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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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Legislative Update

Both chambers of Congress addressed hydropower licensing reform in hearings held in June 2018. On June 7, 2018, the U.S. House Energy and Commerce Subcommittee on Energy held a [hearing](#) on improving the hydropower licensing process. Witnesses included representatives from the Federal Energy Regulatory Commission (FERC), National Marine Fisheries Service (NMFS), U.S. Environmental Protection Agency (EPA), U.S. Fish and Wildlife Service (FWS), and the U.S. Army Corps of Engineers (Corps). The hearing focused on the April 2018 “one-federal decision” Memorandum of Understanding (MOU) among the agencies and their work to streamline the permitting process. FERC Office of Energy Projects Director Terry Turpin noted in his written testimony that the “one-federal decision” MOU, which calls for a goal of completing action on all governmental approvals within two years, should encourage agencies to expedite their processes. Chris Oliver of NMFS noted in his written testimony that NMFS has committed to improving the processing time for informal Endangered Species Act (ESA) consultations by 25% on average nationwide. In general, all of the witnesses acknowledged the need to expedite the permitting process, but were not specific in the ways these agencies would accomplish that.

On June 12, 2018, the U.S. Senate Energy Committee held a hearing to conduct oversight of the FERC. All five FERC Commissioners testified at the hearing. While the hearing focused on broad energy issues including coal and nuclear plant retirements, grid reliability, and cybersecurity, the Commissioners also addressed reform of the hydro licensing process. Senator Lisa Murkowski highlighted that hydro is a critical component of the nation’s overall energy portfolio, and noted that one third of FERC-licensed hydro projects will require relicensing by 2030. Senator Murkowski also stated that it can take over a decade to relicense a hydro project with costs that can reach into the \$50 million range. She asked the Commissioners what could be done to ensure that unnecessary regulatory costs and delays do not result in the loss of existing hydropower projects. Chairman Kevin McIntyre highlighted several steps that the Commission has taken to address this issue, including the establishment of a 40-year default license term. He also noted that the Commission is looking at other ways to improve the process. Commissioners Cheryl LaFleur and Robert Glick noted the delays in relicensing caused by other agencies with jurisdiction over hydropower projects. Commission LaFleur noted that the April 2018 “one-federal decision” MOU was intended to provide discipline in the process to encourage the agencies to voluntarily comply with their regulatory timelines. Commissioner Glick noted that the energy bill that passed the

Senate in the last Congress had a number of provisions to improve coordination among the agencies and would help expedite the licensing process. Senator Murkowski noted that she wants to get that legislation across the line to implement those reforms.

On June 28, 2018, the Senate passed 10 hydropower bills, the majority of which extend the construction deadlines for individual projects. The Senate also passed S. 724, a bill that would amend the Federal Power Act to authorize FERC to issue preliminary permits for up to four years, instead of the current three-year limit. The bill also would authorize FERC to extend a preliminary permit once for no more than four years and would allow FERC to issue a new permit after the end of an extension in extraordinary circumstances. Lastly, the bill would authorize FERC to extend the time a licensee has to commence construction under a license for up to eight years. Under current law, FERC may extend the license once for no more than two years. The bill must pass the House before it is ready for the President's signature.

Also on June 28, FERC Commissioner Robert Powelson announced his resignation. Powelson's term was to have run through June 30, 2020. Powelson has accepted the position of President and CEO of the National Association of Water Companies. Powelson's departure will leave FERC with a split Commission of two Republicans and two Democrats until President Trump nominates Powelson's replacement and that individual is confirmed by the Senate.

Supreme Court Affirms Ninth Circuit in Washington Culvert Case

On June 11, 2018, an equally divided U.S. Supreme Court affirmed the decision of the U.S. Court of Appeals for the Ninth Circuit (Ninth Circuit) in *State of Washington v. United States*. The case involved longstanding disputes concerning the scope of tribal fishing rights under the Stevens Treaties that were negotiated in the 1850s.

In 2001, the Western Washington Treaty Tribes (Tribes), along with the United States, initiated this suit as a subproceeding in the longstanding *United States v. Washington* litigation, which has been ongoing since 1970. The Tribes alleged that the State of Washington (State) violated, and continues to violate, the duty imposed by the Stevens Treaties to refrain from diminishing the number of fish passing through the Tribes' usual and accustomed fishing grounds. The Tribes argued that the State, by building and maintaining culverts underneath state roads, made it difficult or impossible for fish to move freely through State streams, thereby diminishing salmon runs and depriving Tribes of their Treaty-based fishing rights.

