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HYDRO NEWSLETTER

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What's Inside?

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FEDERAL COURT GRANTS MANDATORY INJUNCTION ORDERING COMPLETION OF FORMAL CONSULTATION ON TIDAL FLOODGATE PROJECT

On March 8, 2024, the U.S. District Court for the Western District of Washington ordered the National Marine Fisheries Service ("NMFS") to complete formal consultation under Section 7(a)(2) of the Endangered Species Act ("ESA"), 16 U.S.C. 1536(b)(1), and issue a Biological Opinion ("BiOp") by April 1, 2024.

The litigation concerned a failing tidal flood gate along Padilla Bay in Skagit County, Western Washington. In 2020, the Skagit County Dike Drainage and Irrigation Improvement District No. 12 ("District 12") submitted a Joint Aquatic Resources Permit Application to the U.S. Army Corps of Engineers ("Corps") requesting a Clean Water Act Section 404 permit allowing replacement of the failing tide gate. In December 2022, the Corps requested formal consultation from NMFS. At that time, NMFS represented that it had the information necessary to complete a BiOp. Nonetheless, when the lawsuit was filed, over 400 days had passed, and NMFS still had not completed formal consultation or issued the BiOp.

District 12 filed its lawsuit in the Western District of Washington asking the court to order NMFS to issue a BiOp by April 1, 2024. In its filings, NMFS did not dispute its obligation to complete the BiOp within 90 days (or obtain an agreement to extend the deadline to 149 days) and failed to do so.Instead, NMFS argued that a mandatory injunction was unwarranted because it would be impossible to issue the BiOp by April 1 and, regardless, NMFS planned to issue the BiOp by July 3. NMFS made several additional arguments related to workload constraints, other projects, staffing, the need to complete consultation with the Swinomish Indian Tribal Community, and the development of different assessment mechanisms, all of which the court rejected as insufficient justifications for the delay.

The court also noted that if the tide gate is not fixed before the fall flooding season begins in October, tidal flooding could cause severe irreparable harm to people who live and work in the area by threatening farmland, public sea dike trails, access to roads, residential areas, recreational areas, commercial and industrial facilities, and railroad crossings. Finally, the court noted that NMFS's administrative inefficiency was standing as an obstacle to completion of a project undertaken in the public interest.

The case offers some encouragement to applicants for federal permits bogged down by interminable delays in NMFS's completion of the Section 7 process.

U.S. District Magistrate Judge Brian A. Tsuchida issued the order. The case is *Skagit County Dike Drainage and Irrigation Improvement District No. 12 v. National Marine Fisheries Service, et al., Case No. 2:23-cv-01954-BAT*. VNF attorneys Jenna Mandell-Rice, Charlene Koski, and Sophia Amberson represented District 12.

NINTH CIRCUIT RULES AGAINST APACHE IN DISPUTE OVER SACRED "OAK FLAT" SITE

On March 1, the U.S. Court of Appeals for the Ninth Circuit sided with a lower court decision denying an Apache interest group's motion for a preliminary injunction against the transfer of copper-rich federal land to private company Resolution Copper.

Oak Flat, a piece of land that the Ninth Circuit acknowledges is "a site of great spiritual value to the Western Apache Indians," has been at the center of the dispute largely due to the significant copper ore deposits it sits on. Through the Land Transfer Act, Congress directed the federal government to transfer the land to Resolution Copper, which would then mine the ore. Apache Stronghold sued the government, seeking an injunction against the land transfer on the ground that the transfer would violate its members' rights under the Free Exercise Clause of the First Amendment, the Religious Freedom Restoration Act ("RFRA"), and an 1852 treaty between the United States and the Apaches. The Ninth Circuit disagreed, holding that Apache Stronghold was unlikely to succeed on the merits on any of its three claims before the court.

First, the Ninth Circuit found that under the Supreme Court's controlling decision in Lyng. There, the Supreme Court held that while the government's actions with respect to "publicly owned land" would "interfere significantly with private persons' ability to pursue spiritual fulfillment according to their religious beliefs," it would also have no "tendency to coerce" them "into acting contrary to their religious beliefs." The Ninth Circuit also found that the transfer of Oak Flat for mining operations did not discriminate against nor penalize Apache Stronghold's members, nor deny them an "equal share of the rights, benefits, and privileges enjoyed by other citizens."

