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Breaking News: D.C. Circuit Invalidates FERC's Use of Rehearing Tolling Orders

On June 30, 2020, in *Allegheny Defense Project v. FERC*, the U.S. Court of Appeals for the D.C. Circuit (D.C. Circuit) held that the Natural Gas Act (NGA) does not grant the Federal Energy Regulatory Commission (FERC) the authority to issue a "tolling order" that serves solely to prevent a petitioner from seeking judicial review under a statutory 30-day "deemed denied" provision. Under the order, if FERC fails to act on the merits of a rehearing request within 30 days, the rehearing is deemed denied by operation of law and the party seeking rehearing may seek to obtain judicial review. Because the Federal Power Act (FPA) contains an identical provision requiring FERC action on a rehearing request within 30 days, the case appears to make FERC's use of tolling orders in hydropower proceedings vulnerable to a similar challenge.

The case arose when a group of homeowners challenged several FERC orders authorizing the expansion of a natural gas pipeline in Pennsylvania. Under the NGA, a request for rehearing "may be deemed denied" if FERC does not act on it within 30 days. For over 50 years, FERC has routinely issued "tolling orders" within 30 days of the filing of a request for rehearing. These tolling orders are wholly procedural, granting the request for rehearing for the sole purpose of further consideration and action by FERC. Under prior precedent, the issuance of such tolling orders has been held to foreclose immediate petitions for judicial review of a FERC decision.

In the underlying case, while the homeowners' request for rehearing and stay of an order authorizing the project was pending before FERC, the district court authorized condemnation of homeowners' property based on the presumed validity of FERC's order, and construction of the pipeline commenced. FERC did not deny homeowners' rehearing request until three months after construction began. Homeowners appealed FERC's orders, and a panel of the D.C. Circuit affirmed, based on existing circuit precedent construing the NGA to permit FERC to utilize tolling orders. Judge Millett issued a concurrence to the

opinion, but noted that a second look at the legality of the use of tolling orders was long overdue. Homeowners sought rehearing *en banc*, which was granted by the court on December 5, 2019.

The *en banc* Court found that FERC's routine use of tolling orders to "buy itself more time to act on a rehearing application and stall judicial review" is contrary to the plain language of the NGA and prevents aggrieved parties from obtaining timely judicial review of a FERC decision. The Court rejected FERC's argument that its one-page tolling orders serve to act on a rehearing request because they include language that "rehearing…is hereby granted." The Court found that the statute "is not such an empty vessel" and that FERC's tolling orders qualify as inaction that could be deemed a denial and allow applicants to seek to obtain judicial review. The Court noted that "FERC has rewritten the statute to say that its failure to act within thirty days means nothing; it can take as much time as it wants; and until it chooses to act, the applicant is trapped, unable to obtain judicial review."

While the Court invalidated the use of tolling orders to avoid the "deemed-denied" provision of the statute, it emphasized that a tolling order serving "solely" to prevent immediate judicial review was improper. The court was careful to clarify that it was not requiring FERC to act solely within a 30-day window and declined to rule on a scenario in which FERC grants rehearing for the purpose of substantively reconsidering a prior decision through use of additional pleadings, hearing or other record-building proceedings. The Court also noted that even if FERC takes no action on a rehearing request within 30 days, it retains the authority to modify or set aside an order until the administrative record is filed with the court of appeals. A court may further extend that deadline for submission of the administrative record, upon FERC's request.

An immediate question that arises from the case is the treatment of parties that have rehearing requests before FERC, for which tolling orders have been issued and the statutory periods for filing petitions for judicial review have expired. The Court did not expressly address this situation.

EPA Issues Final Rule to Streamline CWA Section 401 Review

On June 1, 2020, the U.S. Environmental Protection Agency (EPA) released a Final Rule that significantly revises its regulations implementing section 401 of the Clean Water Act (CWA). The Final Rule is EPA's first comprehensive effort to promulgate federal rules governing the implementation of CWA section 401. The Final Rule will become effective 60 days after publication in the *Federal Register*. EPA indicates that certification requests that have been submitted or are currently being processed should continue to be processed under existing law, and certification requests submitted after the effective date of the Final Rule should be processed consistent with the Final Rule.

