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Hydro Newsletter

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President Appoints Commissioner Cheryl LaFleur as Acting FERC Chairman; Former Chairman Norman Bay Resigns; Limitations on FERC's Ability to Act Without a Quorum

On January 25, 2017, President Trump [appointed](#) Commissioner Cheryl LaFleur as Acting Chairman of the Federal Energy Regulatory Commission (FERC or Commission), replacing former Chairman Norman Bay. Acting Chairman LaFleur, a former utility executive, has been a member of the Commission since 2010. She previously served as Acting Chairman from November 2013 to July 2014 and as Chairman from July 2014 until April 2015, when she was succeeded by Norman Bay.

On January 26, 2017, Chairman Bay submitted to President Trump his [resignation](#) from the Commission, effective February 3, 2017. Bay had served as Chairman from April 2015, and previously headed FERC's Office of Enforcement. As Chairman, Bay placed a heavy emphasis on enforcement of FERC's rules against market manipulation.

Commissioner Bay's resignation leaves FERC with only two Commissioners, Acting Chairman LaFleur and Commissioner Colette Honorable, on a commission which may have as many as five members. FERC will therefore lack a quorum until at least one more Commission member is nominated by President Trump and confirmed by the U.S. Senate. Until then, the Commission will be unable to take actions that require a majority vote of the Commissioners.

After several Commissioners announced their intention to resign in 1993, FERC anticipated a possible lack of quorum, at which time it issued an order to the FERC Secretary and the directors of the gas pipeline and electric regulation programs to take certain additional actions under delegated authority. In

a January 30, 2017 interview, Acting Chairman LaFleur confirmed that existing delegations—including licensed hydropower project inspections—will remain in place during any period with no quorum, and explained other actions FERC will continue to take to ensure maximum continuity of its regulatory processes. Acting Chairman LaFleur also has indicated that FERC does not believe it is subject to the regulatory freeze on new regulations imposed by a memorandum from White House Chief of Staff Reince Priebus on January 20, 2017, but will need to have a quorum restored before it can issue regulations.

Second Circuit Reinstates EPA’s Water Transfers Rule

On January 8, 2017, in *Catskill Mountains Chapter of Trout Unlimited, Inc. v. EPA*, the U.S. Court of Appeals for the Second Circuit [reinstated](#) the Environmental Protection Agency’s (EPA) Water Transfers Rule. The rule, adopted in 2008, codifies EPA’s longstanding policy that water transfers between navigable waters that do not subject the water to an intervening industrial, municipal, or commercial use do not constitute an “addition of pollutants” to navigable waters and are not subject to National Pollutant Discharge Elimination System (NPDES) permits under section 402 of the Clean Water Act (CWA). The Second Circuit reversed a U.S. District Court for the Southern District of New York decision which vacated the rule on the basis that it was an unreasonable interpretation of the CWA. The Second Circuit held that although the statute is ambiguous, EPA’s justification for the rule was reasonable and therefore entitled to deference.

The district court’s decision raised concerns for the hydropower industry because reversal of the rule could have ultimately subjected certain dams involving transfers of water between water bodies to NPDES permitting. The Second Circuit’s decision has removed that uncertainty. The Second Circuit’s opinion also expressly preserved longstanding precedent that hydropower dams are generally not subject to NPDES permits, holding that these cases “have no bearing on the outcome of this appeal.”

Van Ness Feldman authored an amicus brief for the hydroelectric industry urging the result reached by the Second Circuit. For more information, see our [alert](#).

FERC to Hold Workshop on Two-Year Pilot Licensing Process

FERC will convene a workshop on the effectiveness of the two-year pilot licensing process on March 30, 2017 from noon to 5 pm at FERC headquarters in Washington, DC. The workshop will be [webcast](#) and open to the public. Participants may register to attend the conference at FERC’s [website](#). FERC will be accepting written comments until April 14, 2017. An agenda for the workshop is [available](#).

As previously [reported](#), the Hydropower Regulatory Efficiency Act of 2013 directed FERC to investigate the feasibility of a two-year licensing process for hydropower development at non-powered dams and closed loop pumped storage projects, to develop criteria for identifying projects that may be appropriate for a two-year process, and to identify pilot projects and implement a two-year licensing process. On January 6, 2014, the Commission solicited proposals from potential applicants to test such a licensing process, and defined the minimum criteria for projects that may be appropriate for licensing within a two-year process. On May 5, 2016, FERC [issued](#) the one and only license under the two-year pilot licensing process for the Kentucky River Lock & Dam No. 11 Hydroelectric Project No. 14276.

