



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 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

# *Hydro Newsletter*

## **VOLUME 6 – MAY 2014**

- *Breaking News: EPA Appeals Order Vacating Water Transfers Rule*
- *Senator Landrieu Holds Field Hearing on Toledo Bend Project*
- *USFWS and NMFS Propose Changes to Endangered Species Act*
- *DOE Unveils Long-Term Plan to Increase Hydropower Development in the US*
- *Water Resources Reform and Development Act Heads to President for Signature*
- *White House Releases National Climate Assessment*
- *Senator Murkowski Releases White Paper on Energy-Water Nexus*
- **Spotlight: Brian J. McManus**

### **Breaking News: EPA Appeals Order Vacating Water Transfers Rule**

On May 29, 2014, the Environmental Protection Agency (EPA) appealed the United States District Court for the Southern District of New York's March 28, 2014 order striking down EPA's Water Transfers Rule in *Catskill Mountains Chapter of Trout Unlimited, Inc. v. EPA*. The appeal will be heard by the United States Court of Appeals for the Second Circuit.

The Water Transfers Rule, adopted in 2008, codified EPA's longstanding policy that water transfers between waters of the United States that do not subject the water to an intervening industrial, municipal, or commercial use do not constitute "addition of pollutants" to navigable waters and are not subject to National Pollutant Discharge Elimination System (NPDES) permits under section 402 of the Clean Water Act (CWA). The district court's ruling, which EPA has now appealed, found that EPA used a "flawed methodology" in interpreting the CWA under the rule and did not reasonably explain its determination to exclude water transfers from the NPDES program. The court vacated the Water Transfers Rule and remanded it to EPA for additional explanation and justification.

Under long-standing judicial precedent, hydropower dams generally are not subject to the NPDES program, unless they physically "add" pollutants, such as the discharge of grease or oil from a pipe. The Second Circuit's decision on appeal could have a significant impact on hydroelectric and water supply projects that involve cross-basin transfers, if it affirms the lower court's ruling.

### **Senator Landrieu Holds Field Hearing on Toledo Bend Project**

On May 17, 2014, Senator Mary Landrieu, chairman of the Senate Committee on Energy and Natural Resources, held a field hearing in Many, Louisiana on the Toledo Bend Hydroelectric Project (Project). The Project is located on the Sabine River on the Texas-Louisiana border, and is jointly owned by the Sabine River Authority of Texas and Sabine River Authority, State of Louisiana (Authorities). The Senator heard testimony from local leaders on the economic significance of the Project to the area. The Senator also expressed support for a new 50-year license for the Project from the Federal Energy Regulatory Commission (FERC). The Authorities' application for a new license for the Project is currently pending before FERC.

**Spotlight on Brian J. McManus**



*Over a 40 plus year career in the field of hydropower law, Brian has extensive experience appearing before FERC, other regulatory bodies, and the federal appellate courts on issues ranging from electric and gas rates, corporate reorganizations, development of independent power projects, formation of holding companies, acquisition of facilities subject to FERC's jurisdiction, oversight of interlocking positions held by officers and directors of utility companies, and the licensing and compliance of hydroelectric generating facilities.*

**Where did you grow up?**

At the tender age of three years, my family moved from my birth place of Chicago, Illinois to the politically-charged atmosphere of Washington, D.C., where I have lived in the same postal zone ever since. From kindergarten through law school, I received all of my education within the District.

**Did you always aspire to be an attorney?**

Although my father was an attorney, I really did not focus on law until my junior year at Georgetown University, when I concluded that having a degree in history, while academically interesting, would not be very marketable.

## **USFWS and NMFS Propose Changes to Endangered Species Act Critical Habitat Designations and "Adverse Modification" Definition**

On May 12, 2014, the U.S. Fish and Wildlife Service and the National Marine Fisheries Service (collectively, the Services) published proposed regulatory changes and policies that would significantly revise the treatment of critical habitat under the Endangered Species Act (ESA). The Services are proposing: (1) changes to existing regulations and new definitions used in the identification and designation of critical habitat; (2) adoption of a new definition of "adverse modification" as used in consultations on the effects of federal agency actions under ESA Section 7; and (3) a formal policy on when to exclude lands or waters from a critical habitat designation pursuant to ESA Section 4(b)(2).

Collectively, the proposed changes would increase the Services' discretion to designate broad areas of occupied and unoccupied habitat as critical habitat, and increase the likelihood that federal actions will be determined to adversely modify designated critical habitat. For more information, please see our [issue alert](#). Comments on the Services' proposed changes must be submitted by July 11, 2014.

## **DOE Unveils Long-Term Plan to Increase Hydropower Development in United States**

On April 29, 2014, Secretary of Energy Ernest Moniz announced the Department of Energy's (DOE) "[Hydropower Vision Plan](#)" to dramatically increase hydropower development over the next half century. Secretary Moniz announced DOE's plan at the National Hydropower Association annual conference in Washington, D.C. The objectives of the plan include federal government partnering with industry to develop hydropower growth scenarios, identifying best available information relative to stakeholder interests, and analyzing relevant information for use by policy and decision makers. DOE expects to release a draft Hydropower Vision report by late 2015.

