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#### **Upcoming Speaking Engagements**

- [Mike Swiger](#), "Water and Energy – Beyond the Nexus," Association of California Water Agencies Regulatory Summit, Sacramento, CA, October 4, 2016.

# *Hydro Newsletter*

## **VOLUME 3, ISSUE 10: OCTOBER 2016**

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- *Obama Administration Ponders Changes to Tribal Consultation Regime*
- *FWS Updates National Listing Workplan*

### **FERC Rejects Jurisdiction over Small Conduit Projects at Reclamation Dam**

On September 22, 2016, the Federal Energy Regulatory Commission (FERC) [denied](#) a petition for declaratory order by Percheron Power, LLC (Percheron), requesting that FERC find that it retains jurisdiction to authorize small conduit hydropower projects within the U.S. Bureau of Reclamation's (Reclamation) Columbia Basin Project, or at certain features of Reclamation's project. When Congress enacted the Small Conduit Hydropower Development and Rural Jobs Act (Small Conduit Act) on August 9, 2013, it provided Reclamation with authority to issue lease of power privileges for 5 megawatt or smaller non-federal hydropower projects on Reclamation conduits. The Small Conduit Act created an exception to the authorization for projects for which a preliminary permit, license, or exemption application had been filed with FERC on the date of enactment. Percheron had filed preliminary permit applications for three of the sites before the Small Conduit Act was enacted, but its applications were denied because a municipal competitor filed competing applications. Those permits were surrendered or expired after enactment. Under FERC's interpretation of the legislation, termination of the competitor's permits ended its authority to authorize development at Reclamation's project.

In its petition, Percheron contended that the term "project" in the exception provision referred to Reclamation projects or, alternatively, could refer to particular sites or features contained within a Reclamation project, with the result that FERC retained jurisdiction over Percheron's applications filed before enactment. Percheron contended that its interpretation was consistent with the intent of the legislation to hasten development of small conduit hydropower projects at Reclamation projects because it would relieve Percheron of the need to pursue development anew under Reclamation's lease of power privilege procedures instead of in the FERC process where it had already expended substantial sums. FERC rejected these claims, holding that the term "project" in the exemption provision clearly refers to projects authorized by FERC, the exception for applications filed on the date of enactment refers only to applications actually pending on the date of enactment, and that Percheron's development costs incurred for the FERC process were incurred at its own risk.

### **FWS Announces Draft ESA Compensatory Mitigation Policy**

On September 2, the U.S. Fish and Wildlife Service (FWS) published its draft Endangered Species Act (ESA) Compensatory Mitigation [Policy](#) (CMP). The draft CMP provides new guidance on the use and establishment of compensatory mitigation mechanisms that can be utilized to address unavoidable adverse impacts to ESA-listed, proposed, and at-risk species and their habitat.

For project proponents, the draft policy would apply primarily to actions subject to ESA Section 7 consultation and ESA Section 10 incidental take permits. Consistent with FWS's draft revised [Mitigation Policy](#), the draft CMP would establish a "net gain" or, at a minimum, a "no net loss" mitigation goal for

affected resources. The draft CMP also has a preference for compensatory mitigation in advance of impacts, and encourages a shift from the project-by-project application of mitigation to a landscape-scale approach that consolidates mitigation measures in an effort to achieve more effective ecological benefits.

In addition, the draft CMP specifies the minimum criteria applicable to the establishment and operation of compensatory mitigation programs and projects. These mitigation mechanisms include permittee-responsible mitigation, conservation banks, in-lieu fee programs, habitat credit exchanges, and other third-party mitigation measures. The draft CMP also provides the standards and considerations for the use of compensatory mitigation, such as siting, in-kind for species, development of metrics, additionality, timing and duration, durability, and monitoring and reporting.

Comments on the draft CMP are due by October 17, 2016.

### **Obama Administration Ponders Changes to Tribal Consultation Regime**

On September 9, 2016, a federal court [denied](#) the request of the Standing Rock Sioux Indian tribe to halt construction of the fully permitted Dakota Access natural gas pipeline on federal lands administered by the U.S. Army Corps of Engineers (Corps) upstream from the tribe's reservation. The tribe contended that the Corps had failed to comply with its duty to consult the tribe under the National Historic Preservation Act (NHPA) regarding matters of religious and cultural significance to the tribe, but the court found that the Corps had likely met its NHPA obligations. Immediately thereafter, the U.S. Departments of the Army, Justice, and Interior issued a Joint Statement that despite the court's ruling, the Corps would refuse to permit construction of the pipeline on its lands pending a decision on whether it should reconsider its prior decisions regarding the pipeline "under the National Environmental Policy Act and other laws." No timetable was established for the Corps' review.

The Joint Statement also called for consultation between the federal government and Indian tribes on whether there is a need to reform the tribal consultation regime under the NHPA for infrastructure projects, stating that the consultation "will focus on how the federal government can better ensure meaningful tribal input into infrastructure-related decisions and the protection of tribal lands, resources and treaty rights, and will also explore with tribes whether new legislation should be proposed to Congress to alter the current statutory framework to promote those goals." On September 23, 2016, the agencies [invited](#) representatives from each of the 567 federally-recognized tribes to take part in the consultations in several western and upper Midwestern cities from October 25 to November 21, following a listening session in Phoenix on October 11. Tribes will also have an opportunity to provide written comments through November 30, 2016. There is no timetable for actions following the formal consultation meetings.

Members of the hydroelectric industry have a direct interest in these consultations, as they may result in changes to existing federal tribal consultation regulations and practices, new legislation, as well as additional substantive requirements for original and new hydroelectric project licenses issued by FERC.

### **FWS Updates National Listing Workplan**

On September 1, FWS released an updated [national listing workplan](#) for ESA listing decisions over the next seven years. The workplan provides a schedule by which FWS will review and address the status of 362 species that have been petitioned for listing or are candidate species. FWS also intends to periodically update the workplan to reflect the addition of new species or changes in listing priorities.

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