

Based upon its review of the record and the arguments of counsel, the Commission hereby adopts the Recommended Decision of the Hearing Officer which was filed on November 16, 1987, in the matter of Ozark Society, et al., vs. Paul N. Means (LIS 87-018). This Decision affirms the issuance of water quality certification for the Fort Smith Lee Creek project.

COMMISSIONERS





CHAIRMAN

SUBMITTED BY: Dennis Griesse DATE PASSED: 11-20-87

FILED 11-16-87 Marilyn Woods

BEFORE THE ARKANSAS POLLUTION CONTROL AND ECOLOGY COMMISSION

OZARK SOCIETY, et al., Appellants)
vs.) Docket No. LIS 87-018
PAUL N. MEANS, Director of ADPC&E,)
Appellee)

RE: IN THE MATTER OF WATER QUALITY CERTIFICATION)
FOR THE LEE CREEK PROJECT OF THE CITY OF)
FORT SMITH, ARKANSAS, Applicant)

MEMORANDUM OPINION

The City of Fort Smith, Arkansas (City), in about 1977, recognized that it was rapidly running out of an adequate supply of drinking water for use by its citizens and other customers. To start a process to try and remedy this necessary part of community living, it employed a local engineering firm to make a study of available sites for it to create a reservoir of water. Some twenty-plus sites were surveyed by this firm (I am under the impression that every site available was included, but that is of no moment), and the result was that the only economically feasible place was on Lee Creek (Creek) at 3.2 river miles upstream from its confluence with the Arkansas River (River), not many miles distant from City in either Crawford or Sebastian County.

Over the past several decades, City has experienced a rapid growth in population as the result of the location of industrial plants in that area. It projects continued

population growth, both upon the basis of a short-term (10-15 years) and upon a long-term basis (over 25 years). It directed the engineer to prepare plans, including cost studies, for a water supply adequate to meet both of these projected growth periods. Throughout this record these two periods are referred to as Phase I and Phase II of its planning for this water supply.

Phase I consists of the construction of a 420-foot MSL spillway elevation dam across Creek which is projected to create an impoundment of about 640 acres of water of about 6 miles in length. It will extend west a mile or so into the State of Oklahoma. Phase II contemplates a much higher dam of some 700-plus feet MSL spillway elevation and a resulting larger lake. Once City was presented with its engineering studies, it decided that Phase I was all it could economically undertake at this time; this is the only project now under consideration in this matter. Quite a bit of the evidence is devoted to the argument that City should be required to undergo at this time studies of the environmental impacts of Phase II, as well as Phase I as, arguably, this approach by City amounts to "piece-mealing," an undesirable approach to the solution to any problem.

That argument is not impressive as it pre-supposes that at some time in the future, if City decides to undertake Phase II at the site of Phase I, it is a foregone conclusion that it will be permitted to do so, regardless of the

environmental impacts Phase II might cause. This is not my understanding of the way problems of this nature are resolved, and it is my recommendation that the establishment of Phase I will give City no added advantage, or foot-in-the-door edge, in that event. It should be made crystal clear to City that if Phase II should come about, it would be a separate and distinct project to be studied at that time as if Phase I did not exist, except of course as to the environmental alterations Phase I has caused.

At the time City decided to try and obtain authority to construct Phase I, it decided to construct this 420-foot MSL spillway elevation dam so that it will produce hydro-electric power (hydro) to operate the treatment plant, pumping stations, etc., necessary to condition the water and deliver it to the buyers. The evidence establishes that there is an abundance of surplus electrical energy available for City to purchase for these purposes. It was the review of materials submitted to the Arkansas Department of Pollution Control and Ecology (ADPC&E) concerning the hydro portion of the project that led ADPC&E to initially on March 10, 1987, deny the water quality certification.

In 1983 City applied to the Federal Energy Regulatory Commission (FERC) for a permit to construct and operate this hydro facility. This application brought into the problem the Federal Clean Water Act (33 U.S.C., Sections 1251, et

seq.), Section 401(a)(1) of which Act (33 U.S.C. Section 134(a)(1)) provides:

"Any applicant...to conduct any activity including...the construction or operation of facilities, which may result in any discharge into the navigable waters, shall provide the licensing...agency a certification from the State in which the discharge originates...that any such discharge will comply with the applicable provisions of Sections 301, 302, 303, 306, and 307 of this Act...."

