

Hydro Power Committee Newsletter

Vol. 1, No. 2

August 2016

CHAIRS' MESSAGE

Cleo Deschamps and Sharon L. White

Hello Hydro Power Committee members! We hope you enjoy this edition of our newsletter. We are heading into the next committee year and are excited about the opportunities that are available to all members. If you would like to become more involved in the committee, please reach out to us. If you have ideas or thoughts on what would be helpful to you and your practice, please let us know. We are always looking for members who want to share a bit of their knowledge with the hydropower community, either through a written newsletter article or via a short committee call. We hope to bring more of both to you next year. Next year we will be focusing on legislative reform of the hydro relicensing process, as well as paying close attention to the developments with the Clean Power Plan and its implications on hydropower. We will also look at the challenges to pumped storage projects. Our aim is to provide members with current and useful information and to build a community of hydropower attorneys. Join us!



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MEMBER SPOTLIGHT: TYLER MANSHOLT

Elizabeth McCormick

With over 100 members in the Section's Hydro Power Committee, practicing all over the country and the globe, check out the "Member Spotlight" for an in-depth look at one of our stellar members. For the second installment of the Spotlight series, we highlight Tyler E. Mansholt, an attorney who first gained hydropower experience working with the federal government and who has since transitioned into private practice, where hydropower continues to be one of his main focuses. This Member Spotlight contains portions of an interview I had with Tyler.

Q. So how did you end up practicing hydropower law?

A. Well, I'm honestly pretty lucky in that regard. I've had an interest in environmental and energy issues all of my life. I grew up on a pretty little lake in a rural part of Illinois that is surrounded by cornfields and cattle farms. Maybe it was all of the days and nights I spent on that lake, but somehow or another from a pretty young age I figured out that environmental and energy issues are the ones I'm most passionate about. I went on to study these issues in undergrad and then continued that education at Vermont Law School, where I was able to focus my legal coursework on environmental and energy matters. While there,

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SECTION OF ENVIRONMENT,
ENERGY, AND RESOURCES**

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Loews Hollywood Hotel
Los Angeles, CA

March 29-31, 2017
46th Spring Conference
Loews Hollywood Hotel
Los Angeles, CA

October 18-21, 2017
25th Fall Conference
Baltimore Waterfront Marriott
Baltimore, MD

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www.ambar.org/EnvironCalendar**

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in the midst of formulating a note topic for law review, I stumbled upon an ongoing jurisdictional issue between the Federal Energy Regulatory Commission (FERC) and a division of the Department of the Interior in regulating offshore hydrokinetic projects. After digging into that legal quagmire, I had the good fortune of obtaining an interview with FERC, which led me to happily accept a summer clerkship in its Office of General Counsel. That clerkship turned into a full-time position and, one thing after another, I've managed to turn my original interest in environmental and energy issues into a career that I care deeply about.

Q. How long did you practice at FERC and what lessons did you take away from that experience?

A. Not including my clerkship, I worked at FERC for roughly three-and-a-half years. It was truly a great place to practice. Upon starting with FERC, I very quickly had opportunities to begin working on some very large and complex cases. Perhaps this is not true, but I have a suspicion that many positions with the federal government are alike in this regard. Besides the interesting and difficult assignments, a true benefit of working at the FERC was the pleasure to coordinate opinions among professionals of a multitude of disciplines, including everything from geology to recreation. Understanding how to work with and relate to folks of all ages and in various fields was probably the most important skill I learned at FERC. I think this lesson is somewhat undervalued, and I truly appreciate how better off I am from having those experiences.

Q. Where did you go after FERC?

A. I joined Duncan, Weinberg, Genzer, and Pembroke, P.C. (DWGP), a firm that specializes in regulatory matters and that is headquartered in Washington, D.C. DWGP has a vast practice in all FERC matters, including attorneys with decades of experience working on hydropower issues. I joined the firm with an intention to continue my hydropower practice and also to gain experiences in other regulatory issues.

Q. How did that transition from FERC to DWGP go?

A. All in all, the transition itself went rather smoothly. I was pretty nervous about leaving FERC and trying my hands in private practice. I think there is often a negative connotation about work-life balances at private firms. Luckily, for me, that has not been a significant issue. With the transition to any new working environment, there certainly are some growing pains you can expect, but with some perseverance and optimism, I think the transition is a challenge that is very manageable. One of the biggest differences I noticed at DWGP has been the difference in the review of work product. At FERC, there are many layers of review, requiring experts from many fields to agree on a chosen outcome. In private practice, although we work on matters in teams, most of those layers simply don't exist, and the responsibility on attorneys is thus heightened. I don't really think this difference is good or bad, but it does take some time getting used to, and it requires the development of some additional skills that an attorney may or may not have already developed.

