



Van Ness Feldman is home to the premier hydropower law practice in the United States and to one of the largest and most experienced teams of attorneys available.

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
- [Mike Swiger](#), National Hydropower Association California Regional Meeting, "Anadromous Fish Reintroduction at Relicensing," San Ramon, CA, December 5, 2017
- [Chuck Sensiba](#), National Hydropower Association California Regional Meeting, "Emerging Federal Policy Initiatives Affecting Hydropower," San Ramon, CA, December 5, 2017

Hydro Newsletter

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FERC Revises License Term Policy for Hydropower Projects

On October 19, 2017, the Federal Energy Regulatory Commission (FERC) issued a policy statement revising its longstanding policy on establishing the length of license terms for hydroelectric projects. The policy statement generally establishes a default license term of 40 years for original and new licenses for hydropower projects located at non-federal dams. However, FERC will consider a longer or shorter term under three circumstances. First, FERC may adjust a license term as necessary to coordinate license terms for projects in the same river basin. Second, FERC will defer to a license term explicitly agreed upon in a comprehensive licensing settlement agreement, provided such term does not conflict with the coordination of other license terms in the same river basin. Third, at an applicant's request and provided it is consistent with coordinating license terms within a basin, FERC will consider a longer license term based on significant measures expected to be required under the new license or voluntary measures implemented during the prior license term. The policy statement appears to leave unchanged FERC's longstanding practice of granting 50-year terms for new and original licenses for projects located at federal dams.

The revised policy ends FERC's longstanding practice of setting the length of the license term between 30 and 50 years based on the amount of redevelopment, new construction, new capacity, and environmental mitigation and enhancement measures required under the license. The revised policy will provide a number of benefits to licensees over FERC's prior policy. For example, the default 40-year license term, as opposed to the prior minimum term of 30 years, affords a licensee needed time to recoup the costs to implement a new license. It also defers the high costs of the next round of relicensing, which can be in the tens of millions of dollars. The revised policy also could incentivize capacity upgrades and new resource protection measures during the license term, which were not credited in the new license term under FERC's previous policy. The new policy also should strengthen FERC's policy of encouraging settlements in licensing proceedings. However, the revised policy is somewhat troubling in emphasizing the coordination of license terms in a river basin as a reason to override agreement on an agreed-upon term in a comprehensive settlement agreement, or to shorten the license term for a project that would otherwise have justified a 40-year or 50-year term based on project improvements.

Senate Confirmation of FERC Commissioner Nominees Stalled

On October 5, 2017, Senator Lisa Murkowski (R-AK) moved the full Senate to confirm by unanimous consent the nominations of Democrat Richard Glick and Republican Kevin McIntyre to be commissioners of FERC. Senator Murkowski's motion was defeated when Senator Jim Inhofe (R-OK) issued an objection to Mr. Glick's confirmation. It has been reported that Senator Inhofe blocked Mr. Glick's confirmation because of delays in scheduling a floor vote for several of President Trump's nominees for key positions at the Environmental Protection Agency (EPA).

The FERC nominees were previously approved by the U.S. Senate Committee on Energy and Natural Resources (Senate ENR), with no votes against either nominee. Mr. McIntyre is a partner in the energy law practice of Jones Day. He has been designated by the President to succeed Neil Chatterjee as FERC Chairman upon confirmation. Mr. Glick is currently legal counsel for the Democrats on the Senate ENR. At this time it is not clear when another floor vote on the FERC confirmations will be scheduled.

Legislative Update

The House and Senate held hearings in October on grid reliability and energy storage technologies that included hydropower industry witnesses. On October 3, 2017, the U.S. House of Representatives Committee on Energy and Commerce, Subcommittee on Energy, held a [hearing](#) titled: *Part II: Powering America: Defining Reliability in a Transforming Electricity Industry*. Part I of the hearing took place on September 14, 2017. Steve Wright, General Manager of Chelan County Public Utility District in Washington State, testified on behalf of the National Hydropower Association, noting that hydropower can provide all components of reliability. Also on October 3, the Senate ENR held a [hearing](#) to "Examine the Status of Energy Storage Technologies, Reviewing Today's Technologies and Understanding Innovation in Tomorrow's Technologies." John Seifarth, Director of Engineering of Voith Hydro, testified on behalf of the hydropower industry.

On October 26, 2017, the House Committee on Energy and Commerce, Subcommittee on Energy, held a markup and reported out two bills to advance hydropower. The first bill, H.R. 2872, the Promoting Hydropower Development at Existing Nonpowered Dams Act, would authorize FERC to grant an exemption for qualifying hydropower facilities at certain non-powered dams operated for the control, release, or distribution of water for agricultural, municipal, navigational, industrial, commercial, environmental, recreational, aesthetic, or flood control purposes. The second bill, H.R. 2880, the Promoting Closed-Loop Pumped Storage Hydropower Act, would establish focused licensing requirements for the expeditious review of license applications for closed-loop pumped storage projects. The bills must now be approved by a full Committee vote before they are sent to the House floor.

