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Hydro Newsletter

VOLUME 6, ISSUE 5: MAY 2019

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D.C. Circuit Denies Rehearing of Hoopa Valley Tribe Order

On April 26, 2019, the U.S. Court of Appeals for the D.C. Circuit (D.C. Circuit) issued orders denying requests filed by several environmental organizations for rehearing of the Court's [decision](#) in *Hoopa Valley Tribe v. FERC (Hoopa Valley)* finding that the withdrawal and resubmission of water quality certification requests under Section 401 of the Clean Water Act (CWA) does not trigger a new statutory period of review. The organizations, including American Rivers, California Trout, and Trout Unlimited, sought rehearing of the decision by the original panel of three judges who issued the decision, or rehearing *en banc* by all active judges on the Court. The Court denied both requests. The environmental organizations will now have up to 90 days from April 26 to file a petition for a writ of certiorari with the U.S. Supreme Court.

FERC Issues Declaratory Order Finding Waiver of State Section 401 Authority

On April 18, 2019, the Federal Energy Regulatory Commission (FERC) [granted](#) Placer County Water Agency's (PCWA) petition for a declaratory order that the California State Water Resources Control Board (Water Board) has waived its authority under Section 401 of the CWA to issue a water quality certification in its ongoing relicensing for its Middle Fork American Project. PCWA filed its petition in response to the D.C. Circuit's [decision](#) in *Hoopa Valley*. PCWA initially filed an application with the Water Board for a 401 certification for its Middle Fork American Project in 2011. It subsequently withdrew and resubmitted its application each year between 2012 and 2018 at the direction of the Water Board. After the D.C. Circuit issued its order in *Hoopa Valley*, PCWA filed its petition for declaratory order asking FERC to declare that the Water Board had waived its certification authority under the *Hoopa Valley* decision.

FERC granted the petition, finding that the Water Board waived its Section 401 authority through the repeated withdrawal and refiling of PCWA's application for water quality certification. It found that while PCWA and the Water Board did not have a formal agreement to withdraw and refile the 401 application each year, correspondence between the parties demonstrates that the process was intended to delay a certification decision, just as the written agreement was intended to do in the *Hoopa Valley* case. FERC rejected arguments that *Hoopa Valley* should be applied only prospectively or is limited to the facts, finding that it applies to similarly-situated cases and that the process has been a cause of lengthy delay in the Middle Fork American Project relicensing.

Upcoming Speaking Engagements

- [Mike Swiger](#), National Hydropower Association Northeast Regional Meeting, Moderator: “CWA 401 Issues,” Lowell, MA, June 5, 2019.
- [Julia Wood](#), National Hydropower Association Northeast Regional Meeting, Panelist: “Hot Topics in the Northeast,” Lowell, MA, June 5, 2019.

Ironically, the Water Board issued a 401 certification for the project the day before FERC issued its declaratory order. FERC does not address this in its order. Neither does FERC address a situation where there has not been a repeated pattern of withdrawals and refilings, or where the lack of a water quality certification decision has not resulted in delay of the licensing process. However, FERC’s holding in *Placer County Water Agency* appears to have broader application beyond the facts of the case in that the order concludes: “Where no new Section 401 application was actually refiled—e.g., because the parties only exchanged correspondence indicating that they would refile without actually doing so—there would not appear to be a new filing with a new deadline.”

Federal District Court Holds It Has Jurisdiction to Hear Exelon Challenge to 401 Certification

On March 29, 2019, the U.S. District Court for the District of Columbia [ruled](#) that Exelon Generation’s challenge to the 401 certification issued by the State of Maryland its ongoing Conowingo Project relicensing properly lies in federal court in the District of Columbia. The court dismissed the State of Maryland’s claim that Exelon should have challenged its 401 certification in state court and that the appropriate state court would be located in Maryland. The 401 certification, issued on April 27, 2018, imposes significant requirements for Exelon to remove itself or pay to have removed the phosphorus and nitrogen that flow from upstream on the Susquehanna River, at a cost of up to \$7 billion over the term of the new FERC license. Exelon argues that the requirements under the 401 certification interfere with two major federal regulatory regimes—the Federal Power Act and the Environmental Protection Agency’s (EPA) Chesapeake Bay Total Maximum Daily Load program.

Exelon argued that venue was proper in federal court in the District of Columbia because “a substantial part of the events having ‘operative significance’ to Exelon’s claim occurred in [the] District,” including that the 401 certification was submitted to FERC and will be incorporated into the new license that FERC will issue in the District. In denying Maryland’s request to transfer the case to state court, the court found that Exelon’s complaint does not turn on questions of substantive state environmental law, but involves federal claims over which federal district courts have jurisdiction. The court held that because the 401 certification will become legally binding only when FERC incorporates it into the FERC license, and a substantial part of the events giving rise to the suit occurred in the District, venue is proper in federal district court in the District.

Exelon has separately requested FERC to find that the State of Maryland waived its 401 authority under the *Hoopa Valley* decision through years of directing it to withdraw and resubmit its 401 application. Exelon’s petition for declaratory order remains pending before FERC.

