



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

- [Mike Swiger](#), HydroVision International, Panelist - Pumped Storage: How to Make it Work, Charlotte, NC, June 28, 2018.

# Hydro Newsletter

## VOLUME 5, ISSUE 6: JUNE 2018

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- *Legislative Update*
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- *DOE Issues 2017 Hydropower Market Report*

### Friends of the River Appeals U.S. District Court Decision on ESA Baseline for Existing Dams

On April 6, 2018, Friends of the River (FOR) filed an appeal to the U.S. Court of Appeals for the Ninth Circuit (Ninth Circuit) of a [decision](#) of the U.S. District Court for the Eastern District of California (District Court) holding that the U.S. Army Corps of Engineers (Corps) did not act arbitrarily and capriciously when it limited its Endangered Species Act (ESA) Section 7 review to Corps activities where the Corps has discretion and excluded from its ESA review the effects of the ongoing existence of two Corps dams.

The Corps operates and maintains two dams on California's Yuba River, which the National Marine Fisheries Service (NMFS) designated as critical habitat for certain ESA listed salmonids and sturgeon. The Corps consulted with NMFS regarding effects of the Corps' projects on the listed species. Capping several years of disputes and litigation regarding this matter, the District Court upheld a NMFS Biological Opinion and letter of concurrence, holding that the Corps and NMFS properly treated the existence of the two dams as part of the environmental baseline for ESA consultation and, because the Corps has no discretion as to the existence of the dams, it cannot be liable for ESA section 9 "take" of listed species resulting from the mere existence of the dams.

On appeal to the Ninth Circuit, FOR argues that the ESA requires agencies to analyze under section 7 the effects of the ongoing existence of facilities on listed species and critical habitats as part of the agency action, even if the agency has no discretion to remove or substantially modify the facility. Should FOR prevail, the definition of "take" under section 9 could be significantly expanded to include habitat modification caused by the existence of a dam in a stream, and the environmental baseline for section 7 consultations for federal actions would be redefined as the pre-dam environment.

Van Ness Feldman currently is working with a group of hydroelectric dam owners considering filing an amicus curiae brief in support of NMFS and the Corps. Amicus briefs are due by August 21 under the current briefing schedule. If you would like more information, please contact Mike Swiger at 202.298.1891 or [mas@vnf.com](mailto:mas@vnf.com).

### Legislative Update

On May 17, 2018, the U.S. Senate Energy and Natural Resources Committee reported out several bills to advance hydropower. The first bill, H.R. 2786, would amend the Federal Power Act with respect to the criteria and process to qualify as a qualifying conduit hydropower facility. While a previous version of

this bill which eliminated the 5 MW cap on qualifying conduit facilities passed the House on July 18, 2017, the Committee amended the bill to establish a cap of 40 MW for such facilities. The second bill, S. 1030, would require the Federal Energy Regulatory Commission (FERC) to submit a report to Congress identifying licensed projects that are located at a non-powered site that serves as storage to support downstream power generation. For each project, FERC must: (1) analyze the value of electric power generation associated with the project; (2) describe the range of options under existing law to surrender or transfer the FERC license for the project; (3) identify barriers to the surrender or transfer of the FERC license; and (4) identify costs incurred by project owners resulting from FERC license requirements. The bills will now head to the Senate floor.

On May 21, 2018, the House Committee on Appropriations approved the Energy and Water Development and Related Agencies Appropriations Act, 2019, H.R. 5895, which contains \$85 million in funding for the U.S. Department of Energy's (DOE) Water Power Technologies Office (WPTO). \$59 million is directed to marine energy activities, with the remaining \$26 million for hydropower and pumped storage initiatives. The House Committee on Rules will meet for general debate on the bill on June 5, 2018, and to consider amendments to the bill on June 6, 2018. On a parallel track, on May 24, the Senate Appropriations Committee approved the Energy and Water Development and Related Agencies Appropriations Act, 2019, S. 2975, which contains \$105 million in funding for the WPTO, with \$70 million toward marine energy initiatives and \$35 million for hydropower and pumped storage activities. The House and Senate will consider these bills in the coming weeks. If the bills pass, they will move to conference to reconcile the differences, and upon passage of identical bills in both chambers, the bill will be sent to the President for signature.

