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DEPUTY COMMISSIONER AND GENERAL COUNSEL

STATE OF NEW YORK
DEPARTMENT OF
ENVIRONMENTAL CONSERVATION
ALBANY, NEW YORK 12233

August 27, 1990

Mr. Brian K. Billinson
Niagara Mohawk Power Corporation
300 Erie Boulevard West
Syracuse, New York 13202

RE: Petition for Declaratory Ruling: 15-09

Dear Mr. Billinson:

You have petitioned, on behalf of Niagara Mohawk Power Corporation (Niagara Mohawk), for a Declaratory Ruling pursuant to §204 of the State Administrative Procedure Act and 6 NYCRR Part 619 regarding the applicability of Environmental Conservation Law (ECL) Article 15, Title 5 to Niagara Mohawk's federally licensed hydropower dam repair and reconstruction activities undertaken pursuant to an order of the Federal Energy Regulatory Commission (FERC).

The question of federal preemption, which raises issues of concurrent federal-state jurisdiction and Congress' intent to occupy the field of hydropower regulation, is not properly resolved through the issuance of a Declaratory Ruling. SAPA §204; 6 NYCRR §§619.3(a) and (d). Moreover, it is not necessary to address the issue of federal preemption under the Federal Power Act since I find, for the reasons set forth below, that the substantive provisions of ECL Article 15, Title 5 are applicable to federally licensed hydropower facilities under authority granted by Congress to the State under §401 of the Federal Clean Water Act (§401). 33 U.S.C. §1341.

Section 401 of the Federal Clean Water Act (CWA) is an express congressional provision giving the states permit authority over federally licensed hydropower facilities to assure compliance with applicable water quality standards. 33 U.S.C. §1341(a)(1). The scope of §401 is best understood through examination of its precursor, §21 of the Federal Water Pollution Control Act ("FWPCA"), enacted in 1970.

The FWPCA focused primarily on the quality of the waters receiving pollution, not on the source of pollution. The CWA, enacted in 1972, significantly shifted emphasis in

pollution control strategy from water quality standards to effluent limitations. 1972 U.S. Code Cong. & Adm. News 7668, 7673. The CWA also expanded the scope of the certification authority granted to the states from water quality standards to include "other limitations, standards, regulations, or requirements, or water quality criteria".

This evolution of authority can be seen by comparing the following two sections of the FWPCA and the CWA:

FWPCA 21(c):

Nothing in this section shall be construed to limit the authority of any department or agency pursuant to any other provision of law to require compliance with applicable water quality standards. The Secretary shall, upon the request of any . . . State . . . provide, for the purpose of this section, any relevant information on applicable water quality standards, and shall, when requested by any such . . . State . . . comment on any methods to comply with such standards (emphasis added).

CWA 401(b):

Nothing in this section shall be construed to limit the authority of any department or agency pursuant to any other provision of law to require compliance with any applicable water quality requirements. The Administrator shall, upon the request of any . . . State . . . provide, for the purpose of this section, any relevant information on applicable effluent limitations, or other limitations, standards, regulations, or requirements, or water quality criteria, and shall, when requested by any such or . . . State . . . comment on any methods to comply with such limitations, standards, regulations, requirements, or criteria (emphasis added).

Further, the CWA added the following provision, clearly delineating the broadened scope of the states' authority:

CWA 401(d):

Any certification provided under this section shall set forth any effluent limitations and other limitations, and monitoring requirements necessary to assure that any applicant for a Federal license or permit will comply with any applicable effluent limitations and other limitations, under section 301 or 302 of this Act, standard of performance under section 306 of this Act, or prohibition, effluent standard, or pretreatment standard under

section 307 of this Act, and with any other appropriate requirement of State law set forth in such certification, and shall become a condition on any Federal license or permit subject to the provisions of this section (emphasis added).

It is notable that the House version of §401(d), HR 11896, did not contain the "any other appropriate requirement" provision. Public Law 92-500; Legislative History, Report 93-1 at p. 1052.

