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Second Circuit Upholds FERC's Interpretation that State Agency Waived Its 401 Certification Authority

The U.S. Court of Appeals for the Second Circuit affirmed the Federal Energy Regulatory Commission's (FERC) orders finding waiver of Clean Water Act (CWA) section 401 water quality certification (401 certification) in connection with FERC's approval of a natural gas pipeline project. In *New York State Dep't of Environmental Conservation v. FERC*, the court found in its March 23, 2021 opinion that the New York Department of Environmental Conservation (NYSDEC) waived certification when it entered into an agreement with the pipeline to change the date on which the agency received the pipeline's certification request in an "attempt to finesse the one-year deadline" for state action under the CWA.

According to the court, this violated the "bright-line rule" in section 401 regarding when the one-year clock starts ticking. In response to NYSDEC's argument that the one-year rule was meant to benefit applicants and therefore applicants should be permitted to extend the deadline, the court held that the intent of Congress in enacting section 401's time limit was not to benefit applicants, but to prevent states from holding federal permitting agencies hostage to the certification process since certification is required in order for a federal agency to grant a license or permit. Accordingly, the court stated, the one-year limit "is not the applicant's right to waive or modify." In ruling that section 401 prohibits a certifying agency from entering into an agreement or otherwise coordinating with an applicant to alter the *beginning* of the review period, the court also cited the U.S. Court of Appeals for the D.C. Circuit's 2019 *Hoopa Valley Tribe* decision which held that an applicant and certifying agency cannot avoid the one-year timeline by agreeing that the applicant would withdraw its certification request prior to the *end* of the one-year review period and then refile it to trigger a new one-year review.

The court further acknowledged FERC's decisions holding that a prohibited agreement between the applicant and certifying agency need not be an express written agreement but can be a "functional agreement." The court did suggest two workarounds to the one-year deadline. First, the court stated the certifying agency could deny a section 401 request "without prejudice" if it believed the applicant had provided insufficient information, prompting the applicant to submit a new request with the additional material. Second, the court pointed to FERC's decision rejecting a waiver petition in *City of*

Morrisville, Vermont where FERC held that the applicant unilaterally withdrew and refiled its application to avoid a bad result, suggesting that an applicant could avoid the one-year deadline if holding the certifying agency to the deadline would not be in the applicant's interest. Nonetheless, the case is a significant win not only for the gas pipeline industry, but for the hydropower industry in that two U.S. Courts of Appeals have now issued decisions confirming that "one year means one year" under section 401. Similar challenges to FERC waiver orders remain pending in the U.S. Courts of Appeals for the Fourth and Ninth Circuits, with oral argument in the Fourth Circuit scheduled for May 6. If FERC's orders in those cases are upheld as well, it will solidify FERC's reestablishment of control over licensing timelines for hydroelectric projects that have been delayed, in some cases for many years, awaiting state certification. The Second Circuit's holding also provides additional support for the U.S. Environmental Protection Agency's (EPA) new section 401 rule, which interprets the statute as imposing a bright-line, one-year review period.

Van Ness Feldman co-authored an amicus brief in support of FERC filed in the Second Circuit case on behalf of the hydropower industry, as well as a similar brief in the pending Fourth Circuit case.

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Senate Confirms Representative Deb Haaland as Secretary of the Interior

On March 15, 2021, the Senate voted 51-40 to confirm Congresswoman Deb Haaland (D-NM) as the 54th Secretary of the Interior, and the first Native American cabinet secretary in U.S. history. This confirmation is seen as a long overdue move as the Department of the Interior not only manages the country's public lands and natural resources but is also responsible for government-to-government relations between the United States and Tribal Nations.

During her time in Congress, Secretary Haaland was a staunch critic of expansive fossil fuel development on public lands, fracking, and the deregulatory agenda of the last administration. Secretary Haaland will also play a key role in the Biden Administration's efforts to make America carbon neutral by 2050 and will emphasize environmental justice issues.

