



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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### DOE Issues Guidance for Hydroelectric Incentive Payments

On July 2, 2014, the U.S. Department of Energy (DOE) issued its [draft guidance](#) document for implementing the Energy Policy Act of 2005 (EPA 2005) Section 242 Program (Guidance). The Guidance describes how DOE intends to provide incentive payments to the owners or operators of qualified hydroelectric facilities for electric energy generated and sold during calendar year 2013. As further described in the [March Hydro Newsletter](#), the Fiscal Year (FY) 2014 Omnibus Appropriations bill allocated \$3.6 million in hydroelectric production incentives (HPI) for the development of new hydropower at existing dams and impoundments under the Section 242 Program. The HPI allows a facility to collect 1.8 cents per kilowatt hour, with a cap of \$750,000 per year, for up to 10 years. Prior to FY 2014, these funds were not appropriated.

The draft Guidance describes the application process and information DOE requires in order to determine an owner or operator's eligibility. To qualify, a non-federal entity must add a turbine or other electric generating device to a dam or conduit existing as of the date of EPA 2005 enactment (August 8, 2005). The installation of the new equipment cannot require any construction or enlargement of the dam or conduit. Any owner or operator may apply for incentive payments for net electric energy sold from a qualifying facility that began operating between October 1, 2005 and September 30, 2015. The facility is not required to be licensed or exempted by the Federal Energy Regulatory Commission (FERC). Because the incentives program was only appropriated by Congress for one year, DOE will only be accepting applications for generation produced in calendar year 2013. An application for incentives payments must be filed during an application period that will be defined by DOE in a future announcement.

### FERC Issues Final Rule on Maps and Drawings

On July 17, 2014, FERC issued a [final rule](#) modifying its regulations on the format and dimensions of maps and drawing submitted by applicants, licensees, and exemptees of hydropower projects, in order to bring FERC's practices in line with modern technology. Under the final rule, project maps and

**Spotlight on Tyson Kade**



*Tyson joined the firm's Seattle Office in 2006, and moved to our Washington, DC Office last year. His practice focuses on natural resource and energy-related issues, with an emphasis on Endangered Species Act matters. He has assisted relicensing proceedings, compliance matters, and litigation in state and federal courts.*

**Where did you grow up?**

New York City

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

No, I was a biology major in college and interested in marine science. While working for the National Marine Fisheries Service, I assisted with an Endangered Species Act litigation matter. That experience sparked my interest in becoming an attorney.

drawings are no longer required in microfilm format on aperture cards. Additionally, FERC has reduced the minimum dimensions of maps and drawings from 24 inches x 36 inches to 22 inches x 34 inches, and reduced the maximum dimensions of maps and drawings from 28 inches x 40 inches to 24 inches x 36 inches. The rule takes effect on September 8, 2014.

**First Circuit Remands Case Turning on Hydropower Operators' "Desired" Downstream Fish Passage Methodology**

On July 14, 2014, the U.S. Court of Appeals for the First Circuit, in a 2-1 panel decision in *Friends of Merrymeeting Bay v. Hydro Kennebec, LLC*, vacated a lower court's summary judgment decision in favor of the operators of four hydropower facilities in southwestern Maine. The case centered on the provisions of a 1998 settlement agreement among the operators of a number of hydropower facilities on the Kennebec and Sebasticook Rivers, National Marine Fisheries Service (NMFS), U.S. Fish and Wildlife Service (USFWS), and the State of Maine involving the removal of the Edwards Dam and fish passage improvements at seven upstream dams. Under the settlement agreement, which is incorporated into the FERC licenses and water quality certifications for the projects, the hydropower operators can choose to accomplish downstream passage of certain fish species by allowing them to pass through the project turbines or by instituting various bypass methods. The operators opted to utilize bypass methods.