In analyzing the newly proposed §401 the 1972 Senate Committee Report states:

In addition, the provision makes clear that any water quality requirements established under State law, more stringent than those requirements established under this Act, also shall through certification become conditions on any Federal license or permit. The purpose of the certification mechanism provided in this law is to assure that Federal licensing or permitting agencies cannot override State water quality requirements.

1972 U.S. Code Cong. & Ad. News 3668, 3735.

Given the clear changes enacted in the 1972 CWA, it is evident that Congress intended the states' authority to extend beyond compliance with water quality standards. The requirements of state law which can be imposed by states in a 401 Certificate were explicitly broadened.

The extent of New York's authority under CWA §401 has not yet been raised before the New York Courts. The only cases relevant to the issue either construed the provisions of the FWPCA, not the CWA, or are distinguishable on the facts.

In De Rham v. Diamond, 32 N.Y.2d 34, 44 (1973) the New York Court of Appeals explicitly recognized and adopted the precedent established in First Iowa Hydroelectric Cooperative v. Federal Power Commission, 328 U.S. 152 (1946), finding that Congress had granted the Federal Power Commission [(FPC) now the Federal Energy Regulatory Commission (FERC)] broad powers to regulate hydroelectric facilities and that that jurisdiction preempted state licensing and permit functions. In De Rham, opponents to Consolidated Edison's proposal to build a pumped-storage facility on Storm King Mountain challenged the DEC's certification pursuant to FWPCA §21(b) that the project would not violate applicable water quality standards. The court found that FWPCA §21(b) relinquished only one element of jurisdiction to the State by authorizing the State to certify whether or not a project would contravene water quality standards. The court held that:

Congress did not empower the States to reconsider matters, unrelated to their water quality standards, which the Power Commission has within its exclusive jurisdiction under the Federal Power Act.

32 N.Y.2d at 44.

After reaching this conclusion, the court went on to determine that DEC did not have jurisdiction to examine other issues that had already been examined by the FPC.

In Power Authority of the State of New York ("PASNY") v. Williams, 94 A.D.2d 69 (Third Dept. 1983); rev'd. 60 N.Y. 2d 315 (1983), DEC denied a 401 certificate for the Prattsville pumped-storage project on the grounds that it would not meet the applicable water quality standards. The Power Authority argued that DEC should have broadened its review to encompass the State Energy Master Plan (SEMP) in rendering its decision. The Appellate Division agreed, holding that DEC must act in accord with the energy policy which requires weighing environmental impacts with the overall public interest. The New York Court of Appeals reversed, finding that DEC had not erred in not considering the SEMP and general environmental factors. The Court, citing De Rham, found the FPA preempts all state licensing and permit functions and that the Clean Water Act relinquished to the States only the narrow question of whether or not construction and operation of the project would violate applicable water quality standards. 60 N.Y.2d at 324-25.

In Fourth Branch Associates, et ano. v. DEC, Misc. 2d _____, 550 N.Y.S.2d 769 (S.Ct. Albany Co. 1989), Petitioners challenged the issuance of a 401 certificate for a hydropower project, arguing that DEC failed to adequately review the project under the provisions of the State's Environmental Quality Review Act (SEQRA) Environmental Conservation Law Article 8; 6 NYCRR Part 617. Petitioners' claims were dismissed by the court, which held that the FPA pre-empts DEC from conducting a full SEQRA review of the project in conjunction with the issuance of a 401 certificate, 550 N.Y.S.2d at 777. The court, citing PASNY and De Rham, also found that DEC's authority under the 401 certificate was limited to a consideration of the project's impacts on applicable water quality standards. 550 N.Y.S.2d at 773-74. In a related decision, Fourth Branch Associates v. DEC, Slip Op. 6029-89; 1989 WL 165837 (S. Ct. Albany Co. November 28, 1989)], the court, citing Fourth Branch Associates and First Iowa, held that DEC could not require proponents of a federally licensed hydropower project to obtain State-issued ECL Article 15 Permits. Slip Op. at 6.

