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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.*

#### **Upcoming Speaking Engagements**

- [Mike Swiger](#) and [John Clements](#), National Hydropower Association Annual Conference, 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*

## **VOLUME 5, ISSUE 5: MAY 2018**

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

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- *FERC Extends Stay of Construction Deadlines at Jennings Randolph Project*
- *11th Circuit Affirms FERC Decision to Revoke License*
- *Federal Agencies Execute Memorandum of Understanding to Coordinate Major Infrastructure Permitting*

### **FERC Extends Stay of Construction Deadlines at Jennings Randolph Project**

On April 19, 2018, the Federal Energy Regulatory Commission (FERC) [granted](#) an extension of the stay of construction deadlines for the proposed Jennings Randolph Hydroelectric Project No. 12715 (Project). The Project is owned by Fairlawn Hydroelectric Company, LLC (Fairlawn), and is located at the U.S. Army Corps of Engineers' (Corps) Jennings Randolph Dam and Lake on the North Branch Potomac River in Maryland and West Virginia. FERC issued the original license for the Project on April 30, 2012. Under Article 301 of the license, Fairlawn was required to commence construction of the Project within two years of issuance of the license and complete construction within five years. On May 13, 2014, FERC granted Fairlawn's request to extend the construction deadlines by an additional two years until May 2016. Because the Federal Power Act (FPA) prohibits FERC from extending the construction deadlines by more than two years, in April 2016, Fairlawn requested that FERC grant a two-year stay of the construction deadlines to allow additional time to secure a permit from the Corps under Section 14 of the Rivers and Harbors Act of 1899 (a Section 408 permit) for the Project. The license prohibits Fairlawn from advancing to the construction phase of Project development without Corps issuance of a Section 408 permit. On September 22, 2016, FERC granted the stay through April 30, 2018.

On February 28, 2018, Fairlawn filed a request to extend the stay of the construction deadlines due to continued delays in the Corps' 408 process. Fairlawn argued that the preconditions to project construction, i.e., the 408 process, were beyond its control and justified an extended stay. It also noted that if the Corps issued the 408 permit in the near future, it could not commence construction until the fall when the lake pool is generally at its lowest.

On April 6, 2018, while the stay request was pending before FERC, the Corps issued the Section 408 permit. On April 19, FERC issued an order extending the stay for an additional year, to allow Fairlawn time to complete its pre-construction license requirements and commence construction. The stay will expire on April 28, 2019, at which time Fairlawn will have two days to commence construction, and until April 28, 2022 to complete construction. Van Ness Feldman represented Fairlawn in the FERC proceeding.

### **11th Circuit Affirms FERC Decision to Revoke License**

On April 19, 2018, the United States Court of Appeals for the Eleventh Circuit (11th Circuit) [affirmed](#) a FERC decision to revoke Eastern Hydroelectric Company's (Eastern) license to generate hydroelectricity at the Juliette Dam in Georgia. The project was licensed by FERC in 1995. Subsequently, Eastern filed a license amendment to increase the generating capacity at the dam. FERC approved the amendment in 2002, subject to a requirement that Eastern design and construct an unspecified fishway at the dam to allow American shad to gain access to upstream spawning grounds. Eastern also was required to install

a fishway under the water quality certification issued by the Georgia Department of Natural Resources in the amendment proceeding.

FERC and Eastern twice came to preliminary agreements in 2006 and 2012 regarding the fishway design, with each agreement resulting in an order from FERC directing Eastern to submit finalized specifications and fishway effectiveness protocols. However, following each agreement, Eastern ran into issues negotiating with the resource agencies, with the result that the expected costs of the fishway began to skyrocket. Ultimately, after several missed deadlines, FERC issued a compliance order, warning that failure to comply could result in revocation of the license. In April 2014, FERC ordered Eastern to cease generation at the project, and in October 2014, FERC revoked Eastern's license, finding that Eastern had knowingly violated the compliance order by, among other things, failing to develop the required fishway effectiveness protocols in consultation with the resource agencies. Eastern then filed a withdrawal of its 2000 application to amend its license and a request for rehearing of the revocation order, both of which FERC denied. Eastern then sought appellate review of FERC's order before the 11th Circuit. Ironically, Eastern never built the expanded generation capacity that triggered the fishway requirement in the first place.

