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# Hydro Newsletter

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## D.C. Circuit Vacates FERC Hydropower License

On July 6, 2018, in *American Rivers v. FERC*, the U.S. Court of Appeals for the D.C. Circuit (D.C. Circuit) vacated the new license issued by the Federal Energy Regulatory Commission (FERC) in 2013 for the Coosa River Project in Alabama and remanded the case to FERC. The license was challenged by several conservation groups on grounds that the FERC license and U.S. Fish and Wildlife Service (FWS) biological opinion (BiOp) FERC adopted violated the Federal Power Act, National Environmental Policy Act (NEPA), and Endangered Species Act (ESA). These challenges derived from FWS's analysis of proposed project operations under the new license, and its exclusion of historic impacts of the project (i.e., construction of the dams in the 1920s) from the environmental baseline. The court found that FWS violated the ESA in establishing the environmental baseline without considering the degradation to the environment caused by the project's past operations and continuing impacts. The court also found that FWS failed to show a rational connection between its finding that the proposed action could result in up to 100 percent incidental take of listed species, and its conclusion that this level of take was not likely to result in jeopardy to these listed species.

With respect to FERC's actions in the relicensing, the court found that FERC violated NEPA by failing to prepare an Environmental Impact Statement (despite significant adverse impacts of the project with respect to fish passage and dissolved oxygen). The court also found that FERC's cumulative impact analysis was flawed because, like the FWS BiOp, FERC did not factor construction of the dams into the analysis. The court also criticized FERC's acceptance of studies and data provided by the licensee, the use of desktop entrainment studies rather than site specific studies, and FERC's allowing the licensee to submit plans to implement license conditions after license issuance.

While it is rare for a court of appeals to overturn FERC in a license case, it remains to be seen whether the D.C. Circuit's decision here will cause FERC to reexamine its environmental baseline policy, which has been upheld previously by both the D.C. Circuit and the 9th Circuit, or whether the implications of the decision will be limited by the somewhat unusual facts. The appropriate scope of the environmental baseline under the ESA also is the subject of an ongoing case in the U.S. Court of Appeals for the Ninth Circuit. That case involves the National Marine Fisheries Service's (NMFS) ESA consultation for the Corps of Engineers' (Corps) maintenance of two dams on the Yuba River in California. The district court

upheld NMFS's exclusion from its ESA review of the effects of the historic and ongoing existence of the dams. Friends of the River has challenged that finding. Van Ness Feldman is preparing an amicus brief on behalf of a group of licensees and trade associations in support of NMFS and the Corps in that case.

## FWS and NMFS Propose Revisions to ESA Regulations

On July 19, 2018, FWS and NMFS (the Services) jointly proposed revisions to the agencies' regulations that implement two key sections of the ESA: section 4 governing the listing of species and designation of critical habitat and section 7 governing consultations. The proposed revisions are in response to the Department of the Interior and National Oceanic Atmospheric Administration's 2017 calls for public comment on how they can improve efficiency and effectiveness of current regulations and regulatory processes. In its July 19 press release, FWS stated that it received numerous comments that "ESA implementation was not consistent and often times very confusing to navigate" and that the Services were "proposing these improvements to produce the best conservation results for the species while reducing the regulatory burden on the American people."

With regard to section 7 consultation under the ESA, the Services have proposed the following revisions to their regulations:

- Simplify the definition of "destruction or adverse modification" of critical habitat
- Revise the definition of "effects of the action," and consider revisions to the definition of "environmental baseline" for ongoing federal actions
- Clarify the information to be submitted to initiate consultation
- Consider the inclusion of a 60-day deadline to complete informal consultation
- Streamline and improve the efficiency of the consultation process
- Promote the use of programmatic consultations

With regard to section 4 listing and critical habitat requirements under the ESA, the Services have proposed the following revisions to their regulations:

- Address the use of "occupied" vs. "unoccupied" habitat in designating critical habitat
- Detail circumstances where designation of critical habitat would not be prudent
- Interpret the phrase "foreseeable future" regarding future threats to imperiled species
- Ensure that standards used to delist species are consistent with those used for listing decisions
- Rescind the blanket "4(d) rule" that automatically conveys the same protections for threatened species as for endangered species

The Services also have solicited additional suggestions for improvement to their regulations. This is a unique opportunity for the hydro industry to weigh in on the challenges many are experiencing in the application of the ESA to FERC-licensed projects.

