

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17-1003

September Term, 2018

FILED ON: OCTOBER 23, 2018

MAINE COUNCIL OF THE ATLANTIC SALMON FEDERATION, ET AL.,
PETITIONERS

v.

FEDERAL ENERGY REGULATORY COMMISSION,
RESPONDENT

BROOKFIELD WHITE PINE HYDRO LLC, ET AL.,
INTERVENORS

On Petition for Review of Orders of the
Federal Energy Regulatory Commission

Before: GARLAND, *Chief Judge*, and ROGERS and GRIFFITH, *Circuit Judges*.

J U D G M E N T

This case was considered on the record from the Federal Energy Regulatory Commission (FERC), and on the briefs and oral arguments of the parties. The Court has afforded the issues full consideration and has determined they do not warrant a published opinion. *See* FED. R. APP. P. 36; D.C. CIR. R. 36(d). It is

ORDERED AND ADJUDGED that the petition for review be denied.

The petitioners, Conservation Groups, challenge FERC's order amending the licenses for three hydroelectric dams on Maine's Kennebec River. Those dams occupy portions of the Kennebec that have been designated critical habitat for Atlantic salmon, an endangered species. The Groups dispute the validity of the Biological Opinion (BiOp) prepared by the National Marine Fisheries Service (NMFS) upon which FERC's order relies. They also argue that FERC's order violates a preexisting agreement (the Kennebec Agreement)

between the Groups and the dams' operator. Finally, they contend that FERC's reliance on NMFS's BiOp was arbitrary and capricious.

The Groups failed to raise their objections to the BiOp's validity in their application for rehearing of FERC's order. We therefore lack jurisdiction to consider them in light of the statutory judicial review provision, which provides that "[n]o objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do," 16 U.S.C. § 825l(b). The Groups' contention that their challenges to the BiOp fall within section 825l(b)'s "reasonable ground" exception are foreclosed by our precedents. *See Ind. Util. Regulatory Comm'n v. FERC*, 668 F.3d 735, 739 (D.C. Cir. 2012); *Allegheny Power v. FERC*, 437 F.3d 1215, 1220 (D.C. Cir. 2006).

We do have jurisdiction to review the Groups' remaining two arguments because they were included in the Groups' application for rehearing. We reject those arguments, however, for the reasons stated by FERC in its order dismissing rehearing. First, assuming without deciding that the Kennebec Agreement binds the Commission, the parties to that agreement have complied with its terms by consulting with one another as the agreement requires. Second, it was not arbitrary or capricious for FERC to rely on the BiOp prepared by NMFS, the expert agency charged with implementing the Endangered Species Act for Atlantic salmon. *See City of Tacoma v. FERC*, 460 F.3d 53, 75-76 (D.C. Cir. 2006). Moreover, the Commission independently reviewed and adopted the Biological Assessment that formed a basis for the BiOp. *See* 157 FERC ¶ 61,089 (2016); Letter from John K. Bullard, Reg'l Adm'r, NOAA, to Kimberly D. Bose, Sec'y, FERC (July 19, 2013) (J.A. 400).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. *See* FED. R. APP. P. 41(b); D.C. CIR. R. 41.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Ken Meadows
Deputy Clerk