



*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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### DC Circuit Denies Rehearing *En Banc* in Appeal of FERC Order Issuing New License

On January 30, 2015, in *Smith Lake Improvement and Stakeholders Ass'n v. FERC*, the U.S. Court of Appeals for the District of Columbia Circuit denied rehearing of its September 2014 order dismissing a shoreline property owners association (landowners) appeal of the Federal Energy Regulatory Commission's (FERC) orders relicensing Alabama Power Company's Warrior River Project. As reported in the [September 2014](#) Hydro Newsletter, 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.

In September 2014, 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 (FPA) begins running when the rehearing order is issued. Thus, because FERC's order denying rehearing did not change the license order, the court held, the 60-day clock began to run following issuance of the rehearing order. By filing their petition following the notice rejecting their second rehearing request, the landowners missed the statutory deadline for appealing the decision and thereby deprived the court of jurisdiction to hear their petition.

The January 30 order amended the court's original opinion to clarify that when a petitioner is unclear whether a rehearing order significantly modifies the prior order, the "safer course" is to file a petition for review before the court, rather than a second rehearing request at FERC.

### President Obama's FY 2016 Budget Request Increases Hydropower Funding

On February 2, 2015, President Obama released his administration's fiscal year (FY) 2016 budget request. The request includes a substantial increase in funding for the Department of Energy's renewable energy and energy efficiency programs, which include the Water Power program. The administration has requested \$67 million for the Water Power program to support hydropower, pumped storage, and marine energy technologies. The hydropower program would receive \$25.5 million and the marine and hydrokinetic program would receive \$40.8 million. This level of funding is a 6 percent increase over the combined funding for both programs in FY 2015.

### Spotlight on Avi Zevin



*Avi draws upon his in-depth knowledge and experience of the political and regulatory process to provide strategic advice, legal advocacy, and public policy analysis and development to clients in the energy, environment, and natural resources areas. He is relatively new to the hydro practice, but is eager to jump in.*

#### **Where are you from?**

I grew up in Orange County, California and went to college in the Bay Area, where I lived for a few years after school. I've been on the East Coast for about eight years now, but in the winter still think of myself as a Californian.

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

I've been practicing for a year and a half. I decided to pursue concurrent law and public policy degrees while working on energy and climate issues at a Washington, DC think tank. I thought I'd probably end up in policy, but found I liked law much more than I had expected to.

The next steps in the federal budget process are for the House and Senate to pass budget resolutions, the appropriations subcommittees to markup appropriations bills, and for both houses to vote on appropriations bills and resolve any differences, after which each bill will be sent to the President for his signature.

### **IRS to Allocate Approximately \$1.4 Billion for Clean Renewable Energy Bonds**

On February 3, 2015, the Internal Revenue Service (IRS) issued [IRS Notice 2015-12](#). The Notice announces a reallocation of \$1,394,479,123 in volume cap authority for new Clean Renewable Energy Bonds (CREBs) for qualifying energy projects, including wind, hydropower, solar, and other facilities to be owned by public power providers, governmental agencies, and cooperative electric companies. Under section 54C of the Internal Revenue Code (IRC), allocation of authority to issue CREBs is valid for three years after the date of the letter issuing the allocation.

The facilities that may be financed with CREBs are the same renewable projects eligible for the production tax credit (PTC) under IRC section 45. However, the various placed-in-service-date rules described in section 45(d) for the PTC do not apply to projects financed with CREBs. For additional information on the PTC, see the [March 2014](#), [July 2014](#), and [February 2015](#) Hydro Newsletters.

In 2009, the IRS solicited applications for the allocation of up to \$2.4 billion in CREBs available for qualified projects owned by eligible entities. In 2009 and 2010, the IRS allocated the entire volume cap designated for projects to be owned by governmental bodies and public power providers and most of the amount designated for cooperative projects. The remaining amount designated for cooperatives was awarded in 2011.

However, not all of the allocations resulted in the issuance of bonds. In Notice 2015-12, the IRS announced that it has identified \$516,565,691 of volume cap available for reallocation for projects to be owned by public power providers, \$597,134,963 available for projects to be owned by governmental bodies, and \$280,778,469 available for projects to be owned by cooperatives. Instructions for filing applications are included in Notice 2015-12. Applications for public power projects are due by June 3, 2015. Applications for government and cooperative projects are due March 5, 2015.

### **FERC Issues Two Orders on Fish Passage**

On February 19, 2015, FERC issued two orders concerning fish passage. In the first order, FERC denied rehearing and stay of its October 2014 order revoking a license for failure to timely construct fish passage facilities. As reported in the [November 2014 Hydro Newsletter](#), in 2002, FERC amended the license to authorize construction of an additional powerhouse, and required the licensee to install new fish passage facilities at the dam. In its termination order, FERC found that the licensee changed the design for its fish passage facilities multiple times over the next 10 years, and failed to meet numerous FERC compliance deadlines. After FERC issued its termination order, the licensee filed a notice of withdrawal of its amendment application filed in 2000, and requested FERC to vacate its 2002 amendment order which required construction of fish passage facilities. On February 19, FERC denied rehearing, holding that if the licensee objected to the conditions of the 2002 amendment order, it should have sought rehearing of that order. FERC also denied various other arguments proffered by the licensee on rehearing, including that FERC lacked jurisdiction over the project.