EPA finalized most of its major proposed reforms to the current section 401 process in the Final Rule without significant change. With regard to the scope of 401, EPA adopted its proposal that the state's review and action under section 401 "must be limited to considerations of water quality" from point source "discharges," rather than the entire activity associated with a federally licensed or permitted project. However, EPA did not adopt its proposal to provide federal agencies with the authority to determine whether a state's water quality certification (WQC) conditions are beyond the scope of section 401. Under the Final Rule, a federal agency is authorized only to determine whether the state complied with the procedural requirements of section 401. Project proponents must challenge conditions that they believe are substantively outside the scope of section 401 before courts of competent jurisdiction. EPA also did not adopt its proposal that a state must describe whether and to what extent a less stringent 401 condition could satisfy water quality requirements, and did not adopt its proposal to allow states to remedy deficient conditions and denials within the one-year period. However, EPA adopted its proposal that the federal agency is responsible for enforcing section 401 conditions once they are incorporated into a federal license or permit.

With respect to timing, EPA will require all project proponents to request a pre-filing meeting with the state at least 30 days prior to submitting a section 401 application. EPA adopted its proposal that "there is no tolling provision to stop the clock at any time" in section 401 once the application is submitted, including to request or receive additional information from the project proponent. In response to comments solicited by EPA on the use of reopener provisions in section 401 WQCs, EPA found that section

401 does not grant states authority either to unilaterally modify a WQC after it is issued or to include "reopener" clauses in a WQC.

EPA's Final Rule is controversial and certain states have already announced their intention to challenge it in court. If the Final Rule goes into effect and survives judicial and Congressional challenge, it promises to provide significant regulatory relief to a process that has caused substantial delays and litigation in energy infrastructure project permitting. For more information, see our issue alert.

McMorris Rodgers Introduces Hydro Licensing Reform Bill in the House

On June 29, 2020, Rep. Cathy McMorris Rodgers (R-WA) introduced the "Hydropower Clean Energy Future Act," a bill to reform and modernize the hydropower licensing process and promote next generation hydropower technologies. Many of the provisions of the bill are similar to those included in the "Hydropower Policy Modernization Act," which was approved by the House in November 2017, and other provisions are new proposals.

The bill stipulates that hydropower is a renewable resource for purposes of all federal programs and is an essential source of energy in the United States, and requires all federal departments and agencies to conform their rules and policies accordingly. The bill also would amend section 4(e) of the FPA to limit conditions for the protection of federal lands to those that mitigate effects of a hydropower project, and would amend FPA section 18 to limit fishway prescriptions to only those that mitigate the effects of the project. The bill would require FERC to convene a public technical conference and prepare a report to Congress describing barriers to the development of conventional, storage, conduit, and emerging hydropower technologies under the rules and regulations of FERC, the RTO/ISOs, and other federal and state hydropower laws, and making recommendations to reduce the barriers and ensure that hydropower projects are properly compensated in energy markets for the full range of electric grid services they provide.

The bill includes two proposals for expedited licensing of certain types of hydropower projects. The first would amend the Public Utility Regulatory Policies Act of 1978 (PURPA) by creating exemptions from part I of the FPA for proposed small projects under 10 MW, or projects under 15 MW that currently are licensed if the license was issued after 1986 and FERC determines that continued operation of project is not likely to jeopardize listed species or adversely affect critical habitat under the Endangered Species Act (ESA). FERC would be required to make a determination on an exemption application within 90 days after submission of an application. Second, the bill would add a new section to the FPA providing for expedited licensing of "next-generation" hydropower projects, including those that use emerging hydropower technologies, a facility that qualifies for the expedited licensing process under the America's Water Infrastructure Act of 2018, closed-loop pumped storage projects, marine and hydrokinetic projects, and hydropower facilities within a conduit system. FERC would be required to issue a license within 3 years of the applicant's notice of intent to file a license application for a next-generation project.

Finally, the bill includes a number of provisions to streamline the licensing process generally. The bill designates FERC as lead agency for purposes of all federal authorizations and any state or local environmental reviews required to license a project. It requires federal and state resource agencies to comply with a schedule established by FERC for all required authorizations, and directs FERC to initiate a rulemaking to establish a process for setting a schedule. The bill also provides that if a federal or state agency fails to meet a deadline in FERC's schedule, it will be subject to rescission of federal funds up to $100,000 in any fiscal year. The bill reflects the sense of Congress that FERC should issue a license for a project within two years of a complete application. It also directs that FERC and other federal and state agencies must use existing studies to the maximum extent practicable. Finally, the bill creates a process for resolving inconsistent or conflicting license terms. Under that process, if FERC cannot resolve the conflict through facilitating consultation between the relevant federal and state resource agencies, FERC may refer the dispute to the Director of the Office of Management and Budget, who can mediate the dispute or refer the matter to the President.

