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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

- [Mike Swiger](#), HydroVision International 2015, Portland, OR, July 17, 2015.

Hydro Newsletter

VOLUME 2, ISSUE 6: JUNE 2015

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Breaking News: EPA and USACE Release Controversial Final Rule Redefining Jurisdictional Waters under the CWA

On May 27, 2015, the Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (USACE) [released](#) their controversial final rule redefining jurisdictional “waters of the United States” under the Clean Water Act (CWA). The proposed rule, which was published last April, defined seven “categories” of jurisdictional waters and also included a list of “excluded” waters that the EPA and USACE believe are not jurisdictional. The final rule now includes eight categories of waters, the first six of which generally mirror the proposed categories, but include significant changes to some of the definitions in these categories. The two new categories in the final rule replace the proposed rule’s “other waters” category and require a case-specific “significant analysis” review to determine whether waters in these categories are jurisdictional under the CWA.

While the agencies continue to assert that the final rule will not expand federal jurisdiction, it is largely expected that the final rule will have significant impacts on project development and operations across the energy, water, construction, building, agricultural, and transportation sectors. Additionally, it appears that some portions of the final rule represent significant deviations from what the agencies proposed last spring.

Van Ness Feldman’s CWA practice continues to analyze the final rule and will publish a more comprehensive analysis of the rule on its website.

Hydro Legislation Update

As reported in the [May 2015 Hydro Newsletter](#), on April 24, 2015, Rep. Cathy McMorris Rodgers (R-WA) issued a [draft discussion bill](#) designed to improve federal regulation of non-federal hydropower, promote transparency and accountability in hydropower licensing decision making, and reduce redundancy and inefficiencies in non-federal hydropower administration. Since then, three additional members of

Congress have released their own hydro bills for consideration. On May 1, House Energy and Commerce Committee Chairman Fred Upton (R-MI) issued a [draft discussion bill](#) proposing changes to modernize the hydropower regulatory process. The Upton bill is substantially similar to the McMorris Rodgers discussion draft issued on April 24. On May 6, 2015, Senate Energy and Natural Resources Committee Chairman Lisa Murkowski (R-AK) [introduced](#) S.1236, the Hydropower Improvement Act. S.1236 was one of 17 legislative proposals issued by Senator Murkowski in advance of legislative hearings related to a broad energy bill currently being assembled by the Senator in consultation with members of the Energy and Natural Resources Committee. On May 14, 2015, Sen. Angus King (I-ME), a member of the Senate Energy and Natural Resources Committee, [introduced](#) S.1338, the Small Hydropower Dependable Regulatory Order Act of 2015, a bill designed to streamline the hydro relicensing process for certain small hydro projects of 5 megawatts (MW) or less, or located at non-power dams.

Congress held two hearings in May on the proposed hydro reform bills currently under consideration. On May 13, 2015, the House Energy and Commerce Committee, Subcommittee on Energy and Power held a [hearing](#) on the Upton and McMorris Rodgers bills. On May 19, 2015, the Senate Energy and Natural Resources Committee held a [hearing](#) on 26 pending energy supply bills, including the Murkowski bill, as well as Senator Gardner's (R-CO) pending bill, S.1270, to reinstitute authorization to appropriate funds for incentive payments to qualifying hydropower owners and operators under Sections 242 and 243 of the Energy Policy Act of 2005 (EPAct 2005). During the hearing, Senator King remarked that he believes "the country is losing potential resources because of the in terrorem effect of an uneconomic, unpredictable, and untimely [permitting] process, particularly in the field of hydro." A hearing on Senator King's bill, S.1338, is scheduled for June 9.

D.C. Circuit Denies Appeal of FERC Order Finding Project Jurisdictional

On May 15, 2015, in *Turlock Irrigation District & Modesto Irrigation District v. FERC*, the U.S. Court of Appeals for the District of Columbia Circuit denied an appeal of the Federal Energy Regulatory Commission's (FERC) orders determining that the 4.75 MW La Grange Project on the Tuolumne River in California is subject to the mandatory licensing provisions of the Federal Power Act (FPA). FERC found that the project is jurisdictional under FPA Section 4(e) because: (1) it is located on a navigable water of the United States; (2) it occupies public lands of the United States; and (3) the stream is a Commerce Clause water, the project affects interstate commerce, and construction occurred after 1935.

The court ruled that FERC provided substantial evidence to support all three determinations. FERC's navigability determination found that the stream is presently navigable based on recent agency activity, was navigable in the past based on upstream passage of gold miners in the 1850s, and is suitable for future navigation through improvements. The court found that navigability is not required throughout the project, but only to the project tailrace. For its federal lands conclusion, FERC relied on its own backwater analysis and data provided by the National Marine Fisheries Service to find that the project reservoir extends onto Bureau of Land Management lands upstream from the project dam. In affirming FERC, the court found that its deference to reasoned agency judgments is particularly warranted when they involve complex scientific or technical questions. Finally, the court affirmed FERC's finding that there was post-1935 construction because the generating capacity of the project increased when the turbines and generators were replaced in the 1980s. The Districts made numerous criticisms of FERC's methodology which the court did not find persuasive, further reinforcing the difficulty of successfully challenging the broad sweep of FERC's hydroelectric licensing jurisdiction except in very rare cases.