President Trump Issues Executive Order for Expedited Environmental Review of High Priority Infrastructure Projects

On January 24, 2017, President Trump issued an [Executive Order](#) stating that it is the policy of the executive branch to streamline and expedite federal environmental reviews and approvals for all infrastructure projects, particularly those identified as a high priority project for the Nation. The Executive Order includes a non-exclusive list of examples of high priority projects, such as new and upgraded electric grid, transportation, and pipeline projects. Designation as a high priority project may be requested by a Governor, the head of any federal executive department or agency, or, on his own initiative, the Chairman of the White House Council on Environmental Quality (CEQ). The Chairman of CEQ is required to make a determination within 30 days of a request. Once a project is designated as

high priority, the Chairman of CEQ is to coordinate with the head of the relevant executive branch agency to establish procedures and deadlines for environmental reviews and approval. Agencies are directed to give "highest priority" to meeting the deadlines. If the deadlines are not met, the agency head must provide the Chairman of CEQ with a written explanation for the delays and identify "concrete actions" taken by the agency to complete the review and approval process as quickly as possible.

The Executive Order applies on its face to executive branch agencies, such as the Corps. It is unclear whether FERC, which is an independent federal agency, will adopt expedited licensing procedures consistent with the Executive Order for any proposed hydroelectric project which also requires executive branch agency permitting, such as Corps permits under the CWA and/or permits to occupy federal lands or transmission lines or other project facilities, and which is designated as high priority. It is also unclear how the new Executive Order will be implemented in conjunction with the 2015 Fixing America's Surface Transportation Act, which established a Federal Permitting Improvement Steering Council (Council) to develop performance standards for federal permitting of new infrastructure projects costing \$200 million or more, and to establish deadlines and track, coordinate, and streamline permitting of covered projects. The Council has issued implementation [guidance](#) and established a [Permitting Dashboard](#) for covered projects.

President Trump Issues Executive Order for Regulatory Reform

On January 30, 2017, President Trump issued an [Executive Order](#) requiring departments and agencies to minimize costs imposed on private parties for compliance with federal regulations. Central to this effort is the adoption of a "2 for 1" rule requiring identification of two existing rules to be revoked for each new regulation proposed or issued, as well as establishment of agency-specific "incremental cost allowances" that are aimed at limiting the potential new costs that an agency can impose upon the private sector through issuing regulations. The Executive Order is generally addressed to federal "executive departments and agencies" without defining those terms. President Trump's comments at the signing ceremony suggest that the Executive Order does not apply to independent agencies (such as FERC). Even if there is no explicit compliance obligation, however, an independent agency can comply voluntarily with the order. For more information on the executive order, see our [alert](#).

FERC Issues Policy Statement on Electric Storage Resources

On January 19, 2017, FERC issued a [policy statement](#) on the ability of electric storage resources (ESR) operating in the dispatch area of an Regional Transmission Organization/Integrated System Operator (RTO/ISO) to receive cost-based rate recovery for certain services while concurrently receiving market-based revenues for providing separate market-based services.

As previously [reported](#), in November 2016 FERC held a technical conference regarding the use in organized wholesale electric markets of ESRs, including hydropower pumped storage, as transmission assets compensated through: (1) transmission rates; (2) grid support services compensated in other ways; and (3) for multiple services. FERC also invited post-technical conference comments.

In the policy statement, FERC states that ESRs are technically capable of simultaneously providing a variety of services to multiple entities and that the key question is not whether to allow multiple use applications but how to allow and enable such applications. The policy statement addresses three issues.

First, to avoid double recovery of costs, FERC identifies crediting of market-based revenues to the provider's cost-based rates and market-revenue offsets to the service provider's cost-based revenue requirement as methods that could obviate the concern.

Second, FERC dismisses concerns about the potential for ESR operators concurrently receiving cost- and market-based revenues to cause adverse impacts on competition in RTO/ISO markets and suppression of market prices to sub-competitive levels, citing its ability to require crediting or other rate conditions to prevent subsidization of shareholders by captive customers.

Third, FERC states that market-based services should be under the control of the ESR operator rather than the RTO/ISO in order to ensure RTO/ISO independence. FERC also notes that coordination between the RTO/ISO and the ESR operator is necessary when cost- and market-based services are provided, but states that where the day and time ESR services are needed to provide cost-based services are sufficiently predictable the ESR operator should be permitted at other times to provide other market-based services. FERC states that if the necessary predictability does not exist, then the ESR operator may be able to offer only cost-based rate service.

Now Acting Chairman LaFleur dissented from the policy statement, urging a more cautious approach to potential impacts of multiple revenue streams on pricing and competition, and arguing that the Commission should not have separated this policy statement from its pending [notice of proposed rulemaking](#) on storage participation.

Supreme Court Agrees to resolve Jurisdiction Issue for Challenges to Waters of the U.S. Rule

On January 13, 2017, the U.S. Supreme Court agreed to resolve conflicts over which federal court should hear challenges to the EPA's and U.S. Army Corps of Engineers' (Corps) contentious 2015 Waters of the United States rule. 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.