FERC Affirms Waiver of Section 401 Authority in Gas Pipeline Case

On April 2, 2019, FERC denied rehearing of its August 2018 order finding that the New York State Department of Environmental Conservation (New York DEC) waived its Section 401 authority to issue a 401 certification for a gas pipeline project in Pennsylvania and New York. New York DEC received an application for 401 certification for the project on March 2, 2016. The applicant and New York DEC subsequently agreed to revise the date on which the application was deemed received to April 8, 2016 to extend the date for New York DEC to make a final determination. New York DEC ultimately denied the 401 application, and the applicant requested FERC to find a waiver based on New York DEC’s failure to act within one year of the date the agency received the 401 application, as required by the CWA. On August 6, 2018, FERC found that the New York DEC waived its 401 authority by failing to act within one year. FERC determined that an applicant and state agency cannot extend the statutory deadline for the state to act under the CWA by an agreement to modify the receipt date from which the one-year period commences.

On rehearing, the New York DEC argued that its denial of the water quality certification was timely because the applicant agreed to extend the one-year deadline. FERC rejected the argument, and affirmed that the section 401 deadline cannot be waived by agreement. FERC relied on the *Hoopa Valley* case, which was issued while rehearing in the case was pending, and found that the cases share the same salient facts, i.e., an agreement was reached to delay the state agency’s action on a 401 application. FERC found that, like the *Hoopa Valley* case, the CWA prohibits state agencies and applicants from

entering into written agreements to delay water quality certifications. It reasoned that an extension of the deadline under the CWA would contravene the statutory purpose of encouraging timely action on water quality certification applications.

In response to New York DEC's concern that it may require additional time to act in the event of an incomplete application, FERC noted that the New York DEC is not without suitable recourse, in that it can deny an application with or without prejudice. FERC has not yet made a similar determination in the hydropower context. However, California has begun to routinely deny 401 applications in hydropower licensings without prejudice even as to applications it has previously deemed complete, in order to attempt to extend the one-year process.

President Trump Issues Executive Order Regarding CWA Section 401

On April 10, 2019, President Trump [issued](#) an "Executive Order on Promoting Energy Infrastructure and Economic Growth." While the Executive Order is targeted toward efficient permitting of energy infrastructure projects utilizing coal, oil, and natural gas, it includes proposals to potentially address the "confusion and uncertainty" of the Section 401 process.

First, the Executive Order directs the Administrator of the EPA to consult with states, tribes, and federal agencies to review EPA's regulations and guidance on Section 401 to determine whether any provisions should be clarified to promote investment in energy infrastructure. The review must focus on: (i) the need to promote timely federal-state cooperation and collaboration; (ii) the appropriate scope of water quality reviews; (iii) types of conditions that may be appropriate to include in a 401 certification; (iv) reasonable review times for certification requests; and (v) the nature and scope of information states and tribes need to act on certification requests within a prescribed period of time.

Second, by June 9, 2019, EPA must complete its review and, as appropriate, issue new guidance to states and tribes to supersede the [interim guidance document](#) entitled "Clean Water Act Section 401 Water Quality Certification: A Water Quality Protection Tool for States and Tribes."

Third, no later than August 8, 2019, EPA must review its regulations implementing Section 401 and issue proposed rules to revise its regulations consistent with the goals of the Executive Order. EPA must finalize the rule by May 10, 2020. Federal agencies that issue permits or licenses subject to Section 401 certifications must review and update their guidance and regulations to be consistent with EPA's final rule.

FERC Issues Final Rule to Implement Expedited Licensing Process under AWIA

On April 18, 2019, FERC issued a [Final Rule](#) establishing rules for a new expedited licensing process (ELP) for qualifying facilities at existing non-powered dams and closed-loop pumped storage projects, as required by the America's Water Infrastructure Act of 2018 (AWIA). FERC's Final Rule largely adopts the rules it proposed in its January 2019 Notice of Proposed Rulemaking (NOPR), as described in our February 2019 [newsletter](#), with only slight modifications.

Among other changes, FERC clarified the definition of a closed-loop pumped storage project. In the NOPR, FERC proposed to retain its previous definition of a closed-loop pumped storage project (i.e., a pumped storage project that is not continuously connected to a naturally-flowing water feature). In response to comments filed by federal resource agencies, FERC revised the definition to include projects that: (1) cause little to no change to existing surface and groundwater flows and uses; (2) are unlikely to adversely affect species listed as threatened or endangered or designated critical habitat of such species under the Endangered Species Act; (3) utilize only reservoirs situated at locations other than natural waterways, lake, wetlands, and other natural surface water features; and (4) rely only on temporary withdrawals from surface waters or groundwater for initial fill and periodic recharge needed for project operation.