The proposals are contained in three separate notices of proposed rulemaking available on FWS's website. Comments on each notice are due by September 24, 2018. Van Ness Feldman will be filing comments on the proposed rules on behalf of various clients.

## CEQ Extends Deadline for Comments on Ways to Modernize NEPA Process

As reported in the July 2018 newsletter, the Council on Environmental Quality (CEQ) has begun the process of revising its procedural regulations on federal agency implementation of NEPA. On June 19, 2018, CEQ issued an Advance Notice of Proposed Rulemaking entitled "Update to the Regulations for Implementing the Procedural Provisions of the National Environmental Policy Act." The notice seeks

public comment on how CEQ can modernize the NEPA review process so that it is more efficient, timely, and effective. The original deadline for comments on the notice was July 20, 2018. However, CEQ has extended the comment deadline to August 20, 2018. For more information on this CEQ initiative or the firm's expertise with regard to the NEPA process, please see the firm's June 21, 2018 alert.

## EPA and the Corps Seek Additional Comment on Proposal to Repeal Definition of "Waters of the United States"

On July 12, 2018, the Environmental Protection Agency (EPA) and the Corps issued a supplemental notice seeking additional comment on their 2017 proposal to repeal the definition of the term "waters of the United States" under the Clean Water Act, commonly referred to as the "WOTUS Rule." The controversial WOTUS Rule, issued by the Obama administration, expands federal control over several types of water bodies, and requires federal permits for dredging, filling, or discharging pollution to those water bodies. Under the 2017 rule proposed by EPA and the Corps under the Trump Administration, discussed here, the agencies would repeal the WOTUS Rule and "re-codify the regulations that existed before" the WOTUS Rule. The agencies' July 12 supplemental notice seeks additional comment regarding that proposal.

The stated purpose of the agencies' supplemental notice is to "clarify, supplement and give interested parties an opportunity to comment on certain important considerations and reasons for the agencies' proposal." The notice supplements the documentary record and rationale supporting the agencies' repeal proposal. The agencies will accept comments on their supplemental notice through August 13, 2018.

In the meantime, the agencies are soliciting comments on whether other alternatives to a full repeal—such as revising specific elements of the WOTUS Rule, issuing revised implementation guidance and implementation manuals, and proposing a further change to the applicability date of the WOTUS Rule—would fully address "potential deficiencies in and litigation risk associated with" the WOTUS Rule. They are also evaluating options for revising the definition of "waters of the United States."

For more information on the supplemental notice, please refer to our July 18, 2018 alert.

## FERC Receives Comments on Proposal to Eliminate Form 80

On May 17, 2018, FERC issued a notice of proposed rulemaking to eliminate the requirement for licensees to file a Licensed Hydropower Development Recreation Report, FERC Form No. 80 (Form 80). Form 80, which under current rules is required to be filed every six years, solicits information on the use and development of recreation facilities at FERC-licensed hydropower projects. The public comment period for the proposed rulemaking closed on July 23, 2018. For more information regarding the proposed rulemaking, please see our June 2018 newsletter.

FERC received a total of 14 comments, including comments from various federal agencies, municipalities, industry participants, and interested towns/counties. The vast majority of commenters support the elimination of Form 80, recognizing that for most licensees, it has been replaced by project-specific recreation management plans with associated monitoring requirements. They note that eliminating Form 80 is a "good start" towards "reducing the burden that comes with the high level of reporting required, especially for projects that have been in operation without issue for decades."

Some commenters noted concern that projects without recreation use reporting measures beyond Form 80 in their license "will have no routine recreation use reporting requirement at all." The U.S. Forest Service noted that in some cases, the agency's section 4(e) mandatory conditions are triggered by information provided through Form 80 reporting, and that without a Form 80 requirement, the agency may use section 4(e) in future relicensings "to ensure that recreational usage is monitored, and to ensure that facility features and operations are meeting the public recreational needs on [Forest System] lands." Roanoke County noted concern that elimination of Form 80 "could result in the loss of a mechanism that provides information to state agencies and local governments in effectively planning recreation facilities

that could be of benefit to the affected hydropower project and the surrounding communities." It suggested that FERC instead require licensees to develop recreation plans in consultation with the appropriate federal or state agencies, and allow for "periodic consultations during the term of a project license to assess changes to the recreation environment at a project and the need for adding or eliminating licensee provided recreation facilities."

