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AMERICAN RIVERS, INC.

**UNITED STATES OF AMERICA
BEFORE THE FEDERAL ENERGY REGULATORY COMMISSION**

_____)
In the Matter of the Application of)
Tunbridge Mill Corporation,)
Tunbridge Mill Project,)
FERC No. 11090-000)
_____)

**PETITION BY CATHERINE
D. BORETOS AND AMERICAN
RIVERS, INC. FOR REHEARING**

Pursuant to 16 U.S.C. § 825l(a), Catherine D. Boretos, a party, and American Rivers, Inc., an intervenor-movant (hereafter, "petitioners"), petition for rehearing of FERC's "Order Issuing License" in this matter, 68 FERC ¶ 61,078 (July 15, 1994).

Petitioners do not seek to stay the license or challenge any substantive condition included therein. Instead, petitioners seek rehearing solely of FERC's decision to reject Conditions J, L, and P in the State of Vermont's certification for this project, issued under Clean Water Act section 401 on June 15, 1992.

ARGUMENT

In its order, FERC rejected Conditions J, L, and P in the State of Vermont's timely-issued certification for this project. FERC thereby reversed its prior practice of incorporating into a license all conditions in any such certification. Order at 7. Petitioners hereby adopt and incorporate all arguments in the State of Vermont's "Application for Rehearing," dated August 12, 1994. Petitioners provide the following further grounds for this petition.

First, this order violates Clean Water Act section 401(d), 33 U.S.C. § 1341(d), which provides that a certification "shall become a condition of any Federal license...." Such incorporation is mandatory: "shall" means shall, not may. Escondido Mutual Water Company

v. LaJolla Indians, 466 U.S. 765, 772 (1984). The Clean Water Act, Federal Power Act, and other federal law nowhere authorize FERC to reject any condition in a timely-issued water quality certification.

Second, this order violates the Clean Water Act's provision that jurisdiction for a challenge to a timely-issued certification lies in state court, and ultimately in the U.S. Supreme Court. Roosevelt Campobello International Park v. U.S. Environmental Protection Agency, 604 F.2d 1041, 1056 (1st Cir. 1982). This order violates the express holding of the First Circuit in that case, which is controlling judicial precedent:

"...the proper forum to review the appropriateness of a state's certification is the state court, and ... federal courts and agencies are without authority to review the validity of requirements imposed under state law or on a state's certification."

Id. at 1056.

Third, this order violates FERC's duty under the Federal Power Act and the National Environmental Policy Act ("NEPA") to avoid unnecessary conflict with state law. A NEPA document must address any inconsistency between FERC's action and the state law and must seek to reconcile the two. See 40 C.F.R. § 1506.2(d). This is so even where FERC has discretion to reject state law; it is essential where FERC has a mandatory duty to incorporate the state law but is concerned, as here, about a conflict between that law and the Federal Power Act. Nothing in the Environmental Assessment or order demonstrates that FERC considered a reasonable range of alternatives to rejection of Conditions J, L, and P.

Fourth, this order violates the Administrative Procedure Act in that FERC does not have an adequately informed basis for its rejection of Conditions J, L, and P. It is our understanding that the record here does not contain the State of Vermont's corresponding record for its certification proceeding, including the underlying state law on which the certification is based. Accordingly, FERC does not have an adequately informed basis for its interpretation of Conditions J, L, and P, which arise under state law.

Fifth, this order addresses issues which are not ripe for final adjudication. By interpreting Conditions J, L, and P as in conflict with Federal Power Act, FERC has assumed

that the State of Vermont would administer them in a particular way. That is premature, particularly in light of FERC's failure to consult with the State of Vermont or incorporate Vermont's record for the certification proceeding.

Sixth, rehearing is appropriate because the State of Vermont, petitioners, and other persons, including the U.S. Environmental Protection Agency, deserve an opportunity to be heard on FERC's unprecedented claim of authority to reject conditions in timely-issued water quality certifications. In effect, FERC is testing the legal issue reserved by the U.S. Supreme Court in PUD No. 1 of Jefferson County v. Washington State Department of Ecology, 114 S.Ct. 1900 (1994): namely, the reconciliation of a certification and a license, when perceived to be in conflict. Given the nationwide significance of this legal issue, it would be fundamentally unjust not to allow affected persons a full opportunity to be heard.

CONCLUSION

Petitioners respectfully request that FERC grant this petition for rehearing. Petitioners further request that FERC incorporate Conditions J, L and P into the license or, in the alternative, provide parties and other interested parties an opportunity to submit briefs on the legal issue addressed above.

Dated: August 15, 1994

Respectfully submitted,

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