



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.

Hydro Newsletter

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- *FERC Holds that Federal Power Act Preempts State Shoreline Management Act for Hydro Tidal Project*
- *FERC Upholds Geographic Limits to Municipal Preference on Rehearing*
- *Senate Energy and Natural Resources Committee Endorses Nomination of Norman Bay and Cheryl LaFleur*
- *Water Resources Reform and Development Act Becomes Law*
- *BOEM Issues Lease to Conduct Marine Hydrokinetic Technology Testing Off the Coast of Florida*
- *EPA's Proposed Rule on Carbon Dioxide Emissions from Existing Power Plants Impacts Hydropower*
- *Forest Service Proposes Amendments to Tongass Forest Plan*
- **Spotlight:** *Sharon L. White*

FERC Holds that Federal Power Act Preempts State Shoreline Management Act for Hydro Tidal Project

On June 19, 2014, the Federal Energy Regulatory Commission (FERC) issued a declaratory order holding that the Federal Power Act (FPA) preempts state and local regulatory authority over a hydropower project under Washington state's Shoreline Management Act (SMA). The case arose when the Washington State Department of Ecology (Ecology) inadvertently waived its Coastal Zone Management Act (CZMA) certification authority over the Admiralty Inlet tidal project. An SMA permit is required for Ecology to issue a consistency certification under the CZMA. Prior to Ecology's waiver, the licensee applied for and received an SMA permit. Under a condition of the permit, construction is automatically stayed until 21 days after Ecology's final approval of the permit, or, if an appeal is filed, until after the appeal is concluded. Two parties appealed the SMA permit, and construction was stayed under state law.

Once Ecology waived its CZMA certification, FERC issued the license for the project. While the licensee was still willing to comply with most of the conditions of the SMA permit, even though it was no longer required under federal law because Ecology waived its CZMA authority, the condition requiring an automatic stay on construction pending the outcome of the SMA permit appeal would have prevented the licensee from commencing construction of the project under the FERC license. The licensee filed a petition for declaratory order, asking FERC to find that the FPA preempts the requirements of an SMA permit when the state waives its CZMA authority. FERC granted the petition, holding that while licensees are encouraged to comply with state and local requirements, such compliance is not required and the laws are preempted when they conflict with FERC requirements under the license or frustrate the purposes of the FPA. FERC's order resolves potentially significant delays in construction of the project under Washington state law and allows construction to proceed immediately as authorized under the FERC license. For more information on FERC's order, please see Van Ness Feldman's [alert](#).

Spotlight on Sharon L. White



Sharon joined the firm in 2003 and has worked with the hydro group since 2005, first as a paralegal and law clerk, and now as an associate attorney. She has worked on a number of major relicensing proceedings, settlement negotiations, compliance matters, and appellate proceedings before the U.S. Supreme Court and various U.S. courts of appeal.

Where did you grow up?

I grew up in Shrewsbury, Massachusetts, just outside of Worcester. I've been in the DC area since I graduated from college in 2001.

Did you always aspire to be an attorney?

No. I was a history major, and my professors said that I had only two professional options with a history degree: author or teacher. Neither appealed to me, so I moved to DC and began working in law firms. Once I joined Van Ness Feldman, I knew I wanted to be an attorney. I started as a hydro paralegal at the firm and attended law school at night. I graduated in 2010 and have been an attorney with the firm since then.

FERC Upholds Geographic Limits to Municipal Preference on Rehearing

On June 18, 2014, FERC denied requests for rehearing of its December 2013 order holding that municipal preference under section 7(a) of the FPA applies only to municipalities seeking to develop a hydropower project located in the "vicinity" of the municipality. The December 2013 order arose from a case in which Western Minnesota Municipal Power Agency (WMMPA), with offices located approximately 400 miles from the project site, claimed municipal preference under section 7(a) in its application for a preliminary

successive permit. On those facts, FERC rejected WMMPA's assertion of municipal preference and issued the preliminary permit to the non-municipal applicant after holding a lottery tiebreaker.

