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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 hydropower 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

- John Clements, National Hydropower Association Annual Conference, Panel Moderator - Alternatives to Relicensing, Washington, DC, April 30, 2018.
- Julia Wood, National Hydropower Association Annual Conference, Contestant- Hydro Game Show, Washington, DC, May 2, 2018.
- John Clements, Midwest Hydro Users Group Spring 2018 Meeting, "Legislative Update," Wausau, WI, May 16, 2018.
- Mike Swiger, HydroVision International, Panelist - Pumped Storage: How to Make it Work, Charlotte, NC, June 28, 2018.

Hydro Newsletter

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Legislative Update

On March 8, 2018, the Senate Committee on Energy and Natural Resources approved S. 1336, the Reliable Investment in Vital Energy Reauthorization Act, a bill to reauthorize the hydropower production incentives from Sections 242 and 243 of the Energy Policy Act of 2005 through fiscal year 2027. The bill was introduced by Sen. Cory Gardener (R-CO) on June 12, 2017. With the Committee's approval, the bill will now be set for a vote on the Senate floor. There is a companion bill with the same title pending in the House of Representatives, H.R. 3256, which was introduced by Rep. David McKinley (R-WV) on July 14, 2017 and referred to the House Committee on Energy and Commerce.

D.C. Circuit Denies Appeal of FERC License Term Decision

On March 6, 2018, the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit) denied the appeal of Duke Energy Carolinas, LLC (Duke), licensee for the existing Catawba-Wateree Project No. 2232, of the Federal Energy Regulatory Commission's (FERC) order establishing a new license term of 40 years for the project. As described in the August 2016 newsletter, Duke had requested a 50-year license, supported by the parties to a comprehensive relicensing settlement agreement.

In its 2015 order issuing the new license, FERC held that the new environmental measures provided for in the settlement agreement, including fish passage, increased minimum flow releases, recreational flow releases and environmental monitoring, constituted a moderate amount of additional investment in the project, meriting a 40-year term. On appeal, Duke argued that FERC failed to fully consider the new license measures and their costs, including the cost of pursuing the new license, which totaled $165 million, and that FERC's decision was arbitrary and capricious because it had treated similarly situated new license applicants differently by issuing 50-year licenses.

The court accepted FERC's arguments that its license term determinations are qualitative in nature and costs to the licensee are not a dispositive measure; that estimates of implementation costs are only estimates and often unreliable; that a license order appearing to support Duke's argument was outdated and more recent orders issuing 40-year licenses reflected its current thinking regarding license terms; and that the relicensing settlement agreement did not unequivocally support issuance of a 50-year license. The court also accepted FERC's explanation for its move away from a cost-based approach to determining license terms to a more fluid analysis ("the general extent of the measures required"). The

court further noted that since the Duke orders, FERC had adopted a new policy of establishing a 40-year default license term, subject to modification based on various factors, so a remand was unlikely to result in a different result. FERC's new license term policy is described in our October 2017 Alert.

The court's deference to FERC's case by case, qualitative approach to setting license terms raises significant questions regarding how FERC will implement its new policy on license terms, which FERC has characterized as providing greater certainty to license applicants. The decision also serves as a caution to applicants negotiating licensing settlements that the settlements must express unequivocal support for a term longer than 40 years if a longer term is desired.

Second Circuit Affirms FERC Orders Establishing Strict One-Year Deadline for State Action on Water Quality Certification

On March 12, 2018, in *N.Y. State Department of Environmental Conservation v. FERC*, the U.S. Court of Appeals for the Second Circuit (Second Circuit) denied the appeal of the New York State Department of Environmental Conservation (NYSDEC) of FERC's orders holding that NYSDEC had waived its authority to provide a water quality certification (WQC) for a natural gas pipeline project under Section 401 of the Clean Water Act (CWA).

As previously reported, FERC issued a declaratory order holding that NYSDEC waived its authority under Section 401 to issue a WQC for the pipeline by failing to issue or deny certification within one year from filing of the application. FERC's order was issued in response to Millennium Pipeline Company, LLC's (Millennium) request for a notice to proceed with construction of the pipeline, for which FERC had previously issued a certificate of public convenience and necessity under the Natural Gas Act. The certificate required Millennium to document receipt or waiver of the WQC before commencing construction.

Millennium's request for a declaratory order was filed in response to a June 2017 decision of the D.C. Circuit, described in our July 2017 newsletter, holding that FERC has the authority to determine if a state has waived its right to issue a WQC for failure to act within the one-year statutory deadline. In the declaratory order, FERC found that the plain text of Section 401 provides that the state agency must act within one year of the filing date, that its own hydroelectric licensing regulations and case law support that interpretation, and that to find otherwise would frustrate the purpose of the one-year review period specified in the statute.

On appeal, NYSDEC argued that the one-year period should begin when the application is deemed by the state to be complete because basing the one-year deadline on the filing date would force it to make premature decisions, impair the opportunity of the public to participate, and discourage the state from working with applicants to make filings that meet its requirements. The Second Circuit affirmed FERC's plain language interpretation of Section 401 and found NYSDEC's arguments to be misplaced, since it can simply deny an application without prejudice and allow applicants to withdraw and refile their application.

