



*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.*

# Hydro Newsletter

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### Recent Actions on Climate Change May Impact Hydropower Regulation

On November 1, 2013, President Obama signed [Executive Order 13653](#), "Preparing the United States for the Impacts of Climate Change," establishing the Council on Climate Preparedness and Resilience (Council). The Council will be co-chaired by the Chair of the Council on Environmental Quality (who recently announced she would be leaving the post), the Director of the White House Office of Science Technology and Policy, and the Assistant to the President for Homeland Security and Counterterrorism. It will also include senior officials from the Departments of the Interior, Agriculture, Commerce, and Energy, the Environmental Protection Agency, and the Army Corps of Engineers, among others. The Executive Order directs the Council to coordinate interagency efforts on climate change preparedness, and support regional, State, local, and tribal actions to cost-effectively increase climate change resilience of infrastructure and natural resources, among other things. Building on a [2009 Executive Order](#) directing Federal agencies to make the reduction of greenhouse gas emissions a priority, these agencies will continue to prepare Agency Adaptation Plans that take climate change risks into consideration that can impact their missions, operations, and programs.

The Executive Order follows the Department of Energy's (DOE) recent report to Congress on the [Effects of Climate Change on Federal Hydropower](#). As directed by section 9505 of the SECURE Water Act of 2009, DOE prepared a comprehensive assessment of the potential effects of climate change on the water available for hydropower generation at Federal facilities and on the marketing of that power. The so-called 9505 Report concluded, among other things, that future changes to precipitation and runoff could potentially impact hydropower generation, water quality and supply, critical habitat, and other important water uses that indirectly affect hydropower generation.

Addressing potential impacts of climate change has been an increasing focus in the regulation of non-Federal hydropower. In two recent Clean Water Act section 401 water quality certifications issued by the California State Water Resources Control Board (California Water Board) for the Federal Energy Regulatory Commission (FERC) relicensing of the Upper American River Hydroelectric Project (UARP) (FERC No. 2101) and the Chili Bar Hydroelectric Project (FERC No. 2155), the California Water Board included conditions to address climate change. The conditions included a re-opener provision reserving the California Water Board's authority to modify or add conditions in the future, should changes in climate occur that significantly alter the baseline assumptions used to develop the certifications. The issuance of the section 401 water quality certifications clear the way for FERC re-licensing of the two projects, which have been operating under annual licenses since 2007. Van Ness Feldman represents the Sacramento Municipal Utility District in its relicensing of the UARP.

**SPOTLIGHT:  
John Clements**



*John joined Van Ness Feldman in 2006 after a distinguished 27+ year career at FERC, where he served in a variety of legal and policy positions, including Office Director and other senior executive positions in the Office of Hydropower Licensing. He was the lead author of FERC Order No. 2002 and the associated regulations which established the Integrated Licensing Process. John's unique background, perspective, and personality make him a tremendous asset to the firm and its clients.*

**Where did you grow up?**

The suburbs of Chicago. It was a great place to be a kid.

**Did you always aspire to be an attorney? How long have you been in practice?**

I took refuge in the law after discovering my American History degree qualified me to wait on tables or sell vacuum cleaners door-to-door in the Michigan winter. With 34 years of hindsight, I'm glad I made the switch.

*continued*

## **FERC and California Sign MOU to Coordinate Approvals of Hydropower Projects**

FERC has identified the absence of water quality certification as the single most common cause of delay in the processing of hydropower license applications. Presumably to address this delay, in late November, FERC and the California Water Board entered into a [Memorandum of Understanding](#) (MOU) to coordinate their review of pre-application activities of non-Federal hydropower projects in California. The goal of coordinating the pre-application activities would be for FERC to issue an environmental document that satisfies FERC's obligations under the National Environmental Policy Act, and the California Water Board's obligations under the California Environmental Quality Act. While the commitments in the MOU are not legally binding on either agency, the agencies' agreement to establish deadlines to ensure a timely relicensing process may address the delay—at least for conventional and pumped storage projects in California. The MOU does not pertain to offshore hydrokinetic projects.

## **FERC Issues New License to Incumbent in Competitive Relicensing**

On November 21, 2013, FERC issued a [new license](#) to Van Ness Feldman client FirstLight Hydro Generating Company (FirstLight) for the Scotland Hydroelectric Project (FERC No. 2662) in Connecticut and denied a competing license application filed by a local municipality. Federal Power Act (FPA) section 15(a)(2) requires FERC to consider several factors, exclusive of fish and wildlife protection plans, in determining which applicant should receive a new license in the event of competing applications. Insignificant differences in project proposals, however, do not result in the transfer of a license from an incumbent licensee, which is referred to as the marginal incumbent preference. The order marks the second time FERC has applied the FPA section 15 criteria. In the first instance, in the relicensing of the Holyoke Hydroelectric Project (FERC No. 2004), FERC found no significant differences between the competing proposals except as to cost-effectiveness, which it evaluated in terms of the cost per MWh of generation, and found the incumbent licensee to have a significant cost advantage. In the Scotland proceeding, FERC concluded that there were no significant differences with regard to any of the section 15 criteria, and awarded the new license to FirstLight under the marginal incumbent preference. Competitive relicensing proceedings are unusual at FERC. In the ongoing relicensing of the Kinzua Pumped Storage Project in Pennsylvania (FERC No. 2280), a competitive applicant withdrew its notice of intent to file a license application just before the application filing deadline, leaving the incumbent licensee as the only applicant.

