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Hydro Newsletter

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FERC Declaratory Order Finding Waiver of California Section 401 Authority Challenged in Ninth Circuit

The California State Water Resources Control Board (Water Board) and a group of environmental organizations, including the South Yuba River Citizens League, California Sportfishing Protection Alliance, Friends of the River, and the Mother Lode Chapter of the Sierra Club, each have filed a petition for review with the U.S. Court of Appeals for the Ninth Circuit (Ninth Circuit) of Federal Energy Regulatory Commission (FERC) orders finding that the Water Board waived its authority under section 401 of the Clean Water Act (CWA) to issue a water quality certification (WQC) in the ongoing relicensing of Yuba County Water Agency's (YCWA) Yuba River Development Project. YCWA filed its request for determination of waiver in response to the U.S. Court of Appeals for the D.C. Circuit's (D.C. Circuit) [decision](#) in *Hoop Valley Tribe v. FERC* and FERC's subsequent [declaratory order](#) in *Placer County Water Agency*. FERC issued its waiver determination on May 21, 2020 and an order denying rehearing on July 21, 2020.

As described in our [June newsletter](#), YCWA initially filed its 401 application with the Water Board in August 2017 and subsequently withdrew and resubmitted its application in August 2018 at the direction of the Water Board. In July 2019, the Water Board denied YCWA's application without prejudice on the basis that the California Environmental Quality Act (CEQA) process and consultation under the federal Endangered Species Act (ESA) were not yet complete, and encouraged YCWA to file a new request. YCWA did not file a new 401 application, but instead sought a determination from FERC that the Water Board had waived its authority under section 401.

FERC granted YCWA's request, finding that the Water Board waived its section 401 authority. Consistent with its other waiver decisions, FERC held that a formal agreement between a licensee and a state is not necessary to support a finding of waiver. In response to the Water Board's argument that YCWA voluntarily withdrew its application each year to avoid a denial without prejudice, FERC found that the Water Board directly asked YCWA to withdraw and resubmit its application to avoid the CWA's one-year waiver deadline. FERC also rejected arguments that the 401 certification process was held up by the CEQA and ESA processes.

As reported in our [September newsletter](#), there are also challenges pending in the Ninth Circuit to FERC's 401 waiver determination in Nevada Irrigation District's ongoing relicensing of the Yuba-Bear Hydroelectric Project.

FERC Commissioner Update

As reported in last month's [newsletter](#), President Donald Trump has nominated Virginia Corporation Commission Chair Mark Christie and former Natural Resources Defense Council attorney Allison Clements to be FERC Commissioners. Once confirmed by the U.S. Senate, Christie would fill the seat previously held by Republican Bernard McNamee, and Clements would fill the seat previously held by Democrat Cheryl LaFleur. They would join Neil Chatterjee (Chairman), Richard Glick (Democrat), and James Danly (Republican), returning FERC to a full slate of five Commissioners. On September 16, 2020, the U.S. Senate Energy and Natural Resources Committee held a hearing to consider the nominations. The Committee will still need to hold a vote on the nominations, followed by a full Senate vote. Chairwoman Murkowski stated during the hearing that she hoped to move the nominees through the Senate quickly, but a floor vote could be delayed by the pending nomination to fill the Supreme Court vacancy.

FERC Amends its Rehearing Practices

On September 17, 2020, FERC [announced](#) changes to its practices concerning requests for rehearing in response to the D.C. Circuit's recent decision in *Allegheny Defense Project v. FERC*. In that case, the D.C. Circuit held that the Natural Gas Act (NGA) does not grant FERC the authority to issue a "tolling order" to extend the time to act on a request for rehearing beyond the statutory 30 days allotted under the NGA (and under an identical provision in the Federal Power Act (FPA)). In response to the Court's decision, FERC has announced that it will no longer issue tolling orders to extend the time to act on rehearing requests in cases arising under the FPA and NGA. Instead, where FERC will not act on the merits of a rehearing request within 30 days, FERC will issue one of two types of notices: a Notice of Denial of Rehearing by Operation of Law, or a Notice of Denial of Rehearing by Operation of Law and Providing for Further Consideration. In the latter case, FERC will issue a further order addressing issues raised on rehearing at a later time, pursuant to its authority to "modify or set aside" the underlying order until the record on appeal is filed with a reviewing court. In both cases, parties continue to have 60 days after the denial by operation of law to file a petition for review with an appropriate appellate court. In lieu of these notices, FERC may still issue a rehearing order on the merits within 30 days of a rehearing request.

FWS Proposes Amendments to ESA Section 4 Implementing Regulations

On September 8, 2020, the U.S. Fish and Wildlife Service (FWS) published a [proposed rule](#), entitled "Endangered and Threatened Wildlife and Plants; Regulations for Designating Critical Habitat" (Proposed Rule) that would amend portions of FWS's implementing regulations for ESA Section 4. Section 4(b)(2) of the ESA mandates consideration of the impacts of designating critical habitat and permits exclusion of particular areas following a discretionary exclusion analysis. The Proposed Rule articulates how FWS would undertake an exclusion analysis, including a list of non-exhaustive categories of potential impacts for FWS to consider. The categories include consideration of impacts on tribal lands; national security and homeland security; federal lands; economic and other relevant impacts; and conservation plans or agreements and partnerships, including conservation plans related to permits under ESA Section 10.

Before the U.S. Supreme Court's 2018 decision in *Weyerhaeuser Co. v. U.S. Fish & Wildlife Service*, FWS took the position that a decision not to exclude an area was entirely discretionary to the point that the decision could not be reviewed by a court under the Administrative Procedure Act. In *Weyerhaeuser*, the Supreme Court held to the contrary that decisions not to exclude a particular area are judicially reviewable. As such, the Proposed Rule acknowledges that decisions not to exclude critical habitat under Section 4(b)(2) are reviewable, while still reserving as much discretion as possible to FWS in making such decisions.

Public comments on the proposed rule will be accepted until October 8, 2020.

MRES Red Rock Hydroelectric Project Commences Operation

On September 2, 2020, Missouri River Energy Services (MRES) held a dedication ceremony to mark the completion of the new Red Rock Hydroelectric Project (RRHP). The project was constructed at the

existing U.S. Army Corps of Engineers' Lake Red Rock Dam on the Des Moines River in Iowa. Construction on the hydroelectric project lasted six years. The project is now Iowa's second largest hydropower generator and is expected to produce more than 36 megawatts of electricity, with up to 55 MW of generation during summer months when water levels are typically the highest. In addition to retrofitting the dam to generate electricity, MRES made several other enhancements to the Lake Red Rock site, including new recreational facilities. Financing for the project was provided by MRES's partner, Western Minnesota Municipal Power Agency.

[Sharon White](#) and [Rachael Lipinski](#) 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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