This is the only law to which I have been referred by counsel that brings the State into this problem. I am aware that this State has enacted legislation concerning water pollution or water quality standards that is certainly similar in purpose (and probably provisions) to the goals of the federal act, but the federal government having assumed jurisdiction over this area of the law must be given precedence. As I understand the law in such circumstances, a state can neither add to nor detract from that assumed federal jurisdiction and law. And in such position, the federal law totally controls except where specifically reserved to a state, which reduces this question to an inquiry as to the effect that the dam may have upon the water quality standards of this State. As I further understand the law in these circumstances, the State of Arkansas has in force a federally approved Water Quality Management Plan and, most importantly, a specific regulation establishing State water quality standards that meet federal criteria. This is Commission Regulation No. 2: Regulation Establishing Water Quality Standards for Surface Waters of

the State of Arkansas (Regulation 2). Much reference is made in the record to this regulation.

The U.S. Corps of Engineers (COE) is charged with the responsibility of issuing, or denying, such permits required by the federal Clean Water Act (and which requires this state water quality certification); and when City applied to construct this dam across Creek, COE notified ADPC&E that the State of Arkansas would have to issue water quality certification.

This was not the first time that ADPC&E had been involved with COE on this federally required certification, and as to public notices and hearings required by the federal act to permit public environmental comment, the two had worked out a routine whereby COE would carry that ball. It would be duplication and a costly process for the State to conduct separate hearings to comply with this federally mandated public input, as the same problems, studies--everything--would be involved in both. It would be burdensome upon the public to be required to duplicate its effort, and costs, to express environmental views. This record establishes that ADPC&E made its determination as to the water quality effects upon the basis of the information that is contained in the printed final environmental impact statement (FEIS) which contains the expressed views of the public upon its conceived ideas of the environmental impacts of such a project; in this matter this costly document was

prepared by FERC and furnished to the State to become a part of its record. A duplication of these efforts by ADPC&E could benefit no one.

Public notices and hearings were given and conducted in this matter by COE and FERC. The public has had at least three opportunities, after published notices, to express views on this proposal (and did so), and no person, organization, association, etc., can assert that either state or federal law, regulation, constitution, or case authority has been violated by this piggy-back process, or right denied to them. Nothing is amiss, or unlawful, for the State to rely upon COE, or FERC, to accomplish compliance with this federal law so long as the State is convinced that the water quality problem is sufficiently studied and reported on for an intelligent determination to be made by it. In this instance, public hearings were held in Sallisaw, Oklahoma, and Fort Smith, and Van Buren, Arkansas, and in addition at least two 25-day comment periods were noticed and compiled, and the water quality effects of the proposed construction exhaustively investigated. There can be no doubt that federal law was abundantly observed by both this State and the federal government in all of its requirements.

A draft environmental impact statement (DEIS) was also prepared, printed, and distributed by FERC in about August, 1986, after searching comments and studies. It contained a

table of figures and text that related predicted water level fluctuations in this proposed lake. The ADPC&E staff interpreted this document to reflect that there would be daily fluctuations of up to eight feet in the lake level. For an unexplained reason, City did not learn of this ADPC&E interpretation until after March 10, 1987. The same table of figures and text was published in the FEIS, which was printed and distributed by FERC in February, 1987.

The evidence is persuasive that an eight-foot daily fluctuation in the level of the lake would create water conditions in the lake that would violate water quality standards of this State, particularly with regard to turbidity standards set forth in ADPC&E Regulation 2, Sec. 6(C). Such large fluctuations would cause soil to wash into the water in such amounts to exceed the prescribed maximum limits.

