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Appeals Court Filings Express Concerns About Proposed Natural Gas Terminal's Effects On Salmon
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The Federal Energy Regulatory Commission was overly hasty and acted without proper environmental impacts analysis in licensing the proposed construction and operation of a liquefied natural gas ship terminal and plant in the Columbia River estuary, according to legal briefs filed Monday in the U.S. Court of Appeals for the Ninth Circuit.

The Nez Perce Tribe, the states of Oregon and Washington and Columbia Riverkeeper all asked the court to order FERC to reconsider its Sept. 18, 2008, decision to license the proposed Bradwood Landing LNG project, as well as its Jan. 15, 2009, denial of requests for a rehearing on the earlier decision.

The project site is located upstream of Astoria, Ore., 36 miles upstream from the river's mouth to the Pacific Ocean.

"FERC failed to consider the harm to salmon and the very real costs of this project to Oregon's farms, forests, and energy prices." said Brett VandenHeuvel, executive director of Columbia Riverkeeper. "In addition, we agree with FERC Chairman Wellinghoff's conclusion that there is no proven need for LNG in the Pacific Northwest."

Riverkeeper and its partners Oregon Chapter of the Sierra Club, Landowners and Citizen for a Safe Community, Willapa Hills Audubon Society, and Wahkiakum Friends of the River, filed a 69-page brief describing a long list of errors FERC allegedly made in approving the project. Oregon and Washington and the Nez Perce Tribe also petitioned the court to review the FERC decision.

The Nez Perce Tribe and Columbia River Inter-Tribal Fish Commission say the Bradwood LNG project raises many significant concerns, but that they are primarily worried about potential impacts to fish and fish habitat. Salmon and steelhead, vital to the tribes' cultures and subsistence, are imperiled with 13 stocks listed under the Endangered Species Act.

The Bradwood project site sits at the mouth of Clifton Channel on the Columbia River. Clifton Channel is a primary shallow-water estuarine rearing habitat for young salmon and the type of habitat that is currently the focus of restoration efforts by federal, state and tribal entities, the tribes say.

"Although the Nez Perce Tribe supports clean energy such as natural gas, the Nez Perce Tribe opposes the Bradwood Landing proposal because it will destroy important juvenile salmon habitat and kill salmon that would otherwise migrate to our usual and accustomed fishing areas in the Columbia River Basin," said Samuel Penney, chairman of the Nez Perce Tribal Executive Committee.

"The tribe believes that FERC did not perform an adequate environmental analysis under federal law, and the agency would likely have arrived at a different result and not concluded that the project is in the public interest. The costs and impacts on aquatic species, especially salmon, are just too great," Penney said.

Sitting on the fence, for now, is the NOAA Fisheries Service, which is charged with protecting ESA-listed fish. NOAA Fisheries also petitioned the court to review the FERC decisions but last week asked the appeals court for an extension of the deadline, Jan. 25, for filing an open brief.

The extension was granted with NOAA Fisheries now due to file an opening brief by Feb. 16, if it decides to do so.

"The United States is in the process of determining whether to proceed as a petitioner in this case, and is

also considering the alternative of amicus curiae participation" and needs another 21 days to make that decision, according to the federal extension request.

"This case presents more complicated and unusual circumstances than many because it potentially involves litigation between federal agencies within the Executive Branch," according to the Jan. 20 request from the Department of Justice. "The case concerns the consultation requirements of Section 7 of the Endangered Species Act, 16 U.S.C. 1536, an issue that is relevant to agencies within virtually all Cabinet departments of the Executive Branch.

"In addition to the unusual posture of this litigation, there has been a change in senior political leadership within several agencies since this petition was filed," the extension request says. "While the Office of the Solicitor General has commenced its consideration of this case, it has not yet reached a final decision."

FERC's deadline for filing replies to the opening briefs is now pushed back to May 4.

NOAA Fisheries is charged by the ESA with assessing whether the project would jeopardize the survival of listed salmon and steelhead. BiOps are required for proposed federal "actions," in this case approval of the Bradwood Landing project. All 13 listed Columbia-Snake river salmon and steelhead stocks come and go through the Columbia estuary.

NOAA notified FERC this week that ESA "consultation" on the Bradwood Landing BiOp was officially initiated Jan. 21. FERC, in an earlier communication, had said it expected NOAA Fisheries to produce a BiOp in the ESA-specified 135 days.

