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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.

Upcoming Speaking Engagements

- [Sharon White](#), National Hydropower Association Southeast Regional Meeting, "Hot Topics in the Southeast," Atlanta, GA, November 2, 2017

Hydro Newsletter

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FERC Commissioner Nominees Approved by Senate Energy and Natural Resources Committee

On September 19, 2017, the Senate Committee on Energy and Natural Resources (Senate ENR) reported favorably the nominations of Republican Kevin McIntyre and Democrat Richard Glick to be commissioners of the Federal Energy Regulatory Commission (FERC). There were no votes against either nominee. Mr. McIntyre is a partner in the energy law practice of Jones Day. He has been nominated to succeed Neil Chatterjee as FERC Chairman upon confirmation. Mr. Glick is currently the general counsel for the Democrats on the Senate ENR.

The next step in the confirmation process is for the nominees to be vetted by both parties for any holds that individual Senators may have placed on a nominee. None are anticipated. Following clearance of any holds, Messrs. Glick and McIntyre will be added to the long list of nominees for floor consideration and a vote by the full Senate. At this time it is not clear when a floor vote will be scheduled.

FERC Holds that One-Year Period for State Action on Water Quality Certification Applications under Section 401 of the CWA Begins When Application Is Filed

On September 15, 2017, FERC issued a [declaratory order](#) holding that the New York State Department of Environmental Conservation (NYSDEC) waived its authority under Clean Water Act (CWA) Section 401 to issue a water quality certification (WQC) for a natural gas pipeline by failing to issue or deny certification within one year from filing of the application. The order was issued in response to Millennium Pipeline Company, LLC's (Millennium) request for a notice to proceed with construction of the gas pipeline, for which FERC had previously issued a certificate of public convenience and necessity under the Natural Gas Act. The certificate required Millennium to document receipt or waiver of the WQC before commencing construction.

Millennium's request was filed in response to a June 2017 [decision](#) of the U.S. Court of Appeals for the District of Columbia Circuit, described in our July 2017 [newsletter](#), holding that FERC has the authority to determine if a state has waived its right to issue a WQC for failure to act within the one year-statutory deadline. Millennium then filed its request for a notice to proceed, arguing that NYSDEC had waived certification. NYSDEC responded that the one-year period did not begin to run until it received a

complete application from Millennium following the receipt of requested additional information, which occurred later than one year from the filing date. In the declaratory order, FERC found that the plain text of Section 401 provides that the state agency must act within one year of the filing date, that its own hydroelectric licensing regulations and case law support that interpretation, and that to find otherwise would frustrate the purpose of the one-year review period specified in the statute.

CEQ Issues List of Planned Actions for Federal Permitting Policies and Streamlining Agency Actions

On August 15, 2017, President Trump issued [Executive Order 13807](#), which directed the Council on Environmental Quality (CEQ) to, among other things, develop an initial list of actions – such as regulations, guidance, and directives – that it intends to take to enhance and modernize the federal environmental review and authorization process. On September 14, 2017, CEQ [issued](#) its Initial List of Actions to Enhance and Modernize the Federal Environmental Review and Authorization Process. CEQ's initial list includes five major actions:

- (1) Develop with the Office of Management and Budget (OMB) and in consultation with the Federal Permitting Improvement Steering Council (Permitting Council) created by the Fixing America's Surface Transportation (FAST) Act a framework for implementing the One Federal Decision policy for major infrastructure projects established in Executive Order 13807 (i.e., a lead federal agency, a single record of decision for National Environmental Policy Act (NEPA) review, and a timetable agreed upon by the lead, cooperating, and participating agencies).
- (2) Refer proposals from states requesting designation of projects as "High Priority Infrastructure Projects" under Executive Order 13766 to the Permitting Council, Department of Transportation and U.S. Army Corps of Engineers, as appropriate, for further action;
- (3) Revise, modify or supplement existing CEQ guidance on several NEPA matters, including: Categorical exclusions; Environmental Assessments (EAs); appropriate use of mitigation and monitoring and mitigated Findings of No Significant Impact; and collaboration and conflict resolution.
- (4) Issue or revise guidance on expediting federal permitting and environmental review for infrastructure, including: Procedural reforms; simplification and accelerated action; and development of infrastructure-specific guidance for a NEPA practitioners' handbook. The handbook may address, among other things: Public involvement; deference to the lead federal agency on key issues; cumulative impacts analysis; appropriate sources of information for analyses; use of existing studies and information; and reliance on state, local and tribal EAs.
- (5) CEQ will also convene an interagency Working Group, consisting of agency Chief Environmental Review and Permit Officers required by the FAST Act, the OMB Director, and representatives of other appropriate federal agencies. The Working Group will address issues including, but not limited to, Endangered Species Act consultation, compliance with the National Historic Preservation Act, and CWA permitting. The Working Group will also: (1) Review the NEPA implementing regulations and other environmental review procedures and policies of Permitting Council member agencies; (2) identify impediments to efficient and effective processing and permitting of infrastructure projects; and (3) identify agencies that require an action plan to address the identified impediments. Following the review, agencies are to develop action plans and timelines to complete identified actions and submit their action plans to CEQ and OMB for comment.

