Van Ness Feldman LLP
vnf.com

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, Northwest Hydropower Association Annual Conference, "Managing the Future Energy Grid, Today," Portland, OR, February 21, 2018.
- Chuck Sensiba, Northwest Hydropower Association Annual Conference, "Legal and Policy Landscape in Flux," Portland, OR, February 23, 2018.

Hydro Newsletter

VOLUME 5, ISSUE 1: JANUARY 2018

To receive the Hydropower Newsletter on a regular basis, follow this link: http://www.vnf.com/KnowledgeCenter.aspx?SignUp=True

- *Full Panel of FERC Commissioners Restored*
- *Legislative Update*
- *DC Circuit Affirms FERC Order Denying Claim for Headwater Benefits Overpayments*
- *FERC Issues Final Rule Modifying Its Methodology for Calculating Annual Charges for Use of Government Lands in Alaska*

Full Panel of FERC Commissioners Restored

On December 7, 2017, Kevin McIntyre was sworn in as Commissioner and Chairman of the Federal Energy Regulatory Commission (FERC). Mr. McIntyre was previously practicing law in Washington, D.C. He succeeds Neil Chatterjee as FERC Chairman, who was serving as Chairman since August 10, 2017, and remains a FERC Commissioner. With Chairman McIntyre sworn in, FERC has been restored to a full panel of five commissioners since December 7.

Legislative Update

On December 12, 2017, the U.S. House of Representatives passed two hydropower bills by voice vote. The first bill, H.R. 2872, the Promoting Hydropower Development at Existing Nonpowered Dams Act, directs FERC to establish an expedited process for licensing non-federal hydropower projects at certain existing nonpowered dams. Qualifying projects must use for generation the withdrawals, diversions, releases, or flows from an existing dam operated for agricultural, municipal, navigational, industrial, commercial, environmental, recreational, aesthetic, drinking water, or flood control purposes. The expedited licensing process would result in an order not later than two years after receipt of a completed license application. The bill also directs FERC and the Secretaries of the Army, Interior, and Agriculture to jointly develop a list of existing nonpowered federal dams with the greatest potential for non-federal hydropower development. The bill passed by the House is markedly different than the bill as introduced, which was modeled after the bill passed by the House in the last Congress, entitled the North American Energy Security and Infrastructure Act of 2015 (H.R. 8).

The second bill, H.R. 2880, the Promoting Closed-Loop Pumped Storage Hydropower Act, directs FERC to establish an expedited process for licensing closed-loop pumped storage projects. Qualifying pumped storage projects must cause little to no change to existing surface and groundwater flows and uses and be unlikely to adversely affect species listed as threatened or endangered under the Endangered Species Act. The expedited licensing process would result in an order not later than two years after receipt of a completed license application. The bill also directs FERC to hold a workshop to explore potential opportunities for development of closed-loop pumped storage projects at abandoned mine sites and provide guidance to assist applicants for such projects. Similar to the nonpowered dams bill, the version of H.R. 2880 as passed by the House is significantly different than the bill as originally introduced and which was approved by the House last Congress in H.R. 8.

The bills have been introduced in the U.S. Senate and referred to the Committee on Energy and Natural Resources.

Van Ness Feldman LLP
vnf.com

DC Circuit Affirms FERC Order Denying Claim for Headwater Benefits Overpayments

On December 22, 2017, the U.S. Court of Appeals for the D.C. Circuit (D.C. Circuit) affirmed a FERC order denying a downstream licensee's request for credits for past overpayments of headwater benefits under state law where the licensee had already resolved the dispute with the upstream operator by contract. Section 10(f) of the Federal Power Act (FPA) authorizes FERC to collect headwater benefits payments from a downstream licensee to reimburse an upstream operator for an equitable share of an upstream operator's interest, maintenance, and depreciation costs. The upstream operator, Hudson River-Black River Regulating District (District), had assessed headwater benefits charges against the downstream operator, Erie Boulevard Hydropower, LP (Erie) under New York state law. Erie challenged the District's charges for several years in state court, but in 2006 the parties reached a settlement in which Erie received monetary benefits in return for releasing all its claims against the District for the years in question.

Later in a 2008 order involving another licensee downstream from the District's dam, the D.C. Circuit found that Section 10(f) preempts state headwater benefits charges. In its ruling, the court suggested that FERC might have authority to remedy downstream licensees' overpayments under state law. On remand, FERC made a headwater benefits determination for both downstream projects and directed the downstream licensees to attempt a settlement with the District based on FERC's calculations. FERC also established a policy of crediting downstream licensees for their past overpayments to the District.

Erie and the District were unable to settle. Erie then claimed $7 million in overpayment credits towards future District assessments which FERC denied, citing the 2006 settlement. Erie appealed, arguing among other things that the District's collection of state headwater benefits assessments violated the FPA, the 2006 settlement notwithstanding. The court found that the federal preemption of state headwater benefits charges does not affect the settlement, which was a contract between Erie and the District. With respect to FERC's crediting system, the court found that the FPA grants FERC the authority to establish a policy of crediting downstream licensees for their state overpayments to an upstream operator. It also found that FERC properly enforced the waiver provisions of the settlement, under which Erie waived its claims against the District for assessments through 2009, by denying Erie's request for credits for overpayments in that timeframe.

FERC Issues Final Rule Modifying Its Methodology for Calculating Annual Charges for Use of Government Lands in Alaska

On December 22, 2017, FERC issued a Final Rule modifying its methodology for calculating annual charges for the use of government lands in Alaska. The Final Rule 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 Final Rule adopts 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. The Alaska licensees who experienced drastic increases in federal land use charges in 2016 should see an approximately 35% reduction in their fees under the Final Rule.

Van Ness Feldman LLP
vnf.com

***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.

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