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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.*

#### **Upcoming Speaking Engagements**

- [Julia Wood](#), National Hydropower Association Annual Conference, Contestant- Hydro Jeopardy, Washington, DC, May 2, 2018.
- [John Clements](#), Midwest Hydro Users Group Spring 2018 Meeting, "Legislative Update," Wausau, WI, May 16, 2018.

# *Hydro Newsletter*

## **VOLUME 5, ISSUE 3: MARCH 2018**

To receive the Hydropower Newsletter on a regular basis, follow this link:

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### **FERC Finds Licensee Not Obligated to Provide Project Output to United States**

On February 15, 2018, the Federal Energy Regulatory Commission (FERC) [held](#) that the Confederated Salish and Kootenai Tribes and Energy Keepers, Incorporated, co-licensees for the Séliš Ksanka Qlispé Project (SKQ Project—formerly, the Kerr Project), are not obligated to make any part of the Project's output available to the United States for and on behalf of the Flathead Indian Irrigation Project (FIIP) or the Flathead, Mission, and Jocko Valley Irrigation Districts (Irrigation Districts). FERC emphasized its long-standing policy of allowing project licensees to allocate power output as they see fit, absent a legislative directive to the contrary, on grounds that the public interest is best served by promoting competitive power markets. FERC held that when "a non-licensee requests an allocation of project power, the non-licensee bears the burden to provide supporting evidence." It further noted that "[m]eeting this burden requires providing [FERC] with supporting evidence (i.e., burden of production) that meets the substantial evidence and public interest standards of the Federal Power Act (i.e., burden of persuasion)."

Applying these principles to this case, FERC held that, as a non-licensee requesting a power allocation from the SKQ Project, the Irrigation Districts were responsible for meeting both the burden of proof and the burden of persuasion. The Irrigation Districts argued that various statutes and contracts demonstrated Congressional intent to require the SKQ Project licensee to provide low-cost power to the Irrigation Districts in exchange for the Project's purported use of the Irrigation Districts' water rights. FERC wholly rejected this argument, holding that the Irrigation Districts did not meet their burdens of proof or persuasion, and thus did not demonstrate that Congress intended to require the SKQ Project licensee to make available project output to the United States for the benefit of the FIIP or the Irrigation Districts.

### **FERC Issues Final Electric Storage Rule**

On February 15, FERC issued [Order No. 841](#), a final rule on *Electric Storage Participation in Markets Operated by Regional Transmission Organizations and Independent System Operators*. The order requires all regional transmission organizations (RTOs) and independent system operators (ISOs) to create a "participation model" of market rules allowing electric storage resources to provide all energy, capacity,

and ancillary services it is capable of providing to the market. Resources must be dispatchable and able to set market clearing prices, and their physical and operational characteristics must be accounted for. Each RTO must file tariff changes implementing Order No. 841 within 270 days of the rule's publication in the *Federal Register*, which will trigger stakeholder discussions throughout 2018.

The rule is intended to be broadly applicable to all types of storage, including pumped storage hydro. To the extent that current market rules prevent pumped storage resources from fully participating as wholesale buyers and sellers, the order provides an opportunity to seek improvements in market rules. However, FERC left open the prospect that existing participation models for pumped storage might already be compliant with the order, and will allow RTOs and ISOs to submit existing models. The rule also indicates that FERC will allow for regional flexibility in several other areas, including what sort of telemetry to require and how to account for physical and operational characteristics of storage resources. Finally, the order requires all RTOs and ISOs to allow storage resources to manage their own state of charge, which is not the case in all markets at present.

For more information on Order No. 841, see VNF's more detailed alert [here](#).

### **Department of Energy Seeks Information on Hydropower Contribution to Grid Resiliency and Reliability**

On February 21, 2018, the U.S. Department of Energy Office of Energy Efficiency and Renewable Energy, Water Power Technologies Office (WPTO) issued a [Request for Information](#) on understanding, accessing, and using the full potential of hydropower, including pumped storage, to contribute to electric grid resiliency and reliability. WPTO also seeks information on opportunities to expand the future contribution of existing and potential hydropower projects to enhancement of the electric grid. WPTO's goal is to develop a research portfolio leading to lower system costs, bring insight to hydropower technology development and research investments, promote optimization of hydro resources, and ultimately support a more secure and reliable electric power system.

WPTO seeks information on five topics presented as requests for comments on several issues and responses to several questions. The topics are: (1) A techno-economic analysis of pumped storage hydro at two sites with high levels of intermittent renewable energy generation as directed by Congress; (2) Alignment of hydropower capability, operational impacts, and costs with system demand; (3) An understanding of hydropower participation in the current energy landscape; (4) The role and value of hydropower in the Nation's energy future, including forecasted future system conditions and impact on hydropower resources; and (5) The appropriate extent of and focus areas for future research needs including the importance of financing models and international engagements.

The deadline for responses is April 6, 2018. Instructions are available on DOE's [website](#).

### **Supreme Court Declines to Review Fourth Circuit Decision on Riverbed Ownership at Yadkin Project**

On February 20, 2018, the U.S. Supreme Court declined to review a decision issued by the U.S. Court of Appeals for the Fourth Circuit (Fourth Circuit) [holding](#) that title to the riverbed underlying the Yadkin River in North Carolina is a federal question. The case originated when the State of North Carolina filed a lawsuit against the licensee of the Yadkin Project, claiming for the first time that the State owned the riverbed underlying the Project because the river stretch was navigable when the state joined the Union in 1789 (i.e., a "navigability-at-statehood" claim), despite the licensee's deeds attesting to its ownership and a consistent history of paying taxes on the property. The State also asserted that the "navigability for title" test established by the Supreme Court's 2012 opinion in *PPL Montana, LLC v. Montana*, holding that a river's navigability is determined segment by segment as of the time of the state's admission to the Union, does not apply to the original 13 states, including North Carolina.