In De Rham the court correctly limited the State to considering compliance with water quality standards as it was interpreting §21 of the FWPCA, and not §401 of the CWA. In PASNY, the court upheld the State's determination that water quality standards of the receiving waters would be violated by the operation of a pumped storage facility. As the 401 certificate was denied on this most basic threshold determination, the issue of whether or not other water quality requirements could be imposed was never reached by the court.

While the lower court's decision in Fourth Branch could be interpreted to limit the State's §401 review to determining whether or not water quality standards will be maintained, the opinion did not analyze the differences between §21 and §401, but merely stated that §401 supersedes §21 "without substantial change". 550 N.Y.S.2d at 769. The comparative analysis set forth above and the legislative history of these sections leads to the conclusion that the decision incorrectly interpreted the scope of the State's authority under CWA §401. The court in Fourth Branch did not revoke the 401 certificate in question. That certificate contains expansive conditions which go beyond assuring compliance with water quality standards. Thus, the Fourth Branch decision did not require nor has it caused the Department to limit the scope of the 401 certificates it issues and does not represent stare decisis for purposes of determining that scope.

Pursuant to the authority granted by Congress to require compliance with all water quality-related State statutes and regulations and "any appropriate requirement of State law" and to the authority conferred by State law, DEC has issued regulations governing use and protection of State waters. 6 NYCRR Part 608. In addition to DEC's explicit water quality standards, 6 NYCRR Parts 701 through 704, Part 608 makes several other regulatory programs applicable to applications for 401 Certification. Those regulatory requirements, as made applicable through 6 NYCRR 608.7(6) are:

- (a) Protection of Waters: disturbance of stream beds [ECL §15-0501];
- (b) Protection of Waters: dam construction [ECL §15-0503];
- (c) Protection of Waters: excavation or fill [ECL §15-0505];
- (d) Dam Safety [ECL §15-0507];
- (e) Reservoir Releases [ECL §15-0801 et seq.];
- (f) Wild, Scenic and Recreational River System [ECL 15-2700, et seq.];
- (g) Freshwater Wetlands [ECL Article 24];
- (h) Fish and Wildlife [ECL Article 11]; and
- (i) Environmental Quality Review [ECL Article 8].

An analysis of each of the applicable regulatory requirements shows that they fall within the scope of water-quality related conditions authorized by CWA §401. These requirements are intended to protect fish and aquatic resources, and other natural resources, against erosion, excessive turbidity, and temperature and flow changes. Further, SEQRA has been interpreted as giving DEC the authority to impose conditions on State permits that are not substantively related to the permit being issued but which are "designed to mitigate the adverse environmental impacts identified, so long as these measures are reasonable in scope and reasonably related to the adverse impacts identified in the EIS". Town of Henrietta v. DEC, 76 A.D.2d 215, 226-227 (4th Dept. 1980). Thus, in conducting a SEQRA review of a 401 Certification request for a hydropower project, DEC may seek to impose additional conditions, including water-quality related conditions, on the certificate.

In summary, Congress has given the states the ability to resolve all water-quality related issues pertaining to the development of hydropower projects, pursuant to Section 401 of the Clean Water Act. This includes incorporation of substantive standards, based in State law and related to water quality, into the State-issued 401 Certificate. I have therefore determined that the substantive provisions of ECL Article 15 Title 5 are applicable to federally licensed hydropower facilities pursuant to §401 of the Clean Water Act.

Commissioner Jorling recently issued an Organization and Delegation Memorandum #907-24 addressing the Department's hydropower review process. I am enclosing a copy to provide you with further guidance.

Very truly yours,



Marc S. Gerstman
Deputy Commissioner and
General Counsel

Enclosure

MEMORANDUM FROM
THOMAS C. JORLING, Commissioner

New York State
Department of Environmental Conservation



July 17, 1990

TO: Executive Staff, Division and Regional Directors

FROM: Thomas C. Jorling *TCJ*

RE: ORGANIZATION AND DELEGATION MEMO #90-24
Policy: Department Guidelines Regarding Review of Hydropower Development as it Affects the State Forest Preserve, the State Wild, Scenic and Recreational Rivers System and Implementation of the Water Quality Certification Provision Section 401 of the Federal Clean Water Act (Supersedes #83-02, dated 2/10/83)