Lastly, the House Energy and Commerce Subcommittee on Energy will hold a [hearing](#) on the Hydropower Licensing Process on Thursday, June 7, 2018 at 11:00 am in the Rayburn House Office building in Washington, DC. The hearing is entitled "Improving the Hydropower Licensing Process." Subcommittee members will review ongoing progress in improving interagency coordination for the timely processing of environmental reviews and authorizations for non-Federal hydropower projects.

### **EPA Issues Draft NPDES General Permit for Cooling Water and other Discharges from Hydroelectric Facilities in Idaho**

On April 27, 2018, the Environmental Protection Agency Region 10 released a draft National Pollutant Discharge Elimination System (NPDES) [General Permit](#) for hydroelectric facilities discharging to waters within the State of Idaho. Under longstanding precedent, releases at hydroelectric dams are not subject to NPDES permits. The General Permit acknowledges this well-established precedent by recognizing that the draft General Permit does not cover "water discharges over or through the dam."

However, the General Permit provides NPDES authorization for discharges of pollutants that may occur as a result of hydroelectric project operations. As proposed, the hydroelectric General Permit would protect "surface waters from discharges of oil, grease and alterations to pH from facility and equipment outfalls and minimize the impacts of the cooling water intake structures to fish and aquatic organisms." The draft General Permit proposes to authorize and establishes effluent limitations for pH, oil and grease and monitoring requirements for five types of discharges from hydroelectric facilities: cooling water, equipment and floor drain water, facility maintenance-related water, maintenance-related water during flood/high water events and backwash strainer water, and any combinations of these discharges.

Certain hydroelectric facilities are not eligible for coverage under the draft General Permit and must obtain an individual NPDES permit. These include: facilities that employ chemicals with toxic properties; facilities that discharge to tribal waters; facilities that discharge to an "Outstanding Natural Resource Water" as defined under Idaho's water quality standards; facilities that are new or have expanded their discharge since July 1, 2011; and facilities with waste load allocation from a total maximum daily load for pH, oil and grease and/or temperature. In addition, hydroelectric facilities that have cooling water intake structures with a design intake flow of greater than two million gallons per day or use more than 25% of

the water it withdraws for cooling water purposes on an average daily basis do not qualify for the General Permit and must seek an individual permit.

Concurrent with the draft general permit, the Idaho Department of Environmental Quality issued a Draft Section 401 Water Quality Certification certifying that "if the permittee complies with the terms and conditions . . . along with the conditions set forth in this water quality certification, then there is reasonable assurance the discharge will comply with the applicable requirements of . . ." the Clean Water Act and Idaho's water quality standards.

Comments on the draft NPDES General Permit are currently due by July 11, 2018. Once finalized, the General Permit will be effective for a term of five years.

### **FERC Eliminates FERC Form 80 Requirement**

On May 17, 2018, FERC issued a [notice](#) of proposed rulemaking, proposing to remove the requirement for licensees to file a Licensed Hydropower Development Recreation Report, FERC Form No. 80 (Form 80). Form 80, which under current rules is required to be filed every six years, solicits information on the use and development of recreation facilities at FERC-licensed hydropower projects. To complete the form, licensees are required to collect data on recreation use, facilities, and capacity for a 12-month period prior to filing.

FERC has proposed to eliminate Form 80 requirements, because today, many licensed projects with significant recreation opportunities have project-specific license conditions that require licensees to prepare and implement a recreation plan, conduct recreation monitoring, and/or file periodic updates to an approved recreation plan. FERC proposes the elimination of the