The Director of ADPC&E and her staff read the FEIS in late February, or early March, 1987, and upon finding that the above-mentioned table and text was unaltered, the Director wrote a letter on March 10, 1987, to COE that the requested water quality certification could not be issued by this State. There is a question as to whether this letter constitutes a final ADPC&E decision as to this certification, but I pass that question as there are reasons that make it unnecessary. In passing, however, it is well to observe that in July, 1985 (see Department Exhibits 5, 8,

and 9 of the record) the State Technical Review Committee (TRC), by majority vote, had concluded that this City project should be supported by the State. TRC is composed of at least the following state agencies which are, with their respective positions stated, as follows:

Health Department, supports; Natural and Scenic Rivers Commission, opposes; Game and Fish Commission, supports with mitigating features; Geology Commission, supports; ADPC&E, anticipated support after FEIS; Department of Parks and Tourism, supports qualifiedly; Soil and Water Conservation Commission, supports.

In that same month the Governor wrote a letter to the effect that he supported the 420-foot MSL spillway elevation dam across Creek, assuming the FEIS was favorable.

City, upon learning of the March 10, 1987 Director's letter above, contacted a Mr. Young of the Soil and Water Conservation Commission (S&W)--I think he served as Chairman of the TRC--to schedule a meeting with ADPC&E officials to discuss the content of that letter. Such a meeting was arranged, to be held on March 24, 1987, in the S&W offices in Little Rock. On that date representatives of City, of Van Buren, the City engineer, and perhaps others, showed up at the appointed time. Representatives of the news media and several legislators from the western part of the State also appeared. It is of no importance who invited the media or legislators to attend, or that they were present.

The City engineer presented computer work sheets to ADPC&E officials present that convinced them that daily eight-foot fluctuations would not occur; and with that problem out of the picture, the evidence is quite clear and convincing that this project would comply with the water quality standards of this State. The Director of ADPC&E then and there agreed to issue the necessary water quality certification the next day (with conditions acceptable to City), and this was accomplished on March 25, 1987.

Within a period of 30 days after the March 25, 1987, certification above, these protestants (designating themselves to be appellants which, in this instance, seems to me to be a misnomer, but that is of no moment) filed a timely appeal to the Commission. The Commission thereupon referred the problem to this Hearing Officer so that a record could be made to record the evidence and arguments the parties wished to present.

The protestants are groups of citizens banded together with common interests in the protection and preservation of bird life, fish and game, canoeing--in general, nature. There can be no doubt as to their sincerity of purposes, or that their purposes are noble. Man has gone about the business of making money and satisfying so-called sporting desires in such a careless way that there is good reason to suspect that unless forcefully curbed the environment in which we live may soon be unfit for any purpose. And

because these people are willing to spend their time, energy, and personal resources to try and stop this dreadful destruction of nature, my hat is off to them. I hope that they will continue to raise their voices in strenuous opposition.

Nonetheless, there comes a time when human need dictates that nature must be disturbed to provide people with basic necessities for community living, and it is the opinion of this Hearing Officer, and so his recommendation to the Commission, that the March 25, 1987 decision of the Director to certify to COE that the water quality of Creek, and of the lake, will fully comply with state standards and should remain undisturbed and be affirmed.

The fact that the Director may have reversed her March 10, 1987 position on this project is of no moment. Every decision-making body, or person, certainly is vested with the inherent and implied authority to correct an error, at least until jurisdiction over the subject matter is lost. In this instance I am persuaded that the jurisdiction of the Director over this matter to correct errors is for a period of thirty days after a decision is made or until a petition for review is filed, whichever first occurs. Denial of this inherent or implied control does nothing but create waste which serves no purpose.

An argument of protestants is that the existing designated instream water "uses" of Creek will be altered by this project (see Regulation 2, Sec. 3, "Anti-degradation Policy"). These designated "uses" are set out in the appendix to Regulation 2, and but two of the six there listed for Creek are here involved: (1) warmwater fishery and (2) primary contact recreation. Aside from the fact that "use" is not involved in this problem, only water quality, the evidence is abundantly clear that the lake to be created will continue to be a "warmwater fishery," meaning that this "use" of Creek will continue unchanged by this project. It is urged that because smallmouth bass do not thrive in a lake environment in Arkansas (and I think this is true), and also that there may be some changes in the minnows, invertebrates, and vegetation that Regulation 2(4)(F) requires that this matter undergo a "use attainability analysis" to establish subcategories of the classification "warmwater fishery"--in the main--to distinguish between a stream (or river) fishery and a lake fishery.

