VOL 9. ISSUE 6

HYDRO NEWSLETTER

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D.C. CIRCUIT REFUSES TO EXTEND HOOPA VALLEY TRIBE SECTION 401 WAIVER RULING

The U.S. Court of Appeals for the D.C. Circuit in *Turlock Irrigation District, et al. v. FERC*, Nos. 21-1120, *et al.* (D.C. Cir. June 17, 2022), has declined to extend its January 2019 ruling in Hoopa Valley Tribe v. FERC regarding a state's waiver of water quality certification under Section 401 of the Clean Water Act. In *Hoopa Valley Tribe*, the Court found waiver where the states of California and Oregon entered into an agreement with the applicant to a scheme under which the applicant would annually withdraw and refile the same certification request in order to avoid the states having to act on the request within the one-year statutory deadline. In *Turlock*, a different three-judge panel of the D.C. Circuit reached the opposite conclusion regarding a similar procedure for avoiding state action on the merits of a certification request, upholding the Federal Energy Regulatory Commission's ("FERC" or "Commission") determination that if the state denies certification "without prejudice," it has not failed or refused "to act" within the meaning of Section 401, and therefore has not waived its authority to issue a certification in response to a later request.

Section 401 requires an applicant for a federal license or permit to conduct an activity that may result in a discharge into waters of the United States to request a water quality certification from the state or states in which the discharge will originate. This certification provides the state with the opportunity to review the project and impose conditions necessary to ensure it will comply with state water quality standards, or even veto the federal license or permit if it will not. If the state "fails or refuses to act" on a certification request within a reasonable period of time, not to exceed one year, the state waives its certification authority. The courts have explained that the purpose of the waiver provision is to prevent a state from indefinitely delaying a federally licensed project by failing to issue a timely certification.

In *Turlock*, co-licensees Turlock and Modesto Irrigation Districts (the "Districts") twice filed certification requests with the state and each time the state issued a denial without prejudice to refiling the application. The state's denials were based on the fact that FERC had not yet completed its National Environmental Policy Act ("NEPA") document, and that the Districts as lead agencies had not completed the California Environmental Quality Act or "mini-NEPA" process. The Districts then filed a third request, but withdrew it upon filing a petition for declaratory order with FERC asserting that the state had waived certification through repeated, rote denials without ruling on the substance of their request. FERC denied the Districts' petition, holding that a denial, even "without prejudice," is still a denial and thus an "act" within the meaning of Section 401.

The Districts appealed to the D.C. Circuit, arguing that if FERC's ruling were upheld, states could extend the time for decision indefinitely by denying one certification request after another without prejudice, thus nullifying Section 401's one-year limit. The Court, however, agreed with FERC, characterizing the Districts' argument as "hypothetical." The court did note FERC's acknowledgment that repeated denials without prejudice, particularly those that do not rest on any substantive conclusions, could be deemed equivalent to the forbidden withdraw-and-refile scheme. However, the court concluded the *Turlock* case did not present the facts to support such a determination.

Van Ness Feldman filed an *amicus curiae* brief on behalf of the hydropower industry supporting the Districts.

DOE ISSUES REQUEST FOR INFORMATION ON INFRASTRUCTURE LAW HYDRO FUNDING

On June 30, 2022, the Department of Energy ("DOE") Grid Deployment Office issued a request for information ("RFI") related to the development of hydroelectric incentive programs under Sections 243 and 247 of the Energy Policy Act of 2005 ("EPAct 2005"), as amended by the Bipartisan Infrastructure Law ("BIL"). The BIL amended Section 243 and appropriated funds for capital improvements related to increasing the efficiency of hydro facilities by at least 3%; an eligible facility may receive up to $5 million in a single year. It also established Section 247, which is a new hydro incentive payment for three types of capital improvement projects: improving grid resiliency, improving dam safety, or environmental improvements.

The RFI seeks feedback from the hydroelectric industry, Tribes, governmental agencies, and academia among many other categories of stakeholders, relating to these capital improvement incentives. Broadly, the RFI is asking for input for the following five categories:

1. General

- DOE has defined "capital improvement" as "The addition, improvement, modification, replacement, rearrangement, reinstallation, renovation, or alteration of tangible assets, such as real property, buildings (facilities), equipment, and intellectual property (including software) used in hydroelectric operations that have a useful life of more than one year, which are capitalized in accordance with generally accepted accounting principles within the [FERC] project boundary of a hydroelectric facility or the defined boundary pursuant to a permit or valid existing right-of-way granted prior to June 10, 1920." Is this definition adequate?Should it be revised or defined otherwise?
- What is the best timing for the funding?
- How should DOE collaborate with FERC's dam safety program to implement the funding?

2. EPAct 2005 Section 243

- What types of capital improvements are needed to improve operational efficiency by 3%? How would DOE validate this improvement?
- Should eligibility be limited only to efficiency improvements that include specific project components (e.g., turbines, generators, and intakes)?Should other improvements be considered?

