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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

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- *Supreme Court Denies Certiorari for Fifth Circuit Preemption Case*
- *Ninth Circuit Upholds Tongass Exemption to Roadless Rule*
- *New BOEM Rule Gives Hydrokinetic Developers More Time to Submit Site Plans*
- *Energy and Climate Change Task Force Issues Mitigation Report*
- *DOE Issues Loan Guarantee Solicitation for Renewable Energy and Efficiency Projects*
- *DOE Issues Funding Opportunity Announcements*
- *Congress Considers Legislation that Would Amend the Endangered Species Act*
- **Spotlight:** *Mike Swiger Awarded NHA's Henwood Award*

Supreme Court Denies Certiorari for Fifth Circuit Preemption Case

On April 21, 2014, the United States Supreme Court granted plaintiffs' petition for certiorari in *Simmons v. Sabine River Authority*, a case in which landowners alleged that the release of flood waters from a Federal Energy Regulatory Commission (FERC) licensed hydropower project damaged their property. The Supreme Court's decision preserves the United States Court of Appeals for the Fifth Circuit's (Fifth Circuit) holding that the Federal Power Act (FPA) preempts certain property damages claims based on state tort law where the alleged damages result from the operation of a hydropower project in compliance with a FERC license. For a discussion of the Fifth Circuit decision, see: <http://www.vnf.com/1076>.

Ninth Circuit Upholds Tongass Exemption to Roadless Rule; Forest Service Responds with Clarification Document

On March 26, 2014, the United States Court of Appeals for the Ninth Circuit (Ninth Circuit), in a 2-1 panel decision, in *Organized Village of Kake v. USDA*, ruled that a 2003 decision by the U.S. Forest Service (Forest Service) to exempt the Tongass National Forest (Tongass) from the Roadless Rule was well-reasoned and should be upheld. The so-called "Tongass exemption," if it is reinstated and endures, could make some hydropower projects in southeast Alaska more attractive, although the Forest Service subsequently emphasized that the decision does not change its role under section 4(e) of the FPA in the licensing of hydropower projects.

The Roadless Rule, promulgated by the Forest Service in January 2001, generally prohibits road construction and reconstruction and timber harvesting in inventoried roadless areas in National Forests, including the Tongass, with limited exceptions. In 2003, as part of a settlement agreement with the State of Alaska and other parties, the Forest Service implemented a temporary exemption of the Tongass from the Roadless Rule. In 2011, the District Court for the District of Alaska invalidated the Tongass exemption and reinstated the prohibitions of the 2001 Roadless Rule.

The Ninth Circuit's March 26, 2014 decision reverses the district court's decision and remands the case to the district court to determine whether the Forest Service should have prepared a Supplemental Environmental Impact Statement for its 2003 decision to exempt the Tongass from the Roadless Rule.

**Mike Swiger Awarded the Dr.
Kenneth Henwood Award**



On April 29, 2014, the National Hydropower Association awarded Mike Swiger the Henwood Award, the most prestigious award in the hydro industry. The Henwood Award is presented to an individual within the hydro industry who exhibits: dedication to hydropower as an energy technology; persistence in the face of institutional obstacles; appreciation and understanding of the relationships among project engineering, environment and economics; strong commitment for fair dealing and plain speaking; and uncommon energy, enthusiasm, and excitement as a leading force in the industry—all traits that Mike has embodied over his career.

Mike accepted the award during the National Hydropower Association's Annual Meeting this past week with many representatives from VNF's hydro team, as well as his wife Suzy, in attendance. Upon his acceptance, Mike said, "I am humbled and honored to receive this recognition which simply reflects the great clients, colleagues and friends with whom I have had the privilege to work over the years on these issues. I am excited for the future of hydropower in this country."

On April 8, shortly after the Ninth Circuit issued its decision, Forest Service headquarters posted a letter to the Alaska Region to "clarify" that the Ninth Circuit decision "has no effect on actions undertaken in Alaska under the [FPA], such as approving road construction and reconstruction or the cutting or removal of timber for hydroelectric development." While the clarification letter touts hydro as "an environmentally and economically preferred source of power," it also states that the Forest Service may develop any conditions necessary to protect the Forest Service reservation utilized by a hydropower project, including "limiting or prohibiting certain roads, preserving remote characteristics, defining the size of facilities, project operations (run-of-river vs. large storage reservoirs, etc.) so long as the conditions do not constitute a veto and thereby usurp FERC's role in deciding to license a hydropower facility."

New BOEM Rule Gives Hydrokinetic Developers More Time to Submit Site Plans

The Bureau of Ocean Energy Management (BOEM), the agency responsible for administering federal leases for offshore renewable energy projects on the outer continental shelf (OCS), has [revised its regulations](#) to give lease- and right-of-way- (ROW) holders more time to prepare and submit required site plans. BOEM's previous regulations had required project developers to submit a site assessment plan (SAP) or general activities plan (GAP) within six months of obtaining a lease or ROW in a competitive bidding process, or within 60 days after a determination of no competitive interest for unsolicited lease or ROW requests. In response to stakeholder feedback that site characterization activities required to support a SAP or GAP could often take longer than six months due to weather and other factors, the agency has agreed to allow all lessees and ROW-holders a full year to submit the SAP or GAP. The change is intended to increase the efficiency of BOEM's approval process for renewable energy projects on the OCS.