Second, Apache Stronghold's claim that the transfer of Oak Flat to Resolution Copper would violate RFRA failed for the same reasons because "what counts as 'substantially burden[ing] a person's exercise of religion' must be understood as subsuming, rather than abrogating, the holding of Lyng."

Finally, the court ruled that Apache Stronghold's claim that the transfer of Oak Flat would violate an enforceable trust obligation created by the 1852 Treaty of Sante Fe because the government's statutory obligation to transfer Oak Flat abrogated any treaty obligation.

The case demonstrates the difficulty Tribes have in stopping major development projects on federal land on religious grounds.

FERC MOVES FORWARD WITH FIRST-READY, FIRST-SERVED GENERATOR INTERCONNECTION PROCESS

On March 21, 2024, the Federal Energy Regulatory Commission ("FERC" or "Commission") issued Order No. 2023-A, affirming the core elements of Order No. 2023, Improvements to Generator Interconnection Procedures and Agreements, with limited revisions and clarifications.

Order No. 2023 represented the first significant change to the Commission's standard generator interconnection procedures and agreements in nearly twenty years. In Order No. 2023-A, the Commission acted on thirty-four Requests for Rehearing and/or Clarification. In its order, FERC preserved the core features of Order No. 2023 while revising and clarifying implementation details.

The most notable aspect of Order No. 2023-A is what it did not do—the Commission did not make any wholesale changes to the general framework it adopted in Order No. 2023. The core elements of Order No. 2023 include pre-entry information (i.e., heatmaps), a cluster study process with readiness standards for entry, a defined step for customers to accept cost allocation or withdraw, replacing the reasonable efforts standard with firm study deadlines with delay penalties, integration of affected system impact studies, and consideration of alternative transmission technologies.

Regarding interconnection studies, FERC explained that transmission providers, as "the entities with the most complete knowledge of the transmission system to which the generator will be interconnecting[,] . . . are responsible for conducting the studies and their actions or inaction in doing so can cause or contribute to such delays."

The Interconnection Process

As part of its order, the Commission clarified implementation of the pro forma interconnection procedures, and provides other important clarifications related to network upgrades and cost allocation. For instance, the Commission revised its pro forma large generator interconnection agreement to clarify the scope of upgrades for which an interconnection option to build can be exercised. Specifically, the option to build applies to both stand-alone network upgrades and a network upgrade shared by multiple interconnection customers.

Next Steps

In light of its rehearing decision, the Commission has extended the deadline to 30 days after the publication of Order 2023-A in the Federal Register, although transmission providers may submit compliance filings before the deadline.

See our full alert on Order No. 2023-A here.

