

Court Scales Back MDNR Authority to Order Fish Study; Keeps MDNR On Hook for Potential Sanctions

The Michigan Court of Appeals has held that the Michigan Department of Natural Resources (MDNR) could not require a power company to study its hydroelectric facility's effect on fish mortality as a condition of receiving approval to operate, where MDNR had not previously determined an acceptable fish impact level.

Facts

Commonwealth Power Company (Commonwealth) planned to discharge water into a Michigan river in connection with its operation of a hydroelectric power plant. Section 401 of the federal Clean Water Act (CWA) provides that a hydroelectric facility may receive a federal permit to operate only after it obtains from the state a certification that the facility will comply with the state's water quality standards.

In 1994, Commonwealth applied to MDNR for such a "Section 401 certificate" for its power plant. MDNR denied Commonwealth's request because it had not complied with MDNR's order to perform a "fish entrainment and mortality study" to determine the potential for fish to be caught in the turbines of the hydroelectric facility and be harmed or killed.

Commonwealth challenged the denial, arguing that MDNR lacked the authority to require the fish study. The circuit court reversed the denial and required MDNR to pay Commonwealth's costs and legal fees, concluding that MDNR had no legal authority to require Commonwealth to complete such a costly study as a prerequisite to obtaining a Section 401 certificate.

Court's Decision

On appeal to the court of appeals, MDNR argued that it had the authority to order the fish study under administrative rules granting it broad authority to protect rivers for fish and fish migration. MDNR cited the U.S. Supreme Court case of *PUD No. 1 of Jefferson County v. Washington Dept. of Ecology* (1994), in which that court held that the State of Washington could condition issuance of a Section 401 certificate on the applicant's maintenance of a particular stream flow level in order to protect fish habitat. Commonwealth argued, however, that because MDNR had no administrative rules specifically addressing the requirements for granting a Section 401 certificate, it could not order the fish study.

The court rejected Commonwealth's argument that MDNR needed specific rules before it could impose any conditions on issuance of Section 401 certificates. It said that "the relevant question is whether the [state's] water quality standards, or any other Michigan law relating to water quality, authorized [MDNR] to order" the fish study.

The court held that, although the *PUD No. 1* case seemed at first blush to support MDNR's position, the requirement in that case was based on the state's prior determination, "on its own, that a particular stream flow was necessary to maintain the fish species contained in the

river in question.” Accordingly, the state in that case ordered the applicant to comply with certain conditions “to protect the fish living in the river.”

In the current case, in contrast, MDNR did not order Commonwealth to take specific measures to protect fish but, rather, “simply wanted [Commonwealth] to conduct an *exploratory study* regarding the number of fish killed.” (Original emphasis.) Because MDNR “did not know or did not express what level of fish kill was acceptable or what type of protective measures were necessary to maintain the proper ‘use’ of the particular river for particular species of fish,” the court held that the circuit court did not clearly err “in determining that [MDNR] exceeded the bounds of its authority in ordering [Commonwealth] to conduct the fish studies.”

The court then turned to the question whether the circuit court erred by requiring MDNR to pay Commonwealth’s court costs and attorney fees for its “vexatious” actions against Commonwealth. The court stated that the lower court relied on the improper court rules for its award of sanctions. Under those rules, sanctions are warranted under the applicable court rules only for frivolous claims or defenses. Here, the court held, MDNR’s defense to Commonwealth’s action was not frivolous because it had at least arguable legal merit under the *PUD No. 1* case. However, the court held, another court rule not considered by the circuit court was also relevant. Under that rule, sanctions would be available if, among other things, an “argument” was “grossly lacking in the requirements of propriety, violated court rules, or grossly disregarded the requirements of a fair presentation of the issues to the court.” Because this rule had not been considered by the circuit court, the appeals court reversed the order for sanctions and sent the question back to the circuit court for a determination whether sanctions under the additional rule were appropriate.

Commonwealth Power Company v. MDNR, Mich. Ct. App., Nos. 204399; 210844 (Mar. 21, 2000)

This article was prepared by Kenneth C. Gold, a partner in our Environmental Department, and previously appeared in the April, 2000 edition of the Michigan Environmental Compliance Update, a monthly newsletter prepared by the Environmental Department and published by M. Lee Smith Publishers.