In 2013, following its 2007 declaratory order, the district court issued a permanent injunction requiring the State to correct its barrier culverts within 17 years, and correct the remainder at the end of their natural life or in the course of independent road construction projects. In 2016, the Ninth Circuit affirmed the permanent injunction, finding that even if the Treaties did not explicitly guarantee the Tribes access to an adequate supply of fish, the court would infer that promise to support the purpose of the Treaties. The Ninth Circuit rejected the State's objections that the injunction was too broad and that the lower court failed to properly consider the significant cost of repairing or replacing the culverts. For more information, see our earlier [hydro newsletter](#) and [alert](#).

The Supreme Court's 4-4 per curiam [decision](#) could significantly affect the programs and budgets of State agencies as they reprioritize funding to remedy the identified barrier culverts to provide fish passage. In addition, notwithstanding the district court's narrow holding, the Tribes could seek broader application of the decision to address other activities that potentially impact salmon and salmon habitat.

CEQ Seeks Comments on Ways to Modernize NEPA Process

For the first time in over three decades, the Council on Environmental Quality (CEQ) has begun the process of revising its procedural regulations on federal agency implementation of the [National Environmental Policy Act of 1969](#) (NEPA). On June 19, 2018, CEQ issued an Advance Notice of Proposed Rulemaking entitled "[Update to the Regulations for Implementing the Procedural Provisions of the](#)

[National Environmental Policy Act.](#) The notice seeks public comment on how CEQ can modernize the NEPA review process so that it is more efficient, timely, and effective.

This rulemaking is part of a series of efforts by the Trump Administration to make the federal environmental permitting system more efficient and timely. On August 15, 2017, the President issued [Executive Order 13807](#), entitled “Establishing Discipline and Accountability in the Environmental Review and Permitting Process for Infrastructure.” Section 5(e) of that order directed CEQ to develop an initial list of actions to enhance and modernize the federal environmental review and authorization process. One of those initial actions identified by CEQ was a review of its NEPA regulations to identify any needed changes. The June 19 notice marks the official beginning of this review.

The notice requests responses to, and suggestions regarding, a series of questions about the basic NEPA process, the scope of NEPA review, and ways that implementation of the NEPA process can be modernized and made more efficient and effective. Given the broad range of actions covered by NEPA—including federal permit applications, federal land management decisions, and more—this rulemaking process provides an important opportunity for energy infrastructure developers, utilities, federal land users, and others to help shape how federal agencies will implement NEPA in the future. Comments are due by July 20, 2018.

For more information on this CEQ initiative or the firm’s expertise with regard to the NEPA process, please see the firm’s [alert](#).

President Trump Issues Federal Reorganization Plan

On June 21, 2018, the Trump Administration issued a government-wide federal [reorganization plan](#) (Reorganization Plan or Plan). The Reorganization Plan covers multiple executive branch agencies responsible for a wide variety of federal government activity. The Plan states that some of its recommendations can be achieved with executive actions, but others will require legislation to implement.

Of particular interest to the hydroelectric industry are two proposals. First, the Plan would transfer substantial responsibilities from the Corps to other federal agencies. Its commercial navigation functions would be moved to the Department of Transportation (DOT). Responsibilities and functions for “all other water resources infrastructure,” “including flood and storm damage reduction, aquatic ecosystem restoration, hydropower, regulatory, and other activities” would be moved to the Department of the Interior (DOI), “where those activities could be integrated and aligned with complementary programs focused on issues like water management, ecosystem restoration, and recreation.” Second, NMFS, which administers the ESA and Marine Mammal Protection Act, would be moved from the Department of Commerce to DOI and merged with FWS. The Reorganization Plan does not address the extent to which moving Corps or NMFS functions into DOI could be accomplished by executive action.

