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FISHWAYS OR DIEWAYS: FEDERAL ENERGY REGULATORY COMMISSION LACKS AUTHORITY TO REJECT FISHWAY PRESCRIPTIONS

I. Introduction

In *American Rivers v. Federal Energy Regulatory Commission*[1] the Ninth Circuit held, as a matter of first impression, the Federal Energy Regulatory Commission ("FERC") has discretion to reclassify, reject, or modify recommendations made by federal and state wildlife agencies submitted pursuant to section 10(j) of the Federal Power Act[2] (FPA).[3] The court stated, "§10(j) clearly vests in the Commission the discretion as to how or whether it will incorporate a section 10(j) recommendation received from a listed agency."[4] However, the court additionally held, as a matter of first impression, FERC *lacked authority* to reject fishway prescriptions proposed by Secretaries of Commerce and Interior under color of section 18 of FPA.[5] Where FERC disagrees with the scope of a fishway prescription, it may withhold a license altogether or voice its concerns in the court of appeals, but at the administrative stages, it is not FERC's role to judge the validity of a fishway prescription, substantively or procedurally.[6]

II. Background

On March 24, 1997, the Federal Energy Regulatory Commission ("FERC" or the Commission) reissued a hydropower license to the incumbent licensee the Eugene Water and Electric Board ("EWEB") for the continued operation of the Leaburg-Walterville Hydroelectric Project for a duration of 40 years.[7] Both licenses had expired by their terms on December 31, 1993, after which time the EWEB managed both developments under separate annual licenses by operation of FPA section 15(a).[8]

During the relicensing deliberations, the Commission, among other things,

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[1] *American Rivers v. Federal Energy Regulatory Commission* 201 F.3d 1186 (9th Cir. 2000).

[2] 16 U.S.C. § 803 (1994).

[3] *American Rivers*, 201 F.3d at 1211.

[4] *Id.* at 1205.

[5] *Id.* at 1186 (emphasis added).

[6] *Id.* at 1210.

[7] *Id.* at 1191.

[8] Under 16 U.S.C. § 808(a) (1994) while a federal takeover or new license application is pending, the Commission must issue an annual license to the existing licensee on the same terms as the original license. *See* 18 C.F.R. § 16.18(b) (1998).

declined to include in the license certain conditions submitted by the Department of the Interior and the Department of Commerce pursuant to section 18 of the Federal Power Act.[9] The Commission concluded the prescribed conditions; on the timing of the construction of a diversion dam, on fish mortality standards for measuring the effectiveness of fish screens, on fish mortality standards for operations of the Leaburg Dam roll gates (used to release flows into the bypassed reach), and on automatic remedial measures when such standards are not met, were not themselves "fishway prescriptions" within the scope of section 18.[10] The Commission subsequently denied a rehearing by the Department of Interior and Commerce to include the omitted conditions. Thereafter, petitions for review of the Commission orders were filed with the Court of Appeals.

The petitioners, a coalition of conservation/environmental organizations and the Oregon Department of Fish and Wildlife, challenged the decision of FERC to reissue the license. The petitioners contended the Commission granted the disputed license (i) without conducting the requisite environmental analysis under relevant provisions of the FPA[11] and the National Environmental Policy Act ("NEPA")[12] and (ii) in violation of sections 10(j)[13] and 18[14] of the FPA.[15]

Granting in part and denying in part petitioners' requests for review, the court vacated the Federal Energy Regulatory Commission's order reissuing the license and remanded the case to FERC for further proceedings.[16]

III. Environmental Framework

A. Federal Power Act

Under the Federal Power Act, the court grants conclusive effect to the Federal Energy Regulatory Commission's findings of fact if such findings are supported by substantial evidence.[17] Petitioners contend that the FPA requires the Commission to evaluate the EWEB proposal against an environmental baseline embodying a theoretical reconstruction of what the basin would be like today.[18] *Chevron U.S.A.*,

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[9] 16 U.S.C. § 791 (1994).

[10] *American Rivers*, 201 F.3d at 1192 n. 11.

[11] 16 U.S.C. § 791(a) et seq. (1994).

[12] 42 U.S.C. § 4321 et seq. (1994).

[13] 16 U.S.C. § 803(j) (1994).

[14] 16 U.S.C. § 811 (1994).

[15] *American Rivers*, 201 F.3d at 1190.

[16] *Id.* at 1186.

[17] *Id.* at 1194.

[18] *Id.* at 1195.

Inc. v. Natural Resources Defense Council[19] sets forth a two-part test against which courts review an agency's construction of the statute it administers.[20] Under the *Chevron* formulation the first question is whether Congress has directly spoken to the precise question at issue.[21] If the intent of Congress is clear, that is the end of the matter. If, the court determines Congress has not directly addressed the precise question at issue the question for the court is whether the agency's answer is based on a permissible construction of the statute.[22]

Under the *Chevron* framework the court is allowed to defer to FERC's interpretations of the statutory provisions it administers, but the court remains the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent.[23]

The court concluded Congress did not directly address the issue of environmental baseline, however, FERC's use of existing environmental conditions as baseline for comparing proposed alternatives was permissible.[24]

B. National Environmental Policy Act

The National Environmental Policy Act does not mandate particular substantive results, but instead imposes only procedural requirements.[25] The court's task under NEPA is to ensure that FERC has adequately considered and disclosed the environmental impact of its actions.[26]

In reviewing actions under NEPA challenging the adequacy of an environmental impact statement, the Ninth Circuit has fashioned a "rule of reason" to determine whether the agency has engaged in a reasonably thorough discussion of the significant aspects of probable environmental consequences.[27] Under this standard once the

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[19] *Id.* at 1193 (citing 467 U.S. 837 (1984)).

