

VOL 11 ISSUE 4

HYDRO NEWSLETTER

BROUGHT TO YOU BY VAN NESS FELDMAN LLP



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This edition's contributors:

Tiffanie Ellis

Mealear Tauch

NATIONAL HYDROPOWER ASSOCIATION AND NORTHWEST HYDROELECTRIC ASSOCIATION CHALLENGE FWS AND NMFS'S ESA SECTION 7 REGULATION CHANGES

On August 2, 2024, the National Hydropower Association (“NHA”) and the Northwest Hydroelectric Association (“NWA”) filed a joint challenge to recent changes to the Endangered Species Act (“ESA”) interagency consultation regulations of the U.S. Fish and Wildlife Service (“FWS”) and the National Marine Fisheries Service’s (“NMFS”) (together, the “Services”).

The Case at a Glance

- Date Filed: August 2, 2024
- Venue: U.S. District Court for the District of Columbia
- Plaintiffs: NHA and NWA
- Defendants: FWS and NMFS (and related parties)
- Key Issue: Whether the Services’ new interpretation of their authority as allowing them to require offsets as Reasonable and Prudent Measures in Incidental Take Statements is inconsistent with the ESA and/or arbitrary and capricious.

Why This Matters

The lawsuit challenges a significant shift in the Services’ ESA consultation regulations that could have far-reaching implications for the hydropower industry and the rest of the regulated community. Under the text of the ESA itself, and under the Services’ prior long-standing interpretation, the Services were limited to requiring Reasonable and Prudent Measures to minimize the impact of the take of listed species. The new regulatory interpretation, which took effect on May 6, 2024, expands the scope of the Services’ authority to not only require minimization measures, but also offsets for the take of listed species. This change could significantly increase the cost and burden associated with maintaining coverage for incidental take of listed species. NHA and NWA are challenging this new interpretation as exceeding the statutory authority granted by the ESA.

What’s Next

The Services filed their answer to the complaint on October 7, and briefing in the case is anticipated in late-2024 through 2025. Other challenges to the same regulations have also been filed by other organizations and will likely proceed in parallel to NHA and NWA’s lawsuit.

Van Ness Feldman—lead by Jenna Mandell-Rice and Tyson Kade—represent NHA in this lawsuit. For more information or to discuss how the Services’ regulations might affect your business, please contact Jenna Mandell-Rice, Tyson Kade, or Tiffanie Ellis. You can download the full complaint [here](#).

PUYALLUP TRIBE OF INDIANS V. ELECTRON HYDRO LLC: AN IMPORTANT DECISION IMPACTING HYDROPOWER RELATED TO ESA “TAKE” AND SPILLWAYS

In a recent ruling, the U.S. Court of Appeals for the Ninth Circuit affirmed a lower court decision in favor of the Puyallup Tribe of Indians (“Tribe”) against Electron Hydro LLC (“Electron Hydro”). The district court granted partial summary judgment in favor of the Tribe holding that Electron Hydro’s temporary spillway on the Puyallup River caused a “take” of threatened species, including the Chinook salmon, the steelhead trout, and the bull trout. The district court also issued a permanent injunction requiring Electron Hydro to remove the center portion of the spillway. Electron Hydro appealed.

The Ninth Circuit agreed that Electron Hydro’s temporary spillway on the Puyallup River caused significant harm to the fishes’ abilities to migrate and spawn. Specifically, Electron Hydro did not dispute that the dominant flow of the river was over the temporary spillway, which created “false attraction flows” that lure migrating fish away from their natural paths and the designated fish ladder. The court reaffirmed its precedent that significant habitat modification “that significantly impair[s] essential behavioral patterns” qualifies as an “actual injury” under the ESA. It further reiterated that evidence of dead or injured fish around the spillway is not required to establish a take under the ESA regulations, 50 C.F.R. § 17.3, or the Circuit’s prior holding. The court affirmed the district court’s rejection of Electron’s proposed alternatives finding that there were significant drawbacks and accepted the permanent injunction requiring that Electron Hydro remove the center portion of the spillway to mitigate the harm to fish populations—what it called a “lasting remedy ‘tailored to remedying the specific harm[s] alleged,’” which it found to include both the false attraction flows and the upstream migration impediments. This case may influence future hydropower project designs and operations and has the potential to increase costs related to fish passage solutions and structure modifications.



NEVADA IRRIGATION DISTRICT CONTINUES CHALLENGE TO CLEAN WATER ACT SECTION 401 DECISION IN THE D.C. CIRCUIT

On August 15, the Nevada Irrigation District (“NID”) filed its [opening brief](#) in a consolidated proceeding challenging Federal Energy Regulatory Commission (“Commission”) orders (1) denying Pacific Gas and Electric Company’s (“PG&E”) request to find that the California State Water Resources Control Board (“State Board”) waived its certification authority with regard to the Deer Creek development of PG&E’s Drum-Spaulding project; and (2) denying NID’s supplemental petition for declaratory order on waiver of water quality certification. As [previously discussed](#), the issues in this case center on whether or not the State Board waived its authority to issue a Clean Water Act Section 401 certification by coordinating an arrangement in which applicants withdrew and refiled their Section 401 certification requests year after year to avoid the State Board having to act on the requests.

The Commission filed its brief on October 11, and briefing will continue into December.



IN MEMORIAM MICHAEL A. SWIGER

As many of you know, our friend and colleague Mike Swiger passed away last month following a long battle with cancer.

Mike was a long-time member of Van Ness Feldman’s hydropower practice. Indeed, he was a VNF institution, having joined the firm nearly four decades ago. He provided insightful, wise counsel, represented his clients with passion and commitment, and supported the development of younger hydropower attorneys within the firm.



Mike was a recognized leader in the hydropower bar. In 2014, the NHA presented Mike with the Dr. Kenneth Henwood Award “in recognition of a lifetime of achievement.” NHA observed that “Mike Swiger has been a preeminent attorney and has tirelessly advocated on behalf of his clients and the hydropower industry as a whole,” and noted that Mike has employed “a proactive approach and creative solutions throughout his storied career.”

Mike’s clients volunteered thoughts of appreciation and respect such as these upon learning of his passing:

-“Mike was an amazing attorney: thoughtful, diligent, and conscientious. We very much enjoyed working with him.”

-“His expertise was very impressive, and his style and approach made it fun to work with him. We will miss him.”

-“He was a great lawyer and, more importantly, a great man. We will miss his knowledge, his dedication, his wit, and his kindness.”

-“I had the utmost respect for Mike. He was a joy to work with and I personally will miss him.”

-“He was an incredibly smart and thoughtful attorney, and we are grateful for the opportunity to have worked with him.”

-“We very much enjoyed working with Mike and had tremendous respect for him as an attorney and a person.”

-“We all enjoyed working with him and always appreciated his thoughtful advice.”

-“He has been an invaluable resource His support and contributions to the broader hydroelectric community over the years will be greatly missed.”

-“I very much enjoyed working with Mike, both because of his level of expertise and professionalism and because I really enjoyed his wit and perspective.”

-“[W]e have lost one of the best.”

May we all hope to have left such a positive mark at the end of a long career.

Please join us in continuing to hold Suzy Swiger and the rest of Mike’s family in our thoughts and prayers.

-Doug Smith and Nancy Macan McNally
Co-Chairs, Van Ness Feldman, LLP

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 Members:

Nakia Arrington - 202.298.1806 - narrington@vnf.com
Gary Bachman - 202.298.1800 - gdb@vnf.com
Xena Burwell - 202.298.1879 - xburwell@vnf.com
Tiffanie Ellis - 206.455.2102 - tellis@vnf.com
Shelley Fidler - 202.298.1905 - snf@vnf.com
Tyson Kade - 202.298.1948 - tck@vnf.com
April Knight - 202.298.1822 - aknight@vmf.com
Rachael Lipinski - 206.802.3843 - rlipinski@vnf.com
Jenna Mandell-Rice - 206.829.1817 - jrm@vnf.com
Michael Pincus - 202.298.1833 - mrp@vnf.com
Patrick Reimherr - 202.298.1921 - preimherr@vnf.com
Mealear Tauch - 202.298.1946 - mzt@vnf.com