But, "As NMFS has previously indicated, given the amount of information and the size and complexity of the proposed action, consultation is expected to exceed 135 calendar days," NOAA Fisheries (NMFS) said in a letter to FERC dated Wednesday. NMFS said it would later provide an estimated time of completion of the BiOp.

"As a reminder, the ESA requires that after initiation of formal consultation, the Federal action agency may not make any irreversible or irretrievable commitments of resources that limits future options," the Jan. 27 NMFS letter says. "This practice insures agency actions do not preclude the formulation or accomplishment of reasonable and prudent alternatives that avoid jeopardizing the continued existence of endangered or threatened species or destroying or modifying their critical habitats."

The tribe and other petitioners say that related BiOps, and other required federal and state permits and authorizations, should have been in-hand before FERC approved the license. FERC has said it is allowed to approve projects on the condition that actual construction does not begin before the BiOp and other processes are completed.

The proposal would involve the construction of a large on-shore industrial facility on roughly 40 acres with LNG offloading, storage, and regasification capabilities. It would include two 42-million-gallon LNG storage tanks, each 170 feet tall by 259 feet wide, and a foundation for a third tank.

To accommodate 1000-foot LNG tankers, up to 125 per year, the project calls for a 58-acre tanker turning basin to be dredged into the main channel of the Columbia to depth of 43 feet, removing 700,000 cubic feet of river bottom.

The project would include construction and operation of a 36.3-mile pipeline that would run upriver on the Oregon shore for nearly 19 miles, cross the Columbia and continue eastward for more than 17 miles to Kelso, Wash. Oregon's opening brief said the pipeline is expected to cross 94 water bodies, including numerous rivers and streams used by salmon.

The petitioners say FERC erred by making its decision before all necessary state authorizations under the Coastal Zone Management Act and the Clean Water Act were complete and for not conducting adequate analysis required by the National Environmental Policy Act, and for not completing ESA consultation with NOAA Fisheries and the U.S. Fish and Wildlife Service.

"In part, because of the numerous missing studies required by the Order's multiple conditions, the FEIS fails to take the required 'hard look' at many significant environmental issues" as required by NEPA, the Riverkeeper brief says, referring to FERC's final environmental impact statement for the proposed LNG

project.

"Those omissions are best illustrated by the failure to consider and document the fish screening system that most parties agree is necessary to mitigate Bradwood's impacts on threatened salmon species," the Riverkeeper brief says. "Without an effective fish screening system LNG tankers would likely kill large numbers of juvenile salmon each time they take on ballast water. Rather than finalizing and evaluating an acceptable fish screening system, the FEIS puts it off for later, thus giving this critical issue a decidedly 'quick glance' rather than the required 'hard look.'"

"While the FEIS includes a description of proposed mitigation for the destruction and degradation of important aquatic habitat, and other significant impacts to fish species, the FEIS makes no attempt to analyze the effectiveness of the proposed mitigation in actually offsetting the significant impacts of the project," according to the Nez Perce Tribe's brief.

The tribe says the project would have multiple impacts related to aquatic species in and around the Bradwood Landing Project area, including those associated with the intake of 20 million to 50 million gallons of water, some of it with juvenile fish entrained, per ship to use as ballast and to cool engines.

The discharge of that heated water could cause problems for young salmon, particularly in summer, the tribe says. And the dredging will stir up sediments and cause water quality problems. None of the potential impacts have been sufficiently addressed the tribe says.

"The tribe is asking the Ninth Circuit to reject a project that will have devastating and long-term effects on essential salmon habitat," according to Paul Lumley, CRITFC's executive director. "This project is neither in the tribes' best interest nor the public's. FERC should never have approved it."

FERC's approval was conditional and requires 109 mitigation measures. The conditions include the requirement that a system be installed that is capable of delivering filtered water from the Columbia River to the LNG carriers while the carriers are at berth during offloading for ballast and engine cooling. The water intakes would have to be screened to prevent the potential entrainment or entrapment of juvenile fish.

FERC will also require NorthernStar to conduct post-installation water flow assessments of the screens for review and approval by the director of FERC's Office of Energy Projects prior to operation. The order also says that ESA consultation must be completed before construction can commence.

The company has promised to spend $59 million through its Salmon Enhancement Initiative to improve watershed health on the lower Columbia River. NorthernStar says the mitigation measures would improve salmon survival by 1.77 million juvenile fish per year.

The mitigation aims to restore formerly diked wetlands, rehabilitate wildlife habitat, reshape former agricultural lands into high value shallow water salmon habitat, and rebuild lower Columbia River wetland and estuary areas.

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