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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.

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Hydro Newsletter

VOLUME 8, ISSUE 1: JANUARY 2021

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Trump Signs Appropriations Bill with Provisions to Benefit Hydro

On December 27, 2020, President Trump signed into law the Consolidated Appropriations Act of 2021, a bill that combines \$900 billion in stimulus relief for the COVID-19 pandemic with a \$1.4 trillion omnibus spending bill for the 2021 federal fiscal year (FY). The bill includes sweeping provisions that span clean energy research and development, programs focused on climate policy, energy tax extenders, pipeline safety reauthorization, and water infrastructure, among other things. With respect to hydropower, the bill provides a one-year extension of the production tax credit (PTC) and the investment tax credit in lieu of the PTC through 2021 at existing rates for hydro and marine and hydrokinetic facilities that begin construction before January 1, 2022. The bill also reauthorizes the Energy Policy Act of 2005 Sections 242 and 243 hydropower production and efficiency incentives programs. The bill will allow qualified hydroelectric facilities that begin operation by 2027 to collect incentive payments. It also expands the eligibility of the Section 242 program to include small hydropower facilities up to 20 MW in areas with inadequate electric service. The bill provides FY 2021 funding for the Department of Energy's (DOE) Water Power Technologies Office (WPTO) at a record level of \$150 million, with approximately \$109 million for marine energy and \$41 million for hydropower research. Finally, the bill includes the Water Resources Development Act of 2020. A provision of this subsection provides that upon request of an eligible non-federal interest, the U.S. Army Corps of Engineers (Corps) will conduct an evaluation to consider operational changes at a Corps dam, including changes to seasonal pool levels and modified releases from the project, to facilitate production of non-federal hydropower, consistent with the project's authorized project purposes.

FERC Commissioner Update

As reported in our [December](#) newsletter, on November 18, 2020, the U.S. Senate Energy and Natural Resources Committee voted to advance President Trump's nominees for Federal Energy Regulatory Commission (FERC) Commissioner, Republican Mark Christie and Democrat Allison Clements, to the Senate floor. On November 30, the Senate confirmed both nominees. Clements was sworn in as a FERC Commissioner on December 8. Christie was sworn in on January 4, 2021. They join Neil Chatterjee (Republican), Richard Glick (Democrat), and James Danly (Republican), returning FERC to a full slate of five Commissioners.

President Elect Biden Announces Nominees to Lead EPA, Interior, and DOE

On December 17, 2020, President-elect Biden announced his picks to lead key federal agencies that affect the regulation of non-federal hydropower projects.

Biden has nominated Michael Regan for Administrator of the Environmental Protection Agency (EPA). Regan is currently the Secretary of the North Carolina Department of Environmental Quality (NCDEQ), the state agency that administers Section 401 of the Clean Water Act (CWA), and previously worked with EPA's air equality and energy programs under the Clinton and Bush administrations. Under Regan's leadership, NCDEQ recently denied a 401 certification for an extension of the Mountain Valley natural gas pipeline, and is currently challenging a FERC decision in the U.S. Court of Appeals for the Fourth Circuit in which FERC found that NCDEQ waived its 401 authority in the licensing of the Bynum Hydroelectric Project.

Biden also has nominated Representative Deb Haaland (D-N.M.) as Secretary of the Interior. If confirmed, Haaland will be the first Native American to head the agency. Maranda Compton, co-coordinator of Van Ness Feldman's Native Affairs practice, was quoted in [Law360](#) saying that Haaland is "relatively new in terms of the world of national politics," but "where she brings incredible expertise and personal knowledge is the relationship between the environment and Indigenous communities, which I think will be very important in a Biden-Harris administration."

Finally, Biden has nominated former Michigan Governor Jennifer Granholm as Secretary of Energy. During Granholm's tenure as governor, Michigan adopted a renewable portfolio standard that requires utilities to purchase or produce 15 percent of the state's electricity from renewable sources by 2021.

Section 401 Updates

There have been several developments with respect to Section 401 of the CWA in the month of December.

Several hydropower licensees have recently filed challenges to their Section 401 certifications. The licensees—Yuba Water Agency (YWA), Nevada Irrigation District (NID), and Merced Irrigation District (MID)—filed lawsuits in California Superior Court based on alleged violations of California's water quality laws. YWA and NID also have challenged their 401 certifications in federal court. The licensees argue, among other things, that the California State Water Resources Control Board (Board) violated federal and state law by issuing 401 certifications without due process, after FERC had found waiver of the Board's 401 authority, and without an application for water quality certification pending before it. In addition to the lawsuits, YWA, NID, and MID each is a party to a case filed by the Board before the U.S. Court of Appeals for the Ninth Circuit challenging FERC's 401 waiver determination in the relicensing proceedings. Van Ness Feldman represents YWA and NID in both the federal lawsuits and the Ninth Circuit.

On December 18, 2020, the U.S. District Court for the Eastern District of Pennsylvania denied EPA's motion to dismiss a pending challenge to EPA's new rules implementing Section 401 of the CWA. In its motion, EPA argued that the case was not ripe for review because there has not yet been a concrete application of the new rule which harms or threatens harm to plaintiffs, and that plaintiffs lacked standing to bring the case because any alleged harm is highly speculative and not imminent. The court found that the plaintiffs had standing because the rule posed a "substantial threat of real harm" to plaintiffs if the rule remains in effect. It also found that plaintiffs showed that the Delaware River watershed would be impacted by any potential project constructed in the area under the new rules. The court's order notes that it "considers prompt resolution of this case very much in the public interest" and suggests that plaintiffs promptly file a motion for summary judgment in the case.