3. EPAct 2005 Section 247

- How should DOE prioritize the three categories of capital improvements under this section? What are the bases that DOE can use to prioritize the specific incentives (e.g., type of investment, first-in-line application, type of ownership, geographic considerations)?
- What type of grid resiliency improvements should receive the highest priority? What are the typical costs associated with these improvements (e.g., adapting to changing grid conditions, ancillary services, integration of variable sources of electricity generation)? What metrics should DOE use to evaluate proposed improvements?
- How can DOE prioritize dam safety capital improvements? Should DOE consider the specific aspects of dam safety investments (e.g., hazard classification, FERC-required improvements, extending the life of a dam)?

- How might DOE prioritize acute environmental conditions versus anticipated effects of climate change?
- How can facilities improve water quality with these investments?What criteria can be applied to evaluate applications that address water quality improvements? How can DOE monitor or evaluate the results of these improvements?

4. Equity, Environmental, and Energy Justice (EEEJ) and Labor Priorities

- What strategies, policies, and practices can DOE deploy to support EEEJ goals?
- What EEEJ concerns/priorities are most relevant to hydro?
- How can applications better engage stakeholders and communities in implementing proposed improvements? How can DOE support these efforts?

5. Expanding Union Jobs and Effective Workforce Development

- How will these capital improvement projects impact the workforce?Is there anticipated job creation/loss, or changes in job quality? Will this affect jobs across the entire supply chain?
- What tools can be utilized to meet job creation goals for residents in the construction phase and long-term operations phase of the project?
- How should the quality of and access to construction phase employment and operations and maintenance phase employment be measured and evaluated?

Important Dates:

- August 9, 2022. DOE will hold an informal webinar to discuss the RFI.
- The deadline to respond is September 6, 2022.

Please do not hesitate to contact Mike Swiger or any other VNF Hydroelectric Practice member if you are interested in submitting comments.

ADMINISTRATION RESCINDS TRUMP ESA RULE DEFINITION OF "HABITAT"

On June 24, 2022, the U.S. Fish and Wildlife Service ("FWS") and the National Marine Fisheries Service (collectively, the "Services") rescinded their 2020 final rule that established a regulatory definition of "habitat" for the purpose of designating critical habitat under the Endangered Species Act ("ESA") ("Final Rule"). 87 Fed. Reg. 37,757. That 2020 final rule defined "habitat" as "the abiotic and biotic setting that currently or periodically contains the resources and conditions necessary to support one or more life processes of a species." The Final Rule rescinding this definition goes into effect on July 25, 2022. After the rescission is effective, though critical habitat designations may proceed, they will do so under a cloud of uncertainty due to the lack of a regulatory definition for "habitat."

Specifically, rescission of the 2020 "habitat" definition, without replacement, returns the Services to an approach that the Supreme Court in *Weyerhaeuser Co. v. U.S. Fish & Wildlife Service*, 139 S. Ct. 361 (2018) found to be an inadequate foundation for designation of critical habitat. Because the Services appear to be claiming broad discretion and flexibility in designating areas of critical habitat, this is like to mean uncertainty, inconsistency, and lack

of transparency in critical habitat designations, particularly for unoccupied areas. For example, it is not clear what type of "reasonable restoration" is necessary for an area to be designated critical habitat. The expanded regulatory authority and uncertainties over what may qualify as critical habitat under the ESA are likely, at least for now, to result in the requirements for such designations being resolved and clarified through litigation.

More broadly, the Final Rule is the first in a series of anticipated actions by this Administration that will significantly revise the ESA regulatory framework. As the Services have noted in the Spring 2022 Unified Agenda, other forthcoming actions include, but are not limited to, those related to:

- Rescission of critical habitat exclusion procedures (expected July 2022).
- Revising regulations for listing species and designating critical habitat (expected October 2022).
- Revising regulations for permits for take of endangered species (expected October 2022).
- Revising regulations governing experimental populations (expected November 2022).
- Reinstating protections for species listed as threatened under ESA (expected January 2023).
- Revising regulations for interagency cooperation (expected February 2023).

For more on this topic, please see our alert.

In a related development, on July 5, 2022, the U.S. District Court for the Northern District of California vacated three Trump era ESA rules: Regulations for Listing Species and Designating Critical Habitat, 84 Fed. Reg. 45,020 (modified how the Services add, remove, and reclassify endangered or threatened species and the criteria for designating listed species' critical habitat); Regulations for Prohibitions to Threatened Wildlife and Plants, 84 Fed. Reg. 44,753 (eliminated the FWS's former policy of automatically extending to threatened species the protections against "take" that Section 9 automatically affords to endangered species); and Regulations for Interagency Cooperation, 84 Fed. Reg. 44,976 (changed how the Services work with federal agencies to prevent proposed agency actions that could harm listed species or their critical habitat). The Services had filed a motion to remand without vacatur, but the court deemed vacatur appropriate at this time.

