



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 hydropower 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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Supreme Court Denies Petition for Certiorari in *Hoopa Valley Tribe*

On December 9, 2019, the U.S. Supreme Court denied a [petition](#) for a writ of certiorari filed by California Trout and Trout Unlimited of the U.S. Court of Appeals for the D.C. Circuit's (D.C. Circuit) January 25, 2019 decision in *Hoopa Valley Tribe v. FERC*. In that case, the D.C. Circuit held that the withdrawal and resubmission of a water quality certification request under Section 401 of the Clean Water Act (CWA) does not trigger a new statutory period of review. With the denial of certiorari, the D.C. Circuit case is now final.

FERC Refuses to Require Removal of Pre-Existing Dam as Condition of License Termination

On December 19, 2019, the Federal Energy Regulatory Commission (FERC) [denied](#) a request for rehearing and stay of its August 2019 order terminating the original license for the Enloe Project for failure to timely commence construction. The Enloe Project was to be located at an existing non-powered dam in Washington State. After the licensee failed to commence construction of the project by the statutory deadline, FERC staff issued an order terminating the license for failure to commence construction (Termination Order). Several conservation groups filed motions to intervene and joint requests for rehearing and stay of the Termination Order, arguing that FERC staff failed to properly notice the proposed termination of the license, and that FERC staff should have required the licensee to develop a plan for disposition of the dam and other facilities that existed at the project site prior to licensing. The groups argued that terminating the license without decommissioning the preexisting facilities would harm the public interest because it was unclear what agency would have jurisdiction over the dam and other facilities or how dam safety would be monitored after FERC's jurisdiction is terminated.

FERC denied the motions to intervene, rejected the request for rehearing, and dismissed the request for stay of the Termination Order. FERC found that in the case of license termination for failure to commence construction, the licensee is not required to propose a decommissioning plan with steps to remedy impacts of the project on the environment. FERC found that "the suggestion that a licensee that has failed to timely commence construction should be required to remove or modify structures that it did not build pursuant to its license is inappropriate and would, even assuming we had the authority to impose such measures, represent bad policy." FERC also upheld its longstanding policy limiting the right to intervention in post-license proceedings, and found that termination of a license for failure to commence construction is a ministerial act between FERC and the licensee. It also found that FERC staff gave adequate notice of the probable termination of the license to interested stakeholders by publishing

notice in the project docket, and staff was not required to publish notice of the termination in the *Federal Register*.

President Trump Signs Spending Bill with Extension of PTC and ITC for Qualifying Hydro and Marine Energy Facilities

On December 20, 2019, President Trump signed a spending bill, [H.R. 1865](#), that extends government funding, avoids another shutdown, and includes several tax extender provisions for renewable resources. The bill retroactively extends the production tax credit (PTC) and investment tax credit (ITC) for qualifying hydro and marine energy facilities for 2018 and 2019 and prospectively through 2020 at existing levels. The PTC and ITC for hydropower were originally included in the Energy Policy Act of 2005 (EPAc) (effective beginning in 2006). Marine and hydrokinetic projects became eligible for the programs in 2008. Before the PTC expired in 2017, wind and geothermal facilities received a PTC of 1.5 cents per kilowatt hour indexed for inflation, and open and closed loop biomass, municipal solid waste, hydropower, and marine and hydrokinetic facilities received 50% of that amount. As an alternative to the PTC, a hydropower project could elect to receive an ITC equal to 30% of the qualified investment in the project. The hydropower PTC and ITC expired at the end of 2017, so only projects that began construction before the end of 2017 could qualify. The spending bill extends the PTC and ITC (in lieu of PTC) to projects that commence construction by the end of 2020. The spending bill did not include tax credits for energy storage facilities.

The spending bill also provides record funding for the Department of Energy's Water Power Technologies Office (WPTO). The bill allocates \$148 million for the WPTO in Fiscal Year 2020, with \$109 million directed to the marine energy program and \$39 million to the hydropower/pumped storage program. The bill directs the WPTO to apply \$7 million of the hydropower program's funding to the EPAc Section 242 hydropower production incentive.

Ninth Circuit Directs EPA to Approve TMDLs for Columbia and Snake Rivers

On December 20, 2019, the U.S. Court of Appeals for the Ninth Circuit (Ninth Circuit), in *Columbia Riverkeeper v. Wheeler*, [held](#) that because Washington and Oregon have conclusively refused to develop and issue temperature total maximum daily loads (TMDL) for the Columbia and Snake Rivers, the U.S. Environmental Protection Agency (EPA) is obligated to act under the CWA. The Ninth Circuit concluded that Washington and Oregon's failure to act constitutes constructive submission of no temperature TMDL and triggered the EPA's nondiscretionary duty to approve or disapprove the TMDL. As EPA has so far failed to do so, the Court stated "the EPA must do so now."

This Ninth Circuit opinion has the potential to affect the hydro industry. Although hydroelectric projects are not typically subject to National Pollutant Discharge Elimination System permits, the TMDL for temperature in the Columbia and Snake Rivers could come into play in the CWA Section 401 certification process.

Craddock Named ASCE OPAL Awards Winner

Ted Craddock has been named by the American Society of Civil Engineers (ASCE) as one of five 2020 winners of its prestigious Outstanding Projects And Leaders (OPAL) awards. Craddock is California Department of Water Resources' acting Deputy Director for the State Water Project, and was Project Manager for the Oroville Emergency Recovery project, a \$1.1 billion emergency repair of the spillway complex for the Oroville Facilities, the tallest dam in the United States. The emergency repair included, as just one component, the innovative use of 350,000 cubic-yards of roller-compacted concrete to serve as the foundation for reconstructing the lower portion of the main spillway. The emergency repair, which was completed between 2017 and 2018 by a team of over 1,000 people working virtually around the clock, also has been named by ASCE as one of 10 outstanding civil engineering projects around the world. The OPAL award for innovation in construction projects and programs is a lifetime achievement award reflecting Craddock's leadership on complex projects throughout California. Craddock will be honored at ASCE's 2020 OPAL Gala on March 13 in Washington, D.C.

Upcoming Speaking Engagements

- [Sharon White](#), Moderator:
Dissolved Oxygen Upgrades and
Technologies Panel, NHA
Southeast Regional Meeting,
Charlotte, NC, February 26, 2020.

[Mike Swiger](#), [Sharon White](#), and [Rachael Lipinski](#) 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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