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HYDRO NEWSLETTER

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What's Inside?

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NINTH CIRCUIT OVERTURNS FERC CLEAN WATER ACT 401 WAIVER DECISIONS

A panel of the U.S. Court of Appeals for the Ninth Circuit has overruled the Federal Energy Regulatory Commission's (FERC or Commission) findings in three relicensing cases in California that the State Water Resources Control Board (SWRCB) waived its certification authority under Section 401 of the Clean Water Act (CWA) to impose conditions on the licenses. In *SWRCB v. FERC*, decided August 4, 2022, the Ninth Circuit held that when the state cooperates with an applicant in repeatedly withdrawing its certification request just prior to the one-year statutory deadline for the state to act on the request, and then refiling the application to trigger a new one-year deadline, the state is simply accommodating the wishes of the applicant and not attempting to evade the deadline – thus, waiver does not occur.

Under CWA Section 401, if an applicant for a federal license or permit conducts an activity that may result in a discharge into waters of the United States, the applicant must 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. If the state deems the project will not comply with the water quality standards, the state may choose to veto the federal license or permit. If the state "fails or refuses to act" on a certification request within a reasonable period of time, "which shall not exceed one year," then the state waives its certification authority. 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. However, states have invented various procedural mechanisms over the years to avoid the one-year timeline.

In the three consolidated cases before the Ninth Circuit, the SWRCB and conservation groups challenged FERC's orders finding waiver for relicensing of projects owned by Merced Irrigation District, Nevada Irrigation District, and Yuba County Water Agency. These were among a number of California cases in which FERC found waiver based on the "withdraw-and-refile" scheme invalidated by the U.S. Court of Appeals for the D.C. Circuit in its 2019 *Hoopa Valley Tribe v. FERC* decision. FERC and the licensees argued that the SWRCB coordinated the withdraw-and-refile procedure and therefore intentionally sought to evade the one-year deadline as it had for decades in numerous other cases in California. The Ninth Circuit, however, agreed with the SWRCB that the licensees voluntarily withdrew and refiled their certification requests for their own purposes, and that the SWRCB was justified in not acting on the requests because state law required completion of a state-level environmental review under the California Environmental Quality Act (CEQA) which had not yet commenced.

The law on Section 401 certification waiver remains unsettled. As previously reported, the D.C. Circuit in Turlock Irrigation District v. FERC recently upheld FERC's interpretation that when a state issues rote denials of certification "without prejudice" year after year, it has not failed or refused "to act" within the meaning of the statute. The co-licensees in that case have filed for rehearing before the D.C. Circuit, pointing out that their case cannot be reconciled with the fundamental principle of *Hoopa Valley Tribe* that under Section 401 one year means one year and the period cannot be extended for any reason. The deadline for seeking rehearing of the Ninth Circuit panel decision is September 19, 2022.

Meanwhile, Congress has taken a strong interest in the Section 401 timeline issue and may take it up as part of a permitting reform package this fall.

Van Ness Feldman represents Nevada Irrigation District and Yuba County Water Agency in the Ninth Circuit cases, and filed an *amicus curiae* brief with the D.C. Circuit representing the hydropower industry supporting the co-licensees in the *Turlock* case.

CALIFORNIA SUPREME COURT ISSUES SPLIT DECISION ON CEQA PREEMPTION

On August 1, 2022, the California Supreme Court in *County of Butte v. Department of Water Resources* issued its decision on a long-running challenge by Butte and Plumas Counties to the California Department of Water Resources' (DWR) environmental document prepared under CEQA for DWR's FERC relicensing of its Oroville Facilities. The decision addresses the issue of whether the Federal Power Act (FPA) preempts CEQA partially or entirely. A state trial court had earlier found DWR's CEQA Environmental Impact Report (EIR) to be adequate under state law, while an intermediate state court had dismissed the Counties' claims as preempted by the FPA without reaching the question of adequacy.

In this latest chapter of the dispute, the California Supreme Court agreed that the FPA preempts the Counties' claims to the extent they would unwind the terms of a comprehensive FERC relicensing settlement agreement on which DWR relied in its EIR, and to the extent the Counties would seek to enjoin DWR from operating the Oroville Facilities under the proposed license. The Court also suggested that the FPA may preempt CEQA if CEQA required mitigation measures that would interfere with FERC's authority to establish the new license terms, but stated such a conflict had not yet arisen so reserved judgment on that question. However, the Court held preemption does not apply to the Counties' challenge to the environmental sufficiency of the EIR more generally "insofar as a compliant EIR can still inform the state agency concerning actions that do not encroach on FERC's jurisdiction."

A separate concurring and dissenting opinion joined by two justices excoriated the majority opinion's preemption analysis, arguing that the majority had invented a new category of federal preemption which applies only if it is impossible to comply both with FERC and CEQA requirements. The minority opinion pointed out that the U.S. Supreme Court and the Ninth Circuit have consistently interpreted the FPA to occupy the field of hydroelectric licensing, leaving no room for duplicative state regulation. The minority opinion further observed that the settlement proposal had been thoroughly analyzed in FERC's Environmental Impact Statement, the sufficiency of which was not in question.

The case will now go back to the lower state courts for further litigation concerning the substantive adequacy of DWR's EIR. Based on the Court's preemption ruling, it appears questionable that the case would have any practical effect on the pending FERC relicensing. Also, the Counties did not challenge the SWRCB's Section 401 water quality certification for the relicensing, which relied on DWR's EIR and incorporated the terms of the comprehensive settlement as conditions in the certification.

Van Ness Feldman represents DWR in the FERC relicensing proceeding.

