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HYDRO NEWSLETTER

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What's Inside?

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10TH CIRCUIT RULES APPEAL OF ARMY CORPS PERMIT FOR FERC PROJECT NOT GOVERNED BY FEDERAL POWER ACT

The U.S. Court of Appeals for the Tenth Circuit has reversed a lower court decision holding that a challenge by environmental groups to a Clean Water Act (CWA) section 404 permit issued by the U.S. Army Corps of Engineers and an associated biological opinion under the Endangered Species Act (ESA) for the City and County of Denver's proposed Federal Energy Regulatory Commission (FERC)-licensed dam raise was required to be brought in the U.S. court of appeals. The U.S. court of appeals is the exclusive judicial forum for review of FERC orders under Part I of the Federal Power Act (FPA). In *Save the Colorado v. Spellmon*, the court held that the FPA does not limit jurisdiction to the court of appeals when challenging another federal permit required for a project that also requires a FERC licensing action.

The decision will allow opponents of FERC-licensed projects to continue to litigate in multiple forums where non-FERC permits are required, not bound by the tight timelines for seeking judicial review imposed by the FPA.

FERC REJECTS INTERIOR ARGUMENT FOR REQUIRING AUTOMATIC POST-LICENSE ESA CONSULTATION

In a September 22, 2022 order addressing arguments raised on rehearing, FERC rejected a recommendation by the U.S. Department of the Interior (Interior) that FERC include in a license issued to the Town of Rollinsford, New Hampshire a requirement that the Town notify the resource agencies and FERC of any activity that may affect a federally listed species under the ESA in a manner not considered in the license itself. FERC pointed out that once a license is issued, the ESA does not require additional consultation during the term of the license, absent a subsequent federal agency action. New information about listed species, while it might prompt FERC or the licensee to pursue amendment of the license, would not in itself trigger ESA section 7 requirements. Further, FERC stated that Interior provided no example of an activity permitted under the license that could affect a federally listed species in a manner not considered in the license. FERC's rejection of Interior's recommendation reinforces FERC's long-held position that there is no ongoing ESA section 7 consultation requirement that is triggered by the licensee's mere implementation of a license, once issued, or by FERC's reservations of authority to make changes during the license term.

FERC EXTENDS BUCKS CREEK LICENSE TERM ON REHEARING

Also on September 22, in an order addressing arguments raised on rehearing of a new license issued to Pacific Gas and Electric Company and City of Santa Clara for the Bucks Creek Project, FERC granted the licensees' request for a 50-year license based on the America's Water and Infrastructure Act of 2018 (AWIA). The AWIA requires FERC to consider, among other things, project-related investments over the term of an existing license related to the efficiency, modernization, rehabilitation, or replacement of major equipment in determining the term of a new license. Congress enacted the AWIA after FERC issued a 2017 policy statement on establishing license terms for hydroelectric projects. FERC's 2017 policy statement established a default relicensing term of 40 years and required a more rigorous showing with regard to project improvements to justify a longer term up to 50 years. Applying the AWIA, FERC found that the project should be relicensed for 50 years.

At the same time, FERC declined the licensees' request to include a limited reopener provision in the license to allow for FERC to consider any modified conditions under section 401 of the CWA which might result from the licensees' state challenge to the California water quality certification issued for the relicensing. FERC stated that should the challenge result in modifications to the certification, the licensees may file an amendment application to incorporate any modified conditions.

NINTH CIRCUIT FINDS SPECIES CONSERVATION IS AMONG TWITCHELL DAM'S "OTHER PURPOSES"

The U.S. Court of Appeals for the Ninth Circuit (Ninth Circuit) has ruled that a California dam's "other purposes" do include species conservation, reversing a California district court's summary judgment one year ago in favor of a contrary argument by the U.S. Bureau of Reclamation (Bureau).

In *San Luis Obispo Coastkeeper v. Santa Maria Valley Water Conservation District*, the court of appeals found that under Public Law 774, the Bureau had discretion to release water from Twitchell Dam to avoid take of endangered Southern California steelhead trout. The court of appeals held the statute "expressly authorized Twitchell Dam to be operated for 'other purposes'" beyond the law's enumerated purposes.

At the center of the litigation was whether the protection of an endangered species of trout was among the dam's purposes when it was created, and whether the Bureau was authorized by law to increase water flow. Under section 9 of the ESA, it is illegal to take or harm an endangered species, including by significantly modifying or degrading its habitat, or disrupting feeding or spawning patterns. Environmental groups sought an order to increase water flow from the dam, arguing that low water levels were interfering with the trout's ability to migrate and spawn, resulting in an unlawful take of protected species.