Q. What advice would you give to students or other new attorneys interested in hydropower law?

A. I think that if you are really interested in hydropower matters then you need to take the bull by the horns and do whatever you can to make sure that at least parts of your coursework, scholarly activities, internships, or job connect in some fashion or another to hydropower. My experience is that there exists an age gap with many hydropower professionals, greatly separating professionals with decades of experience from those that are interested in joining the field. In order to crack into the market, I really think you need to put yourself out there and try your best to gain experience in hydropower issues in whatever way is available to you. That approach seemed to work for me, and with diligence and patience, I think the same can be said for students and new attorneys as well.

Tyler Mansholt *is an attorney with Duncan, Weinberg, Genzer & Pembroke in Washington, D.C., and can be reached at tem@dwgp.com.*

PROPERTY RIGHTS AS A WAY TO PROTECT LOCAL INTERESTS IN HYDROPOWER PROJECTS

William S. Huang, Katharine M. Mapes, and Jeffrey M. Bayne

I. Introduction

In licensing hydropower projects, FERC's statutory mandate requires it to balance multiple uses, such as power generation, consumptive water supply, environmental protection, recreation, shoreline uses, fisheries, and other beneficial uses. Federal Power Act (FPA), §§ 4, 10, 15, 16, U.S.C. §§ 797, 803, 808. Over the years, changes in FERC's policies have reshaped how it balances these competing uses; and some of those changes have made it more difficult for local and state governmental stakeholders to protect their interests in licensing proceedings.

For instance, in the wake of electric industry restructuring, FERC began to disfavor allocations of cost-based project power for the purpose of providing local and regional economic benefits. *See, e.g., N.Y. Power Auth.*, 118 FERC ¶ 61,206, P 73 (2007)(subsequent history omitted); *Power Auth. of the State of N.Y.*, 107 FERC ¶ 61,259, PP 12, 15 (2004) (subsequent history omitted). Likewise, changes to FERC easement and shoreline management policies may constrain access to consumptive water supply for public water systems, or restrict land uses adjacent to project reservoirs and facilities. And in-stream flow and fishery requirements may limit the amount of water available for consumptive use.

In this context, state and local governments may be unable to achieve their goals through direct regulation of the project or licensee—the courts have long held that FERC's hydropower licensing authority preempts the field. *First Iowa Hydro-Elec. Coop. v. FPC*, 328 U.S. 152 (1946); *California v. FERC*, 495 U.S. 490 (1990). The FPA, however, requires licensees to hold the property and water rights necessary to meet their license obligations. And while licensees have

access to the federal power of eminent domain to acquire those rights, FERC does not resolve disputes as to whether the licensee already holds the necessary rights or, if the licensee does not, from whom the licensee must obtain them. *Halecrest Co.*, 60 FERC ¶ 61,121, at 61,413 (1992) (citations omitted).

In the cases discussed below, state, local, and tribal governments have moved beyond simply participating as a party or stakeholder in FERC licensing processes, and have made property rights claims in an effort to protect their interests regarding nearby hydropower projects.

II. Recent Proceedings

A. *PPL Montana, LLC v. Montana*

PPL Montana, LLC v. Montana, 132 S. Ct. 1215 (2012) is the highest profile case of this type in recent years. The case involved ten FERC-licensed hydroelectric projects owned by PPL Montana, LLC (PPL) and located on riverbeds underlying segments of the Missouri, Madison, and Clark Fork Rivers in Montana. Although the projects had existed for many decades, parents of Montana school children filed a federal suit in 2003, claiming PPL's facilities were on riverbeds that were owned by the state of Montana and were part of Montana's school trust lands. The state joined the suit and sought rents from PPL for the use of the riverbeds. Eventually, the Montana Supreme Court held that Montana owned the riverbeds because they were navigable and, under the equal-footing doctrine, were therefore transferred from federal to state ownership upon Montana's statehood. The court then awarded the state \$41 million in rent for the period 2000 to 2007. *Id.* at 1221.

