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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 3, ISSUE 3: MARCH 2016

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### Legislative Update

During the first week of February, the U.S. Senate continued floor debate on S. 2012, the Energy Policy Modernization Act of 2015, the bipartisan energy bill reported out of the Senate Energy and Natural Resources Committee on July 30, 2015. As described in the [August 2015 Hydro Newsletter](#), the bill as reported out of committee still retains a number of hydro provisions. These include: (1) designating the Federal Energy Regulatory Commission (FERC) as lead agency for coordinating federal authorizations from all agencies needed to develop a hydroelectric project; (2) authorizing FERC to refer agency disputes to the Council on Environmental Quality; (3) requiring resource agencies to give equal consideration to developmental and non-developmental values when imposing mandatory conditions or prescriptions; (4) expanding the definition of renewable energy for federal programs to include all forms of hydropower; (5) extending the term of preliminary permits from three to four years and authorizing FERC to extend the initial permit term for an additional four years; (6) extending the start of construction date for new projects for up to eight additional years beyond the time set in the license; and (7) extending the eligibility window for the hydropower production incentives under the Energy Policy Act of 2005 to projects that add a turbine or other generating device between 2016 and 2025.

Floor debate on S. 2012 stalled early in February when the Senate was unable to agree on provisions to address the Flint, Michigan water crisis. As of March 1, Senate leadership has circulated a hotline request that would entail 30 amendments to the energy bill that would be adopted by voice vote, with another 8 amendments to be called up and voted upon with a 60-affirmative vote threshold needed for adoption. However, several holds remain on the energy bill as Senators continue to work through these amendments and finalize a resolution on the Flint water crisis.

### Upcoming Speaking Engagements

- [Julia Wood](#), "Relicensings Upcoming in the Southwest and Nationally," 2016 National Hydropower Association Southwest Regional Meeting, Denver, CO, March 30, 2016.
- [Chuck Sensiba](#), "NHA Legislative Update and Outlook," 2016 National Hydropower Association Annual Conference, Washington, DC, April 25, 2016.
- [Mike Swiger](#), "Hot Topics in the Southeast," 2016 National Hydropower Association Southeast Regional Meeting, Knoxville, TN, May 12, 2016.
- [John Clements](#), License Compliance Workshop, Midwest Hydro Users Group Spring Meeting, Wausau, WI, May 18, 2016.
- [Chuck Sensiba](#), "Return of the Basin Planning Concept: Issues and Perspectives." HydroVision International, Minneapolis, MN, July 26-29, 2016.
- [John Clements](#), "Jurisdiction Changes – Who's Responsible for What in the U.S.?" HydroVision International, Minneapolis, MN, July 26-29, 2016.

## U.S. Supreme Court Grants Stay of Clean Power Plan

In October 2015, the Environmental Protection Agency (EPA) issued its final "Clean Power Plan" (CPP), a rule designed to curb greenhouse gas emissions. As reported in the [November 2015 Hydro Newsletter](#), the CPP requires each state to submit a compliance plan by September 6, 2016. However, a two-year extension is available if a state submits an initial plan with a request for an extension. The plan must provide for the state to reach its emissions reduction target by 2022. The controversial rule is the subject of intense opposition by several states and other parties.

On February 8, 2016, the United States Supreme Court voted 5-4 to grant a request from more than two dozen states, plus utilities and coal companies, for a stay of the CPP. The stay order was unusual because challenges to the CPP are currently pending in the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit), which denied a similar stay request in January. The D.C. Circuit is scheduled to hear oral arguments on the CPP in June, and a decision in the fall is likely. However, under the terms of the Supreme Court's order the stay will not lift even if the D.C. Circuit upholds the CPP. Rather, it will remain in place until the Supreme Court decides whether to grant certiorari and, if it does, the Court will most likely extend the stay until it ultimately makes its own ruling.

