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HYDRO NEWSLETTER

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What's Inside?

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FERC FINDS FEDERAL POWER ACT SECTION 28 HOLDS LICENSEE ACCOUNTABLE TO OBTAIN FLOODING RIGHTS

In a case of first impression interpreting Section 28 of the Federal Power Act ("FPA"), the Federal Energy Regulatory Commission ("FERC" or the "Commission") on January 18, 2024, issued an Order on Remand for the Grand River Dam Authority ("GRDA") finding GRDA accountable for upstream flooding beyond its project boundary affecting the City of Miami, Oklahoma.

In 1939, an original license under the FPA authorized GRDA to "construct, operate, and maintain" the Pensacola Project (the "Project") located on the Grand (Neosho) River in Oklahoma. The City of Miami is located along the Neosho upstream of the Project. On April 24, 1992, the Commission issued a new 30-year license to GRDA that was set to expire March 31, 2022, but received an extension of the license term to May 25, 2025. GRDA filed an application to relicense the Project on May 30, 2023, which is pending before the Commission.

In 2018 the City of Miami filed a complaint with FERC, alleging that GRDA had repeatedly flooded private lands outside the Project boundary. The complaint asked the Commission to find that GRDA was in violation of Standard License Article 5 for failure to acquire the 13,000 acres of flowage rights, and order GRDA to obtain those rights. GRDA's 2019 answer to the complaint asserted that the Project operations were not the cause of upstream flooding and that by statute the U.S. Army Corps of Engineers (the "Corps") has exclusive jurisdiction for flood control at the Project, including the acquisition of lands needed to support the Corps' flood control operations. The Commission denied the complaint. The U.S. Court of Appeals for the D.C. Circuit overturned the denial and remanded the case to FERC, among other things, to interpret the 2019 Pensacola Act, special legislation pertaining to the Project which appeared to withdraw FERC's jurisdiction over flooded lands outside the existing FERC Project boundary.

On remand, the Commission concluded that Section 28 of the FPA, which provides that existing licenses are not affected by subsequent amendments to the Act, precludes the application of the Pensacola Act to GRDA's existing license including any limitations on the Commission's jurisdiction to address property rights under the current license. Although Section 28 has been generally viewed as a protection for licensees against ex post facto laws which would diminish their rights under a license, the Commission found that the Pensacola Act was precisely the type of substantive amendment to a FERC license that Section 28 was intended to prevent. Reading Section 28 together with the Pensacola Act, the Commission determined that the two statutes could be reconciled by interpreting the Pensacola Act to apply to future licenses for the Project, but not the existing license. Finding that Article 5 requires GRDA to acquire adequate property rights in perpetuity to accomplish all project purposes, including flood control, and that there was sufficient evidence in the record to show that the Project had increased flooding around the City of Miami, the Commission directed GRDA to file a report within 120 days that analyzes what property rights GRDA must acquire to be in compliance with Article 5.

SAN FRANCISCO ASKS SUPREME COURT TO REVIEW NINTH CIRCUIT RULING ALLOWING NPDES PERMIT GENERIC PROHIBITIONS

The City and County of San Francisco ("San Francisco") have filed a petition for certiorari to the U.S. Supreme Court, asking the high court to review a U.S. Court of Appeals for the Ninth Circuit ("Ninth Circuit") ruling denying San Francisco's challenge to conditions of a National Pollutant Discharge Elimination System ("NPDES") permit which San Francisco argues are impermissibly vague under the Clean Water Act ("CWA").

The NPDES permit conditions at the center of the dispute were issued by the U.S. Environmental Protection Agency ("EPA") for San Francisco's sewer system and wastewater treatment facilities. The permit includes a prohibition against any discharge that causes or contributes to a violation of any applicable water quality standard for the ocean. It also provides that no discharge of pollutants shall create pollution, contamination, or nuisance as defined by the California Water Code, which defines "pollution" by reference to whether a surface water meets a beneficial use.

San Francisco challenged the two provisions, stating that, in violation of the CWA, the generic permit requirements did not provide San Francisco with clear guidance on discharge limits, exposing it to enforcement action without specifying the pollutant limits which would apply. The Ninth Circuit, however, held that the EPA had authority under the CWA to include the general narrative prohibitions on discharges.

Although hydroelectric projects are not (with exceptions) typically subject to NPDES permitting, the case may have implications for the types of conditions that can be imposed under a CWA Section 401 water quality certification. Both the Ninth Circuit in its decision, and San Francisco in its petition for certiorari, invoked the U.S. Supreme Court decision in PUD No. 1 of Jefferson County v. Washington Department of Ecology, a 1994 case interpreting the scope of Section 401 conditions that can be imposed on a hydroelectric license.

CURTAIN RISES ON SECOND ACT FOR LICENSEE'S CLEAN WATER ACT SECTION 401 WAIVER PETITION

The Nevada Irrigation District ("NID") has filed with FERC a supplemental petition for declaratory order on remand from the Ninth Circuit following the Ninth Circuit's decision finding insufficient evidence that the California's State Water Resources Control Board ("State Board") directed a withdraw-and-refile scheme, thus waiving its certification authority under Section 401 of the CWA over NID's Yuba-Bear Hydroelectric Project.