Several conservation groups, filing suit under the citizen suit provisions of the Clean Water Act (CWA) and Endangered Species Act (ESA) (which claims they later voluntarily agreed to dismiss with prejudice), alleged that the operators were allowing fish to pass through the turbines but failed to engage in the site-specific studies required in the event they "desire" to achieve downstream passage through the turbines. In granting summary judgment in favor of the hydropower operators in 2013, the district court held that evidence submitted by plaintiffs relating to: (1) actual passage of fish through the turbines, and (2) defendants' knowledge of fish passage through the turbines, was not relevant to the inquiry of whether defendants "desired" to achieve fish passage through the turbines, because their election to implement plans to bypass the fish demonstrated their desire for fish to bypass the turbines. The First Circuit, however, vacated the ruling, and remanded the case to the district court, finding that evidence regarding defendants' knowledge and the effectiveness of the bypass measures are relevant to the issue of the defendants' "desire."

The dissenting opinion asserted that the majority ignored the overall structure of the settlement agreement, which requires on-going assessments and interaction among the parties that should be the only relevant evidence of the operators' desired mode of compliance. The dissent further cautioned that the majority's decision could deter hydropower operators from entering into beneficial agreements with state and federal resource agencies. The case, which the U.S. District Court for the District of Maine will now reconsider, reflects the potential complexity of enforcing comprehensive settlement agreements in hydropower licensing proceedings.

**Quadrennial Energy Review Holds Meeting on Energy Storage**

On July 11, 2014, the DOE held its [fifth public meeting](#) as part of the Quadrennial Energy Review covering Electricity Transmission, Storage, and Distribution, with a focus on issues relevant to the western United States, in Portland, Oregon. Officials and executives from government, public power, and private industry testified on the need for, and challenges associated with, deploying future transmission, distribution, and energy storage technologies. Although it was not the focus of the meeting, because hydropower plays a prominent role in energy storage, several speakers addressed the current use and opportunities for hydropower. Elliot Mainzer, Administrator and Chief Executive Officer of the Bonneville Power Administration (BPA), testified that BPA has typically relied primarily on hydropower resources for system flexibility, but stated that BPA is "now at the limits of what the hydro alone can provide." Therefore, Mr. Mainzer testified, BPA has begun accessing additional sources of system flexibility, including traditional gas generation and demand response resources.

Sacramento Municipal Utility District (SMUD) submitted comments explaining that it has engaged in several clean capacity resources initiatives including its proposal to add a new hydropower pumped

## Spotlight (continued)

### What drew you to hydropower?

I enjoy working on projects that involve a combination of legal and scientific issues. Based on my background in fisheries biology, the hydro practice allows me to combine my personal and professional interests.

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

The breadth and depth of knowledge on hydro and other supporting practice areas. Our attorneys have experience assisting a range of clients with all types of issues involving the development or operation of a variety of projects in every part of the country.

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

I would probably be studying the population structure and migratory behaviors of bluefin tuna in the Atlantic Ocean.

### What are the last three books you read?

My Side of the Mountain, Frozen, and Sammy the Seal (I have two daughters).

storage development, Iowa Hill, at its Upper American River Project (UARP). (Coincidentally, FERC [issued](#) a new license for UARP, authorizing the Iowa Hill development on July 23, 2014.) SMUD commented that Iowa Hill was intended to provide the flexibility to integrate renewable resources into the grid under a scenario of decreasing gas-fired generation. Specifically, SMUD explained that the three adjustable-speed pump generators at Iowa Hill would provide significant value in regulating and efficiently dispatching intermittent renewable energy supplies, providing ancillary services to the grid, and supporting the integration of Smart Grid technologies.

## Senate Approves Nominations of Norman Bay and Cheryl LaFleur

As reported in the [February Hydro Newsletter](#), President Obama has nominated Norman Bay to fill the FERC vacancy created by the departure of former Chairman Jon Wellinghoff. Mr. Bay is the current Director of FERC's Office of Enforcement, a position he has held since July 2009. On July 15, 2014, the Senate endorsed Mr. Bay's nomination by a vote of 52-45. The Senate also approved the nomination of Commissioner Cheryl LaFleur, the Acting FERC Chair, for a second term as a FERC Commissioner, by a vote of 90-7. Commissioner LaFleur is expected to continue to serve as the Acting Chair for a nine-month period before Mr. Bay is expected to be designated as FERC Chairman.