PPL petitioned the U.S. Supreme Court, which reversed and remanded. The Court concluded that the 17-mile Great Falls riverbed stretch—where five of PPL's ten projects are located—was, as a matter of law, not navigable at the time of Montana's statehood for purposes of riverbed title under the equal-footing doctrine, and accordingly

was not transferred to state ownership. *Id.* at 1232. Based on the evidence in the record, the Court also determined that there is “a significant likelihood that some of the other river stretches in dispute also fail the federal test of navigability for the purpose of determining title.” *Id.* Because the state cannot demand rents for riverbeds that it does not own, the Supreme Court remanded so that the Montana courts could apply the correct navigability test to the riverbeds at issue.

B. North Carolina ex rel. N.C. Dep’t of Admin. v. Alcoa Power Generating, Inc.

North Carolina made a similar argument in a 2013 lawsuit against Alcoa Power Generating, Inc. North Carolina claimed that, beginning in 1893, it had granted Alcoa’s predecessors the ability to purchase or condemn land in order to construct hydropower projects, with the understanding that Alcoa would use the Yadkin River and riverbed to develop industry that would support a large number of high quality jobs in the state. *N.C. ex rel. N.C. Dep’t of Admin. v. Alcoa Power Generating, Inc.*, 135 F. Supp. 3d 385, 388 (E.D.N.C. 2015) (citing complaint). However, after Alcoa closed its aluminum smelting plant in 2010, North Carolina sued the company, asserting that it, rather than Alcoa, owns title to the riverbed on which Alcoa operated a FERC-licensed hydropower project.

The trial court ruled that the relevant portion of the river was not navigable at statehood, and therefore the ownership of the riverbed was to be determined by ordinary North Carolina property law. *Id.* at 390. It then held that Alcoa had proved valid title. According to the court, Alcoa held title for 99 percent of the relevant section of the river under the state’s Marketable Title Act (which provides that a title is clear and free of all claims whatsoever if it is recorded for 30 or more years); it rejected North Carolina’s claim that the act does not apply against the state. The court also held that because Alcoa actually possessed the relevant segment since 1962 (the year it constructed and opened one of the Yadkin project developments), it had title for the entire relevant section of the river through adverse possession. North Carolina appealed the decision, and that appeal is currently pending.

C. FirstEnergy Generation, LLC, and Seneca Nation of Indians

In 2013, the Seneca Nation of Indians raised a property rights ownership issue in connection with its competitive application for the FERC-licensed Kinzua Pumped Storage Hydroelectric Project (FERC Project Nos. 2280 and 13889). Comments of the Seneca Nation of Indians on the Initial Study Report Meeting Summary of FirstEnergy Generation, LLC (Mar. 4, 2013), eLibrary No. 20130304-5146. According to the Seneca Nation, during the pre-application study period for the competitive relicensing of that project, both the Seneca Nation and its incumbent competitor, FirstEnergy Generation, LLC, performed studies showing that the project’s power generation activities used the entire Allegheny Reservoir—including portions of the Allegheny Reservoir located on lands held by the Seneca Nation pursuant to the Treaty of Canandaigua, entered into with the United States in 1794. *Id.* at 1–2.

The Seneca Nation argued that use of the reservoir for power generation purposes was unauthorized—and had been for the entire length of the previous license. According to the Seneca Nation, the lands at issue were held in fee by the Seneca Nation; and while the Army Corps of Engineers held a flowage easement for Allegheny Reservoir for purposes including flood control and environmental protection, those purposes did not include power generation. The Seneca Nation also argued that a licensee’s power of eminent domain cannot abrogate treaty rights unless it could be shown there was clear and plain intent by Congress to do so. *Id.* at 11–14.

In light of FERC’s Halecrest decision, the Seneca Nation did not ask FERC to adjudicate the property rights issue. *Id.* at 2. However, it stated that FirstEnergy must obtain the right to use the Nation’s lands if it wanted to operate the project during any new license term. *Id.* In November 2013, the Seneca Nation and FirstEnergy entered into a comprehensive settlement agreement regarding the project.

D. Mooresville, N.C., and Duke Energy Carolinas, LLC

Local governments have also asserted that they own real property rights to use hydropower project features for municipal purposes. The town of Mooresville, North Carolina, for example, sought to increase its consumptive water withdrawals from Lake Norman, one of the reservoirs of Duke Power's Catawba-Wateree Project (FERC Project No. 2232). Mooresville and Duke were unable to reach agreement on the terms and conditions of an easement for those withdrawals. In 2007, Mooresville decided to construct an alternative water supply project on property that extended into Lake Norman, and that Mooresville owned in fee simple pursuant to a 1962 deed from Duke to the town.