## NHA Files Comments on Proposed EPA Rule

Simultaneously with its final rule adopting the CPP, EPA published a proposed rule outlining a federal plan that will apply to power plants in states that do not submit an approvable state plan, a set of model emission trading rules, and a Clean Energy Incentive Program (CEIP) to incentivize new wind and solar projects that begin generating during 2020 or 2021. As discussed in the [November 2015 Hydro Newsletter](#), the CEIP does not include hydropower. EPA requested comments on the proposed federal plan, model trading rules, and CEIP program. On January 21, 2016, the National Hydropower Association (NHA) filed [comments](#). NHA noted certain changes in the final CPP rule that recognize hydropower's value in meeting the goals of the CPP, but also commented that the compliance options in the final rule should, but do not, include energy from pumped storage projects and that hydropower should be included in the CEIP.

## FERC Issues Order Concluding Municipal Preference Dispute

As reported previously in the [December 2015 Hydro Newsletter](#), in December 2015 the D.C. Circuit rejected FERC's holding that Federal Power Act (FPA) section 7(a) limits the municipal preference in original licensing for hydroelectric projects to municipalities located "in the vicinity" of the project site. The court held that section 7(a) unambiguously requires FERC to give preference to states and municipalities over non-municipalities, as long as their applications are equally well adapted to development of the region's water resources in the public interest.

In remanding the matter to FERC, the Court suggested that if FERC is concerned that granting the license or permit to a distant municipality would have undesirable consequences, it may address that through the "equally well adapted" provision of section 7(a). On February 18, 2016, FERC issued its order on remand. Consistent with the finding in FERC's initial order that neither the municipal applicant nor the non-municipal applicant claimed that its plan of development was better adapted, the order on remand issued the preliminary permit to the municipal applicant and denied the preliminary permit application filed by the non-municipality. Interestingly, however, the remand order makes no reference to the "best adapted" requirement or the application of municipal preference in the case.

## USFWS and NMFS Revise ESA Process for Designating Critical Habitat and Redefine Adverse Modification

On February 11, 2016, the U.S. Fish and Wildlife Service (USFWS) and the National Marine Fisheries Service (NMFS) (together, the Services) published final regulations and policies that significantly revise the framework for the designation and protection of critical habitat under the Endangered Species Act (ESA). These changes consist of: (1) a final rule modifying the procedures for the designation of critical habitat; (2) a related final policy on the exclusion of lands or waters from a critical habitat designation

pursuant to ESA section 4(b)(2); and (3) a final rule revising the definition of “destruction or adverse modification” of critical habitat as used in consultations on federal agency actions under ESA Section 7.

Through these measures, the Services have fundamentally altered the criteria for the designation and exclusion of areas as critical habitat. Notably, the Services have increased their discretion to designate occupied and unoccupied areas. For example, an occupied area can be designated as critical habitat if it has the potential to support physical or biological features (such as dynamic or ephemeral habitat conditions) which are essential to the conservation of the species, rather than requiring the actual presence of such features at the time of designation. Further, the Services removed the existing regulatory provision that disfavored the designation of unoccupied areas. The likely result will be designations of critical habitat that are broader in scope, including the more frequent designation of unoccupied areas to address anticipated effects of climate change and other factors.

In addition, the Services’ revised definition of “adverse modification” focuses on protecting the use of critical habitat for the conservation of a species, and includes alterations of habitat that preclude or significantly delay the development of physical or biological features supporting the species’ needs. As applied through the ESA consultation process, these revisions could result in the imposition of increased mitigation requirements and additional project modifications.

For a more detailed summary of these rules and policy, please see Van Ness Feldman’s Alert, available [here](#).

### **FERC Issues Energy Infrastructure Update**

On February 2, 2016, FERC’s Office of Energy Projects released its 2015 year-end [Energy Infrastructure Update](#) (Update). The Update provides a statistical look at FERC’s activities in 2015 with respect to licensing new hydropower projects, approving capacity additions at existing projects, and authorizing small hydropower exemptions or conduit exemptions. In 2015, FERC issued original licenses for 15 conventional hydropower projects with a total capacity of approximately 70.5 megawatts (MW), and one previously approved 21 MW project was placed in service during the year. Comparatively, in 2014, FERC issued 16 original licenses with a combined capacity of 1,887 MW, while three previously approved projects with a total capacity of approximately 12 MW were placed into service.

