THE
NATIONAL LAW REVIEW

Hydro Newsletter - Volume 6, Issue 9

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Hydro Newsletter

- Environmental, Energy & Resources
- Administrative & Regulatory

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Thursday, August 29, 2019

FERC Finds Waiver of 401 Certification for Constitution Pipeline on Remand from D.C. Circuit

On August 28, 2019, the Federal Energy Regulatory Commission (FERC) reversed its prior declaratory order and held that the New York State Department of Environmental Conservation (New York DEC) waived its authority under section 401 of the Clean Water Act (CWA) for the proposed Constitution Pipeline Project. The case is important because it demonstrates FERC's application of the Hoopa Valley Tribe v. FERC case to a fact pattern in which there was no written agreement to delay issuance of the 401 certification and no extended history of withdrawals and refilings, and because it appears FERC will not be persuaded to stay its order approving a project pending judicial review of a waiver decision based on a state's assertion that waiver results in a deficiency of environmental review.

Constitution Pipeline Company, LLC (Constitution) first applied for a 401 certification in August 2013, and twice withdrew and resubmitted its application at the state's request. In April 2016, New York DEC denied Constitution's application on grounds that Constitution had not provided relevant information requested by the state. Constitution then petitioned FERC for a declaratory order finding that New York DEC had waived its section 401 authority due to the state's failure to act within one year. In January 2018, FERC issued an order denying the petition based on its

longstanding interpretation that the withdrawal and resubmission of a 401 application restarts the one-year waiver period. Constitution sought review before the U.S. Court of Appeals for the D.C. Circuit (D.C. Circuit). While the case was pending, the D.C. Circuit issued its decision in Hoopa Valley Tribe v. FERC, holding that the withdrawal and resubmission of a 401 certification request does not trigger a new statutory period of review. In light of the Hoopa order, the D.C. Circuit authorized a voluntary remand of the Constitution case back to FERC for reconsideration.

In its August 28 order, FERC reversed its prior decision and found that New York DEC waived its section 401 authority for failure to act within one year. Due to this waiver, FERC found that New York DEC's later denial has "no legal significance." FERC determined that no formal written agreement was needed to demonstrate an impermissible arrangement between an applicant and the state to evade the one-year deadline. Instead, the state's request for Constitution to withdraw and resubmit its application, and the state's failure to act within one year, resulted in waiver of the state's 401 authority. FERC found that a state's reason for delay is not material, nor is the fact that the delay was for a shorter period than in the Hoopa case. In denying the state's request to stay the effectiveness of a waiver until judicial review is complete, FERC rejected the state's arguments that construction of the pipeline without a 401 certification would result in significant environmental harm. FERC held that it did not depend on a forthcoming 401 certification to justify its conclusion that project-related environmental impacts would be acceptable and that the project should be authorized.

Environmental Organizations File Petition for Certiorari in *Hoopa Valley Tribe* Case

On August 26, 2019, California Trout and Trout Unlimited filed a petition for a writ of certiorari with the U.S. Supreme Court of the D.C. Circuit's January 25, 2019 decision in Hoopa Valley Tribe v. FERC. In that case, the D.C. Circuit held that the withdrawal and resubmission of a water quality certification request under section 401 of the CWA does not trigger a new statutory period of review. California Trout and Trout Unlimited were both parties to the D.C. Circuit case. Briefs in opposition to the petition for a writ of certiorari are due by September 27, 2019, unless extended by the Court. Briefs of amicus curiae before the Court's consideration of the petition for a writ of certiorari may be filed upon written consent of all parties or by leave of the Court.

EPA Issues Proposed Revisions to Clean Water Act Section 401 Regulations

On August 12, 2019, the U.S. Environmental Protection Agency (EPA) issued a proposed rule (Proposed Rule) that would make sweeping changes in how states (and certain tribes) implement section 401 of the CWA. The Proposed Rule "is intended to increase the predictability and timeliness of section 401 certifications by clarifying timeframes for certification, the scope of certification review and conditions, and related certification requirements and procedures." The Proposed Rule is the latest in a series of recent executive and judicial developments,

particularly for gas pipelines, hydropower projects, and other energy infrastructure projects, that are changing the section 401 landscape.

