



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

VOLUME 4 – MARCH 2014

- *Breaking News: Court Vacates EPA's Water Transfers Rule*
- *FERC Issues Pilot License for Admiralty Inlet Tidal Project*
- *Federal Agencies Issue NOPR on "Waters of the United States"*
- *FERC Holds Technical Conference for Other Federal Agencies' FY2013 Costs*
- *Bureau of Reclamation Issues Draft Lease of Power Privilege Requirements for Public Comment*
- *DOE Issues Funding Opportunities, Notices of Upcoming Funding Opportunities for Marine and Hydrokinetic Projects and Low-Head Hydropower Technologies*
- *Hydroelectric Production Incentive Funded for FY 2014*

Breaking News: Court Vacates EPA's Water Transfers Rule

On March 28, 2014, the United States District Court for the Southern District of New York struck down the Environmental Protection Agency's (EPA) Water Transfers Rule in *Catskill Mountains Chapter of Trout Unlimited, Inc. v. EPA*. The rule, adopted in 2008, codified EPA's longstanding policy that water transfers between waters of the United States that do not subject the water to an intervening industrial, municipal, or commercial use do not constitute "addition of pollutants" to navigable waters and are not subject to National Pollutant Discharge Elimination System (NPDES) permits under section 402 of the Clean Water Act (CWA). The court found that EPA used a "flawed methodology" in interpreting the CWA under the rule and did not reasonably explain its determination to exclude water transfers from the NPDES program. The court vacated the Water Transfers Rule and remanded it to EPA for additional explanation and justification.

Under long-standing judicial precedent, hydropower dams generally are not subject to the NPDES program, unless they physically "add" pollutants from the outside world, such as the discharge of grease or oil from a pipe. The court's decision undoubtedly will receive wide attention in determining the reach of the NPDES program, and could have significant impact on hydroelectric and water supply projects that involve cross-basin transfers if EPA or reviewing courts ultimately decide that water transfers are subject to NPDES requirements.

FERC Issues Pilot License for Admiralty Inlet Tidal Project

On March 20, 2014, the Federal Energy Regulatory Commission (FERC) issued a 10-year pilot license to the Public Utility District No. 1 of Snohomish County, Washington (District), for the District's Admiralty Inlet Pilot Tidal Project (Project).

The license order authorizes the District to construct the small-scale demonstration Project, which consists of two 6-meter diameter OpenHydro turbines, to be mounted on submerged foundations, and interconnected to the electrical grid on Whidbey Island. The order requires a number of measures for the protection, mitigation, and enhancement of fish and wildlife, as well as cultural and aesthetic resources in the Project area. These measures include the District's implementation of an Acoustic Monitoring and Mitigation Plan, Benthic Habitat Monitoring and Mitigation Plan, and Marine Mammal Monitoring and Mitigation Plan, among numerous other adaptive management and monitoring plans,

many of which were proposed by the District in consultation with federal and state fish and wildlife agencies, tribes, and other stakeholders in the licensing process.

The license also requires the District to implement a number of measures to ensure public safety, including implementation of plans for identifying and responding to Project emergencies; consulting with the U.S. Coast Guard on navigation safety; shutting down the Project's turbines in emergency situations; and removing the Project and restoring the site if the District does not seek a new license at the end of the 10-year pilot license term. The order also requires the District to file a Hazard Identification and Risk Assessment at least 90 days prior to the start of in-water construction.

In a presentation to FERC Commissioners at the March 20, 2014 FERC meeting, FERC staff stated that the plans and protections set forth in the license would enable the safe and environmentally responsible Project to provide valuable information for the hydrokinetic industry. In voting to approve issuance of the license, each of the Commissioners lauded the Project, asserting that it was a well thought-out Project at the forefront of the electric industry. Acting FERC Chairman Cheryl LeFleur described the Project as "an innovative attempt to harness previously untapped energy resources."

The District's is the fourth license issued through FERC's pilot licensing process, and the first tidal energy Project approved for construction on the West Coast. Issuance of the license is a key milestone in the effort to develop technology to harness the nation's vast tidal energy resource. Van Ness Feldman has provided legal, policy, and strategic guidance to the District throughout the course of its development of the Project.