## Deadline Extended for Comments on "Waters of the United States" Rulemaking

The EPA and U.S. Army Corps of Engineers have extended the deadline for comment submissions on their proposed rule redefining "waters of the United States" under the CWA. The new deadline for comments is October 20, 2014. As detailed in the [March Hydro Newsletter](#), the proposed rule seeks to clarify which streams, wetlands, and other waters are considered "waters of the United States" and, thus, subject to permitting requirements under the CWA. Under the proposed rule, if finalized, the agencies will assert jurisdiction over seven categories of waters, including: impoundments, rivers, the territorial seas, all tributaries, and all "adjacent waters." While several categories of waters are not controversial, many view the proposal to assert jurisdiction over non-navigable waters that do not have continuous flow as a significant expansion of the agencies' authority under the CWA, contravening recent U.S. Supreme Court decisions. The proposed rule will affect project development and operations across the energy, water, construction, building, agricultural, and transportation sectors.

## USFWS Announces Draft ESA Policy on Voluntary Prelisting Conservation Actions

On July 22, 2014, the USFWS announced a [draft policy](#) on crediting voluntary conservation actions taken for species prior to their listing under the ESA. The draft policy seeks to incentivize voluntary pre-listing conservation actions by considering the benefits of such actions as subsequent mitigation for incidental take permits issued under Section 10(a)(1)(B) of the ESA or as compensatory measures for the detrimental effects of federal actions under Section 7 consultation. Any credits from a prelisting conservation action could be transferred to a third party if the action and the credit are for the same species and within the same state. Comments on the draft policy are due by September 22, 2014.

## NMFS and USFWS Announce Final ESA Policy on "Significant Portion of Its Range"

On July 1, 2014, NMFS and USFWS (collectively, the Services) announced a [final policy](#) providing an interpretation of the phrase "significant portion of its range" (SPR) as it applies in the listing of endangered and threatened species under the ESA. Pursuant to the policy, if a species is found to be endangered or threatened throughout a significant portion of its range, the entire species is listed and the ESA's protections would apply to all individuals wherever found. The final policy revised the proposed definition of "significant" to mean "if the species is not currently endangered or threatened throughout all of its range, but the portion's contribution to the viability of the species is so important that, without the members in that portion, the species would be in danger of extinction, or likely to become so in the foreseeable future, throughout all of its range." This is a lower threshold than what

was previously proposed and will increase the potential for a listing decision to be made based upon the status of a species within a significant portion of its range. The final policy is effective on July 31, 2014.

### **Agencies Extend Comment Deadline for Proposed Revisions to Critical Habitat Provisions**

On June 26, 2014, the Services extended the deadline for comments on the proposed rules and policy on critical habitat under the ESA to October 9, 2014. As previously mentioned in the [May Hydro Newsletter](#), the Services have published proposed regulatory changes and policies that would significantly revise the designation and treatment of critical habitat under the ESA.

### **Upcoming Speaking Engagements**

Chuck Sensiba and Julia Wood, National Hydropower Association and Energy Bar Association Primer: An Introduction to Hydropower Law and Regulation, Boston, MA, September 15-16, 2014

Matt Love, Comprehensive Review of Hydropower in the Northwest, Seattle, WA, October 9, 2014

*[Julia Wood](#), [John Clements](#), [Michael Pincus](#), [Tyson Kade](#), [Sharon White](#), [Erin Bartlett](#), and [V. Prentice](#) contributed to this issue.*

John Clements	202.298.1933	<a href="mailto:jhc@vnf.com">jhc@vnf.com</a>
Tyson Kade	202.298.1948	<a href="mailto:tck@vnf.com">tck@vnf.com</a>
Matt Love	206.829.1809	<a href="mailto:mal@vnf.com">mal@vnf.com</a>
Brian McManus	202.298.3720	<a href="mailto:bzm@vnf.com">bzm@vnf.com</a>
Michael Pincus	202.298.1833	<a href="mailto:mrp@vnf.com">mrp@vnf.com</a>
Chuck Sensiba	202.298.1801	<a href="mailto:crs@vnf.com">crs@vnf.com</a>
Mike Swiger	202.298.1891	<a href="mailto:mas@vnf.com">mas@vnf.com</a>
Sharon White	202.298.1871	<a href="mailto:slw@vnf.com">slw@vnf.com</a>
Julia Wood	202.298.1938	<a href="mailto:jsw@vnf.com">jsw@vnf.com</a>

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