After Mooresville began construction, Duke sued in the U.S. District Court for the Western District of North Carolina, claiming that it had reserved sufficient rights in the 1962 deed to require that Mooresville obtain approval from Duke and FERC before constructing. Mooresville disagreed. While FERC took the position that additional FERC approval was needed for Mooresville's alternative water supply project, it also made clear that it was Duke's responsibility to assure that only activities authorized by the license occur within the project boundary—not Mooresville's. In a pleading filed with the court in October 2008, FERC stated that it does not have the authority to regulate the conduct of third parties, such as Mooresville, and therefore it did not have a litigation position in the controversy and neither adopted Duke's complaint nor added its own allegations against Mooresville. Shortly after FERC declined to take a position on this property dispute, Duke and Mooresville entered into a settlement to resolve the matter. *Duke Energy Carolinas, LLC*, 130 FERC ¶ 62,126 (2010).

III. Conclusion

Only one of the property rights claims discussed above—the litigation between Montana and PPL Montana, LLC—has been fully litigated.

Settlements were reached in the Seneca Nation and Mooresville cases; appeals of the Alcoa case are still pending. All four examples, however, illustrate how state, local, and tribal governments have attempted to use property rights claims, in conjunction with an understanding of the limits on FERC's authority, to protect the interests of the public.

FERC anticipates that approximately 100 projects will be up for relicensing during the two-year period from October 1, 2016, to September 30, 2018. Notice of License Expiration and Request for Information Regarding Process Selection (Apr. 1, 2015), eLibrary No. 20150401-4007. As FERC gears up for this new spate of relicensings, stakeholders are likely to find that the resource and regulatory landscapes have shifted substantially since those projects were last licensed. For state and local governments, understanding and defending their historical property rights may be a way to protect their interests in key resources.

William S. Huang and Katharine M. Mapes are partners, and Jeffrey M. Bayne is an associate, in the Washington, D.C., law firm of Spiegel & McDiarmid, LLP. They represent municipal and governmental clients in hydroelectric and other matters at FERC, as well as in other regulatory, judicial, and legislative settings.

Endnote

Spiegel & McDiarmid LLP represented the Seneca Nation of Indians in its competitive application for the FERC-licensed Kinzua Pumped Storage Hydroelectric Project (FERC Project Nos. 2280 and 13889). The views expressed herein are those of the authors alone, and not necessarily those of their clients, colleagues, or others.

PUMPED STORAGE LICENSING TRENDS AND REGULATORY IMPLICATIONS: CLOSED-LOOP SYSTEMS

Daniel Nugent

As renewable energy proliferates, pumped storage hydroelectric projects are receiving increasing levels of national attention. *See, e.g.*, Hydropower Regulatory Efficiency Act of 2013, Pub. L. No. 113-23, §§ 6–7, 127 Stat. 493, 495–97 (2013); Nat’l Hydropower Ass’n, Challenges and Opportunities for New Pumped Storage Development 1–2 (2013); U.S. Dep’t of Energy, Pumped Storage and Potential Hydropower from Conduits ii (2015); U.S. Dep’t of Energy, Hydropower Projects (2015). Pumped storage projects are grid-scale energy storage systems that utilize differences in elevation to store energy, by pumping water to a higher elevation, and later generate electricity by releasing the water through turbines. *Pumped Storage Projects*, FERC.gov (Apr. 18, 2016), [http://www.ferc.gov/industries/hydro power/gen-info/licensing/pump-storage.asp](http://www.ferc.gov/industries/hydro%20power/gen-info/licensing/pump-storage.asp). These “giant batteries” can act as a mechanism to ease intermittency, allowing off-peak production (e.g., wind at night, solar on weekends) to be stored and reintroduced to the grid during times of higher demand. Pumped storage projects can also provide a number of ancillary services and benefits to the grid in terms of black start capability, voltage regulation, peak demand mitigation, ramping ability, and more. Nat’l Hydropower Ass’n, *supra*, at 6, 14.