FERC Proposes Changes to Timing of Annual Charges for Non-Municipal Licensees and Exemptees

On May 14, 2015, FERC issued a [notice](#) proposing to amend its regulations regarding its assessment of annual charges for private (non-municipal) hydropower licensees and exemptees for unconstructed projects and projects adding new capacity. Under the current regulations, FERC begins assessing annual charges on private licensees and exemptees with projects greater than 1.5 MW on the date construction commences. The FPA requires a licensee to commence construction within two years of the effective date of the license, but also authorizes FERC to grant a single two-year extension of that deadline. In its

May 14 notice, FERC proposes to commence the assessment of annual charges on private licensees and exemptees two years from the effective date of the FERC order licensing or amending the project, regardless of whether construction has commenced on that date and whether the licensee or exemptee has received an extension of time to commence construction. FERC's rationale for the change is "administrative efficiency"; if the date annual charges begin is automatic, FERC will not have to contact the licensee or exemptee to determine the actual date that construction commences. FERC's proposal will not change the regulations for state or municipal entities, which are not assessed annual charges until the project begins operating.

FERC's proposal would affect non-municipal developers and licensees adding new capacity by assessing annual charges earlier than under current regulations. Comments on FERC's proposal are due by July 21, 2015.

DOE Issues 2014 Hydropower Market Report

On April 28, 2015, the Department of Energy's (DOE) Wind and Water Power Technologies Office released its [2014 Hydropower Market Report](#) providing information on hydropower industry trends in the United States. The report describes the nation's existing hydropower fleet, examines trends in development, evaluates performance metrics, identifies supply chain trends, and analyzes policy and market drivers, highlighting hydropower's major contribution to the U.S. power system. The report is part of DOE's [Hydropower Vision](#) initiative, unveiled at the 2014 National Hydropower Association annual conference, to develop a long-term strategy for hydropower growth in the United States.

Services Issue Proposed Rule Requiring State Coordination on ESA Petitions

On May 21, 2015, the U.S. Fish and Wildlife Service and National Marine Fisheries Service (Services) issued proposed [revisions](#) to the Endangered Species Act regulations for petitions to list species or designate critical habitat. In general, the proposed rule would significantly revise and expand the scope of information that must be provided to the Services for a petition to be accepted for review and to support a subsequent finding that the petitioned action may be warranted. Specifically, the proposed rules would limit petitions to only address one species at a time, and require petitioners to gather all relevant, reasonably available information about the species and include that information with the petition. In addition, the proposed rules would require petitioners to provide the appropriate state agency in states where the species occurs an opportunity to comment on a draft petition in advance of filing the petition with the Services. All data or comments provided by the state must be included with the petition when submitted to the Services.

These proposed revisions are intended to improve the content and specificity of petitions and enhance the efficiency and effectiveness of the petition process. By limiting petitions to one species, requiring coordination with the States, and imposing heightened information requirements, petitioners will have a greater burden to document and provide the scientific basis for a petitioned action. Comments on the proposed rule are due by July 20, 2015.

Legislation Introduced to Extend Authorization for Hydropower Incentive Payments

On May 11, 2015, Sen. Corey Gardner (R-CO) introduced S.1270, the Reliable Investment in Vital Energy Reauthorization Act. The bill would amend EPAct 2005 to authorize continued appropriation of funds for the purpose of providing hydroelectric production and efficiency improvement incentives. Specifically, the bill would amend Section 242(g) of EPAct 2005 to authorize annual appropriation of \$10 million to the Secretary of the Treasury to provide incentive payments to the owners or authorized operators of qualified hydroelectric facilities for electricity generated and sold from such facilities for each of the fiscal years (FY) 2016 to 2025. To qualify, the facility must be a new turbine or other generating device added to a dam or conduit that existed as of August 8, 2005 and not involve any construction or enlargement of an impoundment or diversion structure. The bill would also amend Section 243(c) to authorize a \$10 million annual appropriation from FY 2016 to 2025 for one-time

incentive payments to the owner or operator of a hydroelectric facility at an existing dam to make capital improvements directly related to efficiency improvements of at least three percent, if the payment does not exceed 10 percent of the cost of the capital improvement and does not exceed \$750,000.

In order for the incentive payments to apply, Congress will need to separately appropriate funds for each fiscal year. Although authorization to appropriate funds for this purpose has existed since 2005, Congress first appropriated funds (\$3.6 million), and only for the Section 242 production incentives, in the FY 2014 appropriation.

Commissioner Moeller to Leave FERC

On May 13, 2015, FERC Commissioner Philip Moeller announced that he will not seek a third term when his current term expires on June 30, 2015. Moeller, a Republican, was originally appointed by President Bush and joined FERC as a commissioner in July 2006. Re-appointed by President Obama, Commissioner Moeller is the longest-serving, current FERC commissioner. A native of Spokane, Washington, Commissioner Moeller is widely recognized as the FERC commissioner with the greatest expertise in hydropower. Although he has not announced when exactly he will step down, he could stay at FERC until Congress adjourns at the end of the year, if a replacement is not seated by then.

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