NINTH CIRCUIT ALLOWS MINING PROJECT ON SACRED APACHE LAND

In *Apache Stronghold v. United States*, the U.S. Court of Appeals for the Ninth Circuit in a split panel decision affirmed an Arizona U.S. district court's denial of a preliminary injunction to stop a land exchange and prevent copper mining on Oak Flat, a plot of land within the Tonto National Forest sacred to the Apache American Indians. The land exchange with the U.S. Forest Service was required by a 2014 act of Congress.

Apache Stronghold challenged the land exchange under the Religious Freedom Restoration Act ("RFRA"), the Free Exercise Clause of the First Amendment, and the 1852 Treaty of Santa Fe. The panel rejected the RFRA claim on the basis that no government benefits will be lost or penalties imposed on the Apache, and that transfer of the Forest lands to the mining company would not coerce them to abandon their religion. Regarding liability for trespassing on land that will be private after the exchange, the Court found the Apache had not demonstrated a sufficiently realistic fear of future criminal or civil trespass liability, and even if they had, it would not justify enjoining the entire exchange. Concerning the Free Exercise claim, the Court held that the land exchange was neutral in that its object was not to infringe upon the Apache's religious practices, but to facilitate mineral exploration. Finally, the panel ruled that the Apache failed to demonstrate that the Treaty imposed an enforceable trust obligation on the U.S. which would be violated by the land exchange.

In dissent, Judge Berzon wrote that the majority applied an overly restrictive test for identifying a "substantial burden" on religious exercise under RFRA, which led to the absurd result that blocking the Apaches' access to, and eventually destroying, a sacred site where they have performed religious ceremonies for centuries did not substantially burden their religious exercise. It is also not clear how the result squares with the U.S. Supreme Court's recent cases requiring government to accommodate religious practices and expression and disavowing a strict neutrality test for government action. For now, the decision appears to set a high bar for Tribes to challenge land development activities at sacred sites.

FERC PROPOSES IMPROVEMENTS TO GENERATOR INTERCONNECTION PROCEDURES AND AGREEMENTS

The Commission has issued a notice of proposed rulemaking ("NOPR") intended to improve the generator interconnection process and facilitate the development of new generation resources across the nation. According to FERC, the exponential growth in new resources seeking to connect to the transmission grid, along with an inefficient study process, has created large interconnection queue backlogs.

To alleviate this backlog and get more renewable energy resources connected to the grid, FERC proposes to require public utility transmission providers to eliminate the serial first-come, first-served study process currently required by the Commission's existing standard generator interconnection procedures. Instead, FERC would require transmission providers to use a first-ready, first-served cluster study process.

The new process will allow transmission providers to study numerous proposed generating facilities at the same time, rather than study each individual interconnection customer's request separately and serially. This approach aims to increase the efficiency of the interconnection process and help minimize delays.

As part of the proposed first-ready, first-served cluster study process, the Commission proposes more stringent financial commitments and readiness requirements for interconnection customers to remain in the interconnection queue. These proposed reforms pertain to study deposit amounts, site control demonstration, required commercial readiness milestones, and withdrawal penalties. FERC said the new requirements will discourage speculative interconnection requests and allow transmission providers to focus on processing interconnection requests that have a greater chance of reaching commercial operation.

The Commission proposes to further speed up the interconnection queue process by imposing firm study deadlines on public utility transmission providers by eliminating the reasonable efforts standard. Transmission providers who fail to meet their study deadlines would be subject to penalties in certain instances. The NOPR would also require transmission providers to offer an optional resource solicitation study process to allow a resource planning entity to obtain better information about the interconnection costs of different combinations of projects that may be selected in a state resource solicitation process or qualifying resource plan.

To incorporate technological advancements into the interconnection process, the Commission proposes to require transmission providers to allow more than one resource to co-locate on a shared site behind a single point of interconnection and share a single interconnection request. FERC said this will create a minimum standard that would remove barriers for co-located resources by creating a more efficient standardized procedure for these types of configurations. In addition, the Commission also proposes to require interconnection customers requesting to interconnect a non-synchronous generating facility to meet certain modeling and performance requirements and would also require them to continue providing power and voltage support during grid disturbances.

Comments are due October 13, 2022 and Reply Comments are due November 14, 2022.

YUBA WATER DOCUMENTARY CHRONICLES YUBA RIVER DEVELOPMENT PROJECT

The Tricky Yuba is a new documentary telling the story of Yuba Water, from its inception as a response to the devastating flood of 1955, through the building of New Bullards Bar Dam and Reservoir, to its present day commitments to promote the quality of life in Yuba County, California. The documentary is a history of the agency as told by the people who lived it and overcame many challenges to develop and preserve the Yuba River Development Project, providing clean, renewable hydropower, flood protection, water supply, recreation and fish and wildlife benefits to the community. It is available on the Yuba Water website.

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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