U.S. Supreme Court Issues Decision Clarifying Boundaries of FOIA's Deliberative Process Privilege

The U.S. Supreme Court issued a decision in *United States Fish & Wildlife Service v. Sierra Club* on March 4, 2021, holding that the Freedom of Information Act (FOIA) "deliberative process privilege" exemption protects from public disclosure federal agencies' draft biological opinions prepared pursuant to the Endangered Species Act (ESA) that are "predecisional and deliberative," regardless of whether such drafts reflect the agency's last views regarding a proposal. FOIA provides the public with a right to access federal records unless the documents fall within certain enumerated exceptions. The deliberative process privilege exemption protects from disclosure documents that are both "predecisional" and "deliberative" to ensure that federal agencies are able to engage in frank and open discussions in their decision-making processes.

In *United States Fish & Wildlife Service v. Sierra Club*, the Supreme Court considered the applicability of the deliberative process privilege exemption to draft biological opinions on effects of a proposed rulemaking. The United States Fish and Wildlife Service (USFWS) and National Marine Fisheries Service (together, the Services) prepared draft biological opinions for EPA's proposed rule, which concluded that the proposed rule was likely to jeopardize threatened and endangered species. After further consultation, EPA revised its proposed rule and the Services subsequently issued final biological opinions, concluding that the revised rule was not likely to jeopardize threatened and endangered species. Although the Supreme Court acknowledged that the draft biological opinions were the "last word" by the Services on the proposed rule, the Court determined that the draft biological opinions were "covered by the deliberative process privilege" because EPA changed its proposed rule, and therefore the Services were never in a position to render a final judgment on the ESA consultation on that proposal.

This case has potentially significant implications for federal agencies' responses to FOIA requests beyond the ESA context. As noted by the dissent, the opinion effectively allows federal agencies to hold back

not just a "draft of a draft"—i.e., documents that reflect the unfiltered internal views of the agency and its staff—but also "draft" documents that represent the agency's crystallized thinking at a given point in time, as long as those documents do not reflect the final decision of the Services. Agencies may also consider the Court's interpretation of the deliberative process privilege when developing administrative records in litigation over agency decision-making, as other courts have previously found that agencies may exclude documents from the administrative record based on the deliberative process privilege.

Our recent alert on this issue can be found here.

House Republicans Introduce Hydropower Clean Energy Future Act

On March 5, 2021, Reps. Dan Newhouse (R-WA) and Cathy McMorris Rodgers (R-WA) introduced the Hydropower Clean Energy Future Act (H.R. 1588) aimed at expanding hydropower production in the U.S. and promoting hydropower technology innovations.

Section 2 of the proposed legislation would modify the definition of "renewable energy" in the Energy Policy Act of 2005 to include hydropower, and direct federal departments and agencies to submit to the Senate Committee on Energy and Natural Resources and House Committee on Energy and Commerce a report demonstrating amendments to regulations, orders, or policies related to renewable energy to treat hydropower consistently with the amendments made by the legislation. This section would also amend sections 4(e) and 18 of the Federal Power Act (FPA) to require that mandatory conditions pertaining to federal reservations and fishways be limited to mitigating project effects.

Section 3 would replace existing provisions in section 405 of the Public Utility Regulatory Policies Act of 1978 (PURPA) granting FERC authority to issue exemptions from licensing for certain small hydroelectric projects at existing dams. Under the bill FERC would be able to issue exemptions for two categories of such projects: (1) proposed projects of 10 MW or less, and (2) currently licensed projects of 15 MW or less if FERC issued the license following passage of the 1986 amendments to the FPA in the Electric Consumers Protection Act of 1986, when Congress imposed stricter environmental standards on FERC's issuance of licenses. With respect to the second category, FERC must also find that the continued operation of the project is not likely to jeopardize the continued existence of any ESA-listed species or to result in the destruction or adverse modification of an area designated as critical habitat for any ESA-listed species. FERC would have 90 days to act on an application for exemption of a currently licensed project, but the exemption would not take effect until expiration of the license. An exempted project under either category would be subject to mandatory conditions imposed by state and federal fish and wildlife agencies as with currently exempted projects. Exemption from licensing under the FPA also would not waive federal environmental laws as set forth in existing PURPA section 405, but issuance of exemptions would be categorically exempt from review under the National Environmental Policy Act (NEPA).