FERC Denies Rehearing of Water Quality Certification Waiver Determinations

On March 15, 2018, FERC denied requests for rehearing of two original license orders in which FERC determined that the West Virginia Department of Environmental Protection (WVDEP) had waived WQC by failing to act within one year from filing of the requests for certification. WVDEP argued that under its regulations, the one-year waiver period is triggered when WVDEP deems the application to be complete. FERC disagreed, citing the Second Circuit order in the *N.Y. State Department of Environmental Conservation v. FERC* case discussed in the preceding report. FERC distinguished a case cited by WVDEP in which the court deferred to a U.S. Army Corps of Engineers (Corps) regulation pertaining to CWA Section 404 dredge and fill permits that requires the Corps district to verify that the state agency received a valid request for WQC on the basis that Corps Section 404 permits are independent of FERC license orders.

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Federal Claims Court Rules Flood Damages Caused by Changes to Corps' Management of Missouri River

On March 13, 2018, the United States Court of Federal Claims released a trial opinion, ruling in favor of a group of farmers, landowners, and business owners from six states who claimed that changes in the Corps' management of the Missouri River Mainstem Reservoir System (System), a series of interlocking dams and reservoirs constructed for flood control, amounted to a taking without just compensation in violation of the Fifth Amendment.

The case stems from policy changes made by the Corps in 2004 to comply with the Endangered Species Act (ESA). In 2004 and again in 2006, the Corps issued a revised Master Manual for the System, which outlines the regulation schedules for each dam and specifications for storage and releases from each reservoir. The new version of the Master Manual (Revised Master Manual) includes several significant changes. It strikes language from the 1979 Master Manual, which provided a sequential priority of the Flood Control Act-authorized purposes, including flood control being first priority and fish and wildlife being last priority.

The Revised Master Manual also contains two significant operational guidelines. First, it authorizes the Corps to keep a larger amount of water in the reservoirs for the benefit of other purposes, including fish and wildlife. Second, it addresses the need for more varied river levels for the benefit of threatened and endangered species. The Corps also established the Missouri River Recovery Program, which includes modifying Bank Stabilization and Navigation Project structures, reopening previously closed chutes, and reopening natural chutes that had been removed in order to create shallow water habitat. These changes, including the aggradation of sediment from notching and the degradation of dikes and revetments, have had the effect of raising the Missouri River's water surface elevations in periods of high flows and causing major flooding. These floods and the damages they have caused are what gave rise to this litigation.

Ultimately, the court found in favor of the plaintiffs, stating that the Corps had deprioritized flood control. The court determined that the Corps was liable for the flood events that occurred in 2007, 2008, 2010, 2013, and 2014. The court also determined that since 2007, flooding has been among the worst in the history of the river and the changes in the management of the river caused or contributed to the flooding. Additionally, the notching of dikes and revetments and the reopening of previously closed chutes created potential flood impacts.

The litigation for this matter has been divided into two phases. This ruling represents the end of Phase I. During this phase, the court was focused on the issue of the United States' liability. In the upcoming Phase II, the court will decide whether the United States has any defenses to the plaintiffs' claims and other legal and factual issues associated with proving entitlement to just compensation. For those entitled to just compensation, the court will also decide the appropriate amount of compensation. Although decided in the context of a Fifth Amendment takings claim against the federal government, the case potentially has broader applicability as it suggests that a dam operator's compliance with environmental laws, in this case the federal ESA, may not be a defense against inverse condemnation or property damage claims.

Conservation Groups Seek Review of FERC Orders Limiting Post-License Intervention

On March 16, 2018, American Whitewater, Columbiana, the Center for Environmental Law and Policy, and Sierra Club (Conservation Groups) filed a petition for review in the United States Court of Appeals for the Ninth Circuit (Ninth Circuit) of a FERC order staying the commencement and completion of construction deadlines for a new hydropower project to be located in Washington. FERC issued an original license for the project on July 9, 2013. The licensee was granted a two-year extension of the commencement and completion of construction deadlines until July 31, 2015. Because the Federal Power Act prohibits FERC from extending the deadline to commence construction by more than two years, in June 2017, the licensee requested a two-year stay of the construction deadlines under the

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license, stating that it had been unable to advance to the construction phase of development because of ongoing litigation concerning its water rights. The Conservation Groups opposed the licensee's stay request, arguing that because the delay in the start of construction represents a material change to the terms and conditions of the license that was not contemplated at the time of license, FERC should issue public notice of the filing and solicit motions to intervene and comment.

On September 20, 2017, FERC rejected the Conservation Groups' request to issue public notice of the stay request and solicit motions to intervene, and granted the licensee's stay request. FERC held that because the licensee did not propose to change the project or terms and conditions of the license, public notice was not required. The Conservation Groups sought rehearing, arguing, among other things, that FERC's order wrongly denied their motion to intervene and failed to follow its regulations in approving the stay request. FERC denied rehearing, finding that a material change that would justify notice of a post-license filing would involve significant changes to the project's physical features. Because the licensee did not request to change any of the project's physical features or modify the terms of the license, public notice was not required.

The Conservation Groups seek review of FERC's stay order in the Ninth Circuit. The case has implications for FERC's current policy to limit interventions in post-license implementation and compliance matters. Petitioners' briefs are due by June 4, 2018, and FERC's brief is due by July 5, 2018.

Mike Swiger, John Clements, 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.

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