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Hydro Newsletter

VOLUME 5, ISSUE 9: SEPTEMBER 2018

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USFS Proposes Alaska Version of Roadless Rule

On August 2, 2018, the U.S. Forest Service (USFS) announced a [memorandum of understanding](#) (MOU) with the state of Alaska to develop an Alaska state-specific roadless rule. The state-specific rule will amend the 2001 Roadless Area Conservation Rule, commonly known as the “Roadless Rule,” which limits road construction and timber harvesting in national forests, including the Tongass National Forest in southeast Alaska. There are over 21.9 million acres of National Forest in the state of Alaska, of which approximately 14.7 million are designated roadless areas under the Roadless Rule. The Alaska Roadless Rule will determine which currently designated roadless areas in the state require a different management designation to promote economic development and other needs.

This is the latest development in Alaska’s long-running efforts to overturn the Roadless Rule. Immediately following its promulgation, the state challenged the Roadless Rule, which resulted in a settlement under which the U.S. Department of Agriculture (USDA) would publish a proposed rule that would temporarily exempt the Tongass National Forest from the rule and an advanced notice of proposed rulemaking to permanently exempt the forest from the rule. The U.S. Court of Appeals for the Ninth Circuit struck down the exemption in July 2015. The state brought another case in the U.S. District Court for the District of Columbia after the exemption was overturned, contending, among other things, that the Roadless Rule violated the Tongass Timber Reform Act, which requires USDA to seek to provide a supply of timber from the Tongass that meets market demand. The district court ruled against the state, and the case is currently on appeal before the U.S. Court of Appeals for the D.C. Circuit.

Separately, in January 2018, the state petitioned the USDA to exempt the Tongass National Forest from the Roadless Rule. On June 1, 2018, Secretary of Agriculture Sonny Purdue accepted the petition and directed the Chief of the USFS to initiate a state-specific rulemaking for roadless management direction for the Tongass National Forest. The USFS has previously developed state-specific roadless rules for Colorado and Idaho. The August 2 MOU includes provisions for the parties to cooperate in development of the Alaska state-specific rule. The USFS [press release](#) indicates that a final Alaska Roadless Rule will be released by June 2020. Relief from the Roadless Rule could be key in facilitating development of hydropower on USFS lands.

“Waters of the United States” Rule Reinstated in 26 States after Court Enjoins Delay

On August 16, 2018, the U.S. District Court for the District of South Carolina issued an order enjoining a 2018 rule adopted by the Environmental Protection Agency (EPA) and U.S. Army Corps of Engineers (Suspension Rule) that sought to delay implementation of the agencies’ 2015 final rule redefining

jurisdictional “waters of the United States” under the Clean Water Act, commonly called the “WOTUS Rule.” The controversial WOTUS Rule, issued by the Obama administration, expands federal control over several types of water bodies, and requires federal permits for dredging, filling, or discharging pollution to those water bodies.

The agencies’ Suspension Rule delayed implementation of the WOTUS Rule until 2020 and directed that the definition of “waters of the United States” in the interim would be based on a 1982 regulation and the agencies’ and courts’ interpretations of that regulation. The court ruled that in adopting the Suspension Rule, the agencies violated the Administrative Procedure Act (APA) by failing to solicit public comments on the merits of the WOTUS Rule or the 1982 regulations. The court rejected the agencies’ argument that the Suspension Rule did not rescind or revise the WOTUS Rule. The court further determined that the agencies failed to provide a reasoned analysis for changing course. The court reinstated the WOTUS Rule in 26 states: California, Connecticut, Delaware, Hawaii, Illinois, Iowa, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, New Hampshire, New Jersey, New York, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, Tennessee, Texas, Vermont, Virginia, and Washington. Courts have stayed the effectiveness of the WOTUS Rule in 24 other states. The court’s ruling is limited to the agencies’ failure to comply with the procedural requirements of the APA, and does not rule on the merits of the WOTUS Rule.

The immediate effect of the injunction against the Suspension Rule is that developers must place careful attention on project siting to determine the governing rules for whether a particular stream or wetland is federally regulated. The WOTUS Rule may not remain in effect for long. An appeal of the district court’s decision is likely, and the agencies may issue a new Suspension Rule that comports with the requirements of the APA. As previously [reported](#), the agencies have already proposed formal rulemaking to rescind the WOTUS Rule. The comment period for the proposed rescission closed on August 13, 2018. The agencies also may issue a new WOTUS Rule in the near future.

For more information on the court’s order, please refer to our previous [alert](#).

