Van Ness Feldman LLP
vnf.com

Van Ness Feldman is home to one of the premier hydropower law practices in the United States.

Our current and recent matters involve over 50 percent of all installed hydroelectric capacity in the country.

Additionally, the firm advises developers of new hydropower projects, including conventional large and small hydro, pumped storage, and emerging technologies using wave and tidal energy.

Hydro Newsletter

VOLUME 8, ISSUE 9: SEPTEMBER 2021

To receive the Hydropower Newsletter on a regular basis, follow this link: http://www.vnf.com/KnowledgeCenter.aspx?SignUp=True

District Court Vacates 2020 Navigable Waters Protection Rule Defining WOTUS

On August 30, 2021, the U.S. District Court for the District of Arizona in *Pasqua Yaqui Tribe v. EPA*, Case No. 4:20-cv-00266, vacated the 2020 Navigable Waters Protection Rule ("NWPR") defining jurisdictional "Waters of the U.S." ("WOTUS") under the Clean Water Act ("CWA"). The district court found "fundamental, substantive flaws that cannot be cured without revising or replacing the NWPR's definition" and accordingly remanded and vacated the rule. It appears that the court ruling applies nationwide, but it is possible that the ruling will only apply in Arizona.

Notably, the Environmental Protection Agency ("EPA") and U.S. Army Corps of Engineers ("Corps") (collectively, the "agencies") are already in the process of revising the NWPR's definition of WOTUS, and had sought a voluntary remand of the NWPR while they work on the ongoing rulemaking to revise the WOTUS definition. However, the agencies had not sought vacatur of the NWPR. Following the district court's decision to vacate the NWPR, the agencies announced that they have halted the implementation of the NWPR and will be applying the pre-2015 WOTUS definition. For additional information, please see our alert on the court order an ongoing rulemaking process.

Federal Government Asks to Stay Challenges to ESA Rule

On August 13, 2021, the U.S. Fish and Wildlife Service ("FWS") and National Marine Fisheries Service ("NMFS") ("Federal Defendants" or "Services") filed a motion with the U.S. District Court for the Northern District of California to stay three consolidated lawsuits brought by various states, the Animal Legal Defense Fund, Earthjustice, Natural Resources Defense Fund, and Center for Biological Diversity ("Plaintiffs") challenging Endangered Species Act ("ESA") rules issued by the Federal Defendants in 2019 ("2019 ESA Rules").

The Plaintiffs brought this suit in August 2019 to challenge three 2019 ESA Rules, which were viewed as rollbacks to ESA protections: Section 4 Rule, Section 4(d) Rule, and Section 7 Rule. Briefly, the Section 4 Rule modified the procedures under ESA Section 4 for listing and delisting species and designating occupied and unoccupied areas as critical habitat including: clarifying the duration of the "foreseeable future" when determining whether to list a species as threatened; revising the procedures for designating critical habitat; and streamlining the process for delisting and reclassifying species. The Section 4(d) Rule prospectively required FWS to adopt species-specific Section 4(d) rules for the identification of prohibited "take" of a threatened species (similar to NMFS's long-standing practice).

The Section 7 Rule revised the regulations governing the Services' Section 7 consultation process, including: adopting deadlines for the Services' completion of informal consultations; revising key terms regarding the identification of baseline conditions, potential effects, and the level of causation and certainty required in the review of effects of an action on species and critical habitat; clarifying what constitutes adverse modifications of critical habitat; and adopting programmatic and other alternative consultation mechanisms. For a more detailed discussion of the 2019 ESA Rules, please see our previously published alert.

On January 20, 2021, just one day after the Plaintiffs filed motions for summary judgment asserting challenges to the merits of the 2019 ESA Rules, President Biden issued the Executive Order on Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis. This Executive Order, which directed the Services to evaluate, and where appropriate, revise or rescind environmental and public health related regulations that were issued under the Trump Administration. In a publication accompanying the Executive Order, the Services were specifically directed to review the three ESA regulations challenged in the underlying litigation.