In addition, on October 25, 2017, Representative Elise Stefanik (R-NY) introduced H.R. 4137, the Renewable Electricity Tax Credit Equalization Act, a [bill](#) that would modify and extend the production tax credit (PTC) and investment tax credit (ITC) for hydropower and marine energy facilities. The PTC and ITC were originally included in the Energy Policy Act of 2005 (effective beginning in 2006). Marine and hydrokinetic projects became eligible for the programs in 2008. Under existing law, wind and geothermal facilities received a PTC of 1.5 cents per kilowatt hour (kWh) indexed for inflation, and open and closed loop biomass, municipal solid waste, hydropower and marine and hydrokinetic facilities received 50% of that amount. The hydropower PTC and ITC previously expired at the end of 2013, but were extended retroactively by Congress first through the end of December 2014 and again through the end of 2016. The Renewable Electricity Tax Credit Equalization Act proposes to extend the hydropower PTC and ITC through 2021, and would equalize tax credits for all renewable sources at 1.5 cents per kWh adjusted for inflation.

FERC Reaffirms Lack of Jurisdiction to Authorize Small Conduit Hydroelectric Projects at Reclamation Facilities

On October 19, 2017, FERC issued an [order](#) reaffirming its lack of jurisdiction to authorize conduit hydroelectric projects at facilities controlled by the Bureau of Reclamation (Reclamation). The Federal

Power Act authorizes FERC to issue preliminary permits and licenses for non-federal hydropower projects located at federal dams and facilities. However, FERC does not have such authority if Congress authorizes exclusive federal development of hydropower generation at a site, or if Congress otherwise unambiguously withdraws FERC's jurisdiction over the development of such generation. In 2013, Congress enacted the Bureau of Reclamation Small Conduit Hydropower Development and Rural Jobs Act (Small Conduit Act) to provide Reclamation with exclusive jurisdiction over all small (5 MW or less), non-federal hydropower development projects on Reclamation conduits. The Small Conduit Act contains a provision that allows FERC to retain jurisdiction over such projects if FERC previously permitted, licensed, or exempted them, or if applications were pending before FERC as of the date of the statute's enactment, August 9, 2013.

Prior to the enactment of the Small Conduit Act, there were pending before FERC various competing applications for preliminary permits for small conduit projects to be located within Reclamation's Columbia Basin Project. FERC awarded the permits to the applicant with municipal preference, but those permits subsequently expired and the permittee did not file license applications for the projects. Percheron Power, LLC, which had filed a competing application but was not awarded the preliminary permit, petitioned for a ruling that FERC retains jurisdiction to authorize small conduit hydroelectric projects at the sites that were the subject of any previously-filed application, whether or not FERC denied or rejected the proposal, arguing, in part, that the reservation of authority to FERC provided by the Small Conduit Act applied to the entire Reclamation project and not to the specific hydropower development project proposed at the site at the time of the statute's enactment. In response, FERC determined that it only retained jurisdiction over small conduit hydroelectric projects that, at the time of enactment of the Small Conduit Act, had: (1) an existing FERC-issued preliminary permit, license, or exemption, or (2) a pending application, and that the limited authority only applied to the particular pending permit or license application, not to previous applications that had been denied. Under the Small Conduit Act, should an existing permit expire or a licensed project not be developed, then FERC's jurisdiction over the project at the Reclamation facility is terminated.

Parties Seek Rehearing of FERC Order in Gas Pipeline Case Waiving CWA 401 Authority

As previously [reported](#), 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 proposed by Millennium Pipeline Company, LLC, by failing to issue or deny certification within one year from filing of the application.

On October 13, 2017, NYSDEC filed a [request for rehearing](#) of the declaratory order and a stay of the order pending any and all appeals. NYSDEC also requested that FERC refrain from issuing any Notices to Proceed with construction pending rehearing and any appeals. NYSDEC contends that FERC erred in finding that the one-year period for state action on a WQC application commences upon receipt of an application. Instead, NYSDEC contends, the CWA is ambiguous as to whether a "request for certification," which triggers the one-year period, means an application deemed by the state to be complete, and that its own interpretation that a complete application is required is administratively sound and consistent with other federal agency practice and judicial precedent. NYSDEC asserts that a stay is necessary to prevent irreparable harm to the state's environment and potential harm from a lack of NYSDEC oversight and enforcement authority over the project.

Requests for rehearing were also filed by [Riverkeeper, Inc.](#) and a group of individual [intervenors](#) in the pipeline certificate proceeding at FERC.

EPA Proposes to Repeal Clean Power Plan

In March 2017, President Trump signed an Executive Order that took the first step in rolling back executive actions undertaken by the Obama Administration to address climate change. Most prominently, the Executive Order directed EPA immediately to review the Clean Power Plan, a

regulation promulgated pursuant to section 111(d) of the Clean Air Act that is intended to limit greenhouse gas emissions from existing power plants. The Executive Order directed EPA, "as appropriate," to initiate a rulemaking to suspend, revise or rescind the rule and related actions. The proposed rule, promulgated in August 2015, was immediately challenged, and the U.S. Supreme Court stayed the rule in 2016 until litigation concludes.

On October 10, 2017, EPA formally [proposed](#) a repeal of the Clean Power Plan, after determining that the rule went beyond the agency's Clean Air Act authority. EPA has not committed to replacing the rule with any narrower standards. The proposed repeal has been published in the Federal Register and comments are being accepted until December 15, 2017.

[Brian McManus](#), [John Clements](#), [Sharon White](#), and [Robert Conrad](#) 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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