EPA Proposes Affordable Clean Energy Rule

On August 21, 2018, EPA issued a [proposed rule](#) pursuant to section 111(d) of the Clean Air Act (CAA) that would establish emission guidelines for states to develop plans to limit carbon dioxide (CO₂) emissions from existing fossil-fired power plants. The proposed Affordable Clean Energy (ACE) rule would replace the 2015 Clean Power Plan (CPP), which EPA is proposing to repeal (in a separate rulemaking) on the grounds that the CPP exceeded the agency’s authority under the CAA. The U.S. Supreme Court issued a [stay](#) of the CPP in February 2016.

The ACE rule includes several core elements. Most significant to hydro, the ACE rule defines the “best system of emission reduction” (BSER) from existing coal-fired plants as heat-rate efficiency improvements at the emitting unit. This “inside the fence” BSER determination reflects a different approach than what was used in the CPP. The CPP determined the BSER for power plants based on reductions achievable not only through inside-the-fence measures such as heat rate improvements but also through shifting of generation from higher-emitting to lower-emitting or zero-emitting plants, such as hydropower. EPA has proposed to find that such an “outside-the-fence” approach to determining BSER exceeds the agency’s authority under the CAA.

The proposed rule would provide each state with broad discretion in establishing specific performance standards for particular plants. The proposal also allows state plans to rely on emission averaging and trading among affected coal-fired units at a particular plant. However, EPA has proposed that state plans should not be allowed to incorporate averaging and trading among different plants, such as a state-wide or interstate cap-and-trade program. Nor will any credit be given for CO₂ emissions reductions achieved through increased generation of renewable energy. The proposed rule explains that such an approach would be inconsistent with EPA’s proposed “inside-the-fence” interpretation of BSER under section 111 of the CAA.

According to EPA, the proposed ACE rule would reduce the compliance burden by up to \$400 million per year when compared to the CPP. The EPA estimates that the ACE rule could reduce overall 2030 CO₂ emissions by up to 1.5% from projected levels without the CPP. The deadline for comments on the ACE rule is October 30, 2018, and EPA also will hold at least one public hearing on the proposal, to be announced at a later date. For more information on the ACE rule, please see VNF's previous [alert](#).

EPA Issues Draft NPDES General Permits for Cooling Water and other Discharges from Hydroelectric Facilities in Massachusetts and New Hampshire

On August 20, 2018, EPA Region 1 released draft National Pollutant Discharge Elimination System (NPDES) [General Permits](#) for hydroelectric facilities discharging to waters in Massachusetts and New Hampshire. The General Permits will replace existing General Permits that expired on December 7, 2014.

Under longstanding judicial precedent, releases at hydroelectric dams are not subject to NPDES permits. The General Permits do not purport to regulate such releases. Instead, they provide NPDES authorization for discharges of pollutants that may occur as a result of hydroelectric project operations. As proposed, the General Permits would apply to: (1) equipment-related cooling water (both contact and non-contact), (2) equipment and floor drain water, (3) maintenance-related water from sump dewatering, (4) facility maintenance related water during flood high water events, and (5) equipment-related backwash strainer water. Discharge limitations are established for pH, oil and grease, and total suspended solids. The permit also requires a Best Management Practices plan to ensure discharges meet water quality standards.

Certain discharges are ineligible for a General Permit and require an application for an individual NPDES permit. These include, among others: discharges from new or existing facilities at which cooling water withdrawals exceed specified volumes; discharges to an "Outstanding Resource Water" as defined by state law; discharges to New Hampshire Class A waters (drinking water supply); new or increased discharges to a Wild and Scenic river; new or increased discharges to Massachusetts Ocean Sanctuaries; discharges identified by the state as the cause of an impairment to receiving water segments unless the discharge meets water quality standards; discharges that do not meet the state's anti-degradation policy; discharges likely to adversely affect a federally listed threatened or endangered species; discharges which adversely affect listed or eligible for listing properties under the National Historic Preservation Act; and discharges from a pumped storage facility, as determined on a case-by-case basis.

Operators of existing discharges, including those covered under the General Permits that expired in 2014, or that have individual permits, must file a new Notice of Intent to EPA and the applicable state within 60 days of the effective date of the permit reissuance. Comments on the draft NPDES General Permits are due by October 19, 2018. Once finalized, the General Permits will be effective for a term of five years.

[John Clements](#), [Sharon White](#), and [Robert Conrad](#) contributed to this issue.

For more information

The professionals at Van Ness Feldman possess decades of experience covering every aspect of hydroelectric development, ranging from licensing, environmental permitting, regulatory compliance, litigation, transmission and rates, public policy, transactions and land use planning. If you would like additional information on the issues touched upon in this newsletter, please contact any member of the firm's [hydroelectric](#) practice.

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