On June 4, 2021, after a review of the regulations, the FWS announced its intent to propose a rulemaking to rescind the Section 4(d) Rule, and the Services announced their intent to revise the Section 4 and Section 7 Rules. According to the Federal Defendants' motion, the Services will be prepared to submit the proposed rules to revise and rescind the 2019 ESA Rules to the Office of Management and Budget ("OMB") by October 18, 2021 for the Section 4 and Section 7 Rule, and January 14, 2022 for the Section 4(d) Rule, and submit Notices of Proposed Rulemaking ("NOPR") to the Federal Register for publication by January 27, 2022 for the Section 4 and Section 7 Rules, and April 25, 2022 for the Section 4(d) Rule. After a 60-day comment period on the NOPRs, the Services anticipate sending the final rules to OMB by August 23, 2022, and the Final Action Notices to the Federal Register for publication of the final rules by December 2, 2022 for the Section 4 and Section 7 Rules, and January 27, 2023 for the Section 4(d) Rule. The Federal Defendants explain slightly different deadlines for the Section 4(d) Rule because there are a limited number of agency staff and attorneys at the Services who possess the necessary experience and expertise to craft the regulations.

Because the Services have plans to revise the regulations being challenged in the litigation, the Federal Defendants requested that the court stay the litigation until the Services complete the rulemaking processes and issue final decisions to the 2019 ESA Rules. In their motion, the Federal Defendants argue that the three factors weighed by a court when determining whether to grant a stay weigh in favor of the Federal Defendants: (1) the "orderly course of justice" factor is met because the requested stay can be expected to simplify the disputed issues and promote judicial economy; (2) the Federal Defendants will suffer hardship if the litigation proceeds before the rulemaking process to revise and rescind the 2019 ESA Rules is complete; and (3) the Plaintiffs will not be prejudiced if the case is stayed until the Services make final decisions on the 2019 ESA rules.

Sauk-Suiattle Suit Seeks Declaratory Judgment on Seattle City Light's Gorge Dam

On July 27, 2021, the Sauk-Suiattle Indian Tribe filed a complaint for declaratory and injunctive relief in Skagit County (WA) Superior Court against the City of Seattle and Seattle City Light ("SCL") to require fish passage or to prohibit maintenance of the Gorge Dam. The Dam is one of three dams that make up the Skagit River Hydroelectric Project. Seattle City Light owns and operates the Project pursuant to a Federal Energy Regulatory Commission ("FERC") license.

The complaint alleges violations of the Establishing Acts, which established Oregon Territory, parts of which later became Washington Territory, as well as violations of Washington state law. Specifically, the Tribe claims that the Establishing Acts guaranteed fish passage and that the presence and operation of such dams block fish passage and thus violate the Establishing Acts.In addition, the complaint alleges that the blocking of fish passage violates the Supremacy Clause of the United States Constitution and Washington common law, and constitutes a nuisance.

SCL removed the case to federal court on July 29, 2021, and filed a motion to dismiss on August 5, 2021 alleging that the Tribe's reliance on the Establishing Acts presents no relief and their Washington

common law and tort claims are a collateral attack on the FERC license, and that the Federal Power Act preempts their state law claims.

Hydropower Funding in the Infrastructure Bill

The bipartisan infrastructure bill, which recently passed the U.S. Senate, would provide funding for new hydropower investments if passed by the House of Representatives. Dam removal projects would receive at least $75 million of the $585 million appropriated to the National Dam Safety Act, as well as an additional $10 million in funding for the removal of non-hydropower dams and federal technical assistance. $67 million would be appropriated for federal dam safety activities and assistance to states, including dam removal projects.

Furthermore, the infrastructure bill would invest in hydropower production and improvements, the Columbia River Treaty, research and development, and pumped storage. The bill would authorize $200 million for hydropower production and efficiency incentives; an additional $550 million would be available for projects that improve grid resiliency, dam safety, or environmental performance at existing dams. It would invest $200 million in rebalancing the Columbia River Treaty; half of the appropriations would enhance water storage and hydroelectric capabilities and half would improve coordination on cross-border river and power flows. The bill would also authorize about $145 million for water and marine power research and development, including hydropower. Additionally, the bill would authorize $2 million per year for each fiscal years between 2022 and 2026 for a pumped storage demonstration project to store intermittent renewable energy, such as wind and solar, and modify authority for pumped storage in Bureau of Reclamation reservoirs.

