Federal Energy Regulatory Commission ("FERC") to license hydroelectric power projects on waterways subject to federal Commerce Clause regulation. In exercising this authority, the FPA required FERC to consider whether a proposed project was in the public interest. FERC must take into consideration, among other factors, the adaptability of a project to a comprehensive plan for the "improvement and utilization of water-power development, for the adequate protection, mitigation, and enhancement of fish and wildlife." This determination mandates FERC to give equal consideration to the fish and wildlife protection and enhancement aspects of a project as it does to a project's water-power development potential.

At issue in this case was FERC's 1998 issuance of licenses for six hydropower projects on the Flambeau River, a tributary of the Chippewa River, in Wisconsin. In accordance with applicable regulations, through the course of the licensing process, the applicants for the proposed projects consulted with the appropriate state regulatory agencies. Additionally, the applicants conducted a year-long fish entrainment study in five of the six

proposed project sites.

Following FERC's 1993 public notice of the applications, the Wisconsin Department of Natural Resources ("Department") filed preliminary comments on each of the projects declaring the analyses of fish entrainment insufficient. The Department cited two reasons for its findings of insufficiency: the analyses underestimated fish mortality and the applicants failed to use the Department's fish sampling methodology in the analyses. Additionally, the Department recommended that the applicants be required to develop fishery management plans and consult with the Department on fishery management practices, including fish entrainment. Next, FERC published a draft Environmental Impact Statement ("draft EIS") in December 1995 pertaining to the projects. The draft EIS recognized the difficulty of predicting the effects of entrainment and the accompanying mortality on fish populations from the projects without "long-term detailed information on fish population dynamics" in the Flambeau River. Nevertheless, the draft EIS concluded that the inexistence of a fishery management plan for the river, the estimated extent of entrainment losses that applicants cited in their license applications, and the estimated cost of installing devices to protect fish from entrainment did not justify the installation of fish protection devices.

In its final Environmental Impact Statement ("final EIS"), issued approximately a year later, FERC considered, but rejected, the Department's comments and concluded that applicants' data showed a "minimal or no project-caused adverse impacts on fish populations" that required mitigation. Accordingly, FERC issued licenses for each of the six projects in early 1997. Each license, however, contained a standard "reopener" clause, under which FERC reserved the right to impose additional mitigation measures at a future time, if necessary; required a fish entrainment study; and required a confirmation of the applicants' agreement to consult with the Department in implementing reasonable fishery management practices.

Immediately after the issuance of the licenses, the applicants objected to the imposition of mandatory fish entrainment studies as "unduly burdensome" and "not supported by the record." Shortly thereafter, FERC issued its Rehearing Order pertaining to these licenses and removed the mandate for the fish entrainment studies.

After FERC reconsidered and affirmed the Rehearing Order at the request of the Department, the Department instituted this action alleging that FERC erred as a matter of law in deleting the fish entrainment provisions. FERC challenged that the Department was not "aggrieved" by FERC's issuance of the licenses, and, therefore, was not entitled to judicial review of the agency action. Under the FPA, a party was only "aggrieved" if it meets both the constitutional and prudential requirements for standing, including: (1) that the party has suffered a imminent or actual, concrete, and particularized injury; (2) that a causal connection existed between the alleged injury and the agency conduct; and (3) that it was likely, not merely speculative, that the injury would be redressed by a favorable judicial decision. The Seventh Circuit Court of Appeals concluded that because the licenses contained the "reopener" clauses, it

was "merely speculative" that any judicial review and decision on the matter would redress the injury to the Department.

The court reasoned that the Department's concern that further fish entrainment studies might be required was valid; however, the "reopener" clauses in the licenses provided for just such a concern. The court reasoned that should it become necessary, under the "reopener" clauses, FERC could impose additional requirements such as fish entrainment and other alternative fish protection devices. Thus, the court concluded that any injury to the Department from the failure to explicitly require mandatory fish entrainment studies in the license provisions was not redressable. The "reopener" clauses provided protection to prevent the realization of the Department's speculative injury. The court, therefore, dismissed the Department's challenge for lack of standing.

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NINTH CIRCUIT

B.J. Carney Indus., Inc. v. United States Envtl. Protection Agency, 192 F.3d 917 (9th Cir. 1999) (holding Carney's appeal untimely because Carney filed it more than thirty days after the Administrative Law Judge's order assessing a civil penalty).

B.J. Carney Industries, Inc. ("Carney") operated a wood pole treating company. Water from the company flowed into Sandpoint, Idaho's publicly owned treatment works ("POTW"). The United States Environmental Protection Agency ("EPA"), pursuant to Sandpoint's National Pollutant Discharge Elimination System permit, required Sandpoint to issue industrial waste acceptance ("IWA") forms to Sandpoint's industrial POTW users like Carney.

In November 1985, the EPA wrote Carney and declared: (1) that Carney's discharge to the Sandpoint POTW violated pretreatment standards because the discharge contained PCP and diesel grade oil; and (2) that the EPA would defer to Sandpoint's pretreatment standards enforcement program. On January 9, 1987, Sandpoint issued Carney an IWA allowing small amounts of PCP discharge. Carney contacted the EPA regarding the EPA's conclusion that Carney's discharge violated the EPA's pretreatment standards. Furthermore, Carney stated that Sandpoint and Carney's IWA was more consonant with sensible environmental policy. Consequently, the EPA reasserted that Carney's discharge to the Sandpoint POTW violated the EPA's "no discharge standard," even though Sandpoint had given Carney an IWA permitting such discharge. The EPA, again, stated that it would defer to Sandpoint's enforcement authority and inform Sandpoint of the situation. Carney's IWA allowing PCP discharge expired May 29, 1990. Shortly thereafter, Sandpoint issued Carney an IWA permitting no discharge of PCP. On July 16, 1990, Carney closed its plant