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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.

Recent Publications

- [Sharon White](#) and [Chuck Sensiba](#), "Of Soup Ladles and Marbles: Federal Court Reinstates EPA's Water Transfers Rule," *The Water Report*, Issue #157 (March 15, 2017).

Hydro Newsletter

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Legislative Update

In mid-March, the House and Senate held hearings on the future of hydropower development. On March 14, 2017, the Senate Energy and Natural Resources Committee held a full committee [hearing](#) on "opportunities to improve American energy infrastructure." Among the witnesses who testified at the hearing were Stefan Bird, CEO of Pacific Power, Jeff Leahey of the National Hydropower Association, and Clay Koplín, CEO of Cordova Electric Cooperative, Inc. On March 15, 2017, the House Energy Subcommittee of the Energy and Commerce Committee held a [hearing](#) on "Modernizing Energy Infrastructure: Challenges and Opportunities to Expanding Hydropower Generation." Ramya Swaminathan, CEO of Rye Development, testified at the hearing. The Senate and House committees received testimony on the Federal Energy Regulatory Commission (FERC or Commission) licensing process, how to improve agency coordination, and how to promote new hydropower infrastructure.

In addition, on March 30, 2017, the Senate Energy and Natural Resources Committee approved by voice vote 10 hydropower bills. Most of the bills grant extensions to the statutory deadline to commence construction at new hydropower projects. However, one bill, S. 724, which has not yet been released but is described on the committee's website, proposes improvements to the preliminary permits program and would provide a longer period for commencement of construction of new projects.

President Trump Issues Executive Order Directing EPA to Begin Rollback of Clean Power Plan and Other Programs Addressing Climate Change

On Tuesday March 28, President Donald Trump signed an [Executive Order](#) that takes the first step in rolling back executive actions that had been undertaken by the Obama Administration to address climate change. Most prominently, the Executive Order directs the Environmental Protection Agency (EPA) immediately to review the Clean Power Plan, a regulation promulgated pursuant to section 111(d) of the Clean Air Act that is intended to limit greenhouse gas emissions from existing power plants. The Executive Order directs EPA, "as appropriate," to initiate a rulemaking to suspend, revise or rescind the rule and related actions. Following the issuance of the Executive Order, EPA Administrator Scott Pruitt

Upcoming Speaking Engagements

- [Julia Wood](#), "Re-thinking Mitigation: New Policies and New Questions," 2017 National Hydropower Association Annual Conference, Washington, DC, May 2, 2017.
- [Chuck Sensiba](#), "Legal Hot Topics," 2017 National Hydropower Association Annual Conference, Washington, DC, May 3, 2017.
- [Mike Swiger](#), "FERC Relicensing: What You Need to Know," Association of California Water Agencies 2017 Spring Conference, Monterey, CA, May 10, 2017.

signed a *Federal Register* notice announcing that EPA is reviewing and, "if appropriate, will initiate proceedings to suspend, revise or rescind the Clean Power Plan."

The Clean Power Plan is currently subject to challenge in the U.S. Court of Appeals for the D.C. Circuit and has been stayed by the Supreme Court. Pursuant to another directive in the Executive Order, the Department of Justice has filed a motion with the D.C. Circuit requesting that the court put its proceedings on hold pending further EPA action. This request, as well as any final rule rescinding or revising the Clean Power Plan rule, likely will be challenged by environmental groups, states, and businesses that have supported the Clean Power Plan.

The Executive Order also directs the Council on Environmental Quality (CEQ) to rescind its [final guidance](#) encouraging federal agencies to consider impacts from greenhouse gas emissions and climate change in environmental reviews pursuant to the National Environmental Policy Act. The final guidance, issued August 5, 2016, characterized climate change as a "fundamental environmental issue" and recommended that federal agencies consider the potential effects of a proposed action and related activities on climate change, using reasonably foreseeable, direct, and indirect greenhouse gas emissions as a "proxy" for assessing impacts. This guidance has been revoked without having to go through notice and comment or other administrative procedures. However, the Executive Order does not preclude federal agencies from continuing to consider the impacts of federal action on climate change in order to mitigate litigation risk when conducting environmental reviews.

For additional information on the Executive Order, please see our [March 30, 2017 alert](#).

FERC Holds Workshop on Two-Year Pilot Licensing Process

On March 30, 2017, FERC convened a workshop on the effectiveness of the two-year pilot licensing process as required by section 6 of the Hydropower Regulatory Efficiency Act of 2013 (HREA). The workshop, which was attended by both FERC Commissioners, consisted of two panels with participants including project developers, federal and state agency representatives, and the environmental community. The panelists discussed implementation of the two-year pilot process used for the only project that qualified for the program, FFP Project 92, LLC's Kentucky River Lock & Dam No. 11 Hydroelectric Project No. 14276, which received a license in May 2016. Panelists also discussed the practicality of implementing a two-year process on a programmatic scale, by responding to pre-published questions such as whether there are environmental, economic, regulatory, or legal factors that make a two-year licensing process impractical. FERC will be accepting written comments on the effectiveness of the two-year pilot process until April 14, 2017.

As previously [reported](#), the HREA 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. The HREA also required FERC to submit a report to the House Committee on Energy and Commerce and the Senate Committee on Energy and Natural Resources describing the outcome of the pilot program, public comments from the workshop, how FERC will adopt policies under existing law that result in a two-year process for appropriate projects, and how the Commission will issue new regulations to adopt a two-year process for such projects. FERC must submit its report and recommendations to Congress by May 29, 2017.