EPA Reissues Temperature TMDL in the Columbia and Lower Snake Rivers

On August 13, 2021, the EPA reissued the Columbia and Lower Snake Rivers Temperature Total Maximum Daily Load ("2021 TMDL"). The 2021 TMDL is a revised version of a May 18, 2020 temperature TMDL ("2020 TMDL"), for which EPA sought public comment. It is largely similar to the 2020 TMDL, and identifies wasteload allocations for point sources and load allocations for non-point sources (including dam impoundments) that Washington and Oregon will impose through permit conditions. The load and wasteload allocations, once incorporated as permit conditions, are likely to require changes to the operations of point sources and non-point sources, including dams. Point source discharges are subject to National Pollutant Discharge Elimination System ("NPDES"), and the wasteload allocations for point sources as set forth in the 2021 TMDL will be incorporated into and enforced through NPDES permits.

Although EPA lacks authority to implement non-point source controls or otherwise assure reductions in nonpoint source temperature pollution, load allocations for the dams will become conditions of water quality certifications issued by the states in connection with other federal permits. The eight Corps dams in the lower Columbia and Lower Snake Rivers have sought NPDES permits for their point source discharges of oils, greases, and lubricants. Those NPDES permits require water quality certifications from the State of Washington. Although temperature impacts are unrelated to the point source discharges for which the federal dams sought NPDES permits, Washington included conditions in the water quality certifications that require the dams to meet load allocations in the 2021 TMDL. Those water quality certifications are subject to an ongoing appeal before the Washington Pollution Control Hearings Board ("PCHB"); however, the PCHB already determined that Washington acted within its authority when imposing the conditions related to the TMDL.

The 2021 TMDL could impact non-federal dams. As with the federal dams, non-federal dams may be required to obtain NPDES permits for discharges of oils, greases, and lubricants. Such permits require water quality certifications from the state. Moreover, non-federal dams on the Columbia and Lower Snake Rivers are subject to FERC licensing requirements. When those dams go through the relicensing process, they will again be required to seek a water quality certification from the state. The state is likely to impose requirements on the dam impoundments to meet the load allocations as part of the water quality certification process.

Van Ness Feldman LLP
vnf.com

CWA Section 401 Developments

On August 20, 2021, the EPA and the Corps issued a joint memorandum on the implementation of the 2020 Clean Water Act (CWA) Section 401 Certification Rule ("2020 Rule") associated with Corps permits (the "Joint Memo"). The Joint Memo directs the Corps to provide the maximum one-year period of time allowed before finalizing 41 remaining Nationwide Permits proposed in September 2020. Additionally, the Joint Memo addresses implementation challenges associated with the 2020 Rule and Corps-issued permits and provides specific direction to the Corps on clearing these implementation hurdles. Specifically, the Joint Memo directs the Corps to work with states and Tribes to: (1) identify factors and circumstances that warrant extending the default 60-day "reasonable period of time" for Section 401 certifications, (2) resolve procedural deficiencies, and (3) identify and address circumstances that may require permit modifications.

As background, on May 27, 2021, EPA announced its intent to revise the 2020 Rule after Executive Order 13990 directed the EPA to review and revise or replace the 2020 Rule, as appropriate. The Joint Memo provides direction to the Corps related to the implementation of the 2020 Rule, *while the 2021 rulemaking is underway*. This Joint Memo will be *superseded* by the new rule.

Sophia Amberson, Ani Esenyan, Rachael Lipinksi, and Katie Wimsatt 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.

Practice Group Leader:

Mike Swiger	202.298.1891	mas@vnf.com

Other Group Members:

Gary Bachman	202.298.1880	gdb@vnf.com
Ani Esenyan	202.298.1939	aesenyan@vnf.com
Shelley Fidler	202.298.1905	snf@vnf.com
Rachael Lipinski	202.802.3843	rlipinski@vnf.com
Jenna Mandell-Rice	206.829.1817	jrm@vnf.com
Michel Pincus	202.298.1833	mrp@vnf.com
Mealear Tauch	202.298.1946	mzt@vnf.com