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NATIONAL ENVIRONMENTAL POLICY ACT AND TREATY IMPLICATIONS OF PROJECTS SUCH AS A DEVILS LAKE OUTLET - THE ROLE OF THE ENVIRONMENTAL PROTECTION AGENCY IN PROJECTS SUCH AS A DEVILS LAKE OUTLET

This memorandum discusses the National Environmental Policy Act and treaty implications of constructing a project such as an outlet to Devils Lake as well as the role of the Environmental Protection Agency in such a project.

NATIONAL ENVIRONMENTAL POLICY ACT IMPLICATIONS OF A PROJECT SUCH AS AN OUTLET TO DEVILS LAKE

The Act

The National Environmental Policy Act of 1969 creates the Council on Environmental Quality and imposes on each federal agency the obligation to prepare a comprehensive environmental impact statement before undertaking a proposed action. Subchapter I of the Act imposes a requirement that all federal agencies submit a detailed statement evaluating the environmental impacts of proposed legislation and other major federal actions significantly affecting the quality of the human environment. Federal actions qualifying as major federal actions include federal construction projects, adoption of regulations, issuance of federal permits, and awarding federal funding. Federal agencies must submit an acceptable environmental impact statement before undertaking the proposed action. Although the Act contains no explicit provision for judicial review, the validity of an environmental impact statement is subject to judicial review. The Act is a procedural statute, and it does not require federal agencies to mediate the environmental harm identified in the environmental impact statement. Rather, the environmental impact statement provides information to citizens and to state and federal agencies, and any changes in the federal action must result from the political process. The council is responsible for formulating rules implementing the Act.

Section 2 of the Act (42 U.S.C. § 4321) contains the congressional declaration of purpose. This section provides that the Act's purposes are to "declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and national resources important to the

nation; and to establish a Council on Environmental Quality."

Section 10 of the Act (42 U.S.C. § 4331) contains the congressional declaration of national environmental policy. Subdivision a provides that the "Congress, recognizing the profound impact of man's activity on the interrelations of all components of the national environment, particularly the profound influences of population growth, high-density urbanization, industrial expansion, resource exploitation, and new and expanding technological advances and recognizing further the critical importance of restoring and maintaining environmental quality to the overall welfare and development of man, declares that it is the continuing policy of the federal government, in cooperation with state and local governments, and other concerned public and private organizations, to use all practical means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, and to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans." Subdivision b of section 101 provides that it is the continuing responsibility of the federal government to use all practical means to improve and coordinate federal plans, functions, programs, and resources. This subdivision provides that in order to carry out the policy, "it is the continuing responsibility of the federal government to use all practical means, consistent with other essential considerations of national policy, to improve and coordinate federal plans, functions, programs, and resources to the end that the nation may --

- (1) fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;
- (2) assure for all Americans safe, healthful, productive, esthetically and culturally pleasing surroundings;
- (3) attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences;
- (4) preserve important historic, cultural, and natural aspects of our national heritage, and maintain, wherever possible, an environment

which supports diversity and variety of individual choice;

- (5) achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities; and
- (6) enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources."

Finally, subdivision c states that Congress recognizes that each person should enjoy a healthful environment and that each person has a responsibility to contribute to the preservation and enhancement of the environment.

Environmental Impact Statements

Concerning the requirement of an environmental impact statement, section 102(C) provides that to the fullest extent possible all agencies of the federal government shall include in every recommendation or report on proposals for legislation and other major federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on the environmental impact of the proposed action, and the adverse environmental effects that cannot be avoided should the proposal be implemented, alternatives to the proposed action, the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and any irreversible and irretrievable commitments of resources that would be involved in the proposed action should it be implemented. This provision also states that prior to making any detailed statement, the responsible federal official must consult with and obtain the comments of any federal agency that has jurisdiction by law or special expertise with respect to any environmental impact involved. The council has adopted regulations codified at 40 C.F.R. § 1500.1 et seq. Section 1500.1 states that the purpose of the Act is to ensure that environmental information is available to public officials and citizens before decisions are made and to help public officials make decisions that are based on understanding of environmental consequences and take actions that protect, restore, and enhance the environment.

Section 1506.1 concerns limitations on actions during the process. This section provides that until an agency issues a record of decision, no action concerning the proposal may be taken that would have an adverse environmental impact or limit the choice of reasonable alternatives. This section provides further that while work on a required program environmental impact statement is in progress and the action is not covered by an existing program statement, agencies may not undertake in the interim any major federal action covered by the program that may significantly affect the quality of the human environment unless the action is justified

independently of the program, is itself accompanied by an adequate environmental impact statement, and will not prejudice the ultimate decision on the program. Section 1506.7 allows the council to provide further guidance to agencies concerning the Act and its procedures including successful and innovative procedures used by agencies to implement the Act.

Section 1506.11 specifically deals with emergencies. This section provides that "where emergency circumstances make it necessary to take an action with significant environmental impact without observing the provisions of these regulations, the federal agency taking the action should consult with the council about alternative arrangements. Agencies and the council will limit such arrangements to actions necessary to control the immediate impacts of the emergency."