Section 401 requires an applicant for a federal license or permit to conduct an activity that may result in a discharge into navigable waters to request a water quality certification from the state in which the discharge will originate. Under the statute, the state has up to one year to act on the certification request. If the state fails or refuses to act within one year, it is deemed to have waived certification authority.

FERC had previously found that the State Board waived its certification authority for relicensing of projects owned by NID, Merced Irrigation District, and Yuba County Water Agency by coordinating an arrangement in which the applicants withdrew and refiled their Section 401 certification requests year after year to avoid the State Board having to act on the requests. The State Board appealed FERC's rulings to the Ninth Circuit which, on August 4, 2022, agreed with the State Board that the licensees voluntarily withdrew and refiled their certification requests for their own purposes, and that the State Board was justified in not acting on the requests because state law required completion of a state-level environmental review under the California Environmental Quality Act. The three water agencies filed a petition for certiorari with the Supreme Court on February 6, 2023, which the Court denied on May 15, 2023.

In its supplemental petition on remand, NID asks the Commission to consider additional evidence that was not before the Ninth Circuit, as well as legal arguments not decided by the Ninth Circuit, and to reconsider the entire record in light of the new evidence and arguments. NID's supplemental petition is pending before FERC.

In a related proceeding, NID has petitioned the D.C. Circuit to review the Commission's order denying Pacific Gas and Electric Company's ("PG&E") request to find that the State Board waived its certification authority with regard to the Deer Creek development of PG&E's Drum-Spaulding project. NID purchased the Deer Creek development from PG&E and now owns Deer Creek under a separate license. NID has asked the D.C. Circuit to hold the case in abeyance until FERC issues a final decision on NID's supplemental petition for the Yuba-Bear Project, based on the similarity of the issues presented by the two cases. Van Ness Feldman is representing NID in the D.C. Circuit.

FEDERAL COURT DISMISSES CHALLENGES TO "NONEXISTENT" EPA 2020 RULE AS MOOT

On January 24, the U.S. District Court for the Northern District of California handed down a decision in In re Clean Water Act Rulemaking, dismissing challenges by a number of environmental organizations and "blue" states to the Trump Administration EPA's 2020 Rule implementing CWA Section 401. The court noted that the 2020 Rule has been superseded by EPA's 2023 Rule under the Biden Administration. It held that plaintiffs' request to "set aside" EPA's 2020 Rule and remand it to the agency could not stand because "there is no question that the 2020 Rule is no longer in effect." Plaintiffs had argued that the 2023 Rule itself has been challenged in court and that if the 2023 Rule is enjoined, the 2020 Rule could be reinstated. The court acknowledged that possibility but held it did not alter the "reality" that the 2020 Rule is not presently in effect, and stated that plaintiffs could challenge the 2020 Rule again if it were in fact reinstated.

FINAL RULE INTENDS TO STREAMLINE BALD AND GOLDEN EAGLE INCIDENTAL TAKE PERMITTING PROCESS

On February 12, the U.S. Fish and Wildlife Service ("FWS") published its Final Rule revising its regulations on incidental take permits for eagles and eagle nests under the Bald and Golden Eagle Protection Act. The Act prohibits take, possession, and transportation of bald eagles and golden eagles except as permitted by federal regulation. The Final Rule is the second time the regulations for incidental take of eagles have been revised since the permit process was first established in 2009 after bald eagles were delisted under the Endangered Species Act.

While FWS will continue to issue specific permits, the Final Rule creates a new system of general permits that will expedite authorization for energy infrastructure projects as long as applicants certify that they meet eligibility requirements and will implement pre-identified conservation measures and reporting requirements. These general permits are for activities viewed as low risk to eagle take such as:

- Certain categories of bald eagle nest take;
- Certain activities that may cause bald eagle disturbance take;
- Power line infrastructure that may cause eagle incidental take; and
- Eagle incidental take associated with certain wind energy projects.

In addition to the new general permit, the regulations for specific permits have been revised to improve processes, clarify definitions, and amend the permit fee structure. The Final Rule will be effective April 12, 2024.

CHANGES IN THE FERC COMMISSIONER RANKS

On February 9, the White House announced Willie L. Phillips, Jr. as FERC Chair. Chairman Phillips has been a Commissioner since 2021, and Acting Chair since January 2023. Prior to joining FERC, Chairman Phillips was Chairman of the D.C. Public Service Commission. Chairman Phillips also is an alumnus of Van Ness Feldman from early in his career.

On the same day, Commissioner Allison Clements reportedly stated in an interview that she would not be seeking a second term with FERC. Commissioner Clements has been with FERC since 2020 and her term officially ends in June 2024. While the Commissioner has not stated when she will leave, her exit could leave FERC without a quorum if there are only two sitting Commissioners. By law, Commissioner Clements could elect to remain in her seat until the end of the year. The last time the Commission was without a quorum was 2017.

FERC HYDRO LICENSING DIRECTOR RETIRES AFTER THREE DECADES AT THE HELM

After more than 30 years with the Commission, Vince Yearick, the Director of FERC's Division of Hydropower Licensing, retired at the end of January. During the Commission's January meeting, Chairman Phillips observed that "Under Vince's leadership in the past 11 years, the Division of Hydropower Licensing has issued 228 licenses." Deputy Director Nicholas Jayjack has been named Acting Director.

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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