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Hydro Newsletter

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Federal Judge Halts Waters of the U.S. Rule for 13 States

On August 27, 2015, just one day before the rule was to go into effect, a federal judge in North Dakota granted a [preliminary injunction](#) to block implementation of the Environmental Protection Agency (EPA) and U.S. Army Corps of Engineers' controversial final rule redefining jurisdictional "waters of the United States" under the Clean Water Act (CWA). The final rule expands federal control over several types of water bodies, and requires federal permits for dredging, filling, or discharging pollution to those water bodies. The preliminary injunction was requested by North Dakota and 12 other states in the western and central regions of the country. The court found an injunction justified because the states are likely to succeed in their challenge of the final rule, and that "it appears likely that the EPA has violated its Congressional grant of authority in its promulgation" of the rule. EPA has noted that the final rule became effective on August 28 for states not involved in the litigation before the U.S. District Court in North Dakota.

For more information on the Waters of the United States rule and its potential implications, see our June 8, 2015 [alert](#).

EPA Releases Final Clean Power Plan

On August 3, 2015, EPA issued its final "[Clean Power Plan](#)," a rule promulgated under section 111(d) of the Clean Air Act that sets carbon dioxide (CO₂) emission reduction goals from existing fossil fuel-fired electric generating units (EGUs) in the U.S. power sector. In the final rule, EPA made several significant changes from the proposed rule on its treatment and inclusion of hydropower to meet state compliance goals.

EPA's calculation of state-specific goals in the rule is based on a national "best system of emission reduction" consisting of three building blocks: (1) efficiency improvements at coal-fired steam EGUs; (2) displacing fossil steam generation by increasing generation from existing natural gas combined cycle facilities; and (3) increased renewable generation. The state goals consist of an Interim Goal, which must be met on average during the years 2022-2029, and a Final Goal for 2030 and beyond. In a significant change from the proposed rule, EPA has shifted the compliance start date from 2020 to 2022.

Upcoming Speaking Engagements

- [John Clements](#), Midwest Hydro Users Group Fall Meeting, October 28, 2015, Wausau, WI.

Under the final rule, existing hydropower constructed before 2012 will not be counted toward state compliance, but new and updated hydropower constructed after 2012 is eligible, which is consistent with the rule's treatment of other zero-emitting resources. In the proposed rule, EPA used 2012 as the baseline year for establishing state emissions goals, but because 2012 was a high water year in the Pacific Northwest with decreased fossil emissions, EPA initially proposed emissions goals for these states that assumed unrealistic levels of hydro generation. In the final rule, EPA adjusted the goals for these states based on a historical average of hydro utilization. The final rule also allows states to award emission rate credits to new hydro imported from Canada, if it is connected to the U.S. grid and has a power purchase agreement with a U.S. entity. The final rule does not set emission goals for Alaska, Hawaii, Puerto Rico, or Guam, but EPA will work to develop emission reduction goals for those states and territories in the future.

EPA has not yet published the final Clean Power Plan in the Federal Register, which triggers a 60 day deadline to file an appeal or request reconsideration of the rule. A group of states have already filed a petition for an emergency stay of the rule, which remains pending. It is expected that the final rule will be published in September.

Ninth Circuit Holds Clean Water Act Pollution Discharge Permit Not Required for Return of Water to River of Origin

On August 21, 2015, the United States Court of Appeals for the Ninth Circuit [affirmed](#) a U.S. district court holding that the discharge of water from the U.S. Bureau of Reclamation's Klamath Irrigation Project to the Klamath River is not a "discharge of pollutants" requiring a permit under section 402 of the CWA.

The Klamath Irrigation Project is a complex system of dams, pumping plants, canals, and drains that also encompasses wildlife refuges. The Project initially draws water from the Klamath River and Upper Klamath Lake, which is eventually passed via a tunnel to Lower Klamath Lake, from which the water returns to the river via the Klamath Straits Drain (KSD), an eight-mile-long pump and canal system. ORNC Action, an environmental group, alleged that the return of irrigation water to the river via the KSD is a discharge of a pollutant into a navigable water, which requires a permit under CWA section 402.

In 2013, the U.S. District Court for the District of Oregon granted the defendants' motion for summary judgment on the basis that the discharge was exempted from permitting under EPA's Water Transfers Rule, which codified EPA's policy that water transfers between waters of the U.S. that do not subject the water to an intervening industrial, municipal, or commercial use do not constitute an addition of pollutants to navigable waters and therefore do not require a section 402 permit. After the Oregon District Court's ruling in favor of the defendants, the Water Transfers Rule was struck down by the U.S. District Court for the Southern District of New York, which is currently on [appeal](#). However, the Ninth Circuit upheld the District Court's decision on a different basis. It reasoned that the CWA prohibits the addition of pollutants to a water body from a point source, that no pollutants are added when water is merely transferred between different part of the same water body, and that there is only a discharge if two separate water bodies are meaningfully distinct, citing the U.S. Supreme Court's 2013 decision in *Los Angeles County Flood Control District v. NRDC*. The Ninth Circuit found that the waters of the KSD are not meaningfully distinct from those of the Klamath River because the KSD is essentially an improved version of a previously existing natural waterway that connected Lower Klamath Lake to the Klamath River and that a substantial portion of the water in the KSD originates in the Klamath River.

FERC Approves Swan Lake Dam Raise

On August 18, 2015, the Federal Energy Regulatory Commission (FERC) [approved](#) the Southeast Alaska Power Agency's (SEAPA) proposal to raise the dam and reservoir levels at its Swan Lake Project, located on Revillagigedo Island, Alaska. SEAPA proposed to install spillway gates on the project dam, which would raise the maximum surface elevation of Swan Lake by 15 feet and increase storage capacity at the project. FERC dismissed various arguments from project opponents, who argued that an unconstructed but licensed project located 16 miles away is better adapted to fulfill the electrical needs of the area than the Swan Lake Project. FERC found that under section 10(a) of the Federal Power Act, it must determine

that each project is best adapted to a comprehensive plan for beneficial uses of the waterway, and does not require FERC to choose only one project that it determines to be best adapted. FERC also declined project opponents' allegations against SEAPA under the Public Utility Regulatory Policies Act, holding that such issues must be raised in other fora.

FERC Grants Temporary Variance of Pensacola Project Reservoir Levels

On August 14, 2015, FERC [granted](#) a temporary variance of reservoir levels between August 16 and October 31, 2015 at the Pensacola Project in Oklahoma. The project license includes a rule curve, which requires the licensee to maintain, to the extent practicable, target reservoir surface elevations throughout the year. The licensee requested a temporary variance of the rule curve elevations to reduce boating hazards, improve recreation, better balance competing stakeholder interests, and provide a cushion against a possible late-summer drought. The licensee proposed to ameliorate the risk of upstream and downstream flooding during the variance period through use of an adaptive management process. FERC found that the proposed variance would have multiple benefits and is not likely to significantly exacerbate flooding upstream or downstream of the project.

FERC rejected arguments from an upstream city that the project causes backwater effects resulting in upstream flooding, and the variance would exacerbate the problem. FERC performed an independent analysis to validate the results of two studies finding a rule curve modification would have minimal impacts on upstream flooding. FERC's results were consistent with the study results and did not show a significant risk of substantial increased flooding.

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