The Proposed Rule would limit a state's review and action under section 401 "to considerations of water quality," meaning enumerated provisions of the CWA and EPA-approved state or tribal CWA program provisions. For instance, conditions requiring recreation facilities and access improvements and payments to state agencies for improvements unrelated to the project would exceed this scope. The Proposed Rule would also exclude from the scope of certification conditions to address indirect impacts of a project such as air emissions and transportation effects. It would also limit conditioning authority to water quality impacts from point source "discharges" rather than the entire activity associated with the federally licensed or permitted project.

A state agency requirement unrelated to water quality would not be considered a mandatory condition that a federal agency must include in its license or permit. EPA also proposes to provide federal agencies with the authority to determine whether a certification condition is beyond the scope of certification and whether the state has provided specific information necessary to support each condition. EPA also solicits comment on whether a state may reopen certification.

The Proposed Rule notes that section 401 does not include a tolling provision for the one-year time limit on state agency action and proposes to provide that the state agency may not request the applicant to withdraw a certification request or to take any other action to modify or restart the one-year time period. However, the Proposed Rule recognizes that where applicants and state water quality agencies "are working collaboratively and in good faith," there may be a mutual interest in allowing the certification process to extend beyond one year. EPA solicits comment on whether there is any legal basis for a federal permitting agency, such as FERC, to extend the one-year period in such cases. EPA also proposes that if a state acts within a year, but that action is outside the scope of its section 401 authority, the state will have constructively waived certification.

Under EPA's Proposed Rule, the federal agency is responsible for enforcing section 401 conditions once they are incorporated into its license or permit and the state has no additional or ongoing role in enforcement of the federal license condition.

The Proposed Rule was published in the Federal Register on August 22, 2019. Comments are due by October 21, 2019. EPA also will hold public hearing sessions in Salt Lake City, Utah on September 5 and 6, 2019 to provide interested parties the opportunity to present data, views, or information concerning the Proposed Rule. Interested participants must register to attend or speak at the public hearing on EPA's website.

FWS and NMFS Revise Regulations Implementing the ESA

On August 12, 2019, the U.S. Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS) (collectively, the Services) announced the publication of three final rules that significantly revise their regulations implementing the Endangered Species Act (ESA). The revisions are in response to the Department of the Interior and National Oceanic Atmospheric Administration's

2017 calls for public comment on how they can improve efficiency and effectiveness of current regulations and regulatory processes.

Through these rules, the Services modify the procedures under ESA section 4 for listing and delisting species and designating occupied and unoccupied areas as critical habitat, including clarifying the duration of the "foreseeable future" when determining whether to list a species as threatened, revising the procedures for designating critical habitat, and streamlining the process for delisting and reclassifying species. The Services assert that these revisions to the section 4 implementing regulations provide additional clarity and transparency regarding the listing and delisting of species and the designation of critical habitat. Notably, the Services' treatment of unoccupied critical habitat in this final rule responds to the uncertainty and confusion created by their 2016 regulatory revisions, and the Services provide factors that will be considered when determining whether an unoccupied area will contribute to the conservation of a species.

The rules also revise the regulations governing the Services' section 7 consultation process by adopting deadlines for the Services' completion of informal consultations, revising key terms regarding potential effects and the level of causation and certainty required in the review of effects of an action on species and critical habitat, clarifying what constitutes adverse modification of critical habitat, expanding the Services' ability to reinitiate both formal and informal consultations, and adopting programmatic and other alternative consultation mechanisms. The Services also amend the definition of "environmental baseline" to make clear that the consequences of past or ongoing activities or facilities should be attributed to the environmental baseline when the action agency has no discretion to modify them, rather than being included in the proposed action. Further, it is notable that the Services continue to grapple with how best to identify the scope of effects that can be reasonably attributed to an agency action and appropriately analyzed under the framework of the statutory text.