Conclusion

The United States Army Corp of Engineers must comply with the National Environmental Policy Act. Although the Council on Environmental Quality may determine whether an alternative procedure is warranted, this determination is not a waiver or an exception to the Act. The only entity that could conceivably waive the statutory requirements of the Act by exemption is the United States Congress, which could do so by authorizing a project, funding it, and directing that it be constructed. Presumably such action would be due in situations involving national significance. Construction of the Tellico Dam by the Tennessee Valley Authority and the Alaska pipeline are examples.

The environmental impact statement process may be expedited, but the federal agency in question must still comply with the law. However, in many instances, such as an outlet to Devils Lake, data must be collected over an entire hydrologic cycle, and thus, even if sufficient money and resources are allocated to the environmental impact statement process, there is still a time element that cannot be surmounted.

Finally, if the environmental impact statement process is condensed too much, opponents of the federal action may allege that the federal agency did not follow the necessary procedure, and the more the project is expedited the greater the chance of a procedural error.

TREATY IMPLICATIONS OF A PROJECT SUCH AS AN OUTLET TO DEVILS LAKE

Article 6 of the United States Constitution provides that "[t]his Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be

bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding." Thus, a treaty has the force and effect of a legislative enactment and for all intents and purposes is equivalent to an Act of Congress. It is binding on all courts as the supreme law of the land.

Whether a treaty can be in conflict with federal law is discussed at 74 Am. Jur. 2d, *Treaties*, § 16. Basically, while a state law may be void as inconsistent with a treaty, an Act of Congress can not be similarly declared to be invalid. Where both the treaty and the Act of Congress relate to the same subject, the courts will always endeavor to construe them so as to give effect to both, if that can be done without violating the language of either; but if the two are inconsistent, the one last in date will control the other.

Concerning whether treaty obligations may be waived or its provisions found not to apply in certain situations, 74 Am. Jur. 2d, *Treaties*, § 11, points out that the obligations of a treaty may not be changed or varied except by the same formalities by which they were introduced, or at least by some act of as high an import and of as unequivocal an authority. Thus, a treaty may be modified by subsequent acts of Congress that are inconsistent with the treaty.

Concerning enforcement of treaties, as noted above, treaties are the supreme law of the land and by express command of the Constitution, it is the duty of all judges to uphold and enforce treaties of the United States. Courts are required to take judicial notice of and be governed by treaties, and they are binding upon federal and state courts.

Conclusion

It does not appear that any entity, other than Congress, may waive the provisions of a treaty. However, as noted above, a treaty may be modified by a subsequent Act of Congress.

ROLE OF THE ENVIRONMENTAL PROTECTION AGENCY IN PROJECTS SUCH AS AN OUTLET TO DEVILS LAKE

As a major federal agency, the Environmental Protection Agency always plays a role in projects that impact the environment. Although the Environmental Protection Agency does not have purview over the National Environmental Policy Act, it is an agency with environmental expertise and may play a consultative role for agencies required to prepare an environmental impact statement. The authority of the Environmental Protection Agency derives from the Clean Air Act and the Federal Water Pollution Control Act.

The Environmental Protection Agency will review environmental impact statements to determine whether the proposed project in question is environmentally acceptable and whether the environmental impact statement was done correctly. As a consultative agency, the Environmental Protection Agency has the authority to refer environmental impact statements to the Council on Environmental Quality, which, based upon the comments of the Environmental Protection Agency, may direct the agency preparing the environmental impact statement to redo the statement or may bring an action in federal court for a directive that the agency preparing the statement redo it.

Section 404 of the Federal Water Pollution Control Act, 33 U.S.C. § 1344, commonly known as the Clean Water Act, requires permits to discharge dredged or fill material into navigable waters at specified disposal sites. Although section 404 permits are issued by the United States Army Corps of Engineers, the disposal site must be determined using guidelines developed by the Environmental Protection Agency. An important component of the section 404 program is contained in subdivision c of section 404. This provision allows the Environmental Protection Agency to deny or restrict the use of defined areas as disposal sites. The Environmental Protection Agency may prohibit the specification, including the withdrawal of a specification, of a defined area as a disposal site and may deny or restrict the use of any defined area for specification as a disposal site, whenever it determines the discharge of materials into the area will have an unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas, wildlife, or recreational areas.

The Environmental Protection Agency also plays a role under section 402 of the Clean Water Act, the national pollutant discharge elimination system. This program prohibits anyone from discharging pollutants from a point source into surface waters without first obtaining a national pollutant discharge elimination system permit from the Environmental Protection Agency. A project such as an outlet to Devils Lake may require such a permit.

Conclusion

The Environmental Protection Agency would play an important role in any project such as an outlet to Devils Lake. This role includes review of environmental impact statements, referral of environmental impact statements to the Council on Environmental Quality, determination of disposal sites for dredged or fill material under a section 404 permit, and issuance of a permit to discharge pollutants into surface waters.