Secretary Moniz also announced the release of a [report](#) entitled "A Comprehensive Assessment of Hydropower Energy Potential in the United States," which identified over 65,000 megawatts of potential new hydropower development in the United States. DOE commissioned the report to evaluate the hydropower potential of more than three million U.S. rivers and streams. Secretary Moniz noted that under the results of the study, the hydropower industry could double its generation by 2030.

## **Water Resources Reform and Development Act Heads to President for Signature**

In late May, Congress passed the Water Resources Reform and Development Act (WRRDA) (H.R. 3080), a bill that took more than a year to complete and is the first of its kind in seven years. On May 20, 2014, the House approved the bill by a vote of 412-4, and on May 22, the Senate adopted a conference report on the bill by a vote of 91-7. The legislation is now headed to President Obama's desk for signature, and is considered to be one of the few bills that will pass Congress in the months leading up to the fall midterm elections.

The bill authorizes spending on 34 port, inland waterway and environmental restoration projects and contains reform and streamlining provisions aimed at reducing costs and moving hydroelectric and other project proposals through the U.S. Army Corps of Engineers' (Corps) study process more quickly, including provisions that change the review process under the National Environmental Policy Act. Notably, included within these reform efforts are provisions that encourage non-federal hydropower development at Corps facilities and require a report to Congress on Corps activities to encourage such development. As estimated by the Congressional Budget Office, the legislation will cost

### Spotlight (continued)

#### What drew you to hydropower?

My introduction to utility regulation commenced when I was offered a job as a law clerk for the Federal Power Commission while I was a student at Georgetown University's law school. I started out there working on gas pipeline certificate matters and continued to do so after I obtained my JD degree. Not until I started in private practice did I commence working on hydroelectric issues. I really became immersed in hydropower matters when I became involved in an evidentiary hearing concerning third party uses of project lands and waters, all of which culminated in the issuance of the Federal Energy Regulatory Commission's first comprehensive shoreline management plan for the 600 miles of shoreline encompassed by Project No. 516 in South Carolina.

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

The distinguishing factor is the depth of the firm's hydro bench of attorneys and professionals, along with the firm's deep practice on natural resource issues and related public policy matters.

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

Being an investment banker or learning the complete piano literature of Claude Debussy.

\$5.4 billion in the first five years of implementation and \$6.9 billion in the next five years, with a total of \$12.3 billion in spending over the next decade.

### White House Releases National Climate Assessment

On May 6, the White House released the [Third U.S. National Climate Assessment](#) (Assessment), a comprehensive source of scientific information to date about climate-change impacts across all the United States and on critical sectors of the economy. The Assessment was created by more than 300 experts guided by a 60-member Federal Advisory Committee and was subject to extensive public, government, and peer review. It includes national overviews, as well as chapters on regional impacts (Northeast, Southeast, Midwest, Great Plains, Southwest, Northwest, Alaska, Hawaii and Pacific Islands, Oceans, and Coasts), and on various sectors, including energy, water, ecosystems, indigenous peoples, and land use and land cover change. For the first time, the Assessment also evaluates progress in climate change response strategies, including decision support, mitigation, adaptation, and research needs.

The Assessment notes there could be climate change effects on hydropower generation. In the chapter on [water resources](#), the Assessment explains that climate change is expected to affect hydropower through changes in runoff, and indirectly through increased competition with other water uses. Notably, the Assessment states that hydropower is expected to decline in the southern United States, especially in the Southwest, and increase in the Northeast and Midwest, due to projected runoff changes. In the southern United States, hydropower generation, dependable capacity, and ancillary services are likely to decrease as non-power water demands are expected to increase. The Assessment indicates, however, that these water-related limitations could be offset by the use of more efficient turbines and new innovative hydropower technologies.

A graphic and media-heavy based version of the report is available at <http://nca2014.globalchange.gov/>. For more information, see our [issue alert](#). Van Ness Feldman partner T.C. Richmond served as Vice-Chair of the Federal Advisory Committee in a private capacity.

### Senator Murkowski Releases White Paper on Energy-Water Nexus

On May 6, Senate Energy and Natural Resources Committee Ranking Member Lisa Murkowski released a [white paper](#) entitled "The Energy-Water Nexus: Interlinked Resources That Are Vital for Economic Growth and Sustainability." The report presents an "overview of the interdependencies between energy and water, as well as key challenges and opportunities." Additionally, the report includes recommendations on how the federal government can "take a leadership role in not only promoting a better understanding of this 'energy-water nexus,' but realizing its full potential."

*[Julia Wood](#), [Tyson Kade](#), [Michael Pincus](#), [Sharon White](#), [Megan Walters](#) and [Brian McManus](#) contributed to this issue.*

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