



*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.*

#### **Upcoming Speaking Engagements**

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

#### **Recent Hydro Publications**

- [Mike Swiger](#) and [John Clements](#), *Preparing for the Future: An Indepth Look at the Issues Facing US Hydroelectric Licensing*, International Water Power & Dam Construction Magazine (June 2015). To access the article, click [here](#).

# *Hydro Newsletter*

## **VOLUME 2, ISSUE 7: JULY 2015**

To receive the Hydro Newsletter on a regular basis, follow this link:

<http://www.vnf.com/KnowledgeCenter.aspx?SignUp=True>

- *State ALJ Directs Agency to Issue Outstanding 401 Certification in 30 Days*
- *Hydro Industry Files Comments on Revised Interim Final Rules for Trial-Type Hearings*
- *FERC Issues Update on Implementation of the Hydropower Regulatory Efficiency Act of 2013*
- *FERC Affirms Denial of Request for Extension of Successive Preliminary Permit*
- *FERC Grants Rehearing in Small Conduit Categorical Exemption Case*

### **State ALJ Directs Agency to Issue Outstanding 401 Certification in 30 Days**

On May 29, 2015, a North Carolina Administrative Law Judge (ALJ) [ruled](#) that the state water quality agency improperly denied a Clean Water Act (CWA) Section 401 certification for the Yadkin Project, and directed the agency to issue a certification within 30 days. The licensee of the Yadkin Project in North Carolina has been attempting to obtain a 401 certification from the state since 2007. The state has twice issued and then revoked 401 certifications for the Project. In 2012, the state denied the applicant's third attempt to obtain a certification based on litigation filed by the state's Department of Administration in which the state alleged that the state, not the licensee, owns the river bed underlying the four dams comprising the Project. The applicant appealed the denial in state court.

The ALJ found that the state denied the application based on a property ownership dispute, rather than issuing a ruling on the merits of the application. She further concluded that the state based its decision on an improper factor beyond the scope of its authority under Section 401 of the CWA, and that the ownership of the river bed is irrelevant to issuance of the 401 certification. The ALJ explained that the delays in issuance of a 401 certification prevent the licensee from implementing its proposed water quality enhancements that would be incorporated into a new Federal Energy Regulatory Commission (FERC) license, a result contrary to the purposes and intent of the CWA. The ALJ directed the state to review the 401 application and issue a decision within 30 days.

### **Hydro Industry Files Comments on Revised Interim Final Rules for Trial-Type Hearings**

On June 1, 2015, the National Hydropower Association, American Public Power Association, Edison Electric Institute, and the Public Utility District No. 1 of Snohomish County, Washington (Industry Commenters) filed comments on the [revised interim final rules](#) for expedited trial-type hearings and submission of alternative conditions under the Energy Policy Act of 2005. The trial-type hearings are conducted to resolve disputed issues of material fact with respect to mandatory conditions and prescriptions submitted by federal resource agencies for inclusion in a FERC hydropower license. Industry Commenters commended the Departments for certain changes to the interim rules, which were initially promulgated in 2005, but recommended the Departments further revise the rules.

For example, Industry Commenters recommended revisions to the rules to require a Secretary, when adopting a mandatory condition or prescription, to give equal consideration to energy supply,

distribution, cost, and use, flood control, navigation, water supply, and air quality. The revised interim final rules currently only require equal consideration when a proposed alternative condition has been presented. Industry Commenters also disagreed with the Departments' decision to assign the burden of proof in a trial-type hearing to the party requesting a hearing, rather than to the Department as proponent of its mandatory condition or prescription. Industry Commenters also advocated for an opportunity for trial-type hearing when a Department imposes new conditions as modified final conditions, rather than at the preliminary stage. Under the current rules, Industry Commenters argued that Departments may avoid a trial-type hearing by postponing issuance of controversial conditions until release of modified conditions.

The revised interim final rules took effect on April 30, 2015. However the Departments indicated that they will consider promulgation of further revised final rules based on the comments they receive.

### **FERC Issues Update on Implementation of the Hydropower Regulatory Efficiency Act of 2013**

On June 18, 2015, FERC issued an [update](#) on implementation of the Hydropower Regulatory Efficiency Act of 2013 (HREA). Among other things, the HREA: (1) categorically exempted from the Federal Power Act's (FPA) licensing and exemption requirements conduit facilities that are not larger than 5 MW and meet other qualifying criteria; (2) amended the Public Utility Regulatory Policies Act of 1978 to increase the size of small hydroelectric power projects eligible for exemption from 5 MW to 10 MW; (3) authorized FERC to extend the terms of preliminary permits for up to two years; and (4) directed FERC to investigate the feasibility of a two-year licensing process for hydroelectric development at non-powered dams and for closed loop pumped storage projects.