Purpose

The purpose of this memorandum is to restate and clarify the Department's procedural guidelines, adopted in 1983, for protection of the State Forest Preserve and the State Wild, Scenic and Recreational Rivers System (Rivers System) from those hydropower development projects which are inconsistent with Section 1 of Article XIV of the State constitution, for the Forest Preserve, and Title 27 of Article 15 of the Environmental Conservation Law for the Rivers System. Under the authority of Section 401 of the federal Clean Water Act (33 USC 1341), the Department must either issue or deny a water quality certification for every proposed hydroelectric project which requires a license from the Federal Energy Regulatory Commission (FERC). If the Department identifies a conflict with Section 1 of Article XIV of the State constitution or Title 27 of Article 15 of the Environmental Conservation Law as a result of its review of the project, it will not issue the "401" certification to the applicant. Essentially, the Department's position is one of upholding these important State laws in the context of the FERC licensing process. The FERC cannot issue a license to an applicant to whom the "401" certification has been denied. This memorandum provides background information and describes these procedures more fully in the overall context of the Department's hydropower review process.

Forest Preserve and Rivers System

New York State has a long and proud tradition of stewardship of its land and water resources. Establishment of the Forest Preserve in 1885 by the State is widely recognized as one of

the nation's landmark conservation accomplishments, equaled only by the additional protection accorded the Forest Preserve in 1894 when it was declared to be "forever wild" by amendment of the State constitution. Under this provision, in Section 1, Article XIV of the constitution, Forest Preserve lands may not be "leased, sold or exchanged" and "shall be forever kept as wild forest lands."

Under the "forever wild" provision of the State constitution, construction of new dams, impoundments or diversions in the Forest Preserve for hydroelectric generation or other purposes is prohibited.

The State Wild, Scenic and Recreational Rivers System was established in 1972 under the provisions of Article 15, Title 27 of the Environmental Conservation Law. DEC administers the Rivers System act throughout the state, on public and private land, except on private land in the Adirondack Park where it is administered by the Adirondack Park Agency (APA). The legislative intent of the act is to preserve certain selected rivers of the state in a free-flowing condition, on a natural gradient, and to preserve the outstanding natural, scenic, historic, ecological and recreational values of such rivers and their immediate environs. The act states that after inclusion of any river in the system, "no dam or other structure or improvement impeding the natural flow thereof shall be constructed." The act also provides management standards for permissible land uses in the environs of designated rivers, to preserve the primitive, pastoral and more developed river corridor landscapes that are integral to the "wild," "scenic" and "recreational" classifications. These classification categories reflect the intensity of existing land use conditions at the time of designation. The Rivers System act would tend to perpetuate the same intensity after designation.

Although no new dams, impoundments, diversions or other structures impeding the natural flow of a designated river may be constructed, such structures may have been in existence before designation and, therefore, they may be considered to be an existing use which can be maintained but not expanded after designation. The existence of small dams will not preclude designation of a river segment in the system.

DEC's regulation for administering rivers outside of the Adirondack Park that have been designated in the system allows limited opportunities for hydroelectric development on preexisting dams, consistent with the intent of the statute (6 NYCRR Part 666.18). DEC's regulation prohibits hydroelectric development on "wild" rivers, which by definition do not have any preexisting dams. However, such development will be allowed to be retrofitted on existing dams, under permit, on "scenic" (which allows preexisting low log dams) and "recreational" (preexisting small concrete dams) rivers that have been designated in the system, providing that:

1. In the operational mode of any proposed facility, outflow equals inflow and the reservoir level is not affected by project operation and the project does not alter the natural free-flowing character of the river above the impoundment or below the dam;
2. The proposed facility is integral with the existing dam and there is no dewatered bypassed river reach below the dam;
3. Any required ancillary facilities, such as access roads and transmission lines, conform to the requirements of the act, its attendant regulations and other applicable State laws and regulations.

