



*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](#), National Hydropower Association California Regional Meeting, "Anadromous Fish Reintroduction at Relicensing," San Ramon, CA, December 5, 2017

# *Hydro Newsletter*

## **VOLUME 4, ISSUE 12: DECEMBER 2017**

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

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

- *Senate Confirms FERC Commissioner Nominees*
- *Legislative Update*
- *California DWR Completes Reconstruction of Main Flood Control Spillway at Oroville Dam*
- *FERC Staff Issues Report to White House Identifying Rules and Policies that Materially Burden Hydropower Development*
- *EPA Proposes to Amend Effective Date of WOTUS Rule*
- *Alaska Licensees File Comments on FERC's Proposal to Change Its Methodology for Calculating Annual Charges for Use of Government Lands in Alaska*

### **Senate Confirms FERC Commissioner Nominees**

On November 2, 2017, the U.S. Senate confirmed the nominations of Democrat Richard Glick and Republican Kevin McIntyre to be commissioners of the Federal Energy Regulatory Commission (FERC). Mr. Glick was sworn in as a FERC Commissioner on November 29, 2017. He previously served as legal counsel for the Democrats on the U.S. Senate Committee on Energy and Natural Resources. Prior to his service in the Senate, Mr. Glick was Vice President of Government Affairs for Iberdrola's renewable energy, electric and gas utility, and natural gas storage businesses in the United States. At the time of this publication, Mr. McIntyre has not yet been sworn in as a FERC Commissioner, and it is unclear when that will occur. Mr. McIntyre is currently a partner in the energy law practice of Jones Day. He has been designated by the President to succeed Neil Chatterjee as FERC Chairman, and once Mr. McIntyre is sworn in, FERC will be restored to a full panel of five commissioners.

### **Legislative Update**

On November 8, 2017, the House of Representatives passed H.R. 3043, the Hydropower Policy Modernization Act of 2017, on a bipartisan vote of 257 to 166. In many respects, the bill can be viewed as the successor to the energy bill approved by the House 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 H.R. 3043 also are included in a bill currently pending in the Senate, S. 1460, the Energy and Natural Resources 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. The bill has been referred to the Senate Committee on Energy and Natural Resources.

On November 29, 2017, the U.S. Senate passed S. 245, the Indian Tribal Energy Development and Self-Determination Act Amendments of 2017, by unanimous consent. The bill would amend the municipal preference provisions of Section 7(a) of the Federal Power Act to apply to Indian tribes, along with states and municipalities. An identical provision appears in S. 1460, the Energy and Natural Resources Act of 2017, which is pending before the Senate Committee on Energy and Natural Resources. The Senate

Report for S. 245 notes that Indian tribes will only be granted municipal preference for a proposed project located in the vicinity of the tribe's lands.

### **California DWR Completes Reconstruction of Main Flood Control Spillway at Oroville Dam**

On November 1, 2017, the California Department of Water Resources (DWR) [announced](#) that it has met its goal of repairing and reconstructing the main, gated flood control spillway at the Oroville Facilities to handle flows of 100,000 cubic feet per second this winter. This milestone completes Phase 1 of the Lake Oroville Spillways Emergency Recovery Project, a massive reconstruction effort after high inflow caused record releases in February 2017 that severely damaged the main and emergency spillways at Oroville Dam. "We are truly proud of DWR staff, our contractors, and our federal, state, and local agency partners, for their herculean efforts to restore the main spillway in advance of the upcoming rainy season," said Ted Craddock, DWR's Project Manager for Emergency Recovery of the Oroville Spillways. "Their efforts will ensure that the Oroville Dam facilities will continue to provide flood protection and public safety for our surrounding communities."

The work completed on November 1, 2017 includes the removal and reconstruction of 2,270 feet of the 3,000-foot main spillway and repairs to the uppermost 730-foot portion of the main spillway that connects to the radial gates. DWR will implement the Lake Oroville 2017/2018 Flood Control Season Operations Plan this winter to protect public safety while construction continues on the main and emergency spillways. Under the Plan, DWR will maintain lower than average lake levels during the rainy season to provide space for inflows and to manage releases from the reconstructed main spillway.

The remaining repairs to the spillways will be completed in 2018, including the addition of structural concrete to the middle portion of the main spillway, full reconstruction of the upper portion of the main spillway, and improvements to bolster the emergency spillway. The objective of the recovery project is to restore the spillways to their original design capacity of passing the probable maximum flood at Lake Oroville.

### **FERC Staff Issues Report to White House Identifying Rules and Policies that Materially Burden Hydropower Development**

On October 25, 2017, FERC staff issued its [final report](#) in response to [Executive Order 13783](#) identifying agency rules and policies that potentially materially burden the development or use of domestic energy resources. While the Executive Order did not apply to independent agencies, FERC submitted its report on a voluntary basis. Of the agency rules and policies reviewed, the report identifies nine agency actions that potentially materially burden the development or use of domestic energy resources, eight of which are related to hydropower.

The report classifies these agency actions into three areas where potential material burdens may impact hydropower development and describes changes FERC could make to ease the burden. These areas include: licensing processes, exemption processes, and determinations on deficient applications. With regard to burdens related to the licensing process, the report identifies five areas with the potential for improvement, including: (1) make the Integrated Licensing Process optional and remove the requirement to seek FERC authorization to use other licensing processes; (2) make the requirement to file the draft application and preliminary licensing proposal optional; (3) reduce certain comment and filing deadlines to eliminate three months from the pre-filing process; (4) revise FERC's license term policy (since releasing the report, FERC has revised its license term policy to establish a 40-year default license term); and (5) increase the threshold for certain minimum filing requirements above the present limit of 5 MW.