The Fourth Circuit affirmed a lower court ruling that the federal "navigability for title" test does apply to the original 13 states, and that, on the facts, the applicable reach of the Yadkin River was not navigable

upon statehood. Therefore, under *PPL Montana*, the state was free to grant title to the riverbed to a private party, i.e., the licensee, for money. The State did not challenge the merits of that finding, but filed a petition for certiorari with the U.S. Supreme Court on the theory that the federal courts lack jurisdiction over navigability-at-statehood claims. On this question, the Fourth Circuit had ruled that a state's claim that it owned the bed of a river because it was navigable at statehood presents a federal question in all states, including the original 13 states. The court explained that North Carolina's contrary position "would result in a bizarre state of affairs with two different classes of States under the Constitution." The Supreme Court declined to review that decision, which reaffirms that questions of navigability for determining state riverbed title are governed by federal law.

### **Supreme Court Declines to Review Water Transfers Case**

On February 26, 2018, the Supreme Court declined to review a decision issued by the U.S. Court of Appeals for the Second Circuit (Second Circuit) in January 2017 reinstating the Environmental Protection Agency's (EPA) Water Transfers Rule. The rule, adopted in 2008, codifies EPA's longstanding policy that water transfers between navigable waters that do not subject the water to an intervening industrial, municipal, or commercial use do not constitute an "addition of pollutants" to navigable waters and are not subject to National Pollutant Discharge Elimination System permits under Section 402 of the Clean Water Act (CWA). The Second Circuit reversed a decision of the U.S. District Court for the Southern District of New York which vacated the rule on the basis that it was an unreasonable interpretation of the CWA. The Supreme Court's decision not to review the the Second Circuit order reaffirms the viability of the Water Transfer Rule.

### **USACE Proposes Draft Section 408 Policy Statement**

On January 25, 2018, the U.S. Army Corps of Engineers (USACE) completed a new draft [Engineering Circular](#) (EC) 1165-2-220, to improve the process for issuing permits under Section 14 of the Rivers and Harbors Act of 1899 (RHA), 33 U.S.C. § 408, commonly known as Section 408 permits. New hydroelectric projects located at USACE facilities and modifications to existing projects require a Section 408 permit.

USACE first issued a comprehensive EC for Section 408 permits in 2014. Since then USACE issued interim guidance to improve the Section 408 process in November 2016 and January 2018. The interim guidance addressed several matters, including: delegation of some decisions from USACE headquarters to division offices; authority for district commanders to further delegation of Section 408 decisions; implementation of legislative authority for districts to accept and expend funds contributed by non-federal public and certain private entities to expedite the review process; and removal of the minimum level of detail requirement of 60 percent complete plans and specifications and instead specifying use of the district's best professional judgment to determine the appropriate level of detail needed to make a Section 408 decision on a case-specific basis.

The new draft EC 1165-2-220 includes: eliminating duplication of effort by aligning Section 408 decisions with the USACE Real Estate outgrant and certain RHA Section 10 (obstructions in navigable waters) regulatory processes; delegating all Section 408 decisions to division and district offices; creating a multi-phase review option for requesters who want to pursue Section 408 permission in milestones or smaller phases; implementing review and notification timelines in accordance with the Water Resources Development Act of 2016; creating new appendices to EC 1165-2-220 with more detailed processes, standard conditions, and templates to improve consistency and efficiency; and developing a Section 408 tracking database to better enable requesters to track the status of their request.

Comments were due on or before March 7, 2018, but USACE has extended the comment deadline to April 6, 2018. Instructions for submitting comments are posted at USACE's [website](#).

### **FERC Provides Guidance on Qualified Conduit Criteria**

On February 15, 2018, FERC [denied](#) rehearing of a staff order rejecting an applicant's notice of intent to construct a qualifying conduit hydropower facility in Nevada. The Hydropower Regulatory Efficiency Act of 2013 (HREA) amended Section 30 of the FPA by excluding from FERC's mandatory licensing

jurisdiction qualifying conduit hydropower facilities that meet certain criteria. One of these criteria requires the facility to use only the hydroelectric potential of a non-federally owned conduit. Conduit is defined as “any tunnel, canal, pipeline, aqueduct, flume, ditch, or similar manmade water conveyance that is operated for the distribution of water for agricultural, municipal, or industrial consumption and not primarily for the generation of electricity.” FERC staff’s October 2017 order rejected the notice of intent on grounds that the channel the applicant proposes to use as the conduit for the project was abandoned, and thus not operated for the uses set forth in the FPA. For this reason, the addition of a hydroelectric facility at the site would make electric generation the primary purpose of the channel.

On rehearing, the applicant argued that the channel is not abandoned, but instead operates to provide water to downstream irrigation users. FERC denied rehearing, finding that because the channel has no gates or control structures that would enable one to operate it, there are no irrigation intakes on or near the channel, and the channel is not connected to any irrigation system, the channel is not operated for agricultural, municipal, or industrial consumption. The applicant also argued that the primary purpose of the channel is for irrigation, and the hydroelectric facility would be secondary to this primary purpose. FERC disagreed, finding that the channel, which would bypass an abandoned dam, was originally approved and constructed to provide water for power generation, and the record does not indicate that the channel has been operated for any purpose besides electrical generation.

***[John Clements](#), [Sharon White](#), [Robin Rotman](#), [Gabe Tabak](#), and [Robert Conrad](#)* 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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