The State Wild, Scenic and Recreational Rivers System act and regulations pertaining thereto, as promulgated by the Department and by APA, have been recognized by FERC as being a comprehensive plan under provisions described in Section 10(a)(2)(A) of the Federal Power Act. This section of the Federal Power Act requires FERC to specify the extent to which a proposed project complies with a comprehensive plan for improving, developing or conserving a waterway. The plan must reflect a balancing of the competing uses of a waterway.

Review Process

Recent New York State Supreme Court decisions necessitate clarification of the scope of the State's authority to regulate hydropower. These decisions challenge the State's ability to require hydropower developers to obtain permits required under State laws and regulations for federally licensed hydropower facilities. The complexities of this issue is further compounded by the intricacies of the Federal Energy Regulatory Commission licensing process.

Several initiatives have been and will be taken to resolve the uncertainty. First, the Director of the Division of Regulatory Affairs has consolidated the project management and permit issuance functions for hydropower projects within the Bureau of Energy, Alternate Energy Section. This action will result in a consistent and streamlined review of hydropower projects and will permit the successful integration of the federal and State review processes.

Second, given the interaction between the FERC licensing process and the Department's review of hydro projects, the Deputy Commissioner for Natural Resources directed the Department's Hydro Task Force to develop uniform procedures for processing hydro applications. The procedures were finalized in November, 1989 and have been circulated to Department staff, hydro developers and hydro activist groups. A copy of the Department's hydropower project review procedures is attached to this memorandum and incorporated herein by reference.

Third, the Department's authority under section 401 of the Clean Water Act is broad. We may condition a 401 Certificate upon any substantive limitation, standard, regulation, requirement or criteria that is water quality-related, among other concerns. This approach is supported by the legislative history of the Clean Water Act.

Policy

DEC will oppose an application to FERC for a license or an exemption from licensing for the construction and operation of a hydroelectric facility if the proposed project would violate Section 1 of Article XIV of the New York State constitution, pertaining to the Forest Preserve or the State Wild, Scenic and Recreational Rivers System Act and regulations promulgated by DEC or APA to implement this law.

DEC will give careful scrutiny to any proposed hydroelectric project on a river which has been authorized by State law for study for possible inclusion in the State Wild, Scenic and Recreational Rivers System, in light of the principles of the Wild, Scenic and Recreational Rivers Act, as they are involved through the study designation, and the regulatory standards otherwise applicable to such a project.

If the designated river or the legislatively authorized study river is one that flows on private land within the Adirondack Park and the proposed hydroelectric project that is under review by DEC is within such a river segment, DEC will consult with APA as to whether or not the project conforms with the State Wild, Scenic and Recreational Rivers System act and attendant regulations in issuing or denying the "401" certification.

It is appropriate to consolidate and centralize the project management and permitting functions associated with hydropower projects. I have designated the Chief of the Bureau of Energy's Alternate Energy Section as Deputy Chief Permit Administrator for issuance of 401 Certificates and permits relating to the construction and operation of hydro projects. This centralization will facilitate the continuation and strengthening of our working relationship with FERC staff.

The Hydropower Project Review Procedures memorandum issued on November 13, 1989 by Deputy Commissioner Binnewies provides important guidance for Department staff. Given the evolving nature of the review process, I am directing the Small Hydro Task Force to revisit this memorandum on an annual basis, for revision, as appropriate.

The Department will impose substantive conditions on any 401 Certificate issued for a hydropower project, as provided for under 6 NYCRR Section 608.7(a) to insure full compliance with the following:

- (1) Protection of Streams:
disturbance of stream beds [ECL § 15-0501];
- (2) Protection of Streams:
dam construction [ECL § 15-0503];
- (3) Protection of Waters:
excavation or fill [ECL § 15-0505];
- (4) Dam Safety [ECL § 15-0507];
- (5) Reservoir Releases [ECL § 15-0801 et seq.];
- (6) Freshwater and Tidal Wetlands
[ECL Articles 24 and 25];
- (7) Fish and Wildlife [ECL Article 11]; and
- (8) Environmental Quality Review ("SEQR")
[ECL Article 8].

The 401 Certificate will, of course, be processed in accordance with our Uniform Procedures requirements (6 NYCRR Section 621, et seq.).