Section 3 of the bill would also add a new section 37 to Part I of the FPA to expedite the licensing of "next-generation" hydropower defined to include various categories of emerging technologies and low-impact hydropower. The section provides a detailed process and timeline for this expedited licensing.

Section 4 would identify and remove market barriers to hydropower. The bill would require FERC and the Department of Energy to submit a report to the Senate Committee on Energy and Natural Resources and House Committee on Energy and Commerce identifying barriers to development and proper compensation of conventional, storage, conduit, and emerging hydropower technologies caused by various federal and state laws, and to identify recommendations to reduce these barriers.

Section 5 aims to modernize hydropower licensing by adding a section on licensing process coordination and improvement to sections to Part I of the FPA. Broadly, this section would improve coordination among permitting agencies by setting schedules, clarifying responsibilities, and establishing mechanisms to resolve disputes among licensing participants.

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House Democrats Introduce Revised CLEAN Future Act, Readying Chamber for Action on Climate Change and Infrastructure

On March 2, 2021, the House Energy and Commerce Committee introduced the Climate Leadership and Environmental Action for our Nation's (CLEAN) Future Act (H.R. 1512). The CLEAN Future Act sets national targets to achieve a 50% reduction in greenhouse gas (GHG) emissions from 2005 levels by 2030 and a net-zero GHG economy by 2050. For a more detailed overview of the sectors affected by the CLEAN Future Act, please see our alert here.

Section 235 of the bill focuses on dam safety for FERC-licensed projects. The proposed legislation would amend sections 10 and 15 of the FPA. Section 10 would be amended to require as a condition of licenses that the dam and other project works must meet FERC's dam safety requirements and that the licensee must continue to manage, operate, and maintain the dam and other project works in a matter that ensures dam safety and public safety under the operating conditions of the license. Section 15 would be amended to allow FERC to issue new licenses for existing projects only if FERC determines that the dam and other project works covered by the license meet FERC's dam safety requirements and that the licensee can continue to manage, operate, and maintain the dam and other projects works in a manner that ensures dam and public safety under the operating conditions of the license. FERC would also have to establish procedures to assess the financial viability of license applicants. The bill would also establish requirements for FERC to inform a state in which a project is located when: (1) a licensee is required to take actions to repair a dam or other project works following a dam safety inspection; (2) a licensee who has been so notified fails to take actions to make repairs for a period of five years; and (3) FERC initiates a non-compliance proceeding or otherwise takes steps to revoke a license issued under Section 4 of the FPA. In addition, the bill would require FERC to hold a technical conference with the states on dam safety issues.

Fourth Circuit Decision Remands CWA 401 Denial for Mountain Valley Pipeline

In another CWA 401 case involving natural gas pipelines, the Fourth Circuit on March 11, 2021 issued a decision in *Mountain Valley Pipeline, LLC v. North Carolina Dep't of Environmental Quality*, remanding the North Carolina Department of Environmental Quality's (NCDEQ) denial of a CWA section 401 certification for a gas pipeline on the basis that NCDEQ failed to explain why it denied the 401 certification instead of conditionally approving it. Similar to hydroelectric facilities, when FERC authorizes a natural gas pipeline under the Natural Gas Act (NGA), it must obtain a 401 certification from the state in which discharges related to the pipeline will occur. Unlike hydroelectric projects, the U.S. Courts of Appeals have exclusive jurisdiction over challenges to 401 certification decisions associated with natural gas pipeline permitting under the NGA.

At issue in *Mountain Valley Pipeline* was NCDEQ's denial of a 401 certification for the Southgate Pipeline Project, the utility of which depended on the completion of the Mainline Pipeline Project. The completion of the Mainline Pipeline Project was uncertain because of several legal challenges to necessary federal permits. NCDEQ denied certification for the Southgate Pipeline Project on the basis that allowing adverse environmental impacts without certainty of the project's utility upon completion was inconsistent with principles of minimization.