Lastly, the rules prospectively require FWS to adopt species-specific section 4(d) rules for the identification of prohibited "take" of a threatened species. In the past, FWS followed a 1978 regulation that established a blanket "4(d) rule" that extended all ESA section 9(a)(1) take prohibitions to a threatened species unless a species-specific rule was otherwise adopted. In this final rule, FWS rescinds the blanket "4(d) rule" and, for new listed species, provides for the adoption of species-specific "4(d) rules." This approach aligns with NMFS's long-standing practice.

The ESA rules will become effective on September 26, 2019. For more information on the rules, please see our issue alert.

FERC Issues First Early Action Determination under AWIA

On August 9, 2019, FERC issued its first early action determination under section 36(c) of the Federal Power Act (FPA) finding that certain project investments over the term of an existing license meet the criteria to be considered when FERC sets the term for the new license. FPA section 36(c) is a new provision added to the FPA under the America's Water Infrastructure Act of 2018 (AWIA). Under the AWIA, in determining a new license term, FERC must give equal weight to investments made

over an existing license term and investments planned under the new license. The AWIA also allows licensees to seek a determination in advance whether investments during the existing license term meet the criteria to be considered toward the new license term.

The licensee argued that it has spent or will spend before license expiration over $710 million on rehabilitation of two powerhouses, a new office, warehouse, and storage facilities, replacement of two spillway gate hoists, and implementation of a Habitat Conservation Plan (HCP). FERC found that rehabilitation of the powerhouse and replacement of the spillway hoists meet the criteria for consideration toward the new license term because they will enhance the efficiency, reliability, and safety of the project and were not considered by FERC as contributing to the existing license term. FERC also found that implementation of the HCP meets the criteria because it assists in the recovery, protection, and habitat enhancement of Columbia River salmonids. FERC found that it was unclear from the licensee's request whether the construction of the ancillary facilities were project-related, and expressed uncertainty that Congress intended it to consider facilities that do not have a demonstrated direct hydropower purpose. FERC found that it was unable to determine whether such investments meet the criteria to be considered toward the new license term.

FWS Concludes Substantial Information Supports ESA Listing for Lake Sturgeon

On August 14, 2019, FWS completed its initial 90-day review of a petition to list the lake sturgeon under the ESA. FWS concluded that there is substantial information to consider listing the species as threatened or endangered. Based on this conclusion, FWS will begin an in-depth review to determine if the species should be listed. A listing could have important implications for operators of hydroelectric projects because the species occurs across temperate zone freshwater systems of North America, from Hudson Bay and the Great Lakes, through the Mississippi River drainages. FWS's finding was published in the Federal Register on August 15, 2019. The notice begins a 12-month status review of the species and solicits additional information concerning the species. No deadline is established for the submittal of additional information.

At the conclusion of the 12-month status review, if the data supports the need to list the species but other species are of higher priority, FWS will issue a "warranted but precluded" determination and conduct an annual reevaluation of whether to go forward with listing. If the data supports the need to list and the species is sufficiently high in FWS's priority list, FWS will issue a proposed listing in the Federal Register.

FERC Revises Rules for Hardcopy Filings and Submissions

On August 27, 2019, FERC issued a final rule amending its regulations concerning the process for delivering hardcopy filings to FERC. Specifically, FERC has revised its regulations to require that filings to be delivered to FERC, other than by the U.S. Postal Service (USPS), must be sent to FERC's off-site security screening facility located at 12225 Wilkins Avenue, Rockville, MD 20852. FERC has determined that

sending hardcopy submissions to an off-site facility for security screening and processing will better protect the safety of FERC, its employees, and the public from security risks. The off-site facility will sort, screen, and prepare the filings for delivery to FERC. All documents sent to the off-site facility will be recorded in FERC's docket as received by FERC on the date of delivery to the off-site facility. FERC will still permit USPS mail to be sent directly to FERC's headquarters, because USPS has existing security protocols. All deliveries to FERC's headquarters other than by USPS will be rejected. The rule will become effective 60 days after its publication in the Federal Register.