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Hydro Newsletter

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FERC Releases Year-End Energy Infrastructure Update

In late January, FERC's Office of Energy Projects released its 2013 year-end [Energy Infrastructure Update](#) (Update). The Update provides a statistical look at FERC's activities in 2013 with respect to licensing new hydropower projects, approving capacity additions at existing projects, and authorizing small hydropower exemptions or conduit exemptions. In 2013, FERC issued licenses for six new conventional hydropower projects with a total capacity of approximately 19 megawatts (MW), while four previously approved new projects totaling nearly 95 MW were placed in service during the year. In comparison, in 2012 FERC issued licenses for 12 new hydropower projects with a total capacity of 89 MW, and four new facilities with a total capacity of 18 MW were placed in service. FERC received 16 applications for original licenses for projects totaling 141 MW in 2013, compared to 14 applications totaling 53 MW in 2012. The high-water mark in the last three years was in 2011, when applicants submitted 17 license applications for new projects totaling 384 MW.

The Update indicates that requests to increase capacity at existing conventional hydropower projects have decreased significantly in the last three years. In 2011, FERC received 14 requests to amend licenses to increase capacity by a total of 224 MW; in 2012 those numbers dropped to five requests totaling approximately 18 MW. And in 2013, FERC saw only one capacity amendment request filed, for an increase of less than 0.2 MW.

According to the Update, activities related to conduit exemptions for hydropower facilities also decreased in the last two years. In 2012, FERC received 17 requests for conduit exemptions totaling about 4 MW, while also issuing orders approving 18 exemptions for projects with a total capacity of about 13 MW. In 2013 only five conduit exemption applications were filed for less than 0.9 MW, and FERC issued orders approving exemptions for just six projects with a total capacity of less than 1 MW. The Update does not include data on the new category of qualifying conduit facilities established by the Hydropower Regulatory Efficiency Act of 2013 (HREA), which do not require a license under the Federal Power Act (FPA). FERC has received notices of intent to construct 22 qualifying conduit facilities since the passage of the HREA, and approved 19 such facilities. These 19 facilities total approximately 8 MW.

Finally, the Update reports that no applications for new pumped storage or hydrokinetic facilities were filed in 2013, and FERC did not issue any orders approving such projects during the year.

SPOTLIGHT:

Michael Pincus



Mike joined the firm in 2012 after working for five years in FERC's Office of the General Counsel, where he focused on hydropower licensing and compliance. Since joining the firm, he has continued his hydropower regulatory practice working on FERC licensing and compliance issues.

Where did you grow up?

The suburbs of Philadelphia, Pennsylvania.

Did you always aspire to be an attorney? How long have you been in practice?

Not exactly – I knew that I wanted to work on energy and environmental issues since college. Going to law school and becoming a lawyer seemed like the right path to achieve that goal.

What drew you to hydropower?

I have always been interested in energy, especially renewables. Hydropower law has a great mix of technical and environmental issues wrapped up in public policy and legal issues.

FERC Enforcement Director Nominated for FERC Chairman

President Obama has [announced](#) his intent to nominate Norman Bay to fill the FERC vacancy created when former chairman Jon Wellinghoff left FERC late last year. Mr. Bay is the current Director of FERC's Office of Enforcement, a position he has held since July 2009. An accomplished attorney, Mr. Bay has utilized the expanded enforcement authorities provided to FERC in the Energy Policy Act of 2005. As chairman, Mr. Bay would be responsible for setting and managing the agenda for policy issues to be considered by FERC and leading FERC to decision on issues presented by the flow of work before it, including on hydropower licensing and compliance decisions. Confirmation hearings in the Senate Energy and Natural Resources Committee have not yet been scheduled.

FERC Offers Assistance to California Licensees in Responding to Drought Conditions

In response to the historic drought conditions afflicting California, on February 6, 2014, FERC's Director of the Division of Hydropower Administration and Compliance, Edward Abrams, issued a [letter](#) to all California licensees offering "to act swiftly to review requests to amend licenses on a temporary or longer-term basis, as appropriate, in order to conserve water resources at FERC-licensed hydroelectric projects." The letter recommended that licensees interested in implementing new water conservation measures should review their licenses to determine which requirements may be temporarily modified to retain more water in project reservoirs and begin to consult with state and federal natural resource agencies and Native American tribes.

The letter points out that some licenses include articles that allow for a temporary deviation from a license requirement for a short period of time upon mutual agreement with specified resource agencies, but that licensees must promptly notify FERC of such deviations. Licensees without such a temporary deviation clause should consult with the appropriate agencies and entities before filing proposed temporary variation requests with FERC. Among other things, such requests should: describe the requested variance, including proposed changes in flows and/or reservoir elevations; document resource agency consultation; describe impacts, if any, to other project resources such as recreation, fish and wildlife; and indicate the expected length of time for implementing the temporary variance.