In the United States, pumped storage facilities are regulated by the Federal Energy Regulatory Commission (commission or FERC). The commission licenses the construction and operation of hydroelectric projects under sections 4(e) and 23(b) of the Federal Power Act (FPA), 16 U.S.C. §§ 797(e) and 817 (2016), and currently has 25 active pumped storage licenses, some dating back to the 1950s. The commission also has 22 active pumped storage preliminary permits, issued under section 4(f) of the FPA, which grant an applicant priority for licensure while a proposed site is studied. 16 U.S.C. § 797(f) (2016).

This article reviews 86 pending, active, and recently expired pumped storage preliminary permit and license dockets at the Commission to uncover evolving trends in pumped storage applications. Several findings include renewed industry interest in pumped storage permitting and licensure; focus on renewable energy integration; use of different geological features, particularly abandoned mines; and independence from traditional hydroelectric facilities. Perhaps the most prominent development in pumped storage applications, however, is the proliferation of closed-loop applications. This article focuses on the emergence of closed-loop pumped storage projects and considers two major legal implications associated with these applications: jurisdiction and eminent domain.

I. The Closed-Loop Trend

Applications for pumped storage projects are on the rise. Historically, pumped storage licensure was common between 1957 and 1981, during which time 22 of the 25 currently active pumped storage projects were originally licensed. However, of the remaining three projects, one was licensed in 1990, and the last two were licensed in 2014, leaving an approximately 25-year gap in pumped storage licensure. In recent years, interest has returned. The commission has issued at least 56 preliminary permits for pumped storage projects since mid-2010 (although several have since been surrendered, rescinded, denied extension, or have expired), and one additional permit is currently pending. These permits represent 41,158.4 megawatts (MW) of capacity (19,226.4 MW of which are currently active), more than double the 19,604.6 MW of currently licensed capacity, and have been issued for projects in 13 states that have never hosted a pumped storage project. Moreover, licensing activity proves that industry interest is sincere. In 2014, the commission issued licenses for the Eagle Mountain Project No. 13123 and the Iowa Hill Development P-2101. Additionally, there are currently four pending licenses and at least one permitted project that has formally filed a notice of its intent to file a license application.

Of these new applications, closed-loop projects dominate. Closed-loop projects, compared to open-loop and ocean projects, are pumped storage projects “that are not continuously connected to a naturally-flowing water feature.” *Pumped Storage Projects*, FERC.gov (Apr. 18, 2016), <http://www.ferc.gov/industries/hydropower/gen-info/licensing/pump-storage.asp>. While closed-loop systems have been proposed before, *see, e.g., Swanton Village, Vermont, et al.*, 70 FERC ¶ 61,325 (1995), the volume of applications is a new phenomenon. Thirty-eighty of 61 unlicensed project applications (preliminary permits and pending licenses) reviewed are closed-loop systems, whereas 20 are open-loop, and 5 are ocean projects. This contrasts with the 25 currently licensed projects, of which only one is closed-loop, the recently licensed Eagle Mountain Project. The remaining 24 are open-loop. Even more telling is that all of the four pending pumped storage license applications are for closed-loop systems. Accordingly, a significant majority of future pumped storage capacity will likely come from closed-loop projects, a notable departure from past practice.

II. Regulatory Implications

Given the shift towards closed-loop systems, the Commission’s review of pumped storage projects is likely to evolve in several ways. For instance, because closed-loop projects are separated from naturally flowing water, they necessarily present different environmental impacts relevant to the Commission’s National Environmental Policy Act analysis. Additionally, the proposal of closed-loop pumped storage projects raises two initial legal questions. First, how does the Commission’s jurisdiction apply to closed-loop systems, as they appear to fall under different statutory provisions than most open-loop systems? Second, does the Commission’s eminent domain authority apply to closed-loop systems? These questions, discussed below, have begun to surface in Commission orders and will likely continue to develop in the future.

