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*Our current and recent matters involve over 50 percent of all installed hydroelectric capacity in the country.*

*Additionally, the firm advises developers of new hydropower projects, including conventional large and small hydro, pumped storage, and emerging technologies using wave and tidal energy.*

# Hydro Newsletter

VOLUME 4, ISSUE 3: MARCH 2017

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## Bull Trout ESA Case Dismissed; Reinitiation of Consultation Moots ESA Section 7(a)(2) Claims

On February 23, 2017, in *Alliance for the Wild Rockies v. U.S. Army Corps of Engineers*, the United States District Court for the District of Oregon ruled that claims for procedural violations of Section 7(a)(2) of the Endangered Species Act (ESA) against a federal action agency are moot when the action agency reinitiates consultation. Previously, Ninth Circuit case law did not provide a clear answer whether reinitiation of consultation, by itself, is sufficient to moot a Section 7(a)(2) claim. The district court's opinion is significant because it signals that agencies can avoid liability for procedural violations of Section 7(a)(2) by reinitiating consultation.

In 2016, Alliance for the Wild Rockies (Alliance) filed suit against the U.S. Bureau of Reclamation, U.S. Army Corps of Engineers, and Bonneville Power Administration (collectively, Federal Defendants) under the ESA. Alliance alleged that the Federal Defendants were in violation of their obligation under Section 7(a)(2) of the ESA to reinitiate and ***complete*** consultation with the U.S. Fish and Wildlife Service (FWS) to ensure that their operation of twenty-three hydroelectric dams would not result in the destruction or adverse modification of bull trout critical habitat.

The Federal Defendants moved to dismiss, arguing, among other things, that Alliance's claims were moot or prudentially moot because the Federal Defendants had already reinitiated consultation with respect to nine of the dams and would imminently reinitiate consultation with respect to the remaining dams. One of the central issues argued on the Motion to Dismiss was whether reinitiation of formal consultation renders Section 7(a)(2) claims moot or whether Section 7(a)(2) claims are not moot until consultation is complete.

The district court dismissed Alliance's claims, holding that reinitiation of consultation alone is sufficient to moot Section 7(a)(2) claims. At the time that the district court issued its decision, the Federal Defendants had reinitiated consultation for each dam located in bull trout critical habitat. The district court recognized that the only procedural duty applicable to the Federal Defendants under Section 7(a)(2) was to reinitiate consultation because (1) the ESA does not mandate completion of consultation

under a precise timeframe, and (2) only FWS, which was not named as a defendant, had the authority to complete consultation in this case.

Van Ness Feldman represented Roza Irrigation District and Kennewick Irrigation District, which intervened as defendants in the case.

## FERC Delegates Additional Authority to Staff to Act during Absence of Quorum; Energy Industry Associations Urge President to Promptly Nominate New Commissioners

As previously reported, the recent resignation of former Federal Energy Regulatory Commission (FERC) Chairman Norman Bay has left FERC with only two Commissioners: Acting Chairman Cheryl LaFleur and Commissioner Colette Honorable, on a commission which may have as many as five members. FERC therefore lacks a quorum until at least one more Commission member is nominated by President Trump and confirmed by the U.S. Senate. The absence of a quorum will prevent FERC from taking final action on many matters, including contested hydroelectric licensing proceedings, requests for rehearing of Commission orders, and other matters not delegated to FERC staff.

On February 3, 2017, Commissioner Bay's last day, FERC issued additional delegated authority to its staff to act until a quorum is restored and the full Commission lifts the delegation order. However, the additional delegations are not substantive, but rather administrative measures primarily intended to preserve the authority of the full Commission to act on certain matters. The additional delegations authorize staff to: (1) suspend rates under the Federal Power Act and Natural Gas Act to ensure that filed rates do not go into effect without refund protection; (2) grant extensions of time; (3) act on certain uncontested tariff and rate schedule matters; and (4) accept certain uncontested settlements in non-hydroelectric matters.

On February 2, 2017, a group of 14 public and private energy industry associations, including the National Hydropower Association (NHA), sent a letter to President Trump urging him to promptly nominate candidates to fill the three existing vacancies in order to restore FERC's ability to make major policy decisions and take timely action on energy project applications and other matters.

## Acting FERC Chairman LaFleur Names New Director of Energy Projects

On February 1, 2017, Acting FERC Chairman LaFleur named Terry Turpin as Director of FERC's Office of Energy Projects (OEP), which administers FERC's hydroelectric licensing and gas pipeline certificate programs, effective February 19. Mr. Turpin replaces Ann Miles, who has retired. Until his designation as OEP Director, Mr. Turpin was the Deputy Office Director of that office. Mr. Turpin began his career at FERC in 1998 as a staff engineer in FERC's natural gas pipeline program. He was appointed Deputy Director of the office in February 2016. Mr. Turpin holds a Bachelor of Science Degree in Civil Engineering and is a Registered Professional Engineer. Chairman LaFleur also named John Wood as Acting Deputy Director of OEP.

