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Court of Appeals' Hydropower Decision May Influence FERC Relicensing Process

On August 22, the D.C. Circuit Court of Appeals released a decision in the City of Tacoma's Cushman Dam relicensing litigation that may have broad impacts on the Federal Energy Regulatory Commission's ("FERC's") hydropower relicensing process. In *City of Tacoma v. FERC*, No. 05-1054, Tacoma and the Skokomish Tribe sought judicial review of several provisions of FERC's 1998 Cushman Dam license. The Cushman Dam project includes a portion of the Skokomish Tribe's reservation lands.

An aspect of the decision that will grab headlines is the holding that FERC can effectively shut a project down through imposition of expensive license conditions. Tacoma had contended the license condition that requires a 240 cfs minimum flow into the North Fork of the Skokomish River would make the Cushman project uneconomic. "[W]e find persuasive FERC's argument that Congress implicitly extended to FERC the power to shut down projects either directly, by denying a new license, or indirectly, by imposing reasonable and necessary conditions that cause the licensee to reject the new license." The court did not resolve, however, whether such conditions would force a licensee into costly decommissioning proceedings at FERC or whether a licensee could simply abandon a project under those circumstances. That fight was left for another day.

Several other sections of the decision may impact the substance and timing of FERC's relicensing process for many hydropower projects around the country that are in the midst of relicensing.

The decision addressed the extent of the authority of federal agencies such as the Forest Service and Department of Interior to condition FERC hydropower licenses under Section 4(e) of the Federal Power Act ("FPA"). The Court held that the agencies may "impose license conditions based on the indirect effects a project has on [federal lands] . . . provided that at least 'some' or 'any' part of the licensed facilities is on [federal] land." In the case of Cushman, only the project's access road and a transmission line are located on tribal reservation land held in trust by the federal government. Nevertheless, the D.C. Circuit held that "the Secretary of Interior is not limited in this proceeding to mitigating the impact the access road and the transmission line will have on the reservation. Instead, he may impose license conditions that are designed to mitigate the effect of the project on the Skokomish River to the extent doing so is reasonably related to protecting the reservation and the Tribe."

The decision also calls into question FERC's ability to enforce deadlines on other federal agencies in the relicensing process, including perhaps the strict timelines of FERC's new Integrated Licensing Process ("ILP"). During the Cushman relicensing, the Department of Interior filed its proposed FPA Section 4(e) license conditions with FERC after expiration of the 60-day timeframe set by FERC regulations. The D.C. Circuit held that FERC erred by rejecting Interior's conditions as untimely. "FERC exceeded its statutory authority by placing a strict time restriction on responsibilities Congress delegated to other federal agencies [in the FPA]. . . . FERC has no authority to impose a short 60-day limitation unilaterally, thereby effectively stripping Interior of its statutorily delegated authority."

Another part of the decision relates to FERC's compliance with the Endangered Species Act ("ESA"). The decision confirms the importance of biological opinions issued pursuant to the ESA by the National

Marine Fisheries Service and U.S. Fish and Wildlife Service, reiterating that FERC ignores the findings of these opinions at its peril. However, the Court also suggests that FERC possesses an obligation to ensure that biological opinions contain the best available information prior to their wholesale adoption in a FERC license. The decision similarly suggests that FERC must ensure state compliance with the statutory requirements of Clean Water Act ("CWA") prior to FERC acting on state-issued 401 certification conditions.

Questions raised by the opinion regarding the scope of agency conditioning authority, the validity of deadlines in relicensing, the scope of environmental analysis, and a licensee's obligations upon receipt of license conditions that make a project uneconomic will likely be addressed not only on remand of the Cushman license, but in many other licensing proceedings and court decisions for months and years to come.