FirstLight Power Services Files Amended FLA for Northfield Mountain and Turners Falls Projects

On December 4, 2020, FirstLight Power Services LLC (FirstLight) filed [amended final license applications](#) (AFLAs) to relicense the 68 MW Turners Falls Hydroelectric Project (Turners Falls Project)

Upcoming Speaking Engagements

- [Julia Wood](#), Law Seminars International, Electric Power in the Northwest Conference, Panelist: Noteworthy Issues Before the Federal Administrative Agencies, January 28, 2021

and 1,167 MW Northfield Mountain Pumped Storage Project (Northfield Mountain Project). The Turners Falls Project includes the largest conventional hydroelectric facility in Massachusetts; the Northfield Mountain Project is the largest energy storage facility in New England. The submission of the AFLAs, which follows the April 2016 submission of the final license application, is a major milestone in the relicensing process and culminates an 11-year process in which FirstLight conducted more than 40 scientific studies on hydraulics, erosion, fish passage, recreation, and other environmental resources. The AFLAs propose a number of new significant protection, mitigation, and enhancement measures relative to flows and water elevations, fish passage, and recreation, which collectively represent over \$238 million in capital investment, operations and maintenance costs, and energy revenue losses over a 50-year new license term. FERC has indicated that it expects to issue the Ready for Environmental Analysis notice for the projects in May 2021, in conjunction with the relicensing of three upstream projects on the Connecticut River owned by Great River Hydro. Van Ness Feldman represents FirstLight in the relicensings at FERC.

FERC Proposes Incentives for Voluntary Cybersecurity Investments

On December 17, 2020, FERC [issued](#) a proposal for public utilities to request incentives for certain voluntary cybersecurity investments that go above and beyond the North American Electric Reliability Corporation's (NERC) mandatory Critical Infrastructure Protection (CIP) reliability standards. Under its Notice of Proposed Rulemaking (NOPR), a public utility can receive incentive rate treatment by voluntarily applying identified CIP reliability standards to facilities that are not currently subject to those requirements or implementing certain security controls included in the National Institute of Standards and Technology's voluntary Framework for Improving Critical Infrastructure Cybersecurity. The NOPR would allow a public utility to request incentives using any combination of the two approaches. FERC would allow public utilities to seek approval for one of two types of incentives for voluntary cybersecurity investments: a 200-basis point adder to the return on equity for eligible cybersecurity capital investments or deferred cost recovery for certain cybersecurity-related expenses. Comments on the NOPR are due 60 days after its publication in the Federal Register. If you have questions on the NOPR or are looking for assistance in preparing comments, please feel free to contact [Joe Nelson](#) or [Darsh Singh](#) in Van Ness Feldman's electric practice.

Federal Court Finds that Animals Are Not Traditional Cultural Property under the NHPA

On December 4, 2020, in *Wishtoyo Foundation v. U.S. Fish & Wildlife Service*, the U.S. District Court for the Central District of California held that the endangered California condor and its critical habitat are not a "traditional cultural property" (TCP) under the National Historic Preservation Act (NHPA). Section 106 of the NHPA requires federal agencies approving an "undertaking" to "take into account the effect of the undertaking on any historic property." In the case, plaintiffs argued that while no Native American cultural resources were located in the immediate project area—the site of a proposed luxury resort development in Los Angeles and Kern Counties in California, the U.S. Fish and Wildlife Service (FWS) violated the NHPA when it found that the California condor and its habitat did not qualify as a TCP affected by the project. A TCP is an historic property that is eligible for inclusion in the National Register.

The court found that a TCP is limited "to specific locations and to tangible, inanimate objects" and does not include animals. The court further concluded that if an animal species is a "highly significant species for Native American culture and religion," this supports that the species "might be viewed as contributing elements to a TCP, not a TCP in and of itself." The court found that while the condor's habitat could be considered a TCP, in this case the FWS properly found that the condor habitat in the project area was not eligible for listing in the National Register because it found no link between a specific tribe and its use of the lands as a TCP related to the condor.

DOE Extends Deadline for Technical Assistance to Support Hydropower Decision Making

As described in our November [newsletter](#), DOE's WPTO has announced a [Notice of Opportunity for Technical Assistance](#) (NOTA) for improving hydropower's value through informed decision making. This

opportunity is a part of the [Water Innovation for a Resilient Electricity System Initiative](#) (HydroWIRES Initiative) aimed at understanding, enabling, and improving hydropower's contributions to reliability, resilience, and integration within the U.S. electricity system. Through the NOTA, WPTO anticipates providing technical assistance to up to six recipients, each of whom will receive technical (not financial) assistance valued up to \$400,000. On December 18, the WPTO announced that it has extended the application period for the NOTA to February 17, 2021. Applicants may submit their concept papers through DOE's [website](#).

ACWA Honors YWA's Curt Aikens with Lifetime Achievement Award

At its fall virtual conference, the Association of California Water Agencies (ACWA) honored YWA's Curt Aikens with a Lifetime Achievement Award for his contributions to the California water community. Aikens joined YWA in 1998 and served as General Manager from 2001 until June 2020. He is credited with leading numerous projects and shepherding YWA through negotiation of the award-winning and innovative Lower Yuba River Accord, a collaborative settlement of competing water uses on the Lower Yuba River.

[Julia Wood](#) 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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