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D.C. Circuit Holds that States Cannot Use Section 401 Authority to Delay Hydropower Relicensing

On January 25, 2019, in *Hoopa Valley Tribe v. FERC*, the U.S. Court of Appeals for the D.C. Circuit (D.C. Circuit) concluded that a Federal Energy Regulatory Commission (FERC) hydroelectric licensee's repeated withdrawal and resubmission of water quality certification requests under Section 401 of the Clean Water Act (CWA) pursuant to a written agreement with state water quality agencies does not trigger a new statutory period of state water quality review. The D.C. Circuit held that, as a consequence, FERC acted arbitrarily and capriciously by not concluding that the States of California and Oregon (States) had waived their water quality authority under Section 401. The D.C. Circuit's opinion does not appear limited to the particular facts of the case and thus could radically alter the relationship between FERC and state water quality agencies in the relicensing process.

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The case concerns a settlement agreement for the removal of four dams on the Klamath River. As a condition of the settlement, the licensee and the States agreed to defer the one-year statutory deadline for Section 401 approval by annually withdrawing and re-filing the 401 applications to avoid the certifications being deemed waived under the CWA. In May 2012, the Hoopa Valley Tribe (Tribe) filed a petition for declaratory order asking FERC to find, among other things, that the States had waived their 401 authority and that FERC should promptly issue a new license with appropriate environmental protections. The Tribe argued that the States' failure to act within one year and their agreement with the licensee not to do so amounted to a waiver under the CWA. FERC denied the petition, finding that while the arrangement was inconsistent with the spirit of the CWA, the withdrawal and resubmission of a 401 application is a new request that establishes a new one-year deadline for the state's action under the CWA. The Tribe sought judicial review of FERC's orders.

In a unanimous opinion, the D.C. Circuit held that FERC acted arbitrarily and capriciously by finding that the States did not waive their 401 authority. The D.C. Circuit found that the withdrawals and resubmissions of the 401 applications were not new requests at all, and did not restart the one-year clock for the States to act on the requests. Instead, the D.C. Circuit found that the States' actions constituted a failure or refusal to act under the plain meaning of the CWA, constituting a waiver of their authority. The D.C. Circuit determined that the "coordinated withdrawal-and-resubmission scheme" under the dam removal settlement did not exploit a statutory loophole, but rather circumvented the exclusive authority delegated to FERC by Congress over hydropower licensing. The D.C. Circuit concluded that if this was permitted to continue, the withdrawal-and-resubmission scheme could be used to indefinitely delay federal licensing proceedings and undermine FERC's jurisdiction to regulate such matters. In response to the argument that a one-year review period could result in incomplete applications and premature decisions, the D.C. Circuit found that "it is the role of the legislature, not the judiciary, to resolve such fears."

The facts in the Klamath case are fairly extreme in that the licensee and the States by written agreement had committed to the coordinated withdrawal and resubmittal scheme, and that the process had been ongoing since 2006. However, the D.C. Circuit also commented on the broader issue of delays in FERC relicensing as a result of such practices, noting that at the time of briefing, 27 of the 43 licensing applications before FERC were awaiting 401 certification, some for more than a decade. As the D.C. Circuit stated: "By shelving water quality certifications, the states usurp FERC's control over whether and when a federal license will issue. Thus, if allowed,

the withdrawal-and-resubmission scheme could be used to indefinitely delay federal licensing proceedings and undermine FERC's jurisdiction to regulate such matters."

Although not discussed in the decision, some states including California have put in place comprehensive environmental review processes as part of their 401 certification decision making which in many ways duplicate the FERC licensing process, and which no longer appear to fit easily within the one-year certification window. As a consequence of the D.C. Circuit's ruling, FERC now appears to have a mandate to reassert control over and shorten the length of the licensing process. Further, since applicants for FERC gas pipeline certifications, dredge and fill permits from the U.S. Army Corps of Engineers under CWA Section 404, and other federal permits that involve discharges into navigable waters also must obtain 401 certifications or waivers, the implications of the D.C. Circuit's opinion in the Klamath case go far beyond FERC hydroelectric licensing.