The Reorganization Plan explains that moving the Corps’ civil works missions into DOT and DOI would result in more rational public policy outcomes by increasing consistency of federal policy and actions on transportation and natural resource management. It adds that transfer of Corps programs to DOI and merging NMFS and FWS would consolidate most major federal land and water resource management programs—including those related to Section 404 of the Clean Water Act (CWA) and Section 10 of the Rivers and Harbors Act—into DOI’s existing permitting programs and combine fisheries and wildlife expertise and management capacity into one bureau. The consolidation is expected to simplify infrastructure permitting and improve the effectiveness of land, water, and natural resource management efforts. An additional anticipated benefit of moving the Corps’ ecosystem restoration program to DOI is that the Executive Branch could better direct those efforts to achieve greater environmental benefits and better leverage DOI’s expertise and relationships with State fish and wildlife agencies.

In addition, the Plan proposes for DOI to establish common regional boundaries for its several bureaus and offices to provide better coordination across the department and focus resources in the field, and to make more efficient use of resources by co-locating bureau offices and sharing administrative resources wherever possible.

The Reorganization Plan raises several implementation issues in addition to questions regarding what legislative actions may be needed. For instance, most Corps navigation facilities at which non-federal hydroelectric projects are located have statutory purposes in addition to navigation, including flood control, recreation, and/or fish and wildlife protection. If these facilities are to be transferred to DOT because of their navigation functions:

- Will DOI inherit the Corps' CWA Section 404 dredge and fill permit authorities over non-federal hydropower developments?
- Will DOI inherit the Corps' CWA Section 408 authorities and continue to require use and occupancy permits, a practice the Corps adopted in recent years?
- Will DOT have veto authority over proposed DOI license conditions and permit conditions to protect its navigation project?
- Will existing site access and operating agreements made by licensees with the Corps need to be rewritten?
- Which Corps regulations will DOT and/or DOI need to adopt or modify to reflect the change of regulatory responsibility and what modifications will be made?
- Will EPA have the same oversight and veto authority over DOI's administration of the CWA that EPA now has over the Corps' issuance of CWA permits?
- If a Corps dam does not serve any navigation functions, will the facility be transferred to DOI?

FERC Finds Pumped Storage Project Using Only Groundwater Not Required to Be Licensed

On June 19, 2018, FERC issued an [order](#) in response to a declaration of intention holding that the proposed Vandling Drift Reclamation Pumped Storage Project to be located on non-federal land is not required to be licensed. The proposed project would be a closed-loop development that would make use only of groundwater from an abandoned underground mine for initial charge and seasonal refill of the reservoirs. The groundwater would be transported to the project site from the mine via underground pumping equipment and intakes. FERC's order relies on a 1995 order in which it determined that although groundwater can be an article of interstate commerce, it is not a "stream" and therefore not subject to its mandatory licensing jurisdiction under Section 23(b)(1) of the Federal Power Act. This and several other issues pertaining to the licensing of pumped storage projects are discussed in an [article](#) by Van Ness Feldman attorneys in the June 2017 edition of International Water Power and Dam Construction.

DOE Updates Energy Policy Act of 2005 Hydroelectric Incentive Payment Requirements and Solicits Applications

On May 30, 2018, the U.S. Department of Energy (DOE) issued [notice](#) of minor updates to its Guidance for the Energy Policy Act of 2005 (EPACT 2005) program for incentive payments for power production by owners and operators of qualified hydroelectric facilities at existing dams and impoundments. The payments are available for electricity generated and sold in a specified 10-year period as authorized under EPACT 2005. Congress appropriated and DOE allocated \$6.6 million for this purpose for federal Fiscal Year 2018 (September 1, 2017 – August 31, 2018).

The May 30, 2018 Guidance update: (1) provides guidance regarding the eligibility of existing facilities that were offline because of disrepair or dismantling for at least five consecutive years prior to October 1,

2005, and returned to service with new hydroelectric power on or before September 30, 2015, and (2) emphasizes the statutory deadline by which new hydroelectric power must be placed into operation at a non-powered or powered dam on or after October 1, 2005, and prior to September 30, 2015.

On June 13, 2018, DOE issued additional [notice](#) of the availability of the updated Guidance and of an open application period for incentive payments. At this time, DOE is only accepting applications from owners and operators of qualified facilities for power generated and sold in calendar year 2017. Additionally, the qualified hydropower facility must have begun operating during the October 1, 2005, to September 30, 2015 window. DOE is accepting applications from June 20, 2018 through July 20, 2018.

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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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