



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](#), Northwest Hydroelectric Association Fall Workshop, "National Update," Bellevue, WA, September 15, 2017.
- [Chuck Sensiba](#), National Hydropower Association Alaska Regional Meeting, "Regulatory and Policy Developments in New Hydropower," Girdwood, AK, September 19, 2017.
- [Chuck Sensiba](#), USSD Workshop: The Challenges of Dams in Cold Climates, "Policies and Regulations Affecting New Hydro Development," Girdwood, AK, September 22, 2017.

Hydro Newsletter

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FERC Quorum Reinstated

The three-commissioner quorum at the Federal Energy Regulatory Commission (FERC or Commission) was officially restored on August 10, 2017. 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 had lacked a quorum since the resignation of Chairman Norman Bay on February 3, 2017. Since July 2017, FERC has had only a single commissioner, Cheryl LaFleur (a Democrat), following the expiration of Collette Honorable's term on June 30, leaving FERC with four vacant commissioner positions.

The Senate Committee on Energy and Natural Resources approved President Trump's first two commissioner nominees, Neil Chatterjee and Robert Powelson, both Republicans, on June 6, 2017, but confirmation hearings were delayed due to health care bill negotiations and other Senate business. On August 4, the full Senate confirmed Chatterjee and Powelson, to join LaFleur. Chatterjee was sworn in as commissioner on August 8, and Powelson on August 10, which restored FERC's quorum. On August 25, 2017, the Commission issued an [order](#) lifting the delegations of authority to its staff to take certain actions, which was issued immediately prior to the loss of quorum in February.

President Trump also has nominated Republican Kevin McIntyre and Democrat Richard Glick to serve as FERC commissioners. The Senate Committee on Energy and Natural Resources will hold a confirmation hearing for the nominees on September 7, 2017. The President has named Neil Chatterjee as FERC Chairman until Kevin McIntyre is confirmed.

First Order Issued by Reinstated FERC Quorum is Hydro Order

A top priority for the newly restored FERC quorum has been to clear the backlog of orders that has amassed since February. On August 15, 2017, just five days after Robert Powelson was sworn in and restored the quorum, the Commission issued its first [order](#), which amended the license for the Pensacola Project in Oklahoma. The licensee, Grand River Dam Authority, sought to amend the reservoir elevation rule curve requirements under its license between August 16 and October 31 each year to reduce vessel groundings and improve recreation during the peak recreation season. It had obtained temporary variances granting the identical change in 2015 and 2016, and subsequently applied to make the change on a permanent basis in May 2016.

Van Ness Feldman Welcomes Gwendolyn Keyes Fleming to Environmental Practice

Van Ness Feldman LLP is pleased to announce that Gwendolyn Keyes Fleming, former Chief of Staff to Environmental Protection Agency Administrator Gina McCarthy, has joined the firm as a partner in Washington, DC. Ms. Fleming brings over twenty years of public sector experience to the firm, having served as both an elected and appointed official at the state and local levels, as well as in various branches of the federal government, including most recently as a principal legal advisor at the U.S. Department of Homeland Security, Immigration and Customs Enforcement.

As a partner with the firm, Ms. Fleming will focus on environmental matters with an emphasis on strategic advice and counsel on environmental litigation, national security matters as they relate to the protection of critical environmental systems, and white collar criminal defense including audits and special investigations.

With the continuing lack of a quorum and the permanent amendment proceeding being highly contested, on July 11, 2017 GRDA filed a request for temporary variance of the rule curve requirements for 2017 only, on the basis that FERC staff could approve the variance to protect project and public safety, in the event a quorum was not restored or the FERC Commissioners were unable to rule on the permanent amendment by the time it was needed on August 16.

However, on August 15, the new FERC quorum granted the permanent amendment and dismissed the temporary variance as moot. The Commission's order allows GRDA to maintain reservoir levels and avoids a drawdown during the peak recreation season that includes the Labor Day holiday. In reaching this decision, the Commissioners rejected all arguments raised by a number of opponents to GRDA's application, including several federally-recognized Indian tribes, an upstream municipality, and adjacent landowners, who had raised issues related to federal trust responsibilities to Indian tribes, historic properties and consultation under section 106 of the National Historic Preservation Act, FERC's analysis under the National Environmental Policy Act, and concerns related to flooding.

Van Ness Feldman serves as regulatory counsel to GRDA on hydropower matters, including the variance and amendment proceedings referenced in this summary.

NMFS Finalizes Critical Habitat for Atlantic Sturgeon

On August 17, 2017, the National Marine Fisheries Service (NMFS) published a [final rule](#) designating critical habitat under the Endangered Species Act for five distinct population segments (DPS) of Atlantic sturgeon. Collectively, the designated areas include occupied portions of 31 river systems from Maine to Florida and total almost 4,000 miles of sturgeon habitat.

- Gulf of Maine DPS: approximately 152 miles of the Penobscot River, ME; Kennebec River, ME; Androscoggin River, ME; Piscataqua River, ME/NH; and Merrimack River, MA.
- New York Bight DPS: approximately 340 miles of the Connecticut River, MA/CT; Housatonic River, CT; Hudson River, NY/NJ; and Delaware River, NJ/PA/DE.
- Chesapeake Bay DPS: approximately 480 miles of the Nanticoke River, MD; Marshyhope Creek, MD; Potomac River, MD/VA; Rappahannock River, VA; York, Mattaponi, and Pamunkey Rivers, VA; and James River, VA.
- Carolina DPS: approximately 1205 miles of the Roanoke River, NC; Tar-Pamlico River, NC; Neuse River, NC; Northeast Cape Fear River, NC; Cape Fear River, NC; Pee Dee River, NC/SC; Black River, SC; Santee River, SC; and Cooper River, SC.
- South Atlantic DPS: approximately 1791 miles of the Edisto River, SC; Combahee Rivers, SC; Savannah River, SC/GA; Ogeechee River, GA; Altamaha River, GA; Satilla River, GA; and St. Marys River, GA/FL.