A. Jurisdiction

The Commission has two jurisdictional avenues for licensing hydroelectric facilities: sections

23(b) and 4(e) of the FPA. Section 23(b) of the FPA provides for mandatory licensure. It requires licensing of any “electric power . . . dam, water conduit, reservoir [or] power house” that meets any of the following criteria: is constructed “across, along, or in” navigable waters; is located on federal lands or reservations; makes use of government dams; or is constructed after 1935, on a non-navigable Commerce Clause “*stream or part thereof*,” and affects interstate or foreign commerce. 16 U.S.C. § 817 (2005) (emphasis added). Section 4(e) of the FPA provides permissive licensing of “project works necessary or convenient for the . . . development, transmission, and utilization of power” which are located on “*streams or other bodies of water* over which Congress has jurisdiction under its authority to regulate commerce” (Commerce Clause waters), federal lands and reservations, or which use any government dam. 16 U.S.C. § 797(e) (2005) (emphasis added). Essentially, facilities that meet the conditions of section 23(b) must be licensed; however “[i]f those conditions are not met, section 4(e) would permit licensing . . . in response to a voluntary application if the project is located on a Commerce Clause water.” *Swanton Village*, 70 FERC at 61,993.

Considering the surge in closed-loop project applications, a preliminary question arises as to which statutory provision applies to the different project configurations. Open-loop systems are typically located on navigable waters or Commerce Clause streams, thus invoking section 23(b) mandatory jurisdiction. Closed-loop projects, however, often have very tangential, if any, connection to a navigable water or stream, as construed in FPA section 23(b). Instead, closed-loop systems generally fall into three categories with regard to fill water: (1) those that draw water from underground flows (e.g., P-14692) or wells (e.g., P-11240); (2) those that temporarily or occasionally pull water from a water body (e.g., P-14337); and (3) those that pipe or truck fill water to the project (e.g., P-14344). Additionally, closed-loop projects may not fit the “federal lands” or “government dams” provisions of 23(b).

However, many closed-loop project applications fit into the Commission’s permissive jurisdiction under FPA section 4(e). For example, in *Swanton Village*, the Commission accepted a voluntary preliminary permit application for a pumped storage project that depended on groundwater. The Commission found that section 23(b) would not apply to projects located under a non-navigable Commerce Clause stream, and that groundwater itself cannot be considered a Commerce Clause stream. *Swanton Village*, 70 FERC at 61,994. The Commission also reiterated that intermittent streams cannot, on their own, invoke 23(b) jurisdiction. *Id.* at 61,994–95 (citing *Public Service Co. of N.M.*, 10 FERC ¶ 61,273 (1980)). However, the Commission found that its jurisdiction under section 4(e) is much broader than its jurisdiction under 23(b). It noted that 4(e) jurisdiction applies to “streams or other bodies of water over which Congress has” Commerce Clause authority, which is more expansive than just “stream” under 23(b). 16 U.S.C. § 797(e) (2005) (emphasis added). The Commission then determined that because groundwater “is an article of commerce” within Commerce Clause jurisdiction, and because a stream is not required under 4(e), as it is in 23(b), 4(e) jurisdiction attaches to groundwater-based projects. *Swanton Village*, 70 FERC at 61,995–96 (citing *Sporhase v. Neb.*, 458 U.S. 941 (1982)).

Pumped storage projects that pull fill water from nearby water bodies (e.g., P-14337), and projects that truck or pipe water to the site (e.g., P-14344), would similarly fall under 4(e) rather than 23(b). Section 23(b) would not apply unless such projects are located on federal lands or use government dams, because they would not be located “across, along, over, or in” navigable waters or Commerce Clause streams. However, the projects would presumably pull their fill “from . . . other bodies of water,” and moreover, the water would likely fall within Congress’s Commerce Clause powers, as “Congress’ jurisdiction [sic] under the Commerce Clause extends to almost any conceivable waterways or wetlands within the geographical limits of the United States and its territorial seas.” *Public Service Co. of N.M.*, 10 FERC at 61,530.

Accordingly, most water sources should qualify these types of closed-loop projects for section 4(e) licensure.

B. Eminent Domain

Another legal concern arising from closed-loop projects is whether they can invoke eminent domain under section 21 of the FPA. Under section 21, where licensees cannot acquire property rights necessary for project works, they may use eminent domain to acquire the property so long as the project is “justified in the public interest for the purpose of *improving or developing a waterway* for the use or benefit of interstate or foreign commerce.” 16 U.S.C. § 814 (2016) (emphasis added). For closed-loop projects, the issue becomes whether such projects present improvement or development of a waterway necessary to trigger this authority.

