



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.

Recent Publications

- [Mike Swiger](#), [John Clements](#), and [Hunter Cox](#), [Pumped Storage: 5 misperceptions about licensing, International Water Power & Dam Construction](#) (June 2017).
- [Sharon White](#) and [Chuck Sensiba](#), [Emerging Policies Affecting Hydropower Development and Water Supply Infrastructure](#), [Irrigation Leader](#), Vol. 8 Issue 6 (June 2017).

Hydro Newsletter

VOLUME 4, ISSUE 8: AUGUST 2017

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

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

- *Lack of FERC Quorum Continues*
- *Legislative Update*
- *Fourth Circuit Holds That Licensees Need Not Maximize Recreation Development*

Lack of FERC Quorum Continues

The lack of a three-commissioner quorum at the Federal Energy Regulatory Commission (FERC or Commission) continues as of the date of this publication. FERC is composed of up to five commissioners, appointed by the President with the advice and consent of the U.S. Senate. No more than three FERC commissioners may be from the same political party. FERC has lacked a quorum since the resignation of Chairman Norman Bay on February 3, 2017, which left FERC with only two commissioners: Cheryl LaFleur, whom President Trump named as acting chairman; and Commissioner Colette Honorable. Commissioner Honorable departed the Commission upon the expiration of her term on June 30, 2017, leaving LaFleur, a Democrat, as the sole FERC commissioner.

On May 15, 2017, President Trump nominated Neil Chatterjee and Robert Powelson, both Republicans, to serve as FERC commissioners, which – if confirmed by the Senate – would restore the quorum. The Senate Committee on Energy and Natural Resources held a confirmation hearing for both nominees on May 25, 2017, and approved their nominations on June 6, 2017 by a vote of 20-3. The nominations have not yet been set for a final confirmation vote by the full Senate. President Trump has announced his intention to nominate Richard Glick, a Democrat, and Kevin McIntyre, a Republican, to serve as FERC commissioners. It is expected that the President will designate McIntyre to serve as Chairman, and that he may ask the Senate to confirm McIntyre for two terms, which would extend his tenure through 2023.

Legislative Update

The 115th Congress continues to advance several hydropower bills through the House and Senate. On June 29, 2017, Senators Lisa Murkowski (R-AK) and Maria Cantwell (D-WA) introduced S. 1460, the Energy and Natural Resources Act of 2017. In many respects, the bill can be viewed as the successor to the energy bill approved by the Senate in the last Congress, and includes many of the same regulatory reforms to hydropower relicensing included in that bill. Some of the hydropower provisions in S. 1460 also are included in a bill currently pending in the House, H.R. 3043, the Hydropower Policy Modernization Act of 2017. These provisions include designating FERC as lead agency for coordinating federal authorizations from all agencies needed to license a project, requiring FERC to work with agencies in developing an overall schedule for all federal authorizations needed for a project on a case-by-case basis, and extending preliminary permit terms and start of construction dates.

On July 18, 2017, the House passed H.R. 2786, a bipartisan bill that would eliminate the 5 MW limitation for qualifying conduit hydropower facilities, which are not subject to FERC jurisdiction. The bill also reduces the time for FERC to make a qualifying conduit determination decision for these facilities. The bill has been referred to the Senate Committee on Energy and Natural Resources for consideration.

Fourth Circuit Holds That Licensees Need Not Maximize Recreation Development

On July 6, 2017, in *City of Rockingham v. FERC*, the U.S. Court of Appeals for the Fourth Circuit held, in an unpublished opinion, that FERC's rules on recreation resources do not require a licensee to maximize recreation development at a licensed hydropower project. The case involved an appeal of a FERC license order that rejected recommendations by several entities that the licensee provide greater recreational flows on weekends and holidays during the summer. These additional flows would have required the licensee to install a new turbine capable of providing those flows. FERC found that the limited benefits that the additional flows would provide did not justify the high cost of the measure. FERC also noted that there was low demand for additional recreational measures at the project.

On appeal to the Fourth Circuit, the entities requesting the additional flows argued that FERC failed to prioritize recreational use to the greatest extent possible, arguing that FERC's recreation policy, codified at 18 C.F.R. § 2.7, requires a licensee to seek "the ultimate development of [recreational] resources." These entities argued that under this regulation, FERC was required to provide the "best or most extreme" recreation development. The court deferred to FERC's interpretation of its regulation that "ultimate development" means the final development, not best development, of recreational resources that is "reasonable in light of the facts present in the case." The court found that "ultimate" does not mean "the best at any cost," and that a licensee need not maximize recreation development under FERC's policy.

Sharon White and Chuck Sensiba 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.

John Clements	202.298.1933	jhc@vnf.com
Matt Love	206.829.1809	mal@vnf.com
Jenna Mandell-Rice	206.829.1817	jrm@vnf.com
Brian McManus	202.298.3720	bzm@vnf.com
Chuck Sensiba	202.298.1801	crs@vnf.com
Mike Swiger	202.298.1891	mas@vnf.com
Sharon White	202.298.1871	slw@vnf.com
Julia Wood	202.298.1938	jsw@vnf.com