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*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.*

#### Recent Publications

- [Sharon White](#) and [Chuck Sensiba](#), [Opportunities for New FERC Policies Promoting Hydropower Development Under New Administration](#), Irrigation Leader, Vol. 8 Issue 5 (May 2017).

# Hydro Newsletter

## VOLUME 4, ISSUE 7: JULY 2017

To receive the Hydropower Newsletter on a regular basis, follow this link:

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### Lack of FERC Quorum Continues

The lack of a three-commissioner quorum at the Federal Energy Regulatory Commission (FERC or Commission) continues as of the date of this publication. FERC is composed of up to five commissioners, appointed by the President with the advice and consent of the U.S. Senate. No more than three FERC commissioners may be from the same political party. FERC has lacked a quorum since the resignation of Chairman Norman Bay on February 3, 2017, which left FERC with only two commissioners: Cheryl LaFleur, whom President Trump named as acting chairman; and Commissioner Colette Honorable. Both Acting Chairman LaFleur and Commissioner Honorable are Democrats. Commissioner Honorable announced this week that she will depart the Commission upon the expiration of her term on June 30, 2017. Honorable announced in April that she would not seek a second term as FERC Commissioner, but it was unclear until this week whether she would depart at the end of June or serve until the end of the year.

On May 15, 2017, President Trump nominated Neil Chatterjee and Robert Powelson, both republicans, to serve as FERC Commissioners, which – if confirmed by the U.S. Senate – would restore the quorum. The Senate Committee on Energy and Natural Resources held a confirmation hearing for both nominees on May 25, 2017, and approved their nominations on June 6, 2017 by a vote of 20-3. The nominations have not yet been set for a final confirmation vote by the full Senate. This week, President Trump announced his intention to nominate Richard Glick, a democrat, to serve as a FERC Commissioner.

### Legislative Update

A number of hydropower bills continue to advance through the 115<sup>th</sup> Congress to advance the Trump administration's focus on infrastructure reform. On June 13, 2017, for example, the House of Representatives passed H.R. 2274, a bill to extend preliminary permit terms from three to four years with the possibility of an additional four-year extension in extraordinary circumstances, and to extend the time to start construction of new projects to up to 10 years from the date fixed in the license or exemption. In addition, several important hydropower bills were officially introduced in the House and Senate on June 12, 2017. Representative Morgan Griffith (R-VA) introduced H.R. 2880, the Promoting Closed-Loop Pumped Storage Hydropower Act, a bill that would establish focused licensing requirements for the expeditious review of license applications for closed-loop pumped storage projects.

### Upcoming Speaking Engagements

- [Julia Wood](#), "Growth Opportunities and Markets," National Hydropower Association Northeast Regional Meeting, Portland, ME, July 25, 2017.

Representative Larry Bucshon (R-IN) introduced H.R. 2872, the Promoting Hydropower Development at Existing Nonpowered Dams Act, a bill authorizing FERC to grant an exemption for qualifying hydropower facilities at certain non-powered dams operated for the control, release, or distribution of water for agricultural, municipal, navigational, industrial, commercial, environmental, recreational, aesthetic, or flood control purposes. Lastly, Senator Cory Gardner (R-CO) introduced S. 1336, the Reliable Investment in Vital Energy Reauthorization Act, a bill that would extend the hydropower production incentives from Sections 242 and 243 of the Energy Policy Act of 2005 through fiscal year 2027.

On June 28, 2017, the House Energy and Commerce Committee held a full committee markup to consider eight pieces of energy legislation, two of which involve hydropower. The first, H.R. 3043, the Hydropower Policy Modernization Act of 2017, includes many of the same regulatory reforms to hydropower relicensing proposed as part of the energy bills approved by the Senate and House in the last Congress. These include designating FERC as lead agency for coordinating federal authorizations from all agencies needed to develop a project and requiring agencies to coordinate their activities and studies early in the authorization process. The second bill, H.R. 2786, would significantly reduce the time and simplify the process for FERC to make a qualifying conduit determination decision for certain conduit facilities.

### FERC Issues Report to Congress on Two-Year Pilot Licensing Process

On May 31, 2017, FERC submitted its [report](#) and recommendations to Congress on the effectiveness of the two-year pilot licensing process. The report was a mandatory requirement under section 6 of the Hydropower Regulatory Efficiency Act of 2013, which required FERC to: (1) investigate the feasibility of a two-year licensing process for hydropower development at non-powered dams and closed-loop pumped storage projects, and (2) prepare a report describing the outcome of its efforts in implementing a pilot two-year licensing process. During the pilot program, FERC [issued](#) just one license using the two-year licensing process, for the Kentucky River Lock & Dam No. 11 Hydroelectric Project No. 14276. On March 30, 2017, FERC held a public workshop to solicit comments on the effectiveness of the pilot program, as well as the feasibility and practicability of implementing such a process on a permanent basis.

In its report to Congress, FERC indicated that it believes it is feasible under the Commission's current regulations to complete a licensing (or small hydro exemption) process in two years, and that statutory changes to the Federal Power Act (FPA) or the Commission's authority are unnecessary to achieve that purpose. FERC also indicates that site selection, a well-defined project proposal, thorough pre-filing consultation, and a complete application are the most important elements to ensure a project is authorized in an expeditious manner. According to the report, certain project characteristics further increase the likelihood that a two-year process would be feasible. These include:

- [Design characteristics](#): the project would not alter existing flow regimes or cause significant impoundment fluctuations, and would involve minimal land clearing. Existing structures must satisfy FERC's dam safety guidelines.
- [Environmental characteristics](#): the project would involve few or only minor environmental concerns, including changes to water quality or flow regime, little or no potential effects on migratory fish, and no adverse effects on federally listed species and/or habitat.
- [Information gathering and consultation](#): sufficient existing information about environmental and cultural resources at the project. Early and frequent stakeholder consultation on protection, mitigation, and enhancement measures (PM&Es) would be necessary to address project impacts, and the applicant would include pre-negotiated PM&E measures in its license application.