FERC will now review the comments received and issue a final rule addressing the various issues posed by commenters.

## DOE Issues First Solicitation for Tribal Energy Loan Guarantee Program

On July 17, 2018, the U.S. Department of Energy (DOE) issued its first solicitation for the Tribal Energy Loan Guarantee Program (TELGP), a program authorizing DOE to partially guarantee up to $2 billion in loans to support economic opportunities for federally-recognized Indian tribes and Alaska Native corporations, through energy development projects and activities. The TELGP was authorized under the Energy Policy Act of 2005, but was only recently funded under the Fiscal Year 2017 Omnibus Spending Bill. The TELGP program is modeled on DOE's Financial Institution Partnership Program, which it previously used to help projects, including incremental hydropower, leverage public and private lending. The TELGP program was adopted to address feedback from tribal entities that they can have difficulty accessing the debt capital necessary to finance energy development projects that will benefit their communities.

Under the solicitation, DOE will guarantee up to 90 percent of the unpaid principal and interest due on any loan made to a federally-recognized Indian tribe or Alaska Native corporation for energy development. The tribal borrower will be required to invest equity in the project and all project debt will be provided by non-federal lenders. Eligible projects must be located in the United States (but not necessarily on Indian lands), wholly or partially owned by an Indian tribe or Alaska Native corporation, and provide a reasonable prospect of repayment of the principal and interest. Eligible projects can include fossil energy production and mining, renewable energy, transmission infrastructure, and energy storage projects, among others. Under the solicitation, the financial institution or tribal lender proposing to finance an eligible project must apply to the TELGP program for the loan guarantee; DOE will not accept applications directly from a potential borrower. Interested applicants may apply on DOE's website. The first deadline to apply to the program is September 19, 2018.

## BLM and FWS Rescind Environmental Mitigation Policies

The Bureau of Land Management (BLM) and FWS have each announced the reversal of their mitigation policies. These policies were adopted in response to President Obama's November 3, 2015 Presidential Memorandum on the mitigation of development impacts on natural resources, which established a "net benefit" or, at minimum, a "no net loss" goal for natural resources whenever possible. The BLM and FWS announcements are in response to President Trump's Executive Order 13783, *Promoting Energy Independence and Economic Growth* (March 28, 2017), which rescinded President Obama's Presidential Memorandum, and directed agencies to review and revise all existing regulations, orders, guidance documents, policies, and any other similar actions that potentially burden the development or utilization of domestically produced energy resources.

On July 24, 2018, BLM announced that it will no longer require off-site compensatory mitigation for potential temporary or permanent impacts from activities authorized on public lands under the Federal Land Policy and Management Act (FLPMA). Under BLM's new policy, the agency will not impose mandatory compensatory mitigation into its FLMPA authorizations to use public lands or associated environmental review documents. The new policy provides that BLM will consider voluntary proposals for compensatory mitigation offered by a project proponent under limited circumstances, including as a means to reach a Finding of No Significant Impact under NEPA. BLM's new policy notes that "[u]pon further reflection, the conclusion that FLPMA authorized BLM to impose mandatory compensatory mitigation to achieve a 'net conservation gain' was in error" and that the statute "cannot reasonably be

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read to allow BLM to require mandatory compensatory mitigation for potential temporary or permanent impacts from activities authorized on public lands."

On July 30, 2018, FWS announced that it is withdrawing its November 21, 2016 Mitigation Policy that established a "net conservation gain" mitigation planning goal for all FWS activities. In its announcement, the FWS explains that the "net conservation gain" standard "is inconsistent with current Executive branch policy." FWS also notes that compensatory mitigation requirements raise serious Constitutional questions and, because compensatory mitigation does not directly avoid or minimize the anticipated harm, its application is particularly ripe for abuse. The FWS directs that until further notice, all policies that were superseded by its 2016 Mitigation Policy are reinstated.

***Sharon White* and *Robert Conrad* contributed to this issue.**

## 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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