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FERC Issues Two Declaratory Orders Finding Waiver of California Section 401 Authority

On June 18, 2020, FERC issued two orders finding that the California State Water Resources Control Board (Water Board) waived its authority under section 401 of the CWA to issue a WQC in ongoing relicensings: Merced Irrigation District's (Merced) Merced River and Merced Falls Projects and South Feather Water and Power Agency's (South Feather) South Feather Power Project. Merced and South Feather each filed its request for determination of waiver in response to the U.S. Court of Appeals for the D.C. Circuit's (D.C. Circuit) decision in *Hoopa Valley Tribe v. FERC* and FERC's subsequent declaratory order in *Placer County Water Agency*.

Merced initially filed its 401 application with the Water Board in May 2014 and subsequently withdrew and resubmitted the application each year for four years in coordination with the Water Board. In April 2019, the Water Board denied Merced's application without prejudice on the basis that the California Environmental Quality Act (CEQA) process was not yet complete.

South Feather initially filed its 401 application with the Water Board in May 2008, and subsequently withdrew and resubmitted its application each year for 10 years in coordination with the Water Board. South Feather completed a CEQA document for the project in April 2012 and FERC completed ESA section 7 consultation with the National Marine Fisheries Service (NMFS) in May 2016. In November 2018, the Water Board issued a WQC to South Feather with a number of conditions. Because FERC's license decision was still pending, South Feather sought a determination from FERC that the Water Board had waived its authority under section 401 and requested that FERC not incorporate the WQC conditions into the new project license.

FERC granted both requests, finding that the coordinated withdraw and refile process constituted a waiver of section 401 authority. Consistent with its decisions in *Placer County Water Agency*, *Southern California Edison Co.*, *Pacific Gas & Electric Co.*, *Nevada Irrigation District*, and *Yuba Water Agency*, FERC held that a formal agreement between a licensee and a state is not necessary to support a finding of waiver. In response to the Water Board's argument that the licensees voluntarily withdrew their applications each year to avoid a denial without prejudice, FERC found that the Water Board directly asked the licensees to withdraw and resubmit their applications. FERC also rejected arguments in both cases that the 401 certification process was held up by various environmental documents and consultations that the Water Board claimed were necessary for the development of WQC conditions. FERC concluded, as it did in prior orders, that the "state's reason for delay is immaterial" and that a state's reliance on a regulatory process like CEQA does not excuse compliance with the one-year deadline under the CWA.

In both cases, the licensees had filed an informal request for determination of waiver and did not style their requests as a motion or petition for declaratory order. FERC instructed in both orders that going forward, when a party requests that FERC find a state has waived its right to issue a WQC, the party should file its request as a petition pursuant to FERC's regulations. Notably, the Water Board issued a draft WQC for Merced on June 17, 2020, one day before FERC's waiver order.

FERC Issues New License to Placer County Water Agency

On June 8, 2020, FERC issued a new license for Placer County Water Agency's (PCWA) Middle Fork American River Hydroelectric Project. This is the first license issued for a project in California following a series of orders by FERC finding that the Water Board waived its WQC authority under section 401 of the CWA. PCWA filed its license application in 2011, but was delayed for many years awaiting a 401 certification from the Water Board. The Water Board issued a WQC on April 17, 2019. The next day, citing the D.C. Circuit's decision in *Hoopa Valley Tribe v. FERC*, FERC granted PCWA's petition for a declaratory order finding that the Water Board had waived its 401 authority based on an informal agreement with the licensee to withdraw and refile the 401 application year after year in order to avoid the Water Board having to act within the one-year period mandated by the CWA.

Having found waiver in its prior order, in its order issuing a new license, FERC treated the Water Board's WQC conditions as advisory rather than mandatory. FERC declined to include any of the conditions in the license, finding that a number of the conditions were unnecessary because they were consistent with

mandatory conditions already submitted by the U.S. Forest Service under section 4(e) of the FPA. FERC did not include the remainder of the conditions because FERC deemed them as "administrative" and tied to the Water Board's CWA authority. These administrative conditions include, among others, reopener provisions and authority to withhold approval or require modification of documents prior to Water Board approval. The PCWA license order demonstrates that FERC will use its discretion to reject some or all of the conditions in an invalid WQC as appropriate.