Federal Agencies Issue Notice of Proposed Rulemaking on "Waters of the United States"

On March 25, 2014, the EPA and the U.S. Army Corps of Engineers released a long-awaited [Notice of Proposed Rulemaking](#) (NOPR) redefining "waters of the United States" under the federal CWA. The proposed rule seeks to clarify which streams, wetlands and other waters are considered "waters of the United States" and thus are subject to permitting requirements under the CWA. The joint proposed rule will affect project development and operations across the energy, water, construction, building, agricultural and transportation sectors. While the regulations provide for seven categories of "waters," the definition for "waters of the United States" proposed in the NOPR can be grouped into four categories: (1) waters that are jurisdictional by rule; (2) so-called "adjacent" waters, which may require a case-specific analysis; (3) "other waters" that would require a case-specific, "significant nexus" analysis; and (4) excluded waters, which are never jurisdictional. The agencies' proposal expands the types of waters that will be considered jurisdictional and subject to CWA permitting requirements to include:

- All "tributaries" of jurisdictional waters, and all waters located within a riparian area or a floodplain, which have historically been subject to case-by-case determinations;
- Certain "isolated" wetlands and ditches dug in uplands, which were categorically excluded from jurisdiction under prior agency guidelines and case law; and
- Certain "other" waters that are deemed to have a "significant nexus" to jurisdictional waters.

Comments on the NOPR are due 90 days after publication in the Federal Register. Van Ness Feldman's [issue alert](#) on the NOPR provides additional information. To receive further updates on the NOPR, please send an email to: waters@vnf.com.

FERC Holds Technical Conference for Other Federal Agencies' FY 2013 Costs

On March 20, 2014, FERC held a technical conference to review Other Federal Agencies' (OFAs) fiscal year (FY) 2013 costs for administration of Part I of the Federal Power Act (FPA). Section 10(e) of the FPA authorizes FERC to collect "reasonable" annual charges on hydropower licensees to reimburse the United States for the costs for administration of Part I of the FPA. These administrative annual charges

include FERC's own costs, as well as the OFAs' reported costs for their administrative responsibilities under the FPA. The OFAs reported about \$8.2 million in costs for FY 2013, a reduction of about 26 percent from FY 2012, which FERC staff attributed to sequestration and other cuts in federal funding. In the technical conference, FERC staff preliminarily accepted \$7.8 million of these costs to be passed through to licensees in this year's administrative annual charges bills. With the conclusion of the technical conference, interested parties now have an opportunity to prepare written comments to FERC and questions to the OFAs regarding their cost reports. Although FERC has yet to issue notice of this comment opportunity, FERC staff during the technical conference indicated that the comment deadline is likely to be April 10, 2014. Following the comment period, FERC staff will engage the OFAs on any remaining issues and issue administrative annual charges bills—likely in July or August 2014.

Bureau of Reclamation Issues Draft Lease of Power Privilege Requirements for Public Comment

Last month, the Bureau of Reclamation (Reclamation) issued for public comment a new Temporary Reclamation Manual Release (Temporary Release), [FAC TRMR-61](#), intended to revise and incorporate new process requirements established by the [Bureau of Reclamation Small Conduit Hydropower Development and Rural Jobs Act](#), enacted August 9, 2013.

In accordance with the new law, Reclamation added new procedures to allow for irrigation districts and water user associations to obtain a Lease of Power Privilege (LOPP) to construct hydropower projects at "transferred conduits" and "reserved conduits" (as those terms are defined in the Temporary Release) on Reclamation lands. A LOPP is used when Reclamation leases the right to non-federal entities to develop hydropower at its facilities, so long as the power development does not interfere with the authorized purposes of the Reclamation facility. The new procedures create a process to give irrigation districts and water user associations priority in obtaining a LOPP on Reclamation facilities. For irrigation districts and water user associations operating the applicable transferred conduit or receiving water from the applicable reserved conduit, the new Reclamation procedures offer those entities the right of first refusal if another entity requests a LOPP for the same conduit. If the irrigation district or water user association indicates, within 60 days, that it would like the LOPP, it will have 150 days to submit a proposal for development. The Temporary Release also provides for a categorical exemption from the requirements of the National Environmental Policy Act for "small conduit hydropower" (5 megawatts or less) projects. The Temporary Release does not modify the operation of the Memorandum of Understanding between Reclamation and FERC.