## **FERC Continues HREA Implementation**

FERC continues its implementation of the Hydropower Regulatory Efficiency Act of 2013 (HREA), which, among other things, directs FERC to investigate the feasibility of a two year licensing process for hydropower development at non-powered dams and closed-loop pump storage projects. A two-year licensing process, including pre-filing requirements, would significantly streamline the licensing process for developers of these new hydropower projects. FERC conducted a well-attended public workshop on October 22, 2013 to solicit public comments and recommendations on the feasibility of a two-year licensing process and the criteria it should consider for choosing potential pilot projects to utilize the two-year process. FERC also accepted written comments until November 21, 2013. FERC is required to develop and implement pilot projects for the two-year process within 180 days of enactment of the HREA, or by early February 2014. If FERC is unable to implement pilot projects because it determines that a two-year process is not practicable, the HREA requires FERC to submit a report to Congress by April 6, 2014. At a House Energy and Power Subcommittee hearing held on December 5, 2013, Acting FERC Chairman Cheryl LaFleur indicated that she believed FERC would be able to implement the pilot projects in 2014.

## **Department of Interior to Review Mitigation Policies and Practices**

On October 31, 2013, Secretary of the Department of the Interior (Interior) Jewell issued [Order No. 3330](#) directing Interior's Energy and Climate Change Task Force to review the mitigation aspects of Interior's existing land and water management practices and procedures, and to develop a strategy for strengthening the Interior's mitigation-related decisions in its review and permitting of

**What drew you to  
hydropower?**

Natural resource and other hydro issues are always interesting, every project is different, hydro people are fun, you never stop learning; I could go on.

**In your opinion, what sets  
Van Ness Feldman apart  
from other firms with  
hydropower practices?**

The deepest and best hydro bench anywhere and our commitment to getting it right. My colleagues really keep me on my toes.

**What would you be doing  
if you weren't an attorney?**

When that day comes, my wife will be there with a list.

**What are your three desert  
island albums?**

That's waaay too limiting: *Derek and the Dominos, Mambo Sinuendo*, the first Poco album, *The Humbler* (the astonishing Danny Gatton with Robert Gordon), *Into the Purple Valley* and *Chicken Skin Music* by Ry Cooder, *Sly and the Family Stone's Greatest Hits*, *The Low Spark of High Heeled Boys* by Traffic; I could go on and on . . .

infrastructure development projects. Notably, the Order emphasizes the incorporation of landscape-level planning into mitigation-related decisions, and encourages the use of mitigation plans that address a variety of biological, cultural, and socioeconomic factors. Given Interior's management responsibilities for fish and wildlife resources, recreation, and historic properties, the strategy is likely to influence Interior's role in reviewing hydropower development. The Order obligates the Task Force to summarize its review and strategy within 90 days.

**National Oceanic and Atmospheric Administration Releases Tribal  
Consultation Handbook**

On November 13, 2013, the National Oceanic and Atmospheric Administration (NOAA) announced the release of its "[Procedures for Government-to-Government Consultation with Federally Recognized Indian Tribes and Alaska Native Corporations](#)" (Tribal Consultation Handbook). In accordance with Executive Order 13175, NOAA's Tribal Consultation Handbook describes the applicable procedures for the formalized government-to-government consultation process on actions and policies that have substantial direct effects on a Federally-recognized Indian tribe or its relationship with NOAA. For Alaska Native corporations, NOAA's consultations occur on a "government-to-corporation" basis in a manner similar to consultations with Federally-recognized Indian tribes. The Tribal Consultation Handbook procedures will guide tribal consultations conducted by the National Marine Fisheries Service on certain actions, such as Endangered Species Act consultations, associated with hydropower licensing.

*Julia Wood, John Clements, Michael Pincus, and Tyson Kade contributed to this edition.*

*Founded in 1977 and now with over 100 professionals in Washington, D.C. and Seattle, WA, Van Ness Feldman provides strategic business advice, legislative and policy advocacy, legal and regulatory compliance counsel, representation in administrative proceedings and litigation, and support for project development, permitting, and transactions in the inter-related areas of energy, the environment, natural resources, public lands, real estate, health care, land use, and infrastructure.*

*Van Ness Feldman's hydroelectric practice provides comprehensive legal, policy, and business advisory services for the full range of issues facing the hydropower industry. If you would like additional information, please contact any member of our hydroelectric practice in Washington, DC or in Seattle, WA.*

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