1. Eagle Mountain

This question was recently presented to the Commission in a 2014 request for rehearing regarding the Eagle Mountain Project, P-13123, a closed-loop system filled by groundwater. Kaiser Eagle Mountain, LLC, Request for Rehearing, Docket No. P-13123-002, at 2, 18–22 (July 21, 2014) (Kaiser Rehearing Request). In its request, Kaiser Eagle Mountain, LLC (Kaiser) argued that “waterway” under section 21 of the FPA “means ‘stream’ or ‘definite channel’ . . . [and] is generally understood to be a natural or man-made channel through which water flows.” *Id.* at 18 (citing Bertram C. Frey & Andrew Mutz, *The Public Trust in Surface Waterways and Submerged Lands of the Great Lakes States*, 40 U. MICH. J.L. REFORM 907, 908 (2007)). Kaiser also, somewhat confusingly, cited definitions stating that “[a] waterway . . . may be either natural or artificial,” and is a “‘channel or a tunnel through or along which water runs.’” to argue that “waterway” is synonymous with “stream.” *Id.* at 19–20 (citing *Garret v. Haworth*, 83 P.2d 822, 824 (Okla. 1938); *Webster’s New World College Dictionary* (4th ed. 2001)). It then claimed that groundwater fill proposed for the Eagle Mountain Project does not constitute a stream—a point clarified in *Swanton Village*—and therefore section 21 could not apply.

On October 15, 2015, the Commission issued an Order Denying Rehearing and Denying Stay, upholding its eminent domain authority. Therein, the Commission found that the use of the term “waterway” throughout the FPA provided necessary context for its meaning. *Eagle Crest Energy Co.*, 153 FERC ¶ 61,058, at PP 17–18 (2015). Particularly, the Commission found that sections 4(e) and 23(b) establish the Commission’s licensing jurisdiction, and therefore, the term “waterway,” used therein, must be “coextensive with the water resources that are subject to [the Commission’s] licensing jurisdiction.” *Id.* at P 18, 20 n.26. The Commission supported this reasoning by noting that section 10(a) applies the term “waterway” to *all licenses*. *Id.* at P 22 (citing 16 U.S.C. § 803 (2016)). Accordingly, even licensed closed-loop projects must be considered “waterways,” otherwise section 10(a) would not apply to “[a]ll licenses.” *Id.*

2. Judicial Review

Although Kaiser withdrew its request for rehearing and no judicial appeal was made, should this issue ever be considered on judicial review, the Commission’s analysis seems supportable. *Id.* at P 13. Because this matter relates to the Commission’s interpretation of a statute that it administers, the applicable legal standard would be the two-step test identified in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, often termed “Chevron deference.” 467 U.S. 837 (1984). This test holds that where “the intent of Congress is clear, that is the end of the matter.” However, if “Congress has not directly addressed the precise question . . . [and] the statute is silent or ambiguous,” the agency’s interpretation need only be “based on a permissible construction of the statute.” *Id.* at 843.

Considering the first prong, Kaiser has already conceded that “[t]he FPA does not contain a specific definition of the term ‘waterway.’” However, Kaiser did argue that Congress intended “waterway” to mean “stream.” Kaiser cited legislative history, which it summarized as “debating whether the scope of eminent domain authority would be limited to streams that were

navigable or whether such authority could also properly be exercised with respect to nonnavigable streams.” Kaiser Rehearing Request at 20. The Commission also cited legislative history, however, and instead found that during the legislative process Congress broadened the scope of section 21 from “navigable waters” to “waterways,” while simultaneously narrowing the definition of “navigable waterways.” The Commission therefore concluded that Congress intended waterways to be a distinct and broader category of waters than simply those that are navigable. *Eagle Crest*, 153 FERC at PP 23-25. Given these varying interpretations and the fact that the FPA does not specifically define the term “waterway,” clear Congressional intent is not readily apparent.

Under the second prong, the Commission seems to have reached a permissible construction of the statute. While it should be noted that the Commission appears to have misstated the fact that the term “waterway” is included in FPA section 23(b), its use of context from other sections of the FPA, particularly 4(e) and 10(a), is a logical judicially recognized practice. *See, e.g., Eagle Crest*, 153 FERC at P 17 n.18 (citing *King v. Burwell*, 135 S. Ct. 2480, 2489 (2015), *FDA v. Brown and Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000), and *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997) for the proposition that the context of an entire statute is important for determining the meaning of individual provisions); *see also* Jacob Scott, *Codified Canons and the Common Law of Interpretation*, 98 Geo. L.J. 341, 362 (2010) (describing the common law “whole act rule”).