In the final rule, NMFS made several revisions to the areas that had been proposed for designation. Notably, NMFS declined to designate unoccupied areas on the Cape Fear River, North Carolina, and excluded unoccupied critical habitat on the Wateree, Broad, and Congaree Rivers in South Carolina and the Savannah River in Georgia from the final designation. In addition, NMFS is not designating critical habitat on the Susquehanna River in Maryland. The final rule goes into effect on September 18, 2017.

FERC Proposes Changes to Methodology for Calculating Annual Charges for Use of Government Lands in Alaska

On August 17, 2017, FERC issued a [Notice of Proposed Rulemaking](#) (NPR), which proposes to revise the current methodology for calculating annual charges for the use of government lands in Alaska. The NPR was issued in response to a petition for rulemaking filed by a group of Alaska hydropower licensees, represented by Van Ness Feldman, who experienced drastic increases in federal land use charges of up to 71 percent in 2016. Land values increased when in February 2016, FERC recalculated its

federal lands fee schedule using updated per-acre land values published in the 2012 National Agricultural Statistics Service (NASS) Census. In their petition for rulemaking, the Alaska licensees proposed an alternative methodology for calculating annual charges for the use of government lands in Alaska, using a statewide average per-acre land value, rather than regional per-acre land values based on data published in the NASS Census. Petitioners argued that the NASS Census contains skewed data that significantly overvalues federal lands associated with hydropower projects in certain areas of Alaska above their fair market value. For this reason, Petitioners proposed a statewide land fee for the State of Alaska to be applied to all hydropower projects in the Kenai Peninsula and Fairbanks areas of Alaska. The Group proposed no changes to FERC's current methodology for calculating annual charges for projects in the Aleutian Islands area.

FERC issued a Notice of Inquiry in November 2016 inviting public comment on its methodology for calculating annual charges for the use of government lands in Alaska. The majority of comments it received were in support of a change to the methodology.

FERC's NOPR adopts the Alaska licensees' recommendation to calculate a statewide average per-acre land value for hydropower lands in Alaska, and use it to calculate annual charges for use of federal lands for all hydropower projects in Alaska, except those located in the Aleutian Islands area. Comments on the NOPR are due by October 30, 2017.

President Trump Issues Executive Order to Improve and Expedite Permitting of Infrastructure Projects

On August 15, 2017, President Trump issued an [Executive Order](#) stating that it is the policy of the Federal Government to conduct environmental reviews and authorization processes in a coordinated, consistent, predictable, and timely manner; to speak with a coordinated voice when conducting environmental reviews and issuing authorizations; and to make timely decisions with the goal of completing all federal environmental reviews and authorizations for major infrastructure projects within two years. To that end, the Executive Order directs the Office of Management and Budget (OMB), in consultation with the Federal Permitting Improvement Steering Council (FPISC) to establish within 180 days (by February 11, 2018) a Government Performance and Results Act (GPRA) goal on Infrastructure Permitting Modernization (CAP Goal) so that, whenever permitted by law, environmental reviews may be completed and authorizations issued for infrastructure projects within two years from issuance of a notice of intent to prepare an environmental impact statement (EIS) or any other benchmark designated by OMB. The Executive Order encompasses, but is not limited to, high priority infrastructure projects subject to 2015's Fixing America's Surface Transportation Act (FAST Act). As described in the [January 2016](#) and [February 2017](#) hydro newsletters, the FAST Act established the FPISC to develop performance standards for federal permitting of new infrastructure projects costing \$200 million or more and to establish deadlines and track, coordinate, and streamline permitting of covered projects.

All federal agencies that review, authorize, or consult on infrastructure projects are directed to modify their Strategic Plans and Annual Performance Plans under the GPRA to include performance goals for environmental reviews and agency authorizations for such projects consistent with the CAP Goal established by OMB. Agencies are to integrate achievement of the performance goals into personnel performance plans of appropriate officials. Within 180 days of establishment of the CAP Goal, OMB is to issue guidance for agencies to establish performance accountability systems, to include tracking of major infrastructure projects, reports to OMB, and implementation of best practices established by the FPISC.

The Executive Order provides generally that each major infrastructure project (requiring multiple federal authorizations and an EIS) shall have "One Federal Decision;" that is, a lead federal agency responsible for shepherding the project through federal permitting, a single Record of Decision (ROD) for NEPA compliance unless the project sponsor requests separate NEPA documents, and a timetable agreed upon by the lead, participating, and cooperating agencies. Generally speaking, agency authorizations are to

be issued within 90 days of the ROD. A framework to implement the One Federal Decision concept is to be developed by the Council on Environmental Quality and OMB.

The Executive Order applies to all federal agencies with environmental review, authorization, or consultation responsibilities. Because FEREC is an independent agency, it is not bound by this and similar executive orders, but independent agencies may, and often do, comply voluntarily with the requirements of such orders.

[Chuck Sensiba](#), [John Clements](#), [Tyson Kade](#), and [Sharon White](#) 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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