[20] *American Rivers*, 201 F.3d at 1194.

[21] *Id.*

[22] *Id.*

[23] *Id.* (citing *Natural Resources Defense Council v. United States Dep't of Interior*, 113 F.3d 1121, 1124 (9th Cir. 1997) (citing *Chevron*, 467 U.S. at 843 n. 9, (1984)).

[24] *American Rivers*, 201 F.3d at 1198.

[25] *Id.* at 1193 (citing *Laguna Greenbelt, Inc. v. United States Dep't of Transp.*, 42 F.3d 517, 523 (9th Cir.1994) (citing *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council Inc.*, 435 U.S. 519, 558 (1978)).

[26] *American Rivers*, 201 F.3d at 1194-1195 (citing *Association of Pub. Agency Customers, Inc. v. Bonneville Power Admin.*, 126 F.3d 1158, 1183 (9th Cir. 1997) (citing *Baltimore Gas & Elec. Co. v. Natural Resources Defense Council, Inc.*, 462 U.S. 87, 97-98 (1983)).

[27] *American Rivers*, 201 F.3d at 1195 (citing *Oregon Natural Resources Council v. Lowe*, 109 F.3d 521, 526 (9th Cir. 1997).

court is satisfied that a proposing agency has taken a "hard look", the court's review is at an end.[28]

The court was satisfied the Commission had taken a hard look at the range of licensing alternatives and complied with its procedural obligations under NEPA.[29]

IV. Violation of FPA

A. Section 10(j)

Petitioners' challenges to the Commission's construction of sections 10(j) and 18 of the FPA were both issues of first impression.[30] Petitioners contended that the FPA does not authorize the Commission to decide that a fish and wildlife agency recommendation submitted pursuant to section 10(j) does not qualify for treatment under that section. For section 10(j), the courts analysis began and ended with the first prong under *Chevron*, the statute itself. The court concluded that section 10(j) of the Federal Power Act cannot be read to force upon the FERC the burden of strict acceptance of each and every proper recommendation.[31] While FERC must address each recommendation, the discretion ultimately vests in FERC as to how to incorporate each recommendation. Subsection 10(j)(2) specifies that the Commission should attempt to reconcile agency recommendations with the requirements of the FPA.[32] The court concluded that section 10(j) clearly vests in the Commission the discretion as to how or whether it will incorporate a section 10(j) recommendation received from a listed agency.[33]

B. Section 18

The Commission contended the petitioners lacked standing to challenge the section 18 determinations. Maintaining, petitioners could not independently challenge the Commission's actions because only federal intervenors, not petitioners have rights under section 18.[34] Alternatively, the Commission contended the petitioners' challenges to section 18 were not ripe for review.[35] The court concluded the state Department of Fish and Wildlife had parens patriae standing and environmental

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[28] *American Rivers*, 201 F.3d at 1195 (citing *Idaho Conservation League v. Mumma*, 956 F.2d 1508, 1519 (9th Cir. 1998).

[29] *American Rivers*, 201 F.3d at 1201.

[30] *Id.* at 1201.

[31] *Id.* at 1202.

[32] *Id.*

[33] *Id.* at 1205.

[34] *Id.*

[35] *Id.*

organizations had organizational standing to challenge FERC's determinations regarding fishways prescriptions under section 18 of FPA.[36] Additionally, the section 18 issues were ripe for judicial review, where the Commission's disputed arrogation of section 18 authority turned on discreet issues of law, specifically, whether the Commission properly may reject or reclassify fishway prescriptions submitted by threSecretaries of Commerce or Interior.[37]

Section 18 directs, the Commission, "*shall* require the construction, maintenance, and operation by a license at its own expense of ...such fishways as may be prescribed by the Secretary of the Interior or the Secretary of Commerce as appropriate."[38] Unlike section 10(j) there is no clause which expressly enables the Commission to reject a recommendation.[39] Thus the court concluded that FERC may not modify, reject, or reclassify any prescriptions submitted by the Secretaries of Commerce or Interior under color of section 18, and further concluded that when the Commission disagrees with the scope of a fishway prescription, it may withhold the license altogether or voice its concerns in the court of appeals.[40] The court reasoned, had Congress intended differently they could have modeled section 18 under the language of section 10(j), which they did not do, thereby the intent is clear the designation of fishway prescriptions rest with the Department of Commence and Interior.

V. Conclusion

The Ninth Circuit's *American Rivers* decision could have far reaching consequences. Essentially, the Department of Interior and Commerce have the ability to dictate to FERC conditions upon which the issuance of a license must be premised. While recommendations submitted pursuant to section 10(j) of the FPA are still subject to discretionary review and a balancing test (economic versus environmental), fishway prescriptions under section 18 are not. The prescription of fishways mandated through the Departments of Commerce and Interior will ensure adherence to basic environmental factors deemed necessary. FERC, in the alternative, may withhold a license altogether or go to the Court of Appeals. Time will tell which road the Federal Energy Regulatory Commission will take, however, in the interim if the Departments want to keep this a victory they must implement procedures to guide in the fishway prescription process.

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[36] *Id.*

[37] *American Rivers*, 201 F.3d at 1206.

[38] 16 U.S.C. § 811 (1994) (emphasis added).

[39] *American Rivers*, 201 F.3d at 1206.

[40] *Id* at 1210.