WMMPA and the American Public Power Association filed requests for rehearing of FERC's order, pointing out that FERC's approach imposing a geographic limit to municipal preference reversed more than 90 years of statutory interpretation. In the order on rehearing, FERC nonetheless affirmed its initial holding that the FPA is ambiguous regarding the scope of the municipal preference and that public policy favors a geographical limit on the preference. In addition, FERC declined to clarify the meaning of "vicinity," which is likely to be the cause of disputes in competitive proceedings about whether a municipal applicant is "in the vicinity" of the project site. WMMPA has 60 days to determine whether to seek judicial review of FERC's order on rehearing in the U.S. court of appeals.

Senate Energy and Natural Resources Committee Endorses Nominations of Norman Bay and Cheryl LaFleur

As reported in the [February 2014 Hydro Newsletter](#), President Obama has nominated Norman Bay to fill the FERC vacancy created by the departure of former chairman Jon Wellinghoff. Mr. Bay is the current Director of FERC's Office of Enforcement, a position he has held since July 2009. Some Senators have opposed Mr. Bay's nomination or expressed concern that Mr. Bay may not have sufficient experience and background in energy policy to lead the agency, which caused a contentious confirmation hearing before the Senate Energy and Natural Resources Committee. However, on June 18, 2014, a divided Committee endorsed Mr. Bay's nomination.

The Committee also endorsed the nomination of Commissioner Cheryl LaFleur, the Acting FERC Chair, for a second term as a FERC Commissioner. The Committee vote came following an apparent agreement with the Obama Administration that Commissioner LaFleur will continue to be the Acting Chair for a nine-month period before Mr. Bay, then a Commissioner, is designated as Chair. It is not clear when the full Senate will take up the nominations.

Water Resources Reform and Development Act Becomes Law

In the [January 2014 Hydro Newsletter](#), we reported that the 2013 Water Resources Reform and Development Act, which broadly addresses a wide range of water resources issues, would be a priority issue for the Senate Environment and Public Works Committee. The Senate version included provisions aimed at improving the environmental review process by giving priority to the development of non-federal hydropower at U.S. Army Corps of Engineers (Corps) facilities. Those provisions were not included in the House-passed version of the legislation. However, the House version was amended in conference to include Section 1008 – Expediting Hydropower at Corps of Engineers Facilities, and was adopted by the Conference Committee.

Section 1008 states the development of non-federal hydropower at a Corps dam is to be given priority, and that Corps authorization of non-federal hydropower shall be completed in a timely and efficient manner without diminishing the Corps' other statutory missions. The section also requires the Corps to make a report to the Committee no later than two years from enactment: (1) describing its initiatives to encourage development of non-federal power at its facilities; (2) listing approvals made for new hydro

Spotlight (continued)

What drew you to hydropower?

Actually, hydropower found me. The hydro group needed a paralegal so I joined the practice group and have been with them ever since. Hydro is a unique specialty in energy law because it also involves environmental, tribal, land use, and socioeconomic components, so I enjoy it for its diversity.

In your opinion, what sets Van Ness Feldman apart from other firms with hydropower practices?

Van Ness Feldman's hydro team has depth, both in years of experience and backgrounds. We collaborate as a team and each have individual specialties. We are heavily involved in industry trade associations and are leaders in hydro reform. I am so fortunate to work with such an experienced group of lawyers.

What would you be doing if you weren't an attorney?

Probably a museum curator or librarian.

What is your favorite place in the world?

At home or anywhere with my 11-month old son Marc, watching him play and discover new things. Becoming a mother has changed my life.

facilities and the times required to approve the actions; (3) showing the status of pending applications; (4) describing the benefits or impacts to the environment, recreation, and other uses associated with Corps facilities at which non-federal hydro was developed in the prior year; and (5) showing the total payments to the U.S. government from non-federal hydropower projects at Corps facilities.

Following overwhelming approval in both houses of Congress, President Obama signed the bill into law on June 14, 2014, making it the first water resources policy update in seven years.