The final report identifies two material burdens in the exemption process and suggestions to address them: (1) eliminate the requirement to increase project capacity to convert to an exemption at the end of an existing license term; and (2) provide an exemption applicant with the ability to convert its exemption application to a license application if the exemption application is rejected. With regard to material

burdens caused by deficient relicensing applications, the report suggests that FERC could ease this burden by allowing applicants an opportunity to address deficiencies and refile their applications, which is prohibited under FERC's current rules.

### **EPA Proposes to Amend Effective Date of WOTUS Rule**

On [November 16, 2017](#), the Environmental Protection Agency and U.S. Army Corps of Engineers (collectively, Agencies) unveiled a proposed rule to amend the effective date of the 2015 final rule redefining jurisdictional "waters of the United States" under the Clean Water Act (CWA), commonly referred to as the "WOTUS Rule." The controversial rule, issued by the Obama administration, expands federal control over several types of water bodies, and requires federal permits for dredging, filling, or discharging pollution to those water bodies. Implementation of the WOTUS Rule is currently on hold as a result of the U.S. Court of Appeals for the Sixth Circuit's nationwide stay of the rule and the U.S. Supreme Court's pending decision on the question of whether the court of appeals has original jurisdiction to review challenges to the rule. Concurrently with pending court review, the Agencies are engaged in a two-step rulemaking process to reconsider the WOTUS Rule.

The WOTUS Rule, as finalized in 2015, had an effective date of August 28, 2015. The Agencies' proposal would amend the effective date of the WOTUS Rule until two years after its proposal is finalized and published in the Federal Register (which the agencies estimate will occur in early 2018). The Agencies' rationale for their proposal is that it will provide clarity and predictability to the regulated public during the Agencies' two-step rulemaking process. The Agencies note that if the Supreme Court were to decide that the Sixth Circuit lacks original jurisdiction over challenges to the WOTUS Rule, the Sixth Circuit case would be dismissed and its nationwide stay of the 2015 WOTUS Rule would expire, leading to possible inconsistencies, uncertainty, and confusion as to the regulatory regime that would be in effect pending a final substantive Step 2 rulemaking. The Agencies suggest that a two-year extension of the effective date of the WOTUS Rule would ensure that, during the potential interim period, the scope of CWA jurisdiction will be administered exactly the way it is now and would ensure that there is sufficient time for the regulatory process for reconsidering the definition of "waters of the United States" to be fully completed.

The Agencies will be accepting public comment on their proposal until December 13, 2017.

### **Alaska Licensees File Comments on FERC's Proposal to Change Its Methodology for Calculating Annual Charges for Use of Government Lands in Alaska**

On October 30, 2017, a group of Alaska hydropower licensees filed comments in response to FERC's August 17, 2017 [Notice of Proposed Rulemaking](#) (NOPR), which proposes to revise the current methodology for calculating annual charges for the use of government lands in Alaska. The NOPR was issued in response to a petition for rulemaking filed by the Alaska licensees, represented by Van Ness Feldman, who experienced drastic increases in federal land use charges of up to 71 percent in 2016. Land values increased when in February 2016, FERC recalculated its federal lands fee schedule using updated per-acre land values published in the 2012 National Agricultural Statistics Service (NASS) Census. In their petition for rulemaking, the Alaska licensees proposed an alternative methodology for calculating annual charges for the use of government lands in Alaska, using a statewide average per-acre land value, rather than regional per-acre land values based on data published in the NASS Census, to be applied to all hydropower projects in Alaska, except those located in the Aleutian Islands area. FERC's NOPR adopted the Alaska licensees' recommendation to calculate a statewide average per-acre land value for hydropower lands in Alaska, with certain modifications, including that the "statewide" average be calculated as an average of the Kenai Peninsula and Fairbanks land values under the NASS Census, and excluding the Aleutian Islands from the calculation.

In their comments on the NOPR, the Alaska licensees recommended that FERC promulgate a final rule that is consistent with the NOPR, but with three additional changes. First, the licensees recommended that FERC establish an effective date of fiscal year (FY) 2016 for the new rule, to ensure Alaska licensees

are not overcharged during the period in which FERC was aware of the unreasonable charges and completed the rulemaking process to address it. Second, they requested that FERC include the Aleutian Islands area in its adjusted "statewide" average, because it would result in a more representative and accurate estimate of fair market value of federal lands in Alaska. Third, in recognition that the NASS Census is not an ideal tool for estimating the value of federal lands in Alaska, the licensees reserved their right to petition for further adjustments to the NASS Census, or an altogether alternative billing methodology for Alaska lands, if future updates to the NASS Census produce unrealistic and unreasonable annual charges for Alaska hydropower projects.

*[Sharon White](#) and [Robert Conrad](#) 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	<a href="mailto:jhc@vnf.com">jhc@vnf.com</a>
Matt Love	206.829.1809	<a href="mailto:mal@vnf.com">mal@vnf.com</a>
Jenna Mandell-Rice	206.829.1817	<a href="mailto:jrm@vnf.com">jrm@vnf.com</a>
Brian McManus	202.298.3720	<a href="mailto:bzm@vnf.com">bzm@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>

© 2017 Van Ness Feldman, LLP. All Rights Reserved. This document has been prepared by Van Ness Feldman for informational purposes only and is not a legal opinion, does not provide legal advice for any purpose, and neither creates nor constitutes evidence of an attorney-client relation.