## President Trump Issues Executive Order Directing EPA and USACE to Begin Unraveling Waters of the United States Rule

On February 28, 2017, President Trump issued an Executive Order (EO) directing the Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (USACE) to review their May 2015 final rule defining waters of the United States under the Clean Water Act (CWA). The final rule expands federal control over several types of water bodies, and requires federal permits for dredging, filling, or discharging pollution to those water bodies. In August 2015, one day before the controversial rule was to go into effect, a federal judge issued a preliminary injunction effective in 13 Western and Midwestern states. In October 2015, the U.S. Court of Appeals for the 6th Circuit issued a stay effective nationwide. Then, on January 13, 2017, the U.S. Supreme Court agreed to resolve conflicts over which federal court should hear challenges to the rule.

The EO directs EPA and USACE to review the rule for consistency with a declaration of national policy in the EO that the national interest in keeping navigable waters free from pollution must be carried out consistent with promoting economic growth, minimizing regulatory uncertainty, and with due regard for the roles of Congress and the states under the Constitution. The agencies are directed to issue a proposed rule to rescind or revise the final rule "as appropriate and consistent with the law." In addition, executive branch agencies are directed to review all actions implementing or enforcing the final rule for consistency with the stated policy objectives and rescind or revise, or issue proposed rules to rescind or revise, those actions consistent with the law and with the results of the rulemaking proceeding. EPA and USACE are also directed to inform the Attorney General regarding any pending litigation so that the Attorney General may take appropriate actions in light of the EO.

Finally, the EO states that in connection with the rulemaking proceeding, the agencies are to consider interpreting the term "navigable waters" in the CWA in a manner consistent with the opinion of Justice Scalia in *Rapanos v. United States*, 547 U.S. 715, the 2006 plurality opinion in which Justice Scalia, joined by Chief Justice Roberts and two other justices, held that "waters of the United States" includes only those relatively permanent, standing, or continuously flowing bodies of water ordinarily described as streams, rivers, lakes, and oceans. That understanding of the term excludes intermittent and ephemeral streams. For more information, see Van Ness Feldman's March 1, 2017 Alert.

## FERC Receives Comments on Proposed Rule Requiring Electricity Market Rules to Accommodate Electric Storage Resources

As previously reported, FERC on November 17, 2016 issued a Notice of Proposed Rulemaking (NOPR) to, among other things, require each regional transmission organization (RTO) and independent system operator (ISO) to revise its tariff to include market rules that recognize the physical and operational characteristics of electric storage resources and accommodate their participation in the organized wholesale electric markets. The proposed rule would supersede existing rules that do not always ensure that electric storage resources that are technically capable of providing specific services are permitted to do so. Each RTO or ISO participation model would have to satisfy specified requirements regarding services, bidding parameters, dispatch, minimum size, and pricing of resales back into the market of sales to the storage resource. Comments on the proposed rule were due February 13, 2017.

Comments were filed by numerous entities, including the NHA. NHA considers the NOPR to be a positive step toward recognition of the need for a level playing field for all energy storage technologies based on their abilities to provide key supporting services to the overall electric grid, particularly when taking into consideration project lifecycle costs, performance and energy storage system degradation. NHA supports rules that enable regional grid balancing authorities (RTOs/ISOs) to craft solutions best suited to the areas under their control. It states that all energy storage technologies have a role to play in electricity markets, but different technologies do not always provide the same services or serve the same role within the grid. With these general principles in mind, NHA urges FERC to consider how RTOs/ISOs can better align revenue streams with reliability needs and whether and how additional revenue streams can justify new investment. NHA states that this is particularly important in regions experiencing widespread installation of utility-scale and customer-sited intermittent renewable energy. It adds that price spreads between off-peak and on-peak hours have diminished, while reliance on pumped storage and conventional hydropower storage for long duration load balancing, fast-starts and fast-ramping, has increased. NHA adds that in some regions it may be appropriate to include grid services provided by energy storage projects in long term transmission and planning studies to better understand the potential grid benefits and risks and to help storage asset owners value their investment. Finally, NHA requests FERC to encourage ISO/RTOs to update their long term planning process to more accurately reflect the grid reliability and security services provided by pumped storage facilities.

***John Clements, Sharon White, and Jenna Mandell-Rice contributed to this issue.***

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## For more information

The professionals at Van Ness Feldman possess decades of experience covering every aspect of hydroelectric development, ranging from licensing, environmental permitting, regulatory compliance, litigation, transmission and rates, public policy, transactions and land use planning. If you would like additional information on the issues touched upon in this newsletter, please contact any member of the firm's hydroelectric practice.


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|---|---|---|
| John Clements | 202.298.1933 | jhc@vnf.com |
| Tyson Kade | 202.298.1948 | tck@vnf.com |
| Matt Love | 206.829.1809 | mal@vnf.com |
| Brian McManus | 202.298.3720 | bzm@vnf.com |
| Michael Pincus | 202.298.1833 | mrp@vnf.com |
| Chuck Sensiba | 202.298.1801 | crs@vnf.com |
| Mike Swiger | 202.298.1891 | mas@vnf.com |
| Sharon White | 202.298.1871 | slw@vnf.com |
| Julia Wood | 202.298.1938 | jsw@vnf.com |