In the second order, FERC denied rehearing of its October 2014 decision declining to reopen a license to require fish passage facilities. The U.S. Fish and Wildlife Service (USFWS) and the state initially requested that FERC reopen the license to impose fishways under Standard Article 15, which reserves FERC's authority to impose project modifications for the conservation and development of fish and wildlife resources. The agencies argued that because fish passage was required during the recent relicensing of an upstream project, FERC should reopen the license to require it at the downstream project. FERC denied the agencies' request. The USFWS subsequently requested that FERC impose fishways at the project under its reserved authority under section 18 of the FPA. On February 19, FERC

**Spotlight Continued...**

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

Van Ness Feldman is unique because of our deep expertise across the energy, environment, and public policy spaces and our ability to team across practice groups. This lets us understand hydro's needs from broader environmental and electric regulatory contexts. For example, my primary practice is in the environmental group, where recently I have been focused on EPA's Clean Power Plan. I get to combine the knowledge and experience of the proposed rule with the deep industry expertise of other attorneys here that primarily focus on hydropower to provide solutions for clients that are creative, effective, and practical and also tailored to their needs and concerns.

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

The truth is that I'd probably still be working on energy, environment, and policy issues, even if in a different context. Though, my high school-self would have said "touring the world in a rock band."

**What are the last three books you read?**

Station Eleven (great dystopian sci-fi), The Magicians (an adult Harry Potter), and Wolf in White Van (a new novel by the man behind indie rock group The Mountain Goats!). Recommend them all!

denied this request, finding that while the USFWS reserved its section 18 authority in a letter filed during relicensing, the fishway prescription reserving its authority was not expressly included in the new license. Because the USFWS did not seek rehearing of the license to incorporate the fishway prescription, FERC had no authority to require the licensee to take actions that were not expressly required in the license.

**Implementation Regulations for the Hydropower Regulatory Efficiency Act of 2013**

FERC's revised regulations implementing the Hydropower Regulatory Efficiency Act of 2013 (HREA) became effective on February 23, 2015. As reported previously in the [September 2014](#) Hydro Newsletter, the [Final Rule](#) issued by FERC on September 18, 2014 amends FERC's regulations to conform to the HREA. Although FERC explained in the Final Rule that it was complying with the terms of the HREA and made its compliance procedures available on its [website](#), the Final Rule formalized FERC's compliance procedures in revised regulations on preliminary permits, small conduit hydroelectric facilities, and small hydroelectric power projects. The Final Rule also added a new subpart to FERC's regulations on qualifying conduit hydropower facilities, setting forth the required contents of a notice of intent to construct. The Final Rule also corrected grammatical and typographical errors in FERC's regulations. Although the regulations are now in effect, the revised regulations will not appear codified in the Code of Federal Regulations until the U.S. Government Printing Office prints Title 18 later this year.

**FERC Holds First Clean Power Plan Technical Conferences**

In February, FERC held two of its four announced technical conferences to evaluate the electric reliability, wholesale market, and energy infrastructure implications of the Environmental Protection Agency's (EPA) proposal to limit greenhouse gas emissions from existing power plants (the Clean Power Plan). A national overview [conference](#), held in Washington, DC on February 19, hosted panelists from a wide range of federal, state, and local governments; system operators and reliability organizations; energy-sector trade associations; electric utilities; natural gas pipelines; and environmental advocates. A webcast of the conference and prepared testimony is available on [FERC's website](#). FERC also held a [conference](#) focusing on the reliability, infrastructure, and energy market impacts specific to the Western United States on February 25 in Denver, Colorado. Panelists were similarly wide ranging.

Discussion of hydro issues was more prevalent at the western regional conference. EPA acknowledged concerns it had received through the notice and comment process regarding the Clean Power Plan's treatment of existing hydroelectric power in determining state compliance obligations. Chairman LaFleur asked about the opportunities for multi-state coordination to maximize the benefits of hydro generation as a compliance tool under the Clean Power Plan. In addition, Commissioner Honorable identified the opportunity for upgrading large hydro facilities to reduce greenhouse gas emissions. Hardev Juj, Vice President for Transmission Planning and Asset Management at Bonneville Power Administration, agreed and raised the possibility that the Clean Power Plan could be modified to provide incentives to keep online at-risk hydroelectric facilities (as the current proposal does with nuclear) and to encourage new hydro. Mr. Juj also identified concern with EPA's proposed use of a 2012 baseline to set state emission rate goals, given that it was an abnormally high hydro year. Additional concerns were raised by panelists regarding the risk to electric system reliability posed by the prospect of long-term drought and operational constraints in a system more dependent on hydro power; and on the analytical challenges raised by incorporating increasing levels of hydropower into existing market structures.

Two additional regional technical conferences are scheduled for Washington, DC on March 11, 2015 ([Eastern Region](#)), and St. Louis, Missouri on March 31, 2015 ([Central Region](#)).

The American Bar Association is holding a teleconference on the Clean Power Plan and the implications for hydropower on Wednesday, March 4, 2015 at 2:30 pm EST. Registration information for the teleconference appears in the side bar.

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**Upcoming Speaking Engagements**

- [Avi Zevin](#), Presenter, The Clean Power Plan and Hydro Power: How EPA’s Rule 111(d) Impacts Hydro Power, American Bar Association Section of Environment, Energy, and Resources Teleconference, March 4, 2015 at 2:30 pm. To register for this program, please visit the [ABA website](#).
- [Michael Swiger](#), APPA Pre-Legislative Rally Seminar, Energy-Water Nexus: Issues Facing Public Power in the Future, Washington, DC, March 9, 2015.
- [Charles Sensiba](#) and [Tyson Kade](#), National Hydropower Association Annual Conference, Washington, DC, April 29, 2015.