Electric Utility in Arkansas Ordered to Stop Construction of New Plant After Spending $800 Million

by

James R. Keller

This article appeared in *St. Louis Construction News and Review*, p. 22-23, September-October, 2011.

The Eighth Circuit Court of Appeals (which oversees federal cases in Missouri) recently affirmed a decision from a federal district court in Arkansas to enjoin Southwestern Electric Power Company (SWEPCO) from continuing to build a 600 megawatt pulverized coal fired facility. The court determined that the rights of a hunting club, the Sierra Club, and the National Audubon Society may be substantially damaged if construction were allowed to continue on a power plant where SWEPCO already had spent $800,000,000.

The case is *Sierra Club; National Audubon Society; Audubon Arkansas; Charles Mills v. United States Army Corps of Engineers and Southwestern Electric Power Company*, 2011 WL 2718144 (C.A. 8) Ark.)).

In reaching this result, the Eighth Circuit sided with the rights of environmentalists over the argument by SWEPCO that the injunction would cost the utility $8,000 per day for idled equipment, $400,000 in equipment demobilization, and $250,000 for demobilizing the contractor. The utility estimated that the injunction in a worst case scenario could cost it $11,000,000 per month and the loss of 100 permanent jobs.

At the heart of the court's decision was the fact that SWEPCO commenced plant construction a year before it had received the necessary Clean Water Act permit (the §404 permit) from the U.S. Army Corps of Engineers. Also, the utility had ignored a warning from the Corps that construction would proceed at the utility's own risk since it had not received a permit. The court thus concluded that harm suffered by the utility from this costly result was "self inflicted."

In 2005, SWEPCO had conducted a planning session on the need for additional energy in Arkansas, Louisiana and Texas. It received approvals from the regulatory commissions in each of those states to construct the John W. Turk, Jr. Power Plant. SWEPCO secured a 3,000 acre site in Hempstead County, Arkansas. The site is near commercial pine plantations, agricultural row crop areas, cattle raising operations, railways, and is less than one mile from property owned by the Hunting Club, one of the plaintiffs in this case.

As part of the construction process, SWEPCO asked the court to issue a permit under §404 including permission to discharge "dredged" or "fill" material into wetlands and stream channels so it can construct ancillary components of the power plant, including roads, rail line, a coal yard, a cooling water intake structure, water lines and transmission lines.

Approximately a year after construction had begun, the Corps issued the §404 permit. Three days later, SWEPCO notified the Corps that it already filled 2.47 acres of wetlands as a result of errors in mapping and flagging of wetland boundaries. The Corps immediately withdrew its permit and required SWEPCO to conduct a new survey of the wetlands. SWEPCO then submitted a new permit application seeking "after-the-fact" authorization for its prior unauthorized discharge, as well as for proposed future discharges.

Thereafter, the Arkansas Court of Appeals invalidated SWEPCO's state Certificate of Environmental Compatibility and Public Need Certificate for the plant. Since SWEPCO's §404 permit application was based on this Certificate, the Court of Appeals concluded that the Arkansas Public Service Commission had not determined that there was a need for the construction of such a power plant.

The state court also found "particularly disturbing" SWEPCO's failure to address the comparative merits and determinants of alternative locations for its plant.

After SWEPCO submitted a revised analysis, the Corps issued a final §404 permit in December, 2009. This permit allowed SWEPCO to discharge dredged and fill material into eight plus acres of wetlands, including the 2.47 acres already filled without authorization as well as discharging into various streams.

The plaintiffs in this case did not immediately resort to federal litigation because they relied on a statement from SWEPCO's President that SWEPCO would not construct the plant without first obtaining a valid State Certificate. When construction of the plant continued after the Arkansas courts had invalidated the Certificate, the plaintiffs filed the federal action.

The district court had concluded that the individual plaintiffs in the federal action had suffered an adequate injury to support an injunction because they resided in close proximity to the plant and engaged in bird watching and many other outdoor activities around the area.

The plaintiffs alleged a number of technical defects in the process of approval for the plant, including that the Corps (another defendant in the case) failed to comply with the requirements of the National Environmental Policy Act (NEPA) that federal agencies include a detailed statement on alternatives to the proposed action.

Finally, the Eighth Circuit, while noting the potential economic loss to the utility, said this was more than offset by the potential economic gains in the public's confidence that its government agencies act independently, thoroughly and transparently when reviewing permit applications.

James R. Keller is a partner at Herzog Crebs LLP where he concentrates his practice on construction law, complex business disputes, real estate and ADR. He also is an arbitrator and a mediator.