



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

- [Chuck Sensiba](#), "Financing Hydro Development," *Irrigation Leader Annual Operations and Management Workshop*, Phoenix, AZ, January 27-28, 2016
- [Matt Love](#) and [Chuck Sensiba](#), Northwest Hydroelectric Association Annual Conference, Portland, OR, February 16-18, 2016

Hydro Newsletter

VOLUME 3, ISSUE 1: JANUARY 2016

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Legislative Update

On December 3, 2015, the U.S. House of Representatives passed a comprehensive energy bill entitled the North American Energy Security and Infrastructure Act of 2015 (H.R. 8). H.R. 8 contains a number of bipartisan provisions designed to modernize federal licensing and regulation of non-federal hydropower. Among them are provisions designating the Federal Energy Regulatory Commission (FERC) as lead agency for coordinating federal authorizations from all agencies needed to develop a project, requiring all such agencies to coordinate their activities and environmental studies early in the authorization process, and directing FERC to work with agencies in developing a comprehensive schedule for final disposition on such authorizations. H.R. 8 also contains provisions to promote new hydropower development at existing infrastructure, including: expedited licensing of new closed-loop pumped storage projects; exemptions from licensing for new hydropower projects at existing non-powered dams that meet certain criteria designed to minimize impacts, including no changes to dam operations; and streamlined approval of generation, environmental and recreation upgrades with minimal or positive environmental effects at existing projects. H.R. 8 establishes a voluntary pilot program in which FERC and resource agencies would conduct basin-wide studies to inform future relicensing of projects in the basin, and includes provisions to protect private property interests at hydropower projects.

H.R. 8 also includes provisions to benefit marine and hydrokinetic research and development. The bill expands the marine and hydrokinetic renewable energy research and development program established under the Energy Independence and Security Act of 2007 (EISA 2007) to include current, tidal, wave, and thermal technologies, and adds FERC as a consulted agency for the program. The bill authorizes the National Marine Renewable Energy Research, Development, and Demonstration Centers established under EISA 2007 to participate in demonstration projects, support in-water testing, support arrays of technology devices, and serve as information clearinghouses for marine and hydrokinetic technology. The bill also authorizes appropriations for marine hydrokinetic research through fiscal year (FY) 2019.

The bill was received in the Senate and referred to the Committee on Energy and Natural Resources on December 7, 2015.

DOE Issues Updated Guidance on Hydropower Production Incentive

On December 16, 2015, the Department of Energy (DOE) published [updated guidance](#) for implementing the Energy Policy Act of 2005 (EPAct 2005) Section 242 Program (Updated Guidance) on hydroelectric production incentives (HPI). As reported in the [April 2014 Hydro Newsletter](#) and [June 2014 Hydro Newsletter](#), the FY 2014 omnibus budget bill allocated \$3.6 million in 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. FY 2014 was the first year in which these funds were appropriated. DOE issued guidance in January 2015 and accepted applications from owners and operators of qualified hydroelectric facilities generated and sold in calendar year 2013.

DOE has updated its guidance and is now accepting applications from December 16, 2015, through February 1, 2016, from owners and authorized operators of qualified hydroelectric facilities generated and sold in calendar year 2014. The Updated Guidance more specifically describes the types of production DOE considers “new” production and the information necessary to demonstrate adequate metering. First, the Updated Guidance provides that increases in production from maintenance activities, such as replacing turbine runners updating control software, do not qualify. Second, as under the previous guidance, the net energy generated and sold must be measured by a metering device sensor that: (a) meets generally accepted industry standards; (b) is properly maintained according to the manufacturer’s instructions; and (c) is calibrated according to generally accepted industry standards. These standards have not changed, but the Updated Guidance requires the applicant to submit detailed evidence that the standards are met and identifies the types of information which suffices for that purpose.

Wisconsin DNR Invites Comments for Fish Passage Strategic Analysis

On November 10, 2015, the Wisconsin Department of Natural Resources (WDNR) issued a [scoping document](#) for a strategic analysis for fish passage at dams throughout the state. The strategic analysis is intended to gather and assess the most current scientific, natural resource, and socio-economic data regarding fish passage to enable WDNR to develop a systematic approach to evaluate fish passage at dams in Wisconsin. The scoping document identifies over 20 topics proposed for discussion in the strategic analysis. WDNR also issued a press release inviting interested stakeholders, including agencies, tribes, non-governmental organizations, and dam owners and operators to provide comments by January 29, 2016, to assist its effort. Following the public comment period, WDNR will issue a draft strategic analysis for public review and comment.

FERC to Assess Federal Land Use Charges for Minor Projects

By letters issued to licensees in December 2015, FERC announced that beginning in FY 2016 (October 1, 2015, to September 30, 2016) it will assess annual charges for the use of federal lands by licensees of minor projects (i.e., projects with an authorized installed capacity of 1.5 megawatts (MW) or less). The assessments will be made using the same method used to assess federal land use charges for major projects (greater than 1.5 MW). The federal land use charges bills will be issued in late January through mid-February 2016. Federal land charges bills are required to be paid within 45 days. Although FERC’s regulations exempt licensees of minor projects from administrative annual charges, the regulations do not provide a similar exemption from federal land use charges. Nonetheless, the assessment of federal land use charges against minor projects appears to be a departure from decades of consistent practice in which FERC only assessed such fees for major projects.

Obama Signs Omnibus Bill with Permitting Provisions and Tax Extensions for Energy Projects

On December 4, 2015, President Obama signed into law, as part of the omnibus package, the Federal Permitting Improvement Act (Act), which streamlines the federal permitting process for major new infrastructure projects of \$200 million or greater, including energy projects. The Act establishes a Federal Permitting Improvement Steering Council (Council) to track, coordinate and streamline

permitting of covered projects, and to develop performance standards for permitting various categories of projects. Each affected federal agency, including FERC, must appoint a high ranking official to the Council and designate a chief environmental review and permitting officer (CERPO) to advise and assist the agency council member. The Council's tasks include setting up an online database or "Permitting Dashboard" to track covered projects, which will enable the public to track the status of review and authorizations. The Act requires agencies to coordinate their environmental reviews through enhanced communication, transparency, and progress reporting, as well as an annual report by the Council to Congress on its progress in implementing the Act. A project proponent can initiate the process by providing notice to the lead agency that it believes it qualifies as a covered project. The Act does not amend any of the substantive laws that provide the basis for requirements for permits and authorizations, such as the National Environmental Policy Act, the Endangered Species Act, and the Clean Air Act. For more information on these federal permitting provisions, see Van Ness Feldman's Alert titled, "[Congress Establishes Federal Permitting Reforms for Major Infrastructure Projects.](#)"

The omnibus package also included the "Protecting Americans from Tax Hikes Act of 2015," which extends both the production tax credit (PTC) and investment tax credit (ITC) for qualified hydropower. The law extends both credits, which had expired at the end of 2014, retroactively for 2015 through 2016. Hydropower received the same treatment as other renewable energy technologies with the exception of wind and solar, which received five year extensions for both the PTC and ITC, with phase-downs over those years.

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