In addition, the court held that Public Law 774 required the Bureau to operate the dam substantially in accordance with a Secretary of the Interior report. The district court came to a contrary conclusion, stating that Public Law 774 aimed to conserve water "by limiting releases from the dam," and that increasing water flow would result in waste that "conflicts with the express water conservation purpose of Twitchell dam." The court of appeals ruled that the statute required substantial compliance, not strict compliance, with the Secretary's report, granting the Bureau discretion to alter water flow from Twitchell Dam and thus subjecting the dam's operations to the provisions of the ESA.

NINTH CIRCUIT RESTORES TRUMP ESA RULES

Trump-era rollbacks of the ESA are once again in effect after a recent Ninth Circuit holding that a California federal judge's order clearly erred in vacating the regulations without ruling on their legal merit.

In *Washington Cattlemen's Ass'n*, the U.S. District Court for the Northern District of California had vacated the Trump-era rules because they were in the process of being rewritten, not because the regulations lacked merit. The Biden administration had announced that the Trump ESA regulations would be revised, but it also requested the district court to preserve the regulations during revision in the interest of order and consistency. However, by vacating the rules, the California district court reinstated pre-Trump rules while the Biden administration is finalizing new regulations.

The Trump rules were challenged by environmental groups alleging that that they violated the Administrative Procedure Act and the National Environmental Protection Act. The groups moved for summary judgment in January 2021, immediately before President Biden signed an executive order directing the U.S. Fish and Wildlife Service and National Marine Fisheries Service (NMFS) to evaluate, revise or rescind those regulations enacted by his predecessor. The district court's July 5 decision took the revision process into account in vacating the Trump ESA regulations.

The Ninth Circuit's decision reinstated the following regulations.

- A final rule revising the regulations governing ESA section 7 consultation, which revised key terms regarding the identification of environmental 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. The rule also clarified what constitutes adverse modification of critical habitat and adopted deadlines for the completion of informal consultation.

- A final rule revising the procedures for listing species and designating critical habitat. In part, this rule clarified the duration of the "foreseeable future" when determining whether to list a species as threatened, revised the procedures for designating critical habitat including clarifications regarding the treatment of unoccupied areas, and streamlined the process for delisting and reclassifying species.

- Withdrawal of the "blanket 4(d) rule," which automatically applied the ESA section 9 take prohibitions to threatened species and adopted a threatened species-specific approach to applying the take prohibitions (similar to NMFS's practice).

PNNL REPORT HIGHLIGHTS IMPORTANT ROLE OF HYDROELECTRIC POWER EVEN DURING DROUGHT

The U.S. Department of Energy's Pacific Northwest National Laboratory (PNNL) recently published a report entitled *Drought Impacts on Hydroelectric Power Generation in the Western United States*. The report is based on two decades worth of annual generation data gathered from more than 600 hydroelectric plants to analyze the impacts of historical western droughts on hydroelectric power. PNNL found that even during severe droughts such as in 2021 and 2001, the western hydropower fleet sustained 80% or more of its typical annual generation, which is approximately 140-150 terawatt-hours of renewable energy—similar to annual output from all other renewable electricity sources in the West combined. The report found that while the most extreme impacts of drought on hydro are found at individual dams, western annual hydropower generation on the whole is relatively stable because drought rarely impairs hydro facilities across all western river basins at once. The report projects that total western hydropower generation in 2022 is likely to rebound from the previous year despite continued droughts throughout the region.

FERC EXTENDS TIME TO COMMENT ON DUTY OF CANDOR NOPR

In July 2022, FERC issued a Notice of Proposed Rulemaking (NOPR) to broaden the duty of candor requirements for all entities communicating with FERC on matters subject to its jurisdiction. Specifically, the NOPR proposes to revise 18 C.F.R. Part 1 of FERC's regulations to require that all entities communicating with FERC on a matter within FERC's jurisdiction: (1) submit accurate and factual information, (2) not submit false or misleading information, and (3) not omit material information. The original deadline to comment on the NOPR was October 11, 2022. At the request of several trade associations, FERC has now granted an extension of time for commenters to have more time to consider and evaluate questions raised in the NOPR. The new deadline to file comments is November 10, 2022.

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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