FERC Denies Request for Waiver of Fishway Prescription

By a letter dated February 24, 2017, FERC staff denied a request of the City of Columbia, South Carolina, licensee for the Columbia Canal Project (Project No. 1895), for waiver of the monitoring and reporting requirements associated with the operation of the fish passage facilities located at the project's diversion dam on the Broad River. The requirements were included in the project's license as part of the fishway prescription by the U.S. Fish and Wildlife Service and the National Marine Fisheries Service under section 18 of the Federal Power Act (FPA). The project has been inoperable since October 2015 after sustaining major damage from Hurricane Joaquin. The licensee has not decided whether it will seek to make the

necessary repairs to put the project back into operation. As water from the Broad River is no longer being diverted to the canal leading to the powerhouse, the river is passing over the diversion dam in a free flow. The licensee stated that the required monitoring of the fish passage facilities and the yearly reporting entails an expenditure of approximately \$60,000, the cost of which cannot be covered due to the project's inoperable status. The licensee committed to keep the fishway open and to perform the annual cleaning required by the approved fishway maintenance plan. Prior to making its waiver request to the FERC, the licensee contacted the relevant resource agencies, all of whom objected to the waiver. Referring to the fact that the monitoring and reporting obligations arose under FPA section 18, FERC staff stated that the Commission is without discretion to either waive or modify the prescription. The licensee did not seek rehearing of FERC staff's order.

Likely Nominees for FERC Commissioner Vacancies Identified

As reported in our February 2017 newsletter, the resignation of former Chairman Norman Bay has left FERC with only two Commissioners, Acting Chairman Cheryl LaFleur and Commissioner Colette Honorable, and therefore no quorum. Although FERC took steps to ensure continuity until a quorum is re-established by delegating additional authority to its staff prior to Mr. Bay's departure, the lack of a quorum prevents FERC from taking many actions which require a majority vote of the Commissioners.

Three names have been widely discussed as nominees to fill the three vacancies. Kevin McIntyre is frequently mentioned as the likely nominee for Chairman. Mr. McIntyre is a partner in the law firm of Jones Day and co-head of the firm's energy practice. He would bring a wealth of experience in federal energy regulation, including FERC regulation of the natural gas and electricity industries. The second potential nominee, Neil Chatterjee, has been Senate Majority Leader Mitch McConnell's energy policy advisor since 2009. Mr. Chatterjee previously worked for the National Rural Electric Cooperative Association for two years. The third potential nominee is Robert Powelson, currently chairman of the Pennsylvania Public Utility Commission, where he began serving as a Commissioner in 2008. Although these three individuals are widely anticipated to be nominated, the White House has not yet named anyone to fill the FERC vacancies.

FERC Issues Updated Fee Schedule for Hydropower Use of Government Lands

On February 28, 2017, 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.

Unlike previous years, FERC's February 28 Notice did not include updated acreage information for projects occupying federal lands in Alaska. Instead, FERC indicated that notice of those fees will be provided upon action in the ongoing proceeding for annual charges for the use of government lands in Alaska. As previously [reported](#), in that proceeding FERC issued a [Notice of Inquiry](#) (NOI) on November 17, 2016 requesting comments on whether land values based on data published in the NASS Census result in reasonably accurate land valuations for calculating federal land use annual charges for hydroelectric projects located in certain areas of Alaska. The NOI was issued in response to a petition for rulemaking filed by a group of Alaska hydropower licensees, represented by Van Ness Feldman, who experienced drastic increases in federal land use charges of up to 71 percent in 2016.

Because the February 28 Notice did not include updated acreage information for projects in Alaska, Alaska licensees likely will not receive annual charges bills, which are typically issued in the March/April time period, until FERC acts on the NOI.

FERC Reaffirms that Disputes over Property Rights on Project Lands Belong in State Court

As reported in our December 2016 Newsletter, on November 21, 2016, the U.S. Court of Appeals for the Fourth Circuit, in *Pressl v Appalachian Power Co.*, held that disputes over the extent of flowage easements at FERC-licensed hydroelectric projects belong in state courts. Subsequent to the court's decision, a shoreline property owner asked FERC to clarify its property rights guidance for licensees and shoreline property owners in light of the 4th Circuit's decision. In a letter dated March 7, 2017, FERC staff denied the property owner's request, finding that it has no reason to issue or revise guidance to licensees at this time. Staff found that the property owner's concerns about the extent of a licensee's property rights must be resolved between the licensee and property owner in state court, and not before FERC, which lacks the authority to adjudicate property law matters. Staff noted that if, as a result of a state court's decision, it appears a licensee does not possess adequate property rights necessary for project purposes, FERC may then require the licensee to obtain such rights.

FERC Holds Hydropower Security Program Requirements and Cyber Security Briefing

On March 8, 2017, FERC's Division of Dam Safety and Inspections held a webinar for licensees and exemptees to discuss lessons learned during the 2016 dam and project safety inspections and to review compliance for Revision 3A to the Security Program for Hydropower Projects. The Security Program requires licensees and exemptees to have a Security Plan which establishes the standard operating procedures relating to physical, cyber, and procedural security. Revision 3A, adopted in March 2016, modified the cyber security requirements concerning identification of the security classification of remotely controlled cyber assets. The slides which accompanied the webinar and related updates to frequently asked questions are posted on the Security Program page of FERC's [website](#).

[John Clements](#), [Brian McManus](#), 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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