For more information, see our issue alert.

FERC Issues Notice of Proposed Rulemaking to Implement AWIA

On January 31, 2019, FERC issued a Notice of Proposed Rulemaking (NOPR) proposing rules to establish a new expedited licensing process (ELP) for qualifying facilities at existing nonpowered dams and closed-loop pumped storage projects, as required by America's Water Infrastructure Act of 2018 (AWIA), enacted on October 23, 2018. The NOPR does not propose to alter FERC's existing licensing processes. Instead, it establishes procedures for FERC to determine, on a case by case basis, whether applications for an original license at a qualifying project meet the criteria to participate in the new ELP. The ELP would apply only to original license applications; it would not apply to relicensing proceedings. Applicants must include with their licensing application a request for authorization to use the ELP. FERC will act on the request to use the ELP within six months from the date of application filing.

To qualify for the ELP, an applicant must demonstrate that its proposed project meets the statutory criteria for qualifying facilities under the AWIA, as described in our November 2018 newsletter. In addition, FERC proposes several additional eligibility requirements. For example, the NOPR requires applicants for the ELP to include in their license application documentation of prior consultation with agencies and Indian Tribes. FERC also proposes to require an applicant to submit, at the time of filing its license application, a copy of its request for water quality certification under Section 401 of the CWA, and: (i) a copy of the 401 certification; (ii) evidence of the state's waiver of 401 authority; or (iii) documentation from the state certifying that the 401 application is complete. With regard to the Endangered Species Act, FERC proposes to require an applicant for the ELP to include: (i) a no-effect determination that includes documentation that no listed species or critical habitat are present at the proposed project site; (ii) documentation of concurrence from the U.S. Fish and Wildlife Service (FWS) and National Marine Fisheries Service (NMFS), as necessary, on a not likely to adversely affect determination; or (iii) a draft biological assessment that includes documentation of consultation with FWS and NMFS, as necessary. In addition, if the proposed project would use any public park, recreation area, or wildlife refuge established under state or local law, FERC proposes to require documentation from the managing entity demonstrating that it is not opposed to use of the park, recreation area, or wildlife refuge for hydropower development.

For projects at existing nonpowered dams, FERC proposes to require an applicant to provide, at the time of application filing, documentation verifying consultation with the owner of the dam and the results of the consultation. For a proposal at a non-federal nonpowered dam, the applicant would be required to provide documentation of consultation with the non-federal dam owner, including confirmation that the non-federal dam owner does not oppose the project development. For a proposal at a federal nonpowered dam, the applicant would be required to provide documentation from the federal dam owner confirming that non-federal hydropower is not precluded at the proposed location and that the federal owner does not oppose project development.

For closed-loop pumped storage projects, FERC proposes to retain its previous definition of a closed-loop pumped storage project (i.e., a pumped storage project that is not continuously connected to a naturally-flowing water feature). However, FERC is soliciting comments from the public on this proposed definition or proposals for alternative definitions. FERC also seeks comment on whether the ELP should be available to proposed projects that would require FERC to prepare an Environmental Impact Statement (EIS) under the National Environmental Policy Act. Under FERC's current regulations, licenses for any unconstructed water power project normally require the preparation of an EIS.

Under the AWIA, FERC must "seek to ensure a final decision will be issued no later than two years after" the receipt of a completed application. The NOPR does not propose to change or streamline the pre-filing licensing process in any way, and the pre-filing process is not included in the two-year timeframe. FERC also proposes to consider late-filed recommendations by fish and wildlife agencies or mandatory terms and conditions under FPA Section 4(e) of fishway prescriptions under FPA Section 18 as cause to remove the application from the ELP.