BOEM Issues Lease to Conduct Marine Hydrokinetic Technology Testing Off the Coast of Florida

On June 3, 2014, the U.S. Department of the Interior's Bureau of Ocean Energy Management (BOEM) issued a [first-of-its-kind lease for marine hydrokinetic technology testing](#) off the coast of Florida, which will allow the lessee, Florida Atlantic University's Southeast National Marine Renewable Energy Center (SNMREC), to test turbines powered by ocean currents. [BOEM's issuance of a lease to SNMREC](#) will allow the lessee to install anchored floating test sites to evaluate turbines of multiple designs, all of which will be powered by the ocean currents of the Gulf Stream. The testing areas will be sited on the Outer Continental Shelf (OCS) in waters 10-12 nautical miles off the coast of Fort Lauderdale, Florida.

This lease marks a major step in SNMREC's effort to test the commercial viability of hydrokinetic technology. BOEM's announcement regarding the SNMREC hydrokinetic lease expands the renewable energy portfolio of the federal OCS beyond wind to marine hydrokinetic technologies. The SNMREC lease is intended for demonstration and testing of ocean current technology, the results of which will inform the direction of the marine hydrokinetic industry in the coming years.

EPA's Proposed Rule on Carbon Dioxide Emissions from Existing Power Plants Impacts Hydropower

On June 2, 2014, the Environmental Protection Agency (EPA) issued a [proposed rule](#) under section 111(d) of the Clean Air Act, which would regulate carbon dioxide (CO₂) emissions from existing power plants. The proposed rule attempts to determine an attainable improvement in the CO₂ emissions rate (pounds of CO₂ per megawatt-hour) for each state based on the "best system of emission reduction." The proposed rule would then require each state to submit a plan achieving or exceeding that level of rate reduction by 2030.

The proposed rule contains several areas impacting hydropower resources. EPA's "best system of emission reduction" includes expansion of renewable generation as a mechanism for states to reduce their CO₂ rate, but does not include existing hydropower production when calculating state renewable energy targets. New hydropower plants and incremental capacity installed at existing facilities would count towards each state's ability to meet its goals. EPA has calculated its proposed renewable energy targets based on a regional average of state renewable portfolio standards policies, which generally does not include existing hydropower. However, EPA is also seeking comments on a modified approach that would include existing hydropower in calculating each state's emissions goal. Additionally, while existing nuclear power plants are treated similarly to hydroelectric facilities and excluded from state energy baselines, 5.8% of nuclear installed capacity is termed "at-risk," and states will be given credit for maintaining that capacity; there is no comparable assessment of whether any hydropower facilities are "at-risk." Comments on the proposed rule are due by October 16, 2014, and EPA intends to issue a final rule in early June 2015. For more information on the structure of the rule, please see Van Ness Feldman's [alert](#).

Forest Service Proposes Amendments to Tongass Forest Plan

The U.S. Forest Service has proposed amendments to the Tongass National Forest Land and Resource Management Plan (Forest Plan), which governs the management of the Tongass National Forest, located in southeast Alaska. While the bulk of the amendments involve timber management in the forest, the amendment process will also address whether changes to the Forest Plan are needed to provide for development of hydropower in the Tongass National Forest. A draft environmental impact statement for the amendments is expected to be released in August 2015. Additional information on amendments to the Tongass Forest Plan can be found on the Forest Service's [website](#).

John Clements, Michael Pincus, Sharon White, and Gabe Tabak contributed to this issue.

John Clements	202.298.1933	jhc@vnf.com
Tyson Kade	202.298.1948	tck@vnf.com
Matt Love	206.829.1809	mal@vnf.com
Brian McManus	202.298.3720	bzm@vnf.com
Michael Pincus	202.298.1833	mrp@vnf.com
Chuck Sensiba	202.298.1801	crs@vnf.com
Mike Swiger	202.298.1891	mas@vnf.com
Sharon White	202.298.1871	slw@vnf.com
Julia Wood	202.298.1938	jsw@vnf.com

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