

Who Would Face Liability For Oroville Dam Management?

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On Feb. 12, 2017, the Butte County, California, sheriff ordered the evacuation of more than 180,000 people in the communities surrounding California's Oroville Dam after officials spotted severe erosion in the dam's emergency spillway.

Although the evacuation mandate has since been lifted and downgraded to an evacuation warning, residents of the Oroville area are still concerned about the dam's safety. Another storm is currently headed to that region and additional rainfall is expected.

The Oroville Dam facilities are managed on the federal level by the Federal Energy Regulatory Commission, which licenses the project to California's Department of Water Resources (DWR). In 2002, the DWR applied for relicensing with FERC and eventually submitted a draft environmental impact report (DEIR).

Environmental groups and local governments responded to the DEIR and urged FERC to investigate the adequacy and structural integrity of the dam's spillway. Their concern was that a season of significant rainfall would cause water to flow over the spillway and erode the spillway's earthen structure. If the spillway's surface was reinforced with rock or concrete, then the erosion could be prevented and the structural integrity preserved.

In response, FERC explained that dam safety issues were properly addressed through the commission's ongoing safety program, and not the relicensing process. The existing license, originally issued in 1956, established that the DWR was to collaborate with the U.S. Army Corps of Engineers to formulate a plan of operation in the interest of flood control.

The license also required flood control operation to be in accordance with the rules and regulations established by the secretary of the Army pursuant to Section 204 of the Flood Control Act of 1958. Thus, in response to the environmental groups' and local governments' concerns about the spillway, FERC explained that the Army Corps of Engineers would work with the DWR to ensure the dam's overall safety.

Ultimately, FERC chose not to heed the environmental groups' and local governments' suggestions and granted the Oroville facility's relicensing without considering reinforcement of the spillway.

Although California has been in a serious drought for much of the past decade, it has recently experienced significant rainfall and Oroville's emergency spillway has been put into operation for the



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first time in the dam's history.

As the environmental groups and local governments appear to have predicted, the spillway was subject to significant erosion after water breached the concrete portion of the spillway. This erosion threatened the structural integrity of the spillway, causing the Butte County sheriff to order the evacuation.

Although other avenues may exist to pursue liability against the agencies involved in management of the Oroville facilities, those agencies might avoid state tort liability on preemption grounds.

The Federal Power Act of 1935 (FPA) governs FERC's operation of the Oroville facilities. Section 10(a)(1) of the act requires FERC to issue licenses that the commission determines are "best adapted" for power development and other public uses of the waters, including flood control. Here, FERC renewed DWR's license after it approved the relicensing of the Oroville facilities in 2008.

Section 10(c) states that "[e]ach licensee hereunder shall be liable for all damages occasioned to the property of others by the construction, maintenance, or operation of the project works or of the works appurtenant or accessory thereto, constructed under the license, and in no event shall the United States be liable therefor."

Thus, FERC is specifically exempt from liability for property damage even though it is the entity that made the final decision to relicense the Oroville Dam without considering the environmental groups' and local governments' suggestion to investigate and retrofit the spillway. The DWR, as Oroville Dam's licensee, would likely shoulder the burden.

Section 27 of the act also contains a savings clause which states that "[n]othing contained in this chapter shall be construed as affecting or intending to affect or in any way to interfere with the laws of the respective states relating to the control, appropriation, use or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein."

The Fifth Circuit considered whether the Federal Power Act preempts property damage claims under state law where the claim alleges negligence for failing to act in a manner FERC expressly declined to mandate while operating a FERC-licensed project.

In *Simmons v. Sabine River Authority of Louisiana*, 732 F.3d 469, 472 (5th Cir. 2013), several property owners brought suit against Louisiana state agencies operating a FERC-licensed dam facility. The plaintiffs alleged that the agencies' failure to raise the dam's minimum reservoir elevation had caused flooding and erosion which damaged their property. FERC had considered several requests to modify the project's operations to raise the minimum reservoir level. It then conducted an analysis of historical floods and found that the dam had not had "any significant effect" on flooding downstream. FERC ultimately denied the request to raise the project's minimum reservoir elevation, and issued a report explaining its reasoning. After flooding allegedly damaged their property, the plaintiffs brought several causes of action, including negligence, against Louisiana state agencies involved in operation of the dam.

At issue was whether the FPA's savings clause allowed for state negligence claims despite Section 10(c)'s language. The Fifth Circuit relied on the Supreme Court's decision in *California v. FERC*, 495 U.S. 490 (1990), which held that the FPA has occupied the field of "power development and other public uses of the waters," with the exception of a narrow carve-out for water use. Thus, the FPA's savings clause could not be interpreted so broadly as to allow state tort law to supplant FERC's exclusive control of dam operations.

The Fifth Circuit ultimately concluded that “the FPA preempts property damage claims based in state tort law where the alleged damage is the result of ‘negligently’ operating in compliance with a FERC-issued license.” This was the case because the state law property damage claims at issue infringed on FERC’s operational control and were therefore conflict preempted.

As another storm appears on the horizon, should the dam fail, litigation would be sure to follow, but the question remains whether the agencies involved in managing the Oroville facilities would face tort liability under California law.

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