The 11th Circuit found that, even in these unusual circumstances, FERC has authority under the FPA to require compliance with a license and to revoke the license if the licensee knowingly violates a FERC order and has been given reasonable time to comply. With regard to withdrawal of the amendment, the court found that Eastern could not do so since FERC's license amendment order had long been final and nonappealable. The court noted that as a result of FERC's license revocation, "the dam still obstructs the shad, as it always did" and "it is unclear what useful purpose has been served by the course of events." Nevertheless, the court declined to second guess FERC's decision.

### **Federal Agencies Execute Memorandum of Understanding to Coordinate Major Infrastructure Permitting**

On April 9, 2018, the Department of Interior (Interior), Department of Agriculture, Department of Commerce, Department of Housing and Urban Development, Department of Transportation, Department of Energy, Department of Homeland Security, the Corps, Environmental Protection Agency, FERC, Advisory Council on Historic Preservation, and Federal Permitting Improvement Steering Council (Agencies) entered into a [Memorandum of Understanding](#) (MOU) in an effort to promote timely processing of environmental reviews and authorization decisions for proposed major infrastructure projects under policies established in Executive Order (E.O.) 13807.

E.O. 13807 establishes a new "One Federal Decision" (OFD) approach under which federal agencies with a role in the environmental review and permitting process for a major infrastructure project are directed to develop an environmental review and authorization decision schedule for that project. This would entail agencies developing a single permitting timetable for necessary environmental review and authorization decisions, preparing a single environmental impact statement, signing a single record of decision (ROD), and issuing all necessary authorization decisions within 90 days of issuance of the ROD. The goal of E.O. 13807 is to reduce the time for completing environmental reviews and authorization decisions.

The purpose of the MOU is to: (1) provide a more predictable, transparent and timely federal review and authorization process for delivering major infrastructure projects; (2) establish standard operating procedures for how the federal government will make concurrent and synchronized reviews for major infrastructure projects; and (3) eliminate duplication of effort among agencies, improve the efficiency of project delivery, make better-informed decisions and promote good environmental, community and economic outcomes.

Within the MOU, the Agencies agree to a two-year goal, where agencies would complete all environmental reviews and authorizations decisions for major infrastructure projects within two years. The Agencies also agree to submit a plan to facilitate the efficient implementation of OFD. Agencies will also communicate with one another, as well as project applicants and sponsors, in an effective and

structured manner, carry out their environmental review and authorization decisions for major infrastructures concurrently with the review performed by the lead agency under the National Environmental Policy Act (NEPA), and will work together to meet the milestones provided in the permitting timetable. Agencies will, among other things, work individually and collectively to identify and remove process impediments to implementing OFD, implement best practices that will result in more efficient reviews, and develop and implement appropriate programmatic agreements with respect to project review where multiple major infrastructure projects present common issues.

Lastly, the MOU provides guidance on determining lead and cooperating agencies under NEPA; development of permitting timetables; lays out the Agencies' roles and responsibilities; provides guidelines for preliminary project planning, notices of intent, scoping and concurrence points, and elevation of delays and dispute resolutions.

For hydroelectric projects, the MOU appears to be a significant improvement over present agency practice, in that the Corps has not typically acted as a cooperating agency in FERC licensing or aligned its permitting processes under the Clean Water Act (CWA) with FERC. The MOU also raises several questions regarding how the FERC process may change under the MOU. For example, will FERC be reexamining its policy that a cooperating agency under NEPA cannot be an intervenor in the FERC proceeding? Also, it is not clear how a FERC proceeding can result in a single ROD, since FERC issues a license under the FPA, the Corps issues 404 and 408 permits under the CWA and Rivers and Harbors Act, and Interior and the U.S. Forest Service issue separate rights-of-way under their organic statutes. Issuing a single ROD also would raise jurisdictional questions regarding the appeals path for permitting under these various statutes.

*[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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