Additionally, in 2015 FERC received six applications for original licenses for projects totaling 1,043.6 MW (three conventional and three pumped storage), one exemption application, and one application for a capacity amendment. By comparison, in 2014 FERC received 14 applications for original licenses (210 MW) and four exemption applications.

### **FERC Issues Updated Fee Schedule for Hydropower Use of Government Lands**

On February 18, 2016, FERC issued its [annual update](#) to the fee schedule in its regulations governing per-acre fees for the use of government lands by hydropower licensees.

Section 10(e)(1) of the FPA requires FERC to establish “reasonable” annual charges for hydropower licensees’ use and occupancy of federal lands. In January 2013, FERC revised the way it calculates annual charges for hydropower licensees’ use of federal lands. FERC’s methodology is based on the per-acre average agricultural land values found in the National Agricultural Statistics Service’s (NASS) Census of Agriculture. FERC updates its per-acre fee schedule by state and county annually based on an annual inflationary index, and completes a more comprehensive update with the publication of the NASS Census every five years. FERC’s February 18 notice updates the fee schedule based on the recent publication of the 2012 NASS Census. As a result, federal lands fees have significantly increased since last year in a number of states and counties, and particularly for hydropower projects located in some areas of Alaska.

## U.S. Court of Appeals Retains Jurisdiction over Waters of the U.S. Rulemaking Appeals

On February 22, 2016, the U.S. Court of Appeals for the Sixth Circuit (Sixth Circuit) [announced](#) that it will retain jurisdiction over challenges to a final rule clarifying the definition of waters of the United States under the Clean Water Act issued by the EPA and U.S. Army Corps of Engineers (Corps). The [controversial](#) rule expands federal control over several types of water bodies, and requires federal permits for dredging, filling, or discharging pollution to those water bodies.

Over 20 challenges to the rule have been filed in U.S. district courts and courts of appeal by states, environmental groups, and industry groups. The Sixth Circuit decision will allow EPA and the Corps to defend the controversial rule in a single U.S. court of appeals instead of in multiple federal district courts, which many of the challengers would prefer. Separately, the U.S. Court of Appeals for the Eleventh Circuit is hearing a challenge by Florida and 10 other states to a district court ruling that a U.S. court of appeals is the proper venue for their challenge to the rule.

In August 2015, a federal judge in North Dakota granted a [preliminary injunction](#) to block implementation of the final rule at the request of North Dakota and 12 other states in the western and central regions of the country. On October 9, 2015, the Sixth Circuit [stayed](#) the rule in a consolidated challenge by 18 states.

## DOE Issues Hydro Funding Opportunities

On February 24, 2016, DOE's Office of Energy Efficiency and Renewable Energy (EERE) issued a Notice of Intent to issue a funding opportunity announcement (FOA) called "[Marine and Hydrokinetic Energy Conversion and Environmental Monitoring Technology Advancement](#)." The FOA will solicit applications for projects involving the marine and hydrokinetic (MHK) industry. The two topic areas for this FOA are:

- Topic Area 1: projects that integrate advanced MHK components into system designs that will ultimately be tested in open water; and
- Topic Area 2: projects that "support the innovation, testing and validation of instrumentation for monitoring potential environmental impacts of MHK devices." Specifically, there are four areas of preferred focus: acoustic outputs of MHK devices; electromagnetic fields created by MHK equipment; marine animal interaction with MHK devices; and supporting integrated systems of multiple sensors to measure a single or multiple environmental concerns.

EERE anticipates that up to three awards will be issued on Topic Area 1 (\$5.35 million each) and up to seven awards will be issued for Topic Area 2 (ranging from \$750,000 to \$1.1 million depending on focus area). The FOA is likely to be issued on March 1, 2016.

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