Section 4(e) uses the term waterway in a particular context. After defining the Commission’s licensing authority thereunder, 4(e) provides several exceptions and limitations. The term “waterway” is used in that context, as follows:

[N]o license affecting the navigable capacity of any *navigable waters* of the United States shall be issued until the plans . . . have been approved by the Chief of Engineers and the Secretary of the Army. Whenever the

contemplated improvement is, in the judgment of the Commission, desirable and justified in the public interest for the purpose of improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, a finding to that effect shall be made by the Commission and shall become a part of the records of the Commission. 16 U.S.C. § 797(e).

Arguably, this provision within 4(e) is referring only to projects affecting navigable waters, which is contrary to the Commission's more expansive interpretation of waterway. However, at the same time, 4(e) as a whole has generally been construed to apply very broadly, as discussed above. The term waterway, considering the purpose of entire section, could be read to stem from the totality of waters over which Congress and the Commission have jurisdiction under 4(e). Because *Chevron* only requires a permissible construction, this interpretation may be valid on its own.

The Commission's argument regarding section 10(a) is perhaps more persuasive and complements its stance regarding 4(e). Section 10(a) requires that "[a]ll licenses" be found "best adapted to a comprehensive plan for improving or developing a waterway . . ." 16 U.S.C. § 803 (2016). If the meaning of "waterway" under section 10(a) was narrower than the Commission's jurisdictional authority, licenses could be issued for projects unrelated to a waterway. For example, if "waterway" is narrowly construed to mean a traditional stream, closed-loop projects licensed under 23(b) for location on federal land, as well as closed-loop projects licensed under 4(e) that use groundwater, would not invoke 10(a), despite the fact that 10(a) is supposed to apply to "[a]ll licenses." Accordingly, if "waterway" under 10(a) is not coextensive with the Commission's entire licensing authority, the phrase "[a]ll licenses" in FPA section 10 would be meaningless. Such an interpretation is inconsistent with precedent and literature cited above, making the Commission's position quite viable.

3. *Alternative Arguments*

An additional consideration supporting the Commission's position has to do with the plain meaning of "waterway." At common law, the "plain meaning rule advises interpreters to follow the plain meaning of language unless the text suggests an absurd result . . . [and] the dictionary rule supports consulting widely used dictionary definitions of terms the legislature has not defined." Scott, *supra*, at 353. In assessing the permissibility of the Commission's interpretation, a number of the dictionary definitions cited both by the Commission and by Kaiser support the concept of waterway as applying to a closed-loop system.

In particular, Kaiser noted that "the long-accepted definition of the term is that waterway means . . . 'definite channel,'" and that "[a] 'waterway' . . . is generally understood to be a natural or *man-made* channel through which water flows." Kaiser Rehearing Request at 18 (emphasis added). The Commission noted that the definitions of waterway include "a way or channel for water." *Eagle Crest*, 153 FERC at P 20. Importantly, none of these definitions exclude closed-loop systems. A closed-loop pumped storage project provides a definite, man-made channel through which water flows—that being the penstock: the tunnel connecting the upper and lower reservoirs that feeds water to the turbines. The entire system could therefore be read to constitute a waterway in and of itself.

Moreover, section 21 of the FPA does not limit eminent domain authority to preexisting or naturally occurring waterways. Section 21 provides eminent domain authority over "property . . . necessary to the construction, maintenance, or operation of any dam, reservoir, diversion structure, or the works appurtenant . . . thereto, in conjunction with any improvement . . . justified in the public interest for the purpose of improving or developing a waterway . . . for the use or benefit of interstate or foreign commerce." 16 U.S.C. § 814 (2016) (emphasis added). Given that "development" is defined by Merriam-Webster as "the state of being created or made more advanced; the act or process of creating something over a

period of time,” section 21 could certainly be read as encompassing the construction (development) of a pumped storage facility (waterway, reservoir, and works appurtenant thereto).

Conclusion

Closed-loop pumped storage projects are clearly a major trend in pumped storage permitting and licensing at the Commission. These projects present a number of important potential benefits to the modern grid, have seen federal support and growing industry interest, and therefore are likely to be further explored and implemented in the foreseeable future. The associated legal issues are therefore also likely to persist. While the unique jurisdictional aspects of such projects, as well as the eminent domain concerns, largely seem resolved, the arguments, law, and analysis are likely to evolve in step, presenting an interesting unknown in the ultimate success of pumped storage in our national electric system.

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