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Hydro Newsletter

VOLUME 6, ISSUE 10: OCTOBER 2019

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FERC Proactively Determines Water Quality Certification Waived

On September 20, 2019, the Federal Energy Regulatory Commission (FERC) issued an original license to McMahan Hydroelectric, LLC for a hydroelectric project in North Carolina, in which it determined that the North Carolina Department of Environmental Quality (NCDEQ) had waived Clean Water Act (CWA) section 401 water quality certification (WQC) for the project by failing to act on the WQC application within a reasonable period of time, not to exceed one year from receipt of the application. FERC's order is noteworthy because it appears to be the first time since the U.S. Court of Appeals for the District of Columbia Circuit's (D.C. Circuit) decision in *Hoopa Valley Tribe v. FERC* that FERC has ruled that a state agency waived its section 401 authority based on withdrawal and refiling of a certification request where the license applicant did not request such a determination.

The applicant in the case filed its initial WQC application in 2017. NCDEQ requested additional information and informed the applicant that its application would be on hold until the additional information, including FERC's Draft Environmental Analysis (EA), was received. The applicant submitted the additional information, but FERC did not issue its EA within one year of the application. NCDEQ instructed the applicant to withdraw and resubmit its WQC application, which it did prior to one year from the initial submittal. Before one year passed from the resubmittal, the D.C. Circuit issued its decision in *Hoopa Valley*, holding that the withdrawal and resubmission of a WQC request under section 401 does not trigger a new statutory period of review. Shortly thereafter, the applicant made a second resubmittal of its WQC application.

Consistent with its post-*Hoopa Valley* waiver orders, FERC held that refiling of the WQC application did not restart the one-year clock; a formal agreement between the state agency and the applicant to extend the deadline is not necessary to support a finding of waiver; and neither a request for nor submittal of additional information delays the one-year deadline.

FERC also stated that submittal of additional information requested by a state agency would not generally be a material change in the application sufficient to be characterized as a material amendment to the application warranting a new WQC request. FERC cited in this connection a prior order in which it characterized a material change in the proposed project as one involving significant changes to a

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Upcoming Speaking Engagements

- Matt Love, The Seminar Group: Hydropower Relicensing, Panelist: "Clean Water Act – One Year Deadline" and "Federal Environmental Regulatory Update," Seattle, WA, October 3, 2019.

project's physical features. It may be that FERC intended to establish a standard that in order for a resubmittal of a WQC application or submittal of additional information to restart the one-year clock, it must involve significant changes to a project's physical features.

In his partial dissent, Commissioner Richard Glick agreed that NCDEQ waived its section 401 authority because the resubmitted WQC application did not significantly modify or supplement the application. However, he suggested that a significant modification to a pending WQC application might justify withdrawal and resubmittal of the application without violating the one-year deadline for action. The majority disagreed, responding that in the absence of a significant modification to the project's physical features, only unusual circumstances might justify an exception to the one-year time limit.

Supreme Court Extends Deadline to File Responses to Petition for Certiorari in *Hoopa Valley Tribe* Case

On August 26, 2019, California Trout and Trout Unlimited filed a petition for a writ of certiorari with the U.S. Supreme Court to the D.C. Circuit's January 25, 2019 decision in *Hoopa Valley Tribe v. FERC*. Briefs in opposition to the petition for a writ of certiorari were originally due by September 27, 2019. However, upon requests filed by PacifiCorp and the U.S. Department of Justice Office of the Solicitor General, the Court extended the deadline for responses to October 28, 2019 for all respondents.

Litigation Filed Challenging Endangered Species Act Final Rules

On August 27, 2019, the National Marine Fisheries Service and U.S. Fish and Wildlife Service (USFWS) (together, the Services) published three final rules revising the Endangered Species Act (ESA) regulations implementing: section 4 (listings and critical habitat); section 7 (consultation); and section 4(d) (USFWS application of take prohibition to threatened species). For more information on the final rules, see our earlier hydro newsletter and issue alert.

Prior to publication of the final ESA rules, on August 21 2019, a number of environmental groups filed a complaint in the U.S. District Court for the Northern District of California challenging the rules. The complaint currently includes claims regarding certain revisions to the ESA section 7 regulations, compliance with the National Environmental Policy Act, and the adequacy of the notice and comment rulemaking process. Based on a 60-day notice letter, the plaintiffs are likely to amend their complaint to include additional claims regarding the revisions in the ESA section 4 rule, the recession of the blanket section 4(d) rule, and failure to conduct section 7 consultation on the final rules. Separately, on September 24, 2019, a coalition of 17 States, the District of Columbia, and the City of New York filed their own complaint in the same court challenging the three ESA final rules on procedural and substantive grounds.

This litigation presents an important opportunity for members of the regulated community to provide additional arguments regarding the ESA regulatory revisions. If you are interested in finding out more, please contact Tyson Kade at 202-298-1948.

Services Delay Effective Date of ESA Section 7 Regulatory Revisions

The Services have delayed the effective date of the final rule revising their ESA section 7 consultation regulations to October 28, 2019. The final rule was previously scheduled to go into effect on September 26, 2019. The Services state that additional time is needed to adequately educate and train staff and the affected federal agencies on the regulatory revisions to ensure a smooth transition and allow for additional coordination. The final rules revising the section 4 and section 4(d) regulations went into effect on September 26, 2019.

Federal Agencies Repeal Obama-Era Clean Water Rule

On September 12, 2019, the Environmental Protection Agency and U.S. Army Corps of Engineers (together, the Agencies) announced that they are publishing a final rule (the Repeal Rule) that rescinds the definition of "Waters of the United States" under the CWA adopted by the Obama administration in 2015 (the 2015 Rule). If implemented, it is expected that the Repeal Rule will narrow the scope of

waterbodies subject to regulation under the CWA. The Repeal Rule becomes effective sixty days from its date of publication in the *Federal Register*.