House Democrats Introduce Infrastructure and Recovery Bill

On June 22, 2020, Democrats in the U.S. House of Representatives introduced the Moving Forward Act (H.R. 2), a comprehensive infrastructure and recovery bill estimated at more than $1.5 trillion. The bill includes a number of provisions related to dam safety at non-federal hydropower dams.

First, the bill would add a new subsection to section 10 of the FPA to require as a statutory matter that all licensed hydropower projects must meet FERC's dam safety requirements and licensees must operate and maintain their projects in a manner that ensures dam safety and public safety. Second, the bill would add a new subsection to section 15 of the FPA mandating that FERC may issue a new license only if it determines that the project meets FERC's dam safety requirements and the licensee can operate and maintain the project while ensuring dam safety and public safety. Third, the bill requires FERC to establish procedures to assess the financial viability of a license applicant to meet FERC's dam safety requirements under the license. Fourth, the bill appropriates $1 million for FERC to hold a technical conference with the states by April 1, 2021 to provide information on dam maintenance and repair, risk informed decision making, climate and hydrological regional changes that may affect the structural integrity of dams, and high-risk dams. Finally, the bill requires FERC to notify a state within which a hydropower project is located if it requires a licensee to repair a dam or other project works, the licensee fails to make the repairs within five years, and FERC initiates a non-compliance proceeding or takes steps to revoke the license. If FERC revokes or approves the surrender of a license, the bill directs it to provide the state within which the project is located all records related to dam safety, maintenance or repair work at the dam, information on the age of the project and its hazard classification, an assessment of the condition of the project, hydrologic information used to determine the potential maximum flood for the dam, and results of the most recent risk assessment completed for the project.

The bill also requires FERC to conduct a briefing for, and submit a report summarizing the briefing to, the House Committee on Energy and Commerce regarding the Edenville and Sanford Dam failures in Michigan. FERC's briefing must include: (1) an explanation of the findings of the Forensic Investigation Team on the causes of the dam failures; (2) a determination of whether FERC's dam safety procedures should be revised based on lessons learned from the incidents; (3) a determination whether additional dam safety inspections should be required after large storms; (4) a determination of whether safety requirements and testing protocols for dams adequately account for the projected effects of climate change and atmospheric rivers on dams; and (5) a determination of whether additional actions should be taken to ensure the safety of dams that operate without an emergency spillway.

The bill is expected to be brought to the House floor for a vote before July 4, 2020.

New WOTUS Rule Takes Effect in All States but Colorado

On June 19, 2020, a federal district court granted the State of Colorado's motion to stay the Trump administration's new rule redefining the term "Waters of the United States" (WOTUS) as applied under the CWA. The court's order stays implementation of the WOTUS rule only in the State of Colorado. On the same day, the U.S. District Court for the Northern District of California denied a request by a coalition of states and cities for a nationwide stay of the WOTUS rule. In light of these orders, the WOTUS rule became effective on June 22, 2020, as originally scheduled, in all states except Colorado. Since the rule went into effect, several environmental groups and Native American Tribes filed new lawsuits challenging the WOTUS rule in federal courts in Arizona, Washington, and the District of Columbia. There also are ongoing legal challenges to the rule pending in federal courts in several other states.

The WOTUS rule narrows the scope of waters subject to regulation under the CWA. Specifically, the rule removes interstate streams as a separate jurisdictional category; excludes ephemeral streams and water

features; requires rivers, streams, and other natural channels to directly or indirectly contribute flow to a territorial sea or traditional navigable water; and excludes wetlands that are not adjacent to non-wetland jurisdictional water. Additionally, the WOTUS rule confirms that groundwater is not subject to regulation under the CWA, and thus, that surface water features connected only by groundwater are also not jurisdictional. For more information on the WOTUS rule, please see our issue alert.