In August 2015, a federal district court 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. In October 2015, the U.S. Court of Appeals for the Sixth Circuit stayed the rule in a consolidated challenge by 18 states. In February 2016, a divided Sixth Circuit announced that it would retain jurisdiction over challenges to the final rule, rejecting claims that the challenges should be heard in federal district courts. That ruling conflicted with rulings by other federal courts, including the U.S. Court of Appeals for the Eleventh Circuit and the North Dakota district court which enjoined the rule in August 2015. Opponents of the rule petitioned the Supreme Court to overturn the Sixth Circuit decision.

The Supreme Court's agreement to resolve the matter will allow the Trump Administration and congressional opponents of the rule time to consider their options with regard to the rule, which may include rescinding the rule, action by Congress to vacate the rule, or other actions.

FERC Adjusts Civil Penalty Amounts

On January 9, 2017, FERC issued a [final rule](#) to amend its regulations governing the maximum civil monetary penalties for violations of statutes, rules, and orders within its jurisdiction. The rule adjusts the amounts pursuant to the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015.

Section 31(c) of the FPA and FERC's implementing regulations authorize FERC to assess civil penalties for violations by permittees, exemptees, and licensees of any: (1) rule or regulation of Part I of the FPA; (2) term or condition of a permit, exemption, or license; (3) section 31(a) compliance order; or (4) requirement of Part I of the FPA. In June 2016, FERC issued an [interim final rule](#) which raised the maximum penalty under section 31(c) of the FPA from \$11,000 per violation, per day to \$21,563 per violation, per day. The January 9 final rule affirms that action.

Section 315(a) of the FPA authorizes FERC to impose forfeiture on any licensee for, among other things, willful failure to comply with any FERC order, failure to file any report required by Part III of the FPA, or failure to comply with any rule or regulation issued thereunder. The interim final rule raised the maximum penalty under section 315(a) from \$1,100 per violation to \$2,750 per violation. The final rule also affirms that action.

The final rule became effective on January 24, 2017.

Army Corps of Engineers Releases 2017 Nationwide Permits

On January 6, 2017, the Corps issued its 2017 [Nationwide Permits](#) (NWP) for work in streams and wetlands under section 404 of the CWA and section 10 of the Rivers and Harbors Act of 1899 (RHA). The 2017 NWP are effective March 19, 2017 for a period of five years, replacing the 2012 NWP that expire on March 18, 2017. NWP are a type of general permit issued by the Corps intended to reduce delay and paperwork for certain activities in jurisdictional waters and wetlands with minimal adverse environmental impacts.

The Corps reissued all 52 existing NWP, many with significant clarifications and changes. Changes most likely to be of potential interest to hydroelectric project license applicants or licensees are:

NWP 3 (Maintenance) – clarifications regarding removal of structures, fills, and accumulated sediments and debris.

NWP 33 (Temporary Construction, Access, and Dewatering) – clarification that pre-construction notices (PCNs) to the Corps are required only for activities in waters that are “navigable” under CWA section 10.

NWP 52 (Water-Based Renewable Energy Generation Pilot Projects) – expanded to include, among other things, wave energy projects, and clarified to state that hydrokinetic renewable energy generation projects authorized by FERC under the FPA do not require separate authorization under section 10 of the RHA.

NWP 53 (Removal of Low-Head Dams) – this new NWP authorizes removal of a dam that passes flows over all, or nearly all, of the width of the dam crest on a continual and uncontrolled basis where the dam provides little storage and does not have a separate spillway or spillway gates. In general, compensatory mitigation is not required for activities authorized by this NWP.

The Corps also significantly revised various NWP General Conditions (GCs). Modified GC 17 (Tribal Rights) sets a standard of no more than “minimal adverse effects” on tribal treaty rights. Activities with greater than minimal effects need an Individual Permit. Also, the scope of GC 17 was extended beyond treaty rights to include broadly defined “protected tribal resources.” Regional conditions may also be added to PCNs for NWP with potential for more than minimal adverse effects on “tribal rights, protected tribal resources, or tribal lands.”

GC 18 (Endangered Species Act) requires a PCN for any activity that “might affect” listed species and designed critical habitat. The Corps added definitions for direct and indirect effects to ensure that such effects are considered when it determines whether an activity “may affect” a listed species or its habitat.

New GC 31 (Activities Affecting Structures or Works Built by the U.S.) requires any NWP activity that also requires a section 408 Permit to alter a federal facility to submit a PCN, which must be verified by the Corps.

Also, district engineers may issue Regional Conditions that prohibit or further condition the use of the 2017 NWP within that district. Under section 401 of the CWA, issuance of the 2017 NWP starts a 60-day period for states to condition or deny use of any of the 2017 NWP.

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

For more information

The professionals at Van Ness Feldman possess decades of experience covering every aspect of hydroelectric development, ranging from licensing, environmental permitting, regulatory compliance, litigation, transmission and rates, public policy, transactions and land use planning. If you would like additional information on the issues touched upon in this newsletter, please contact any member of the firm's [hydroelectric](#) practice.

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