

9-1-2003

Alabama Rivers Alliance v. FERC, 325 F.3d 290 (D.C. Cir. 2003)

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J. Reid Bumgarner, Court Report, Alabama Rivers Alliance v. FERC, 325 F.3d 290 (D.C. Cir. 2003), 7 U. Denv. Water L. Rev. 161 (2003).

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the cross claim. Because this claim had not yet come properly before the district court, the court did not address the quiet title action, but focused its resolution of the MRGCD's appeal on the BOR's obligations under the ESA. The court concluded that the BOR's authority to manage the MRGCD and SJCP works triggered its ESA obligations.

RCAA appealed on the grounds that the district court's standard for granting injunctive relief afforded endangered species the highest of priorities while completely ignoring "traditional equitable principles." The court, quoting *Tennessee Valley Authority v. Hill*, stated that it is "beyond a doubt that Congress intended endangered species to be afforded the highest of priorities," confirming the district court application of the proper standard for granting preliminary relief. Concluding that the BOR has discretion to reduce allotments of water under its contract to comply with the ESA, the court affirmed the district court's order.

Jason V. Turner

DISTRICT OF COLUMBIA CIRCUIT

Alabama Rivers Alliance v. FERC, 325 F.3d 290 (D.C. Cir. 2003)
(holding the Federal Energy Regulatory Commission should have required power company to obtain water quality certification from state before replacement of turbine generators that significantly altered the dissolved oxygen level, volume, intensity and timing of water flow into navigable waterway).

Alabama Power produces electricity with turbine generators at its Martin Dam project located on Alabama's Tallapoosa River. Three of its generators began commercial operations in 1927 and over time fell into disrepair. Alabama Power, in December 2000, filed a license amendment application with the Federal Energy Regulatory Commission ("FERC") to replace these generators. Alabama Power estimated the replacement turbines would increase the flow of water into the Tallapoosa by roughly 900 cubic feet per second ("cfs"), an increase of 8.6%.

Alabama Rivers Alliance ("ARA") and two other organizations subsequently moved to intervene in the application hearing, arguing section 401(a)(1) of the Clean Water Act ("CWA") required state water quality certification for FERC to amend the license. FERC rejected ARA's argument and approved Alabama Power's proposed license agreement, reasoning the replacement of the existing generators was "not an activity which may result in discharge within the meaning of [s]ection 401(a)(1)" since the existing generators would release water in essentially the same manner as the replacement generators.

ARA subsequently filed a petition for rehearing, which FERC also denied. The ARA then appealed FERC's decision to the United States Court of Appeals for the District of Columbia, claiming FERC improperly approved the license amendment when it failed to require Alabama Power to obtain water quality certification from the State of Alabama.

On appeal, the court focused its analysis on section 401(a)(1) of the CWA and whether FERC properly authorized Alabama Power's amended license. Specifically, the court addressed whether Alabama Power's replacement generators would "result in any discharge in the navigable waters."

ARA contended the operation of the new generators would create significantly different "volume, timing and intensity" of water flow as well as increase the flow of low dissolved oxygen water. According to ARA, such differences required Alabama Power to obtain state water quality certification in order to amend its license under section 401(a)(1). Conversely, FERC argued the generator replacement would alter but not increase the amount of water passing through the generators because of reductions in the daily runtime of the generators.

The court disagreed with FERC's argument, stating such a distinction lacked any basis in the statutory language of section 401(a)(1). Furthermore, the court explained the term discharge contemplates the addition of a substance or substances into navigable waters and that the replacement generators would cause an additional 900 cfs of water to flow into the river. Accordingly, low level dissolved oxygen would be released into the river at an increased rate of 900 cfs. The court therefore concluded the installation and operation of the replacement generators was an activity that "results in discharge."

Finally, under section 401(a)(1) of the CWA the court held Alabama Power was required to obtain water quality certification from the State of Alabama prior to approval of the license amendment authorizing replacement of three of its generators at the Martin Dam Project. Thus, the court vacated FERC's prior approval of the license amendment because no certification existed at the time of the amendment's approval.

J. Reid Bumgarner