Department of Energy Issues Funding Opportunities, Notices of Upcoming Funding Opportunities for Marine and Hydrokinetic Projects and Low-Head Hydropower Technologies

On March 10, 2014, the Department of Energy (DOE) announced two important funding opportunities for developers of Marine and Hydrokinetic (MHK) energy projects. DOE announced the availability of \$3.5 million to support the development of technologies to monitor potential environmental impacts associated with technologies. This grant opportunity, entitled [Environmental Stewardship for Renewable Energy Technologies: MHK Environmental and Resource Characterization Instrumentation](#), provides funds for the development and testing of sensors, instrumentation, or processing techniques to collect wave data for wave energy conversion devices. Grants will be awarded in three general topic areas: (1) MHK environmental software and instrumentation development; (2) the development and integration of instrumentation packages; and (3) wave measurement instrumentation for feed forward controls. Applicants must submit a concept paper by April 7, 2014 to be eligible to submit a full application, due May 22, 2014.

In addition, DOE has made \$6.5 million available for the creation of a Wave Energy Converter (WEC) Prize and is now accepting applications for a WEC Prize Administrator with expertise in prize competitions. The objective of the [Administration of the WEC Prize](#) funding opportunity is to collaborate with DOE, technical experts, and other stakeholders in developing and implementing the prize and to

Upcoming VNF Speaking Engagements

Julia Wood, *New Legislation to Bolster New Hydropower Projects*, Energy Bar Association Annual Meeting, April 8-9 2014.

Charles Sensiba, *Session Leader, Hydro Regulation Update: Issues, Proposals, SOLUTIONS!*, National Hydropower Annual Conference, April 28, 2014.

select a single entity to administer the WEC Prize. Administration of the WEC Prize will be comprised of phases including: prize development, implementation of the WEC Prize competition stages (e.g., design, build, and test and evaluation), and post-competition publicity and wrap-up. The WEC Prize is intended to challenge individuals, universities, and existing and emerging companies to improve the performance and lower the cost of energy produced by WEC devices. Applicants must submit a concept paper by April 7, 2014, in order to submit a full application, due May 14, 2014.

DOE also issued three notices of intent (NOI) on behalf of the Wind and Water Power Technologies Office to issue funding opportunities. The first, entitled [Water Power Manufacturing](#), to support the application of advanced materials and manufacturing techniques for the development of new low-head hydropower technologies. It is anticipated that this Funding Opportunity Announcement (FOA) will be released no later than April 2014.

The second NOI is entitled [Marine and Hydrokinetic \(MHK\) Research and Development University Consortium](#). The purpose of the FOA is to support a university consortium—for an award period of approximately three years—in further advancing U.S. MHK technology via current Research and Development (R&D). The R&D activities may include array performance testing and in-water testing and evaluation of new environmental monitoring techniques, among other things. DOE plans to issue the FOA in the first half of 2014.

The final NOI, [Competitive Marine and Hydrokinetic \(MHK\) Demonstrations at the Navy's Wave Energy Test Site \(WETS\)](#), will support the deployment of two WEC systems in Kaneohe, Hawaii at the WETS, for comparison of performance, reliability, and levelized cost of energy. Beside furthering the Navy's R&D portfolio planning, this initiative will be important to the Department of Defense's renewable energy goals. DOE plans to issue the FOA in the second half of 2014.

Hydroelectric Production Incentive Funded for FY 2014

The FY 2014 Omnibus Appropriations bill, enacted into law on January 17, 2014, allocated \$3.6 million in hydroelectric production incentives (HPI) for the development of new hydropower at existing dams and conduits. The HPI, originally authorized in section 242 of the Energy Policy Act 2005, allows a facility to collect 1.8 cents per kilowatt hour, with a cap of \$750,000 per year, for up to 10 years. Prior to FY 2014, these funds were not appropriated.

To qualify, the new hydropower development must not require the enlargement or construction of impoundment or diversion structures (other than repair or reconstruction) during the installation of the power-generating equipment. In addition, the incentive is available to facilities owned or solely operated by non-federal entities.

[Julia Wood](#), [Michael Pincus](#), [Sharon White](#), [Erin Bartlett](#), [Megan Walters](#), and [Mealear Tauch](#) contributed to this issue.

Richard Agnew	202.298.1815	raa@vnf.com
Gary Bachman	202.298.1880	gdb@vnf.com
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