Energy and Climate Change Task Force Issues Mitigation Report

Following an October 2013 [order](#) issued by Secretary of the Department of the Interior (Interior) Sally Jewell, Interior's Energy and Climate Change Task Force issued a [report](#) to improve the department's mitigation policies. The report, entitled "A Strategy for Improving the Mitigation Policies and Practices of the Department of the Interior," sets forth guiding principles to govern a department-wide approach for incorporating landscape-level planning into Interior's mitigation-related decisions relative to its review and permitting of infrastructure development projects. One of the objectives of the policy is to simplify planning and review while improving operational certainty for project proponents. The report recommends a number of near-term next steps which may affect hydropower interests, including the development of guidance for landscape-scale mitigation of impacts to cultural resources under section 106 of the National Historic Preservation Act.

DOE Issues Draft Loan Guarantee Solicitation for Renewable Energy and Energy Efficiency Projects

On April 16, 2014, the Department of Energy (DOE) issued a draft loan guarantee [solicitation](#) making \$2.5 billion in loan guarantee authority available for renewable energy and energy efficiency projects that avoid, reduce, or sequester greenhouse gases. DOE's sample illustrative list of potential projects it will consider include the incorporation of power production at non-powered dams, the inclusion of variable speed pump-turbines into existing hydro facilities, and storage projects that enable greater adoption of renewable generation. DOE has initiated a comment period until May 16, 2014 to solicit feedback on the solicitation. A full summary of the draft solicitation can be found [here](#).

Upcoming VNF Speaking Engagements

Charles Sensiba, *Emerging Regulatory Issues Facing Hydro Development in Alaska*, NHA 2014 Alaska Regional Meeting, Ketchikan, AK, June 11-12, 2014

Sharon White, *Emerging Regulatory Issues Facing Hydro Development in Alaska*, NHA 2014 Alaska Regional Meeting, Ketchikan, AK, June 11-12, 2014

Charles Sensiba, *Hydro Power Developments*, 2014 APPA National Conference & Public Power Expo, Denver, CO, June 16-18, 2014

DOE Issues Funding Opportunity Announcements

DOE has announced Funding Opportunity Announcements (FOA) for the three Notices of Intent profiled in our [March Hydro Newsletter](#). On April 11, 2014, the DOE's Water Power Program released an FOA for [Water Power Manufacturing](#) to promote the development of low-cost power generation for low-head sites. Some criteria for the design of these generators include: the ability to produce energy at a levelized cost of less than \$0.06 per kilowatt-hour; the use of advanced materials; and "a design that will not have significantly negative effects to marine life or to the existing resource and infrastructure." The total award of this FOA is \$4.4 million. The submission deadlines are May 9, 2014 for the concept paper, and June 24, 2014 for the full application.

The second FOA is for the [Marine and Hydrokinetic \(MHK\) Research and Development University Consortium](#). Its intent is to fund a consortium of two or more domestic universities, or a consortium where a domestic university is designated as the lead. The consortium must focus on researching and developing innovative technologies capable of generating renewable and cost-effective electricity from U.S. waters. The total award is \$4 million. The submission deadline is May 30, 2014.

On April 25, 2014, a third FOA was issued entitled [Marine and Hydrokinetic \(MHK\) Demonstrations at the Navy's Wave Energy Test Site \(WETS\)](#). Applicants must be in the "advanced stages of technology development" to deploy wave energy converter systems at the Navy test site. The DOE anticipates making two awards of \$5 million each. The submission deadline is June 11, 2014.

Congress Considers Legislation that Would Amend the Endangered Species Act

In the past two months, lawmakers in the House and Senate have introduced a number of bills that would modify provisions of the Endangered Species Act (ESA). These bills reflect some of the recommendations of a February 2014 report prepared by the Endangered Species Act Congressional Working Group.

On April 8, 2014, the House Committee on Natural Resources held a hearing to consider the four bills that would make targeted revisions to the ESA to increase transparency in ESA-related listing decisions and litigation.

- H.R. 4315 (the "21st Century Endangered Species Transparency Act") would require the public release (via the internet) of the best scientific and commercial data available for a proposed or final rule designating a species as threatened or endangered.
- H.R. 4316 (the "Endangered Species Recovery Transparency Act") would require an annual report on expenditures for certain ESA-related lawsuits. A searchable database of the information must also be made publicly available on the internet.
- H.R. 4317 (the "State, Tribal, and Local Transparency and Recovery Act") would: require each affected State to be provided with "all data that is the basis of the determination" before a final species listing determination; and add a definition of "best scientific and commercial data available" to include "all such data submitted by a State, tribal, or county government."
- H.R. 4318 (the "Endangered Species Litigation Reasonableness Act") would apply the requirements of the Equal Access to Justice Act to the recovery of attorney fees under the ESA citizen suit provision.

In addition, five other bills have been introduced that would modify provisions of the ESA, including bills in the House and Senate that would specify the timing and scope of the draft economic analysis for the proposed designation of critical habitat and require the exclusion of areas from critical habitat if the benefits of exclusion outweigh the benefits of inclusion. This morning, the House Natural Resources Committee marked up and favorably reported these four bills to the full House of Representatives.

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