FERC has been true to its word on acting swiftly on such requests, in several cases within days of approving them.

FERC Limits Term of Successive Preliminary Permit

On February 14, 2014, FERC staff issued an [order](#) issuing a successive preliminary permit for a term of 24 months, rather than the typical 36-month term requested by the applicant. In justifying the shorter term, staff referenced the HREA, which, among other things, authorizes FERC to extend preliminary permits for up to two additional years beyond the three years allowed under section 5 of the FPA. Staff observed that because the HREA "suggests that five years is a sufficient maximum period to allow a potential applicant to prepare a development application," it would, as a general matter, limit to two years any successive permits that follow three-year initial permits. Should the two-year limit be applied uniformly to requests for successive permits in the future, applicants seeking additional time to pursue a permitted project may prefer to opt for a two-year extension under the HREA, which, unlike a request for successive permit, would not open the project site to competition.

USFWS Delists Two Fish Species from Endangered Species Act

In February, the U.S. Fish and Wildlife Service (USFWS) issued proposals to delist two fish species from the Endangered Species Act (ESA). If finalized, the proposals would mark the first fish species USFWS has ever delisted from the ESA. The first species, the [Oregon chub](#), is a small minnow that exists in floodplain habitats in the Willamette River Basin in Oregon. While initially listed in 1993 due to loss of habitat and predation by non-native species, USFWS found in the proposal that recovery has been achieved through collaborative partnerships to restore and acquire habitat, operational changes at the U.S. Army Corps of Engineers' Willamette River Basin Project, and the reintroduction of chub into

Spotlight (continued)

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

When I was practicing at FERC, everyone knew about the great reputation of the hydropower practice at Van Ness Feldman. I'm really pleased to be part of such a large and dynamic hydropower practice.

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

I vacillate between farming, cooking, and owning my own B&B.

What are the last three books you read?

This probably sounds a little boring, but being honest: *Lost to the West: The Forgotten Byzantine Empire That Rescued Western Civilization*, *Ready Player One: A Novel*, and *A River Lost: The Life and Death of the Columbia*.

historical habitat. The second species, the [Modoc sucker](#), is a small fish native to the upper Pit River drainage in southern Oregon and northeastern California. While USFWS initially listed the species in 1985 due to loss of habitat, USFWS stated in the proposal that recovery has occurred due to improvements in riparian habitat and reductions in the impacts of livestock grazing through the imposition of better management practices. USFWS is currently accepting public comments on the proposed delistings, and will seek peer review of the proposed rules. If finalized, the two species would be delisted and the currently designated critical habitat would be removed from the ESA.

Senator Landrieu Takes Chairmanship of Senate Energy Committee

On February 12, 2014, the Senate confirmed Senator Mary Landrieu (D-LA) by unanimous consent as the new Chairman of the Senate Energy and Natural Resources Committee. Former committee Chairman, Senator Ron Wyden (D-OR), moved to chair the Senate Finance Committee. This places Senator Landrieu atop the Senate Energy Committee alongside Republican Ranking Member Lisa Murkowski (R-AK).

Hydropower-Related Legislation Considered

This week members of the Subcommittee on Energy and Power held a [hearing](#) on two hydropower-related bills: the Hydropower Development Equity and Jobs Act (H.R. 1963), which would authorize conduit hydropower development at certain Bureau of Reclamation projects; and the Marine and Hydrokinetic Renewable Energy Act of 2013 (S. 1419), which seeks to improve the approval process for hydrokinetic projects using wave, tidal, and current energy. John Katz, Deputy Associate General Counsel for Energy Projects at FERC, appeared before the Subcommittee to discuss implementation of the Marine and Hydrokinetic Renewable Energy Act. Among other things, Mr. Katz suggested that renewable energy research, development, and demonstration centers authorized under the bill be owned by the U.S. Department of Energy (DOE), so that testing facilities would not have to undergo FERC's licensing and permitting authorization requirements. Senator Ron Wyden (D-OR) stated that the hearing and legislation under consideration underscored the Committee's commitment to wave and tidal energy and urged DOE to follow through on funding commitments to ensure research for wave energy technologies is prioritized.

Julia Wood, Tyson Kade, Michael Pincus, Sharon White, Megan Walters, and Steve Baruch contributed to this edition.

Founded in 1977 and now with over 100 professionals in Washington, D.C. and Seattle, WA, Van Ness Feldman provides strategic business advice, legislative and policy advocacy, legal and regulatory compliance counsel, representation in administrative proceedings and litigation, and support for project development, permitting, and transactions in the inter-related areas of energy, the environment, natural resources, public lands, real estate, health care, land use, and infrastructure.

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