D.C. Circuit Declines to Reopen Yadkin Project Relicensing or Require Federal Recapture

On January 18, 2019, in *State of North Carolina v. FERC*, the D.C. Circuit denied the State of North Carolina's petition for review of FERC's issuance of the new license for the Yadkin Project, FERC Project No. 2197. In its challenge, the State argued that the prior licensee, Alcoa Power Generating, Inc. (Alcoa), misrepresented its plans to discontinue the use of project power for industrial production at Badin Works, a nearby aluminum smelter plant, giving Alcoa an unfair advantage in relicensing. Due to Alcoa's alleged misrepresentations, the State argued that FERC should be required to reopen the licensing to competition or, in the alternative, that FERC recommends federal capture of the Yadkin Project for transfer of the Project to the State in return for payment equal to Alcoa's net investment and severance damages. After FERC issued a new license for the Project and denied the State's recapture proposal, the State sought judicial review of FERC's orders.

On review, the D.C. Circuit found no evidence of deficiencies or deception in Alcoa's license application. Rather, the Court found that Alcoa disclosed the curtailment of operations at Badin Works every step of the way through the licensing process, and the fate of Badin Works should have been apparent to any competitor who wished to pursue the license. While the Court acknowledged that the "loss of jobs from the closure of Badin Works is a dark and menacing cloud that hangs over the state of North Carolina," it nonetheless found that "Alcoa did not conceal this impending squall, and thus, FERC did not err by denying North Carolina's request to reopen licensing."

The Court also found no legal basis for the State's proposal for the federal government to take over the project and transfer it to the State. While the Court acknowledged FERC's authority to recommend that the federal government take over a hydropower project for public purposes, the Court held that federal recapture is limited to projects that the federal government takes over and thereafter maintains and operates. The Court found that, under the plain language of the Federal Power Act, Congress authorized federal recapture for federal purposes, not for subsequent transfer to state entities. The Court also acknowledged that the State's desire to obtain the Project at a value less than just compensation, as it would have under its federal recapture proposal, and political pressures stemming from the loss of jobs at Badin Works, "do not create a legal basis for federal recapture when its sole purpose is transferring the hydropower project to a state."

Finally, the Court rejected the State's argument that FERC erred in its licensing decision by failing to consider the adverse impact that permanent closure of Badin Works had on local employment and the public interest. The Court held that "[w]hile the loss of jobs caused by the permanent closure of Badin Works did affect public interest, FERC had already accounted for its impact." Accordingly, the Court found the State's challenge unavailing.

The State previously challenged Alcoa's ownership of the riverbed underlying the Yadkin Project, arguing instead that the State owned the riverbed because the river stretch was navigable when the State joined the Union in 1789. The U.S. Court of Appeals for the Fourth Circuit held in 2017 that the applicable reach of the Yadkin River was not navigable upon statehood and that the state was free to grant title to the riverbed to a private party, i.e., the licensee, for money. The U.S. Supreme Court declined to review the Fourth Circuit decision.

Van Ness Feldman represents Cube Yadkin Generation LLC, which acquired the Project from Alcoa shortly after FERC issued the new license, and which intervened in support of FERC in the D.C. Circuit proceeding.

FERC Update

On January 2, 2019, FERC Commissioner Kevin J. McIntyre passed away. McIntyre was named FERC Chairman by President Trump and joined FERC on December 7, 2017. He served as Chairman until October 24, 2018, and served as a Commissioner until his passing. The Trump administration has not yet announced a nominee for McIntyre's position.

On January 31, 2019, FERC Commissioner Cheryl LaFleur announced that she will not seek a third term as FERC Commissioner. LaFleur was nominated by President Obama in 2010 and has served eight years as a Commissioner. She served as Acting FERC Chairman from November 2013 to July 2014 and January to August 2017 and as Chairman from July 2014 until April 2015. LaFleur intends to remain at FERC at least through the end of her term on June 30, 2019.

DOE Announces Recipients of Section 242 Incentives for Calendar Year 2017

The Department of Energy (DOE) recently announced the recipients of hydropower production incentives (HPI) under Section 242 of the Energy Policy Act of 2005 for calendar year 2017. Under the HPI program, a facility may receive incentive payments of 1.8 cents per kilowatt-hour, with a cap of $750,000 per year, for up to 10 years,

from generation from qualifying new turbines or other generating devices that were initiated on or after October 1, 2005. A list of the calendar year 2017 recipients is available on DOE's website.

Congress has appropriated $6,600,000 to DOE for Section 242 hydropower production incentives for calendar year 2018.