The Fourth Circuit rejected several arguments by the project proponent that the denial exceeded the scope of NCDEQ's authority under the CWA. However, the Fourth Circuit concluded that NCDEQ had failed (1) to adequately explain why it chose to deny certification rather conditioning certification upon the Mainline Pipeline Project receiving its permits, and (2) to reconcile conflicting conclusions from the hearing officer as to whether the Southgate Pipeline Project fully minimized its potential impacts on surface waters. The court rejected attempted post hoc rationalizations from NCDEQ to explain possible reasons for NCDEQ's choice of denial. Accordingly, the Fourth Circuit remanded the 401 certification to NCDEQ. The Fourth Circuit's decision illustrates the difficulty in challenging 401 certifications on the basis that they exceed the scope of the state's authority under the CWA, but demonstrates that states must provide an explanation for their decision at the time that they issue the decision.

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FERC Issues PacWave a 25-year License

FERC has issued an original 25-year license to Oregon State University for the PacWave South Hydrokinetic Project (Project), a wave energy test facility that will consist of both offshore and onshore components. The 20 MW Project will be located on the Outer Continental Shelf in the Pacific Ocean and will occupy lands administered by the Department of the Interior's Bureau of Ocean Energy Management. The Project will be the first marine renewable energy research facility in federal waters off the Pacific Coast.

The proposed purpose of the Project will be to allow for a venue to test technologies that generate electricity using wave energy converters (WECs) anchored to the sea floor. Using these WEC devices, clients will be looking for ways to harness the ocean waves and transmit the energy to the electric grid. Wave power is a clean and renewable energy that could offer greater reliability. According to the U.S. Energy Information Administration, the theoretical energy potential of wave energy off the coasts of the United States is estimated to be as much as 2.64 trillion kilowatt-hours, which equates roughly to 64% of domestic electricity generation in 2019.

D.C. Circuit Remands Biological Opinion Based on Possible Overreach in Setting Reasonable and Prudent Measures in a Non-Jeopardy Opinion

On March 26, 2021, the D.C. Circuit issued an opinion in which the court sent back to FERC and USFWS a biological opinion and FERC license amendment regarding endangered mussels. Lakefront owners had challenged the amendment and biological opinion because they would require the licensee to draw down the lake to ensure that listed mussels downstream were not stranded and desiccated during low flow periods. The project was already being operated on an inflow/outflow basis but the USFWS's hydrologic analysis found that run of river operations based on reservoir elevation remaining constant was not an accurate proxy for natural flows because of intervening water losses and withdrawals. The lake owners disputed the USFWS model as "junk science," said it would result in more water being released downstream than would occur if there were no dam and complained it would render the lake usable for recreation.

Illustrating the difficulty of challenging a biological opinion in court, the D.C. Circuit upheld the USFWS analysis based on an extremely deferential standard of review, refusing to second guess it even though the lake owners contradicted it with expert scientific studies. Also notable is that although FERC tried to balance the competing uses of the lake in its NEPA document, FERC adopted the conditions in the biological opinion in its amendment order on the basis that it would not expose itself or its licensee to potential take liability under the ESA. Despite upholding the USFWS findings, the court found the FERC amendment and the biological opinion to be flawed because the USFWS had issued a non-jeopardy opinion with its preferred method of operation listed as a "reasonable and prudent measure." Under the ESA, reasonable and prudent measures are supposed to result in only minor changes from a proposed action. The court found that neither FERC nor the USFWS explained how this could be a minor change given that the new mode of operation would result in significant drops in reservoir level and remanded the case to the agencies for further explanation. The court's opinion suggests that issuing a non-jeopardy opinion while imposing significant environmental measures—a practice that is quite typical in hydroelectric licensing—is inconsistent with the ESA. It remains to be seen whether this encourages the Services to issue more jeopardy opinions in licensing cases.

Ani Esenyan, Jenna Mandell-Rice, Mike Swiger, and Mealear Tauch contributed to this issue.

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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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