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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.*

# Hydro Newsletter

## VOLUME 10 – SEPTEMBER 2014

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### D.C. Circuit Dismisses Appeal of FERC Order Issuing New License

On September 26, 2014, in [Smith Lake Improvement and Stakeholders Ass'n v. FERC](#), the U.S. Court of Appeals for the District of Columbia Circuit dismissed, on jurisdictional grounds, a shoreline property owners association (landowners) petition for review of the Federal Energy Regulatory Commission's (FERC) orders relicensing Alabama Power Company's Warrior River Project.

The landowners objected to, among other things, FERC's decision to approve the licensee's proposal to maintain the same lake levels required under the prior license. FERC initially issued an order denying the landowners' rehearing request based on the merits. Instead of seeking judicial review following FERC's rehearing order, the landowners filed a second rehearing request with FERC, responding to the issues addressed in FERC's order denying rehearing. In response, FERC issued a notice summarily rejecting the landowners' second rehearing request, based on the fact that the order on rehearing did not significantly modify the license order.

Upon review, the court held that under its precedent, if an order on rehearing does not significantly modify the prior order, the 60-day clock for filing a petition for judicial review under the Federal Power Act begins running when the rehearing order is issued. Thus, because FERC's order denying rehearing did not change the license order, the court held, that is when the 60-day clock began to run. By filing their petition following the notice rejecting their second rehearing request, the landowners missed the statutory deadline and thereby deprived the court of jurisdiction to hear their petition.

### FERC Issues Final Rule Revising Regulations in Conformity with the Hydropower Regulatory Efficiency Act of 2013

On September 18, 2014, FERC [issued](#) a Final Rule amending its regulations to conform to the Hydropower Regulatory Efficiency Act of 2013 (HREA). Enacted last year, the HREA: (1) amended section 30 of the Federal Power Act (FPA) to create a new category of qualifying conduit hydropower facilities; (2) increased the capacity of conduit projects eligible for FERC's existing conduit exemption program from 15 to 40 megawatts (MW), and expanded the applicability of the exemption to conduit projects located on federal lands; (3) amended the Public Utility Regulatory Policies Act of 1978 to double the capacity of hydropower projects eligible for the small hydropower exemption from FERC's licensing requirements under the FPA, from five MW to 10 MW; (4) required FERC to investigate the feasibility of establishing a two-year licensing process for hydropower development at non-powered dams and closed-loop pumped storage projects; and (5) amended the FPA to allow FERC to extend the term of a preliminary permit, at its discretion, for not more than two years beyond the current three-year maximum term.

## Upcoming Speaking Engagements

October 9, 2014

Matt Love, Comprehensive Review of Hydropower in the Northwest, Seattle, WA

October 20, 2014

John Clements, American Public Power Association 2014 Legal Seminar: Municipal Preference in Hydro Licensing, San Antonio, TX

FERC explained that although it has been complying with the HREA and made its compliance procedures available on its [website](#), the Final Rule formalizes FERC's compliance procedures in revised regulations on preliminary permits, small conduit hydroelectric facilities, and small hydroelectric power projects. The Final Rule also adds a new subpart to its regulations on qualifying conduit hydropower facilities, setting forth the required contents of a notice of intent to construct, which the Final Rule states will provide FERC with information necessary to determine whether the proposed facility meets the requirements of the HREA. In addition, FERC explained that the Final Rule corrects grammatical and typographical errors to its regulations. Notably, the Final Rule will become effective on February 23, 2015.

## District Court Upholds Designation of Unoccupied Critical Habitat in Louisiana

On August 22, 2014, the District Court for the Eastern District of Louisiana "reluctantly" upheld the U.S. Fish and Wildlife Service's ("USFWS") designation of unoccupied critical habitat for the dusky gopher frog under the Endangered Species Act in *Markle Interests, LLC v. U.S. Fish and Wildlife Service*. While the species is currently located only in Mississippi, the USFWS included 1,544 acres of privately owned timber land in Louisiana as critical habitat even though the species was last sighted there in the 1960s. Notwithstanding the lack of occupancy, the court upheld the designated area based upon USFWS's finding that the ponds located there are essential for the frog's recovery. Further, based on the different statutory definitions of occupied and unoccupied habitat, the court found that unoccupied areas are not required to have primary constituent elements to be designated as critical habitat.

Several of the plaintiffs have filed appeals of the *Markle* decision to the U.S. Court of Appeals for the Fifth Circuit. As we previously [reported](#), the USFWS and National Marine Fisheries Service (collectively, the Services) have proposed revisions to their regulations regarding the designation of critical habitat. The Services indicate that they anticipate designating more unoccupied areas as critical habitat in the future to address, for example, the impacts of climate change. The resulting decision in *Markle* will likely have significant implications for how the Services address the designation of unoccupied areas as critical habitat for other species in the future.

## DOE Issues Award for Administration of Wave Energy Converter Prize Program

In March 2014, we [reported](#) that the Department of Energy's (DOE) Water Power Program announced two funding opportunities for development of marine and hydrokinetic energy projects. One of these opportunities was a \$6.5 million award for administration of a Wave Energy Converter (WEC) Prize. Administration of the WEC Prize is a three-phase program consisting of: 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 aims to attract innovative ideas from developers by offering a monetary prize purse and providing an opportunity for tank testing and evaluation of scaled WEC prototypes. DOE's goal is to achieve performance enhancements that will enable cost-effective commercial scale development of WEC devices.

On September 24, 2014, DOE [awarded](#) the WEC Prize administration to a team led by Ricardo Inc. of Van Buren Township, Michigan. Ricardo Inc. will be supported by JZ Consulting, from the Greater Detroit Area, for challenge development and management expertise. Sandia National Laboratories and the National Renewable Energy Laboratory, as well as the Naval Surface Warfare Center's Carderock Division in Maryland, will also support Ricardo Inc. by providing engineering and technical expertise for WEC device design, building, and testing. Access to the Carderock Division's advanced wave generating basins will allow WEC Prize participants to test their devices in scenarios that accurately simulate actual wave action. DOE indicates that information about registering for the WEC Prize competition will be available on the Water Power Program website in Spring 2015.

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