FERC reports that since the HREA was enacted, it has received notices of intent to construct 58 conduit facilities qualifying for the categorical exemption from the FPA and has qualified 48 facilities, rejected 8 facilities because they did not meet the statutory criteria, and is reviewing the remaining notices. FERC also reports that it has received only one application for a small hydropower exemption under 10 MW but larger than 5 MW. FERC has granted 15 permit extension applications and denied 14 based on a finding of lack of diligence regarding development of a license application.

To implement the two-year licensing process investigation, FERC developed a two-year process and criteria for development of a pilot project after conducting a workshop and establishing a window for filing requests to test the process that closed in May 2014. Two pilot projects were proposed: a pumped storage project and a conventional project at a U.S. Army Corps of Engineers dam. The pumped storage proposal (Project No. 13482) was rejected because it did not meet FERC's criteria. In 2014, FERC approved the proposed two-year process plan and schedule for the Kentucky River Lock & Dam Project No. 14276 with a proposed application date of May 5, 2015. The application was timely filed and is currently under review for completeness by FERC staff.

FERC also noted that pursuant to the HREA, it will hold a final workshop to solicit comments on the effectiveness of the pilot project no later than February 5, 2017, and submit a report to Congress no later than April 6, 2017.

### **FERC Affirms Denial of Request for Extension of Successive Preliminary Permit**

In an order issued on June 18, 2015, FERC [denied](#) a request for rehearing of a staff order denying a request for a ten month extension of a second preliminary permit for the proposed Grant Lake Project No. 13212 in Alaska. During the term of the initial permit, the permittee filed a Notice of Intent, Pre-Application Document, and request to use the Traditional Licensing Process. During the second permit term, the permittee finalized its study plans, secured study permits, conducted numerous studies, and issued study reports, but did not complete a draft or final license application. FERC staff denied the permittee's request for a ten month extension, holding that it had not satisfied the standards of

extraordinary circumstances or a showing that factors beyond its control prevented it from filing a license application.

On rehearing, the full Commission affirmed application of the extraordinary circumstances standard to requests to extend a successive permit. It also held that the permittee had not supported its assertion that Alaska's harsh winter conditions and limited study seasons prevented it from timely completing development of an application. Moreover, FERC held, even if the permittee had been able to document such circumstances, they do not rise to the level of extraordinary circumstances. Rather, FERC stated, applicants for permits for projects in remote areas with lengthy, harsh winters should prepare themselves for such challenges in order to timely develop their applications.

### **FERC Grants Rehearing in Small Conduit Categorical Exemption Case**

In an order issued on June 18, 2015, FERC [granted](#) a request for rehearing of a staff order which determined that a facility does not meet the requirements of FPA Section 30(a) for a categorical exemption of a small conduit facility from the licensing and exemption requirements of the FPA.

The HREA categorically exempts from the FPA's licensing and exemption requirements new small facilities located on non-federal conduits that are not larger than 5 MW. Soldier Canyon Filter Plant filed a Notice of Intent for a proposed 100 kW facility that would be located on a municipal water supply conduit downstream from a dam. FERC staff rejected the notice on the basis that the facility would rely entirely on the hydroelectric potential created by the dam rather than the conduit.

On rehearing, Soldier Canyon argued that although Section 30 requires exclusion of dams from qualifying facilities, it does not require exclusion of facilities that use hydroelectric potential created in part by a dam, as long as the conduit is non-federal, and to do otherwise would restrict the categorical exemption to a very small class of facilities, contrary to Congress' intent. FERC reviewed the statute, its rulemaking implementing Section 30 as originally enacted and precedential orders, and concluded that Soldier Canyon was correct.

***[John Clements](#) and [Sharon White](#) contributed to this issue.***

John Clements	202.298.1933	<a href="mailto:jhc@vnf.com">jhc@vnf.com</a>
Tyson Kade	202.298.1948	<a href="mailto:tck@vnf.com">tck@vnf.com</a>
Matt Love	206.829.1809	<a href="mailto:mal@vnf.com">mal@vnf.com</a>
Brian McManus	202.298.3720	<a href="mailto:bzm@vnf.com">bzm@vnf.com</a>
Michael Pincus	202.298.1833	<a href="mailto:mrp@vnf.com">mrp@vnf.com</a>
Chuck Sensiba	202.298.1801	<a href="mailto:crs@vnf.com">crs@vnf.com</a>
Mike Swiger	202.298.1891	<a href="mailto:mas@vnf.com">mas@vnf.com</a>
Sharon White	202.298.1871	<a href="mailto:slw@vnf.com">slw@vnf.com</a>
Julia Wood	202.298.1938	<a href="mailto:jsw@vnf.com">jsw@vnf.com</a>