Petitions for Certiorari filed in Water Transfers Case

On September 14 and 15, 2017, a group of states and several environmental organizations each filed petitions for certiorari with the U.S. Supreme Court to review a [decision](#) issued by the U.S. Court of Appeals for the Second Circuit in January 2017 reinstating the Environmental Protection Agency's (EPA) Water Transfers Rule. The rule, adopted in 2008, codifies EPA's longstanding policy that water transfers between navigable waters that do not subject the water to an intervening industrial, municipal, or

commercial use do not constitute an “addition of pollutants” to navigable waters and are not subject to National Pollutant Discharge Elimination System (NPDES) permits under Section 402 of the CWA. The Second Circuit reversed a decision of the U.S. District Court for the Southern District of New York which vacated the rule on the basis that it was an unreasonable interpretation of the CWA. The deadlines to file oppositions to the petitions for certiorari are October 19 and 25, 2017.

The lower court’s decision raised concerns for the hydropower industry because reversal of the rule could have ultimately subjected certain dams involving transfers of water between water bodies to NPDES permitting. The Second Circuit’s decision removed that uncertainty. The Second Circuit’s opinion also expressly preserved longstanding precedent that hydropower dams are generally not subject to NPDES permits, holding that these cases “have no bearing on the outcome of this appeal.” The Second Circuit’s decision is also consistent with the U.S. Court of Appeals for the Eleventh Circuit’s decision upholding the rule, thus foreclosing a conflict among the federal circuits.

Van Ness Feldman authored an amicus brief for the hydroelectric industry urging the result reached by the Second Circuit. For more information, see our [alert](#).

FERC Denies Rehearing of Yadkin Project License and Transfer

On September 19, 2017, FERC issued two rehearing orders addressing the relicensing and transfer of the license for the Yadkin Hydroelectric Project (Project) in North Carolina. The first [denied](#) rehearing of the order granting a new license for the Project, issued by FERC on September 22, 2016 after the Project had been operating under an annual license since the previous license expired in 2008. Several parties, including the State of North Carolina, sought rehearing of the license order on various issues. FERC denied the state’s rehearing request, finding that its concerns stem from closure of the aluminum smelting plant that was previously powered by the Project, but ceased operations in 2002. FERC rejected the state’s requests to solicit competing license applications or recommend federal takeover and transfer of the Project to the state, finding that such requests were untimely and unwarranted. FERC also denied the City of Salisbury’s arguments that the license should have incorporated an environmental measure to mitigate flooding at the City’s wastewater treatment plant, located on non-Project lands, finding that licensees are not required to mitigate effects on non-project facilities unless necessary to protect public safety. FERC rejected a third rehearing request because the entity was not a party to the proceeding with standing to seek rehearing, and denied requests for stay of the license.

The second order [denied](#) requests for rehearing of FERC’s December 13, 2016 order approving the transfer of the license for the Project from Alcoa Power Generating Inc. (APGI) to Cube Yadkin Generation LLC (Cube Yadkin). FERC dismissed the rehearing requests on procedural grounds for failure to list a statement of issues, but nonetheless addressed the merits of the rehearing requests. FERC reaffirmed that transfer of a license may occur at any time, including when a project is operating under an annual license; that staff appropriately applied the public interest standard for review of a transfer, which is limited to the transferee’s ability to carry out its responsibilities under the license; and that staff appropriately approved the transfer to Cube Yadkin. Cube Yadkin purchased the Project from APGI in February 2017. Van Ness Feldman serves as FERC regulatory counsel to Cube Yadkin.

[Brian McManus](#), [John Clements](#), and [Sharon White](#) contributed to this issue.

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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