FERC also committed to take several actions to further aid applicants in the licensing process. These include updating and improving the small/low-impact hydropower portion of its website, and issuing

more frequent processing updates to provide additional clarity and certainty during the licensing process.

### **EPA and USACE Propose to Rescind Waters of the United States Rule**

On June 27, 2017, the Environmental Protection Agency (EPA) and U.S. Army Corps of Engineers (USACE) [proposed](#) to rescind their 2015 final rule redefining jurisdictional “waters of the United States” under the Clean Water Act (CWA), and to recodify the regulatory text that was in place prior to the 2015 rule. The [controversial](#) rule, issued by the Obama administration, expands federal control over several types of water bodies, and requires federal permits for dredging, filling, or discharging pollution to those water bodies. The rule, which was challenged by a number of parties, has been stayed by the U.S. Court of Appeals for the Sixth Circuit since October 9, 2015.

In their proposal to rescind the rule, EPA and USACE indicate that the proposed rule is the first step in a two-step process to review and revise the definition of “waters of the United States” under the CWA. During the second step, the agencies will initiate a separate notice-and-comment rulemaking to propose a new definition of “waters of the United States.” The agencies’ proposal to rescind the rule is consistent with President Trump’s February 28, 2017 Executive Order on “Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the ‘Waters of the United States’ Rule,” which directed EPA and USACE to rescind or revise the 2015 rule as appropriate and consistent with law.

### **First Circuit Reaffirms that Judicial Review of FERC Orders Lies in the Courts of Appeals**

On June 7, 2017, in *Maine Council of the Atlantic Salmon Federation v. NMFS*, the U.S. Court of Appeals for the First Circuit [reaffirmed](#) that challenges to a biological opinion (BiOp), the terms of which have been incorporated into a FERC order, must be decided by the U.S. courts of appeals. The case involved the licensees of four hydropower dams on the Kennebec River in Maine who sought to amend their licenses. Because Atlantic salmon, a protected species under the Endangered Species Act, are present in the Kennebec river, FERC was required to obtain BiOps from the National Marine Fisheries Service (NMFS) on whether the proposed amendments would jeopardize the species or degrade its habitat. The Maine Council of the Atlantic Salmon Federation and other environmental groups sought review of the two BiOps issued by NMFS in the proceeding before the U.S. District Court for the District of Maine. While that case was pending, FERC issued an order approving the amendment applications and incorporating the terms of the BiOps. The district court then dismissed the case for lack of jurisdiction, based on a provision of the FPA that vests jurisdiction of appeals from FERC orders in the courts of appeals.

In an opinion authored by retired Supreme Court Justice David Souter, who sat in on the case, the First Circuit affirmed the district court’s ruling. The court found that once FERC approved the license amendments and incorporated the terms of the BiOps, the courts of appeals had exclusive jurisdiction over challenges to the BiOps. The court held that the environmental groups would have the opportunity to litigate their exact claims against the BiOps before the U.S. Court of Appeals for the D.C. Circuit, where they had already filed challenges to the FERC orders. The court rejected the groups’ argument that the scope of review under the FPA is narrower than the review that would be afforded on a district court action under the Administrative Procedure Act. It noted that the courts of appeals’ exclusive jurisdiction to hear appeals of FERC orders applies both to review of FERC’s reliance on the BiOps, as well as the substantive validity of the BiOps themselves.

### **D.C. Circuit Holds that FERC Has Authority to Determine if State Has Waived Right to Issue Water Quality Certification under CWA**

On June 23, 2017, in *Millennium Pipeline Co., L.L.C. v. Seggos*, the D.C. Circuit [held](#), in the context of a natural gas case, that FERC has the authority to determine whether a state has waived its right to issue a water quality certification for failure to act within the CWA’s one-year statutory window. On November 9, 2016, FERC issued a provisional certificate of public convenience under the Natural Gas Act (NGA) authorizing a proposed extension of Millennium’s existing natural gas pipeline in Orange County, New

York. FERC conditioned its approval on receipt of “all authorizations required under federal law,” including the CWA. Millennium had submitted an application for water quality certification to the New York State Department of Environmental Conservation (DEC) in November 2015, and DEC had failed to act within one year, as required under the CWA. Millennium sought judicial review under a provision of the NGA that grants the courts of appeal jurisdiction to review “an alleged failure” by a state agency to issue a permit required under federal law. Millennium also asked the court to also find that DEC had waived its right to issue a water quality certification.

The D.C. Circuit dismissed the petition, finding that Millennium lacked standing to sue because if DEC had delayed for more than a year, as Millennium alleged, then DEC waived its authority under the CWA and the delay cannot injure Millennium. Because the state waived its authority, the court found that Millennium could present evidence of its waiver to FERC, and FERC will make a determination of whether the state has waived its authority.

This case is consistent with existing precedent in the hydropower context that FERC determines whether a state has waived its water quality certification. Moreover, unlike the natural gas industry, FERC’s hydropower regulations further provide that a state agency is deemed to have waived its authority under the CWA if it has not denied or granted a certification by one year after the date the certifying agency receives a written request for certification.

***Sharon White and Eli Daniels contributed to this issue.***

### **For more information**

The professionals at Van Ness Feldman possess decades of experience covering every aspect of hydroelectric development, ranging from licensing, environmental permitting, regulatory compliance, litigation, transmission and rates, public policy, transactions and land use planning. If you would like additional information on the issues touched upon in this newsletter, please contact any member of the firm’s [hydroelectric](#) practice.

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