There are several reasons why this further study would be, in this instance, an unlawful and unwarranted action. I repeat for emphasis that this type of action has nothing to do with "use"; the problem to be resolved is limited to a determination of water quality. And to subcategorize "uses" in the middle of the action with the intent that the result apply retroactively to this final determination as to water

quality would violate the due process rights of City. There is ample and undisputed testimony in this record that an ecological change in this area of Creek began some while back and before this application was filed as the result of (a) the City of Van Buren constructing a low water dam across Creek for its water supply and (b) backwater from River caused by a dam across it downstream from its confluence with Creek. In any event, such a study would ignore the immediate and urgent need of City to obtain this additional water supply.

The "use," primary contact recreation, is defined by Regulation 2(4)(D)(3) to be "waters where direct body contact (swimming, skiing, etc.) is involved." It appears that the Health Department has a regulation which prohibits this type of activity in municipal water supply impoundments. What has been said before as to the fishery use, where applicable, need not be repeated. I would also assume that the Van Buren lake which will be inundated by this project is at this time off limits to this activity.

Protestants urge that further studies be made of possible alternate sites for city to build this needed water supply. The evidence reflects that several in-depth studies of alternate sites have already been made with the result that Creek site is the only one economically feasible. Further study would be a waste of time, effort, and money and is not recommended.

The engineer City employed, many years before that event, joined with a group of businessmen in City to purchase several thousand acres of land in Oklahoma, some of which will be inundated by this project. In anticipation that the project will become a reality, City has purchased some of the land it will need, including several hundred acres of the land above mentioned, at a profit to the owners. Protestants suggest that this creates a conflict of interest on the part of the engineer. Assuming this to be the case (which it is not), the only effect would be to discredit some of his testimony which may be in conflict in material areas, and I am not aware of any such. I am under the impression that the independent experts employed by FERC to prepare the DEIS and FEIS made independent study of alternate sites and reached the same conclusion as that of the engineer. The purchase of that land is much too remote in time to bear upon this issue.

When this project first surfaced, it was opposed by the Oklahoma Water Resources Board and by the Federal Environmental Protection Agency. Their extensive comments in opposition are contained in this record which minutely detail the reasons for objection. At the time of this hearing, both agencies had withdrawn their objections.

If I understand one of the arguments of protestants, it is that ADPC&E should hold an independent public hearing, after notice, prior to making a determination to issue, or

refuse, water quality certification. It seems to me that protestants lose sight of the fact that the entirety of this action is controlled by federal law, and I find nothing that requires that this be done. This may be an odd procedure, but it cannot be said that the public has not had ample opportunity to express opinions on every phase of this project. Furthermore, the action of this Commission to refer the problem to hearing has given protestants more than ample opportunity to searchingly inquire into the basis for the Director decision of March 25, 1987, and its propriety, and they have been denied no right.

In conclusion, I recommend to the Commission that the following proposed findings of fact presented by counsel for City be adopted:

1, 2, 3, 4 except its subsection (d), 6, 8, 9, 10, 11, 12, 13, 14, 15, 17, 18, 19, 20, 21 except its subsection (a), 22, 23, 24, 25 except its subsection (d), 26, 27, 28 except its subsection (d), and 29.

And that the following conclusions of law proposed by counsel for City be adopted:

1, 2, 3, 5, 8, 9, 10, 11, 12, 14, and 15.

The findings and conclusions submitted by counsel for protestants have not been ignored; it is only that the acceptable ones would be a duplication of the ones above. And I thank learned counsel for both parties for the excellence of their presentations. You were of great assistance to me in this, my introduction into this new area

of the law for me, and without which the problems would have been infinitely more difficult.

It is my recommendation to the Commission that based upon the evidence in this record that the March 25, 1987 decision of the Director to the effect that this water quality certification must be issued be affirmed in all respects.

Respectfully submitted,


Bruce T. Bullion
Hearing Officer