U.S. FISH AND WILDLIFE SERVICE RESCINDS ENDANGERED SPECIES ACT CRITICAL HABITAT EXCLUSION REGULATIONS

On July 21, the U.S. Fish and Wildlife Service (FWS) rescinded regulations from 2020 that changed the process for excluding areas from critical habitat designations under Section 4(b)(2) of the Endangered Species Act (ESA). 87 Fed. Reg. 43,433. Per the agency, this action restores the Secretary of the Interior's discretion to determine how and when to exclude areas from critical habitat designations and FWS's role as the expert agency responsible for administering the ESA. The final rule takes effect on August 22, 2022.

Under the final rule, FWS will resume its previous approach to exclusions. That previous approach, which is currently used by the National Marine Fisheries Service (NMFS) and outlined in a 2016 policy on 4(b)(2) exclusions, requires FWS to consider the economic impacts of a proposed critical habitat designation and publishes the economic analysis concurrent with the proposed designation. In addition, FWS must consider exclusion of areas covered by a permitted voluntary conservation plan, tribal lands, and areas for which a federal agency has asserted national security concerns.

Critical habitat designations identify areas and habitat features that are essential to conserve listed species. FWS may exclude areas from designations after considering economics, national security, and other factors (such as conservation activities). Federal agencies must ensure actions they fund, permit, or conduct do not destroy or adversely modify designated critical habitats. Critical habitat designations do not affect actions on private lands unless the actions involve the authorization or funding of a federal agency. Further details can be found here.

FERC ISSUES PROPOSED RULE EXPANDING DUTY OF CANDOR

On July 28, 2022, FERC issued a Notice of Proposed Rulemaking (NOPR) in Docket No. RM22-20-000 to broaden the duty of candor requirements for all entities communicating with FERC on matters subject to its jurisdiction. The NOPR explains that FERC relies extensively upon the accuracy of information provided to it for effective decision making. While FERC has adopted a variety of regulations imposing a duty of candor, there are no generally applicable requirements. The NOPR aims to fill the gaps by proposing a broad duty of candor on all communications from regulated and other entities to FERC, as well as to other specified organizations upon which FERC relies. The latter would include FERC-approved market monitors, regional transmission organizations (RTO) and independent system operators (ISO), jurisdictional transmission or transportation providers, and the Electric Reliability Organization and its associated Regional Entities. If adopted, the proposed rule would expand FERC's Office of Enforcement's purview to investigate potential violations of the duty of candor.

Specifically, the NOPR proposes to revise 18 C.F.R. Part 1 of FERC's regulations to require that all entities communicating with FERC on a matter within FERC's jurisdiction: (1) submit accurate and factual information, (2) not submit false or misleading information, and (3) not omit material information. However, the NOPR proposes that exercising due diligence to prevent inaccurate information would be an affirmative defense to violations of the requirement. The NOPR also clarifies that it is not intended to impose a duty of disclosure.

The NOPR would limit the duty of candor to communications related to a matter subject to FERC's oversight. Communications that are tangential or unrelated to matters subject to FERC regulation are not covered by the proposed regulation (e.g., employer/employee disputes). The duty of candor would apply to all entities, including both organizations and individuals, that either make such communications or are responsible for making such communications.

Commissioner Danly in a dissenting opinion expressed grave concerns about the sweeping nature of the proposed duty of candor. For example, he noted the threat of enforcement actions based on communications between employees of one electric utility and employees of another electric utility could dampen cooperation within the industry and raise the stakes for legal departments to monitor those interactions. He also noted that the public, who are being encouraged in other contexts to engage more with FERC, could be subject to liability for weighing in on matters of political, social, and community concern, and that this could have the unintended effect of deterring public involvement as well as infringing on speech at the core of First Amendment protections.

Comments on the proposed rule will be due 60 days from the date of publication in the Federal Register. The NOPR invites comments on a number of issues including whether the scope of communications subject to the proposed rule is adequate or should be expanded. Commissioner Danly's dissent encourages comments on whether the NOPR creates Constitutional due process concerns by being impermissibly vague, whether the proposed rule would chill public engagement with FERC, whether FERC has statutory authority to enact the rule, whether the proposed rule should be modified to exclude unintentional violations, and whether the rule should include a materiality requirement. Commissioner Danly noted that the regulated community may be reticent to comment unfavorably on the NOPR and encouraged companies to speak out candidly anyway.

PROPOSED WRRDA AMENDMENT WOULD STREAMLINE PERMITTING AT CORPS DAMS

On July 14, 2022, Senators Daines (R-MT) and Feinstein (D-CA), along with Representative Kuster (D-NH) introduced bipartisan legislation to expedite hydropower at U.S. Army Corps of Engineers (Corps) facilities. The companion bills, S. 4540 and H.R. 8383, would amend the 2014 Water Resources Reform and Development Act (WRRDA) to require the Secretary of the Army to assess opportunities to: (1) increase the development of hydroelectric power at existing Corps hydroelectric dams, and (2) develop new hydroelectric power at nonpowered Corps dams.

This would be accomplished with the help of a newly created Corps position of program manager for non-federal hydroelectric power development. The program manager would be located at the Corps headquarters office and be responsible to: (1) ensure timely and consistent review of applications for Corps permits across Corps districts and levels; (2) answer questions within the Corps and facilitate communication between developers and the Corps concerning Corps permits; (3) answer question from developers regarding the Corps permitting process; (4) coordinate with FERC on licensing matters; (5) facilitate timely action on all aspects of federal permitting required for hydropower development and (6) ensure that new hydropower projects are designed and operated with environmentally sustainable technologies and management plans.

The proposed legislation appears intended to address long-standing concerns among hydropower developers that the Corps permitting process is outdated, inconsistent among Corps district offices, time-consuming, and not well coordinated with FERC's license process.

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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