The 2015 Rule raised several concerns for the hydropower industry which are addressed by the Repeal Rule. Specifically, it established a bright-line rule that categorized all tributaries (including ephemeral tributaries), impoundments of jurisdictional waters, and all wetlands within 100 feet of a tributary of a jurisdictional water or within 1500 feet of a high tide line as waters of the United States. Therefore, under the 2015 Rule, jurisdictional status could be established where ephemeral streams or ditches are connected to water conveyance and delivery systems that are part of a hydroelectric facility, including flumes, siphons, and/or canals. As discussed in a previous alert, as a result of litigation, the 2015 Rule has been effective in 22 states and the District of Columbia but enjoined in 27 states.

The Repeal Rule finalizes step one of the Agencies' two-step process, which would (1) repeal the 2015 Rule; and (2) replace it with a more streamlined rule. In December 2018, the Agencies began step two with a proposed rule to redefine the meaning of "Waters of the United States" (the Replacement Rule). It is anticipated that the Replacement Rule will be acted upon later in 2019 or early 2020.

As a practical matter, the Repeal Rule returns the definition of "Waters of the United States" to the pre-2015 regulatory text and allows for implementation under the Agencies' guidance issued after the Supreme Court's decision in *Rapanos v. United States*. Both the Repeal Rule and Replacement Rule will likely be challenged by environmental groups. Depending on the outcome of litigation, the 2015 Rule could continue to be effective in those jurisdictions where it has not been enjoined. Also, continued litigation is a near certainty, and the Repeal Rule or a finalized Replacement Rule could be vacated, remanded, or upheld. Thus, the hydropower community will face continued uncertainty regarding the geographic scope of the CWA in the near term. For more information on the Repeal Rule, see our issue alert.

FERC Proposes Reforms to PURPA Regulations

On September 19, 2019, FERC issued a notice of proposed rulemaking (NOPR) to revise its regulations implementing the Public Utility Regulatory Policies Act of 1978 (PURPA). PURPA was enacted to encourage development of small power production facilities that do not rely on fossil fuels and cogeneration facilities (together, qualifying facilities or QFs). FERC has not comprehensively reviewed its PURPA rules since they were first enacted in 1980. In its NOPR, FERC explained that circumstances have changed since 1980 and its proposals are intended to better address consumer concerns and market changes in the energy landscape. The proposed changes are likely to have significant implications for utilities required to purchase the output of QFs and for developers and generators that rely on PURPA rates and obligations for the commercial viability of their projects.

The NOPR includes several significant changes to FERC's implementation of PURPA. First, FERC proposes to allow states the flexibility to incorporate market pricing in avoided cost rates. It would allow states to eliminate a QF's option to fix energy rates for the full term of the contract and require instead that energy be purchased at a variable rate calculated at the time of delivery. Alternatively, the states could retain the QF's ability to fix energy rates for the full contract term, but require such fixed rates to be based on forecasted energy prices at the time of delivery. Second, FERC proposes to require a QF to demonstrate commercial viability and financial commitment to construct a project, as determined by the state, as a prerequisite to a utility's obligation to purchase.

FERC also proposes to broaden the ability of utilities to terminate their mandatory purchase obligation from small power production QFs. Under PURPA, a utility may seek to terminate its mandatory purchase obligation by demonstrating that QFs have non-discriminatory access to wholesale markets. FERC's current rules establish a rebuttable presumption that QFs with a capacity of 20 MW or less do not have non-discriminatory access to wholesale markets. FERC proposes to reduce the rebuttable presumption for small power production QFs to 1 MW or less.

FERC also proposes to modify its one-mile rule. Currently, affiliated QFs located within one mile of one another that use the same power source are treated as a single facility for purposes of PURPA's 80 MW size limit. To address arguments that QF developers circumvent the one-mile rule by siting small power

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production facilities just over one mile apart to be considered separate facilities, FERC proposes to allow parties to challenge the QF status of generators located more than one mile but less than 10 miles apart. FERC proposes a rebuttable presumption that QFs located more than one mile but less than 10 miles apart are separate facilities. Purchasing utilities, other parties, or FERC itself may attempt to rebut the presumption and argue that the facilities should be treated as a single facility.

FERC also proposes to allow a party to protest a self-certification or self-recertification without being required to file a separate petition for declaratory order, for which its current regulations assess a filing fee of $28,990.

Comments on the NOPR are due 60 days after publication in the *Federal Register*. For more information on the Repeal Rule, see our issue alert.

Yuba Water Agency's Curt Aikens Receives Lifetime Achievement Award

On September 4, 2019, the American Society of Civil Engineers' Sacramento Section honored Yuba Water Agency General Manager Curt Aikens with its 2019 Lifetime Achievement Award. The award recognizes individuals who, through their innovative efforts and long-term involvement, have advanced or significantly contributed to the field of civil engineering for the benefit of the community. Aikens was specifically recognized for leading Yuba Water Agency's role in reducing the flood risk for the people of Yuba County, and for his role in the development and operations of the Forecast-Coordinated Operations program for New Bullards Bar and Oroville Reservoir water releases. The award also highlighted Aikens for the initiation of the new secondary spillway project at New Bullards Bar Dam, which will reduce flood risk and enhance dam safety. Van Ness Feldman is FERC regulatory counsel to Yuba Water Agency.

John Clements, Tyson Kade, Sharon White, and Sophia Amberson 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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