Update in *Friends of the River v. NMFS* Case in Ninth Circuit

In October 2018, the hydropower industry filed an amicus brief in *Friends of the River v. National Marine Fisheries Service* before the U.S. Court of Appeals for the Ninth Circuit (Ninth Circuit). The case involves the important issues of whether agencies must analyze the effects of pre-existing dams on listed species as part of the agency action, rather than as part of the environmental baseline, during ESA consultation, and whether blockage of fish migration alone constitutes a prohibited "take" of listed species under the ESA. The district court upheld NMFS's decision to not treat existing dams as part of the proposed action for purposes of ESA consultation and rejected the argument that the mere existence of a dam in a stream constitutes a "take." On October 3, 2019, the Ninth Circuit remanded the case to the district court on procedural grounds, finding that NMFS had not made clear its rationale for reversing its position from its prior biological opinion (BiOp) regarding whether the dams in the Lower Yuba River are part of the environmental baseline, and directing NMFS to provide a "reasoned explanation" for excluding from the scope of the proposed action in its current BiOp the continued existence of the dams. In addition, the Ninth Circuit reversed, in part, the district court's determination on the "take" claims, and remanded the case for the court to consider the legal merits of Friends of the River's argument that the U.S. Army Corps of Engineers (Corps) is liable for take arising from third-party operations at water diversions and hydropower facilities at the dams.

On June 17, 2020, Yuba Water Agency (YWA), an intervenor in the case, filed a motion requesting the district court to direct NMFS to promptly provide the requested explanation so judicial review of NMFS's BiOp can proceed on the merits. The motion requests the court to order NMFS to produce the explanation within 45 days and to issue a stay of Friends of the River's "take" allegation until NMFS has furnished the explanation required by the Ninth Circuit. YWA filed the motion to request the court to conclude a case that has languished unresolved for more than nine months since the Ninth Circuit's remand order. The motion also presents the district court with an alternative to a proposed settlement between the federal defendants and Friends of the River that would eliminate a precedent-setting court decision that was a basis for the nationally-significant 2013 Corps ESA Guideline that environmental impacts from the continued existence of Corps' structures and facilities do not need to be mitigated as part of ESA compliance. YWA's motion is pending before the district court.

Trump Issues Executive Order to Promote Economic Recovery by Expediting Infrastructure Projects

On June 4, 2020, President Trump issued an Executive Order (Order) to accelerate the Nation's economic recovery from COVID-19 by expediting infrastructure investments and other activities. The Order directs federal agencies and executive departments to take "all reasonable measures" to speed infrastructure investments and other actions to "strengthen the economy and return Americans to work." Specifically, the Order directs the use of all relevant emergency and other authorities to expedite work on, and completion of, authorized and appropriated projects on highway and other infrastructure projects within the authority of the Department of Transportation; civil works projects within the authority of the Corps; and all infrastructure, energy, environmental, and natural resources projects on federal lands (except Indian trust lands) within the authority of the Departments of Defense, Interior, and Agriculture. The Order also requires reports from specific agencies on expedited projects.

The emergency and other procedures under the National Environmental Policy Act, ESA, and CWA do not waive compliance with the relevant permitting requirements, but rather allow for the use of alternative procedures to comply with the statutory obligations. Expedited emergency permitting performed

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pursuant to this Order, which encourages expanded use of these procedures, may be subject to increased scrutiny and heightened litigation risk from third parties. For more information, see our issue alert.

Whittlesey Assumes General Manager Role at Yuba Water Agency

On July 1, Willie Whittlesey will assume the role of General Manager of Yuba Water Agency (YWA). YWA owns and operates the Yuba River Hydroelectric Project and the Narrows 1 Hydroelectric Project on the Yuba River and tributary streams in northern California. Whittlesey is a registered forester and has served as the Assistant General Manager at YWA since 2017. He previously worked at Pacific Gas and Electric Company for 13 years. The departing General Manager, Curt Aikens, joined YWA in 1998 and has held the position of General Manager since 2001. Aikens, who shepherded YWA through negotiation of the award-winning and innovative Lower Yuba River Accord, a collaborative settlement of competing water uses on the Lower Yuba River, will focus on special projects until his January 2021 retirement.

FPA Reaches 100-Year Milestone

June 10, 2020 marked 100 years to the day since the enactment of the Federal Water Power Act, now known as the FPA, a landmark statute that created federal oversight of hydropower development on navigable waters of the United States. The Act created the Federal Power Commission (now called FERC) and gave the agency authority to regulate the construction, operation, and maintenance of non-federal hydroelectric power generation. While aspects of the statute have been amended and supplemented several times over the years, the core text still remains in effect today.

Sharon White and Rachael Lipinski 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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