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METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA

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EXECUTIVE SECRETARY

August 23, 1994

To: Board of Directors (Legal and Claims Committee--Information)
(Water Problems Committee--Information)
From: General Counsel
Subject: U.S. Supreme Court Decision in P.U.D. No. 1 of Jefferson
County and City of Tacoma v. State of Washington,
Department of Ecology

Report

Members of the Legal and Claims Committee have asked for a report of the potential impact on Bay/Delta issues of a recent United States Supreme Court decision entitled P.U.D. No. 1 of Jefferson County and City of Tacoma v. State of Washington, Department of Ecology.

The issue involved in the P.U.D. No. 1 case was the authority of a state to impose instream flow requirements on a proposed hydroelectric project under section 401 of the Federal Clean Water Act. Section 401 requires a federal permit/license applicant for an activity which will result in a discharge to navigable waters to provide a certification from the applicant's state that the activity will comply with specific provisions of the Clean Water Act and with "any other appropriate requirement of State law." The license/permit will not be granted absent the certification.

The plaintiff public utility district and city had applied for a Federal Energy Regulatory Commission (FERC) license to construct a hydroelectric project on a stream in the State of Washington. Because a federal license was at issue, plaintiffs were required to obtain the section 401 certification from the state. When the state imposed a minimum stream flow requirement in the certification, plaintiffs sued, asserting that the state had no authority to impose a water flow requirement under the Clean Water Act.

The United States Supreme Court upheld the state's authority to include minimum stream flow requirements in a section 401 certification. This holding is especially significant for owners and operators of federally licensed hydroelectric projects in the Bay/Delta watershed. These projects had supposed that they were beyond the State Water

Resources Control Board's (SWRCB) authority to impose instream flow requirements, based on an earlier United States Supreme Court decision (California v. Federal Energy Regulatory Commission) which held that the SWRCB could not impose stream flow conditions on such a project beyond the minimum stream flows contained in the project's FERC license. SWRCB now has authority to impose its own stream flow requirements on FERC licensed projects through the section 401 certification process.

Other than with respect to hydroelectric power projects, the specific holding regarding section 401 authority likely will not have a major impact on Bay/Delta regulation because the SWRCB has sufficient authority under state law to impose stream flow requirements, and has done so as part of its Bay/Delta regulatory program. However, in the course of its analysis of the states' authority under section 401, the Supreme Court broadly surveyed water quality authority under the Clean Water Act, using language which likely will have an impact on the water quality standard process under section 303. The most significant potential impacts are summarized below.

First, the Court rejected the position that water quality standards must be limited to traditional water quality parameters, and should not include non-quality requirements such as stream flow. The Court found that the argument that the Clean Water Act is concerned with water "quality" and does not allow regulation of water "quantity", is an artificial distinction: diminishment of water quantity can constitute water pollution. This probably answers the question whether the SWRCB can, if it wishes, adopt general outflow standards under its water quality authority. Metropolitan had in the past contended that general outflow requirements must be based on SWRCB's water rights authority, rather than its water quality authority. (While the P.U.D. No. 1 case appears to authorize SWRCB adoption of general outflow standards under its water quality authority, it does not change existing law which requires a water rights hearing before the general standards can be implemented against a specific water rights holder.)

However, the Court's opinion was in the context of a review of a state's ability to include instream flow requirements and may be subject to some revision if and when the courts are faced with the question of whether the United States Environmental Protection Agency (EPA) has the authority under its water pollution authority to impose outflow standards on a state contrary to the state's wishes.

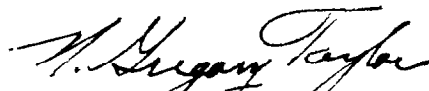
Second, the Court held that while sections 101(g) (the Wallop Amendment) and 510(2) of the Clean Water Act preserve a state's authority to allocate water quantity as between users, they do not limit the scope of water pollution controls that may be imposed on the exercise of water rights to protect the environment. In this case, the Court was upholding a state's rights to impose state-developed water quality controls on water users through the section 401 certification process. Thus, the Court merely recognized that sections 101(g) and 510(2) did not limit states from regulating, through water quality controls, water rights for environmental purposes.

However, this does not answer the significantly different question posed in the Bay/Delta--whether EPA has the authority to impose its own outflow standards under section 303 of the Clean Water Act which would interfere with state-established water rights. It is our contention that sections 101(g) and 510(2) preclude EPA from doing so and that if directly faced with that question, the Supreme Court would agree. Nevertheless, the broad language used in the P.U.D. No. 1 decision opens the door to the argument that EPA may impose outflow standards which impact water rights despite sections 101(g) and 510(2).

It should be pointed out that the main state-federal jurisdictional argument raised by Metropolitan and other urban agencies was not at issue at all in this case. That argument, based on substantial legislative history and on case law, is that Congress clearly intended that ocean derived salinity intrusion (which is the issue in the Bay/Delta) would be regulated through state-developed area-wide waste management plans or non point source control programs under sections 208 and 319 of the Clean Water Act, and not through federal (i.e., EPA) water quality standard regulation. This argument is not dependant on section 101(g) and should not be affected by the Court's opinion, no matter how broadly it is read.

Recommendation

For information only.


N. Gregory Taylor