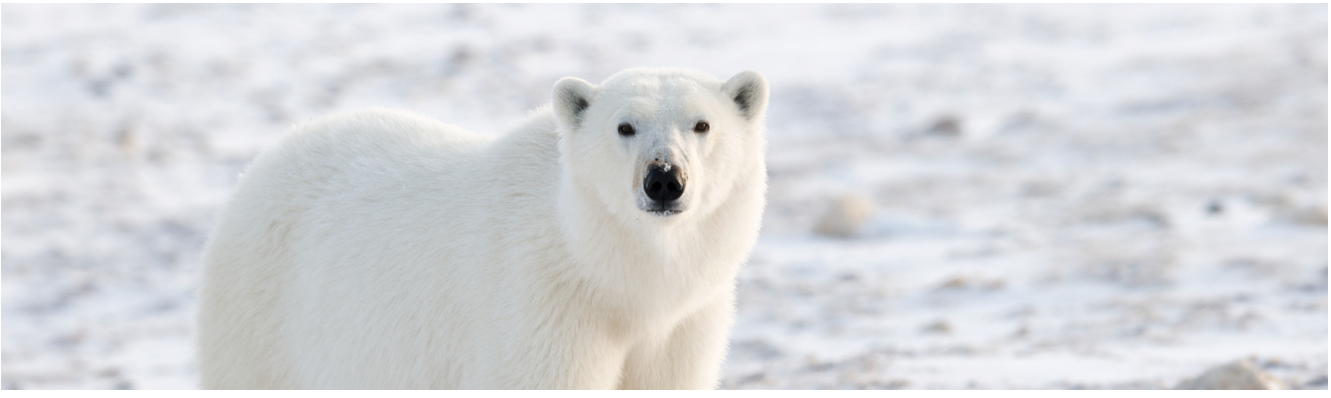
ADMINISTRATION FINALIZES REVISED ENDANGERED SPECIES ACT REGULATIONS

On March 28, 2024, the Administration released three final rules that significantly revise regulations, previously promulgated in 2019, that implement several sections of the ESA. The U.S. Fish and Wildlife Service ("FWS") and NMFS (collectively, the "Services") finalized regulations that amend or reverse several components of the ESA regulations implementing Section 4 (listing of species as threatened or endangered and the designation of critical habitat) and Section 7 (consultation procedures).Additionally, FWS finalized regulations reinstating its "blanket rule" under Section 4(d) (application of the ESA's "take" prohibitions to threatened species). The final rules will become effective May 6, 2024. Detailed summaries of the targeted revisions to these regulations are available here.

By way of background, the species and habitat protected under the ESA extend to all aspects of our communities, lands, and waters. There are almost 2,400 species listed as threatened or endangered pursuant to ESA Section 4. Critical habitat for one or more species has been designated in all regions of the U.S. and its territories. Through the Section 7 consultation process and "take" prohibitions under Sections 9 and 4(d), the ESA imposes species and habitat protection measures on the use and management of private, federal, and state lands and waters and, consequently, on governmental and private activities.

Pursuant to President Biden's Executive Order 13990, the Services reviewed certain agency actions taken under the prior administration and identified five final rules related to ESA implementation that should be reconsidered. In 2022, the Services rescinded two of those final rules—the regulatory definition of "habitat" for the purpose of designating critical habitat and the regulatory procedures for excluding areas from critical habitat designations. While the three final rules released on March 28 reflect the consummation of that initial effort, the Services are currently preparing additional revisions to other ESA regulations and policies.

These latest final rules perpetuate the ongoing fluctuation that has become prevalent with respect to the ESA regulatory landscape as each Administration reevaluates and revises ESA policies and priorities of prior Administrations. In addition, the durability of these regulations will likely be tested through litigation, as both environmental and industry groups have signaled likely legal challenges.



FWS OPENS UP COMMENT PERIOD ON NEW GUIDANCE FOR CERTAIN BAT SPECIES

FWS issued guidance documents related to ESA relevant bat species. The particular species, the Tricolored Bat ("TCB") and the Northern Long-Eared Bat ("NLEB") are present in nearly 40 states throughout the Eastern and Southern United States. In 2022, FWS proposed to list the TCB as endangered; it set an intended listing date of September 2024. Last year, FWS also upgraded the NLEB from threatened status to endangered status. On April 2, 2024, FWS issued four draft guidance documents and tools available for public review and comment: (1) Rangewide NLEB and TCB Determination Key, (2) Consultation Guidance for Development Projects; (3) Tricolored bat Wind Guidance; and (4) Sustainable Forest Management Guidance.

Most relevant to hydropower matters, the Determination Key ("DKey") and Consultation Guidance document relate to FWS's Information for Planning and Consultation ("IPaC") planning tool. The Consultation Guidance, also called the voluntary environmental review process, is a recommended approach for new projects and is voluntary. The approach recommends using IPaC, which is meant to streamline ESA-requirements by providing pre-determined outcomes for specific projects as determined by a DKey. Importantly, under the DKey, the NLEBs are impacted by water-borne contaminants in surface water, which they drink, and water quality degradation can reduce insect densities, which also impacts the species. Projects involving bridge or culvert work or resulting in the creation of a new point source discharge from a facility will be excluded and ineligible for a determination under IPaC and the DKey. Similarly, actions requiring Corps permits due to direct impacts to streams likely will be impacted by these listings and guidance documents.
The tools and guidance documents are not specifically applicable to the TCB until it is listed as endangered. Nonetheless, hydropower projects in the states with TCB and/or NLEB presence may be impacted by the listing and guidance documents, which prohibit activities that alter NLEB and/or TCB hibernacula entrances: for example, actions that impact present hydrology.

Changes to the ESA regulations promulgated by the Services will go into effect prior to listing and will have impacts on the listings, critical habitat designations, and/or consultation requirements related thereto. For a full discussion of the Final Rules, click here.

Comments on the guidance documents are due May 1

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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