In addition, FERC modified its requirements regarding Section 401 water quality certifications for projects using the ELP. In the NOPR, FERC proposed to require an applicant to submit, at the time of

filing its license application, a copy of its request for Section 401 water quality certification, and: (i) a copy of the 401 certification; (ii) evidence of the state's waiver of 401 authority; or (iii) documentation from the state certifying that the 401 application is complete. Recognizing that requiring applicants to submit documentation from a state agency that the 401 application is complete would be unduly burdensome, FERC removed this requirement, and applicants need only provide a copy of the request for 401 certification, the water quality certification itself, or evidence of a state's waiver. This mirrors the requirements for applicants under FERC's existing licensing processes.

FERC resisted hydropower industry proposals to expand the rulemaking to include ways to streamline the pre-filing process for applicants utilizing the ELP. Relying on the AWIA's requirement to "seek to ensure a final decision will be issued no later than two years after" the receipt of a completed application, FERC declined to address the pre-filing phase.

The Final Rule will become effective as of June 23, 2019.

FERC Grants Rehearing of Poe Project New License

On April 18, 2019, FERC granted [rehearing](#) of its new license for the Poe Hydroelectric Project, located in California, by modifying the new license term from 40 to 50 years. The licensee, Pacific Gas and Electric Company (PG&E), argued on rehearing that it should have received a 50-year new license term under FERC's "Policy Statement on Establishing License Terms for Hydroelectric Projects," which allows FERC to grant a license term longer than the default 40 years based on significant measures voluntarily implemented by the licensee during the prior license term. PG&E stated that it had invested over \$54 million in capital improvements at the project since filing its license application in 2003. FERC granted rehearing and extended the license term; however, it based its decision not on its Policy Statement but on the AWIA. Section 3005 of the AWIA requires FERC to consider voluntary investments by the licensee over the term of the existing license related to the efficiency, modernization, rehabilitation or replacement of major equipment, some of which are excluded from consideration under FERC's Policy Statement. Consequently, FERC found that PG&E's investments, including turbine and generator improvements, replacement of a cooling water system, replacement or refurbishment of trunnion gates, and replacement of the gate control system, all were related to improving the operational efficiency of the project and modernizing and rehabilitating the project works, and thus justified a longer license term under the AWIA.

DOE and BOR Issue Funding Announcements

During the month of April, the Department of Energy (DOE) and Bureau of Reclamation (BOR) announced multiple competitions and funding opportunities aimed at development of technology and innovation in the hydropower field.

The Furthering Advancements to Shorten Time (FAST) Commissioning for Pumped Storage Hydropower (PSH) Prize: This [competition](#) seeks novel solutions and technologies that address the non-regulatory challenges PSH developers face deploying new storage projects and supports the goal to reduce the time to commission PSH from its current 10 years to fewer than five years. The FAST Commissioning Prize provides both cash and in-kind laboratory support prizes. The goal of the prize is to catalyze new solutions, designs and strategies to accelerate PSH development. Concepts could include innovative PSH concepts, new layouts, creative construction management, improved construction equipment, application of advanced manufacturing, or standardization of equipment. 10 finalists will be selected. These finalists will receive 50 hours of support over approximately three months from the FAST national laboratory partners in preparation for a pitch contest with up to three winners and up to \$950,000 of combined cash prizes and vouchers support. The concept stage of the prize closes on May 24, 2019 with concept stage winners being announced in July 2019. Grand prize winners are slated to be announced in October 2019.

Innovative Industry-Led Technology Solutions Related to Hydropower and Marine Energy: In an effort to drive innovative industry-led technology solutions to advance the marine and hydrokinetics industry and increase hydropower's ability to serve as a flexible grid resource, DOE [announced](#) up to \$26.1 million in funding. The funding will support projects in four Areas of Interest—Hydropower Operational Flexibility, Low-Head Hydropower and In-Stream Hydrokinetic Technologies, Advancing

Wave Energy Device Design, and Marine Energy Centers Research Infrastructure Upgrades—to increase affordability of hydropower and marine energy, strengthen U.S. manufacturing competitiveness, and build on Department-wide storage initiatives, which focus on improving the capabilities of technologies to deliver value to the grid.

Hydropower and Water Innovation for a Resilient Electricity System: The Water Power Technologies Office [announced](#) a new initiative known as Hydropower and Water Innovation for a Resilient Electricity System (HydroWIRES). The goal of the initiative is to better understand and utilize the full potential of hydropower and pumped storage technologies to support electricity system reliability and resilience. Research under this initiative supports DOE’s storage efforts and is divided into four separate but interrelated areas—Value under Evolving System Conditions, Capabilities and Constraints, Operations and Planning, and Technology Innovation.

Improving Fish Exclusion from Water Diversions and Intakes: BOR [announced](#) a new prize competition—the Improving Fish Exclusion from Water Diversions and Intakes Prize—to seek innovative concepts for excluding fish from water systems, which could also improve downstream fish passage at hydropower dams. The first stage of this effort is being led by BOR and has a prize purse of up to \$75,000. In addition, DOE, in partnership with BOR and DOE national laboratories, intends to support a multi-phase contest to follow this competition, with a total prize purse of up to \$750,000 potentially available for high-impact opportunities identified in the first stage. This competition will close on May 6, 2019.

[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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