Ninth Circuit Holds that Ongoing Hydroelectric Operations and License Reopeners Do Not Trigger Consultation Under § 7 of the Endangered Species Act

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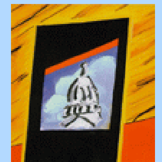
On December 12th, in *California Sportfishing Protection Alliance v. FERC*, the United States Court of Appeals for the Ninth Circuit held that ongoing operations of a hydroelectric project under a license issued by the Federal Energy Regulatory Commission (FERC) do not constitute a federal "agency action" triggering the consultation requirement under § 7 of the Endangered Species Act (ESA). The court also held that a "reopener" in a license does not constitute "discretionary Federal involvement or control" over project operations triggering § 7 consultation. This decision represents an important clarification of the application of the ESA to FERC-licensed hydroelectric projects and will provide operators of such projects some degree of certainty with respect to their operations, in the event new species are listed as threatened or endangered under the ESA.

Background

In 1980, FERC issued Pacific Gas & Electric (PG&E) a 30-year license to operate the DeSabla-Centerville hydroelectric project (Project), located in Butte County, California. The Project affects water flows in Butte Creek, which contains spawning habitat for Chinook salmon. In 1999, the National Marine Fisheries Service (NMFS) listed Chinook as a threatened species under the ESA. Following fish mortality events in Butte Creek in 2002 and 2003, NMFS filed a petition requesting that FERC initiate formal consultation under the ESA regarding the effect of the Project's ongoing operations on Chinook salmon. FERC denied the petition. In 2004, the California Sportfishing Protection Alliance (CALSPA) also petitioned FERC to initiate formal consultation to assess the effect of ongoing Project operations on listed Chinook. FERC again denied the petition, and CALSPA filed a petition for review. Van Ness Feldman filed an amicus curiae brief on behalf of the hydroelectric industry urging the court to sustain FERC's order denying the request for formal consultation.

ISSUE



ALERT

The Court's Decision

The court's decision in *CALSPA v. FERC* resolved a key issue regarding the application of the ESA to FERC-licensed projects: whether ongoing project operations under a FERC license constitute a federal "agency action" triggering ESA § 7 consultation if new species are listed as threatened or endangered. The court held that the language of the ESA, implementing regulations, and judicial precedent supported a holding that ongoing project operations do not constitute a federal agency action triggering consultation. Looking first at the language of the statute, the court found that the event triggering the consultation requirement must be an agency action, not the listing of a species. Moreover, the court explained that Congress's use of the words "is not likely to" in § 7(a)(2) refers to future contemplated agency actions, not ongoing activities previously authorized by the agency. The court found support for this interpretation in the Supreme Court's decisions in *Tennessee Valley Auth. v. Hill* and *Bennett v. Spear*. The Ninth Circuit explained that, in those decisions, the Court was focused on "the potential effect" of "contemplated" or "proposed" agency action. The court similarly distinguished other decisions, explaining that they involved future agency actions, not previously authorized actions or previously issued permits.

The court then found that the agency action at issue was FERC's issuance of a license for PG&E's Project in 1980, and that the agency action was completed. The court explained that PG&E is a private party acting pursuant to that 1980 agency action, and that FERC has not proposed any subsequent "affirmative act" that would trigger ESA § 7 consultation. The court found support for its interpretation in the regulations implementing the ESA, which define an "action" to include the granting of licenses and permits.

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Finally, the court held that license reopeners authorizing FERC to modify project operations after issuance of a license do not constitute "discretionary Federal involvement or control" under the ESA. The court noted that reopener provisions allow FERC to require changes in Project operations only after providing opportunity for notice and hearing. Thus, the court found that reopener provisions merely give FERC the "discretion to decide whether to exercise discretion, subject to the requirements of notice and hearing." The court held that such provisions are not sufficient to constitute discretionary agency "involvement or control" mandating consultation.

Implications of the Court's Decision

The Ninth Circuit's decision in *CALSPA v. FERC* is important to the hydroelectric industry, particularly for operators of FERC-licensed projects located in areas where there have been recent listings under the ESA. A finding that ongoing project operations constitute a federal agency action or that the presence of a license reopener constitutes discretionary agency "involvement or control" would have created substantial uncertainty for licensees. Under such an interpretation, FERC could have been required to undertake time-consuming and expensive formal ESA consultations every time a new species is listed or ongoing operations result in alleged new effects on existing listed species. This would have affected thousands of projects and could have seriously disrupted FERC's hydroelectric program.

Moreover, FERC has held that it has virtually no discretion to reject recommendations made in formal biological opinions issued under ESA § 7. Once § 7 is triggered, FERC treats such recommendations as virtually mandatory. A finding in favor of CALSPA in this case would have significantly expanded the ability of NMFS and the United States Fish and Wildlife Service to force licensees to modify project operations.

For Additional Information

For additional information on this case, or for questions relating to hydropower licensing or threatened and endangered species, please contact Mike Swiger or Sam Kalen in our Washington, DC office at (202) 298-1800, or Matt Love in our Seattle office at (206) 623-9372, or any other member of the firm.

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Founded in 1977, **Van Ness Feldman** helps clients in a variety of industries achieve their business goals by designing and complying with the nation's energy and environmental laws. Many of the firm's more than 80 attorneys and public policy professionals served as chief legal counsel to key congressional committees and Members of Congress; high-level officials in the Department of Energy, the Federal Energy Regulatory Commission, the Environmental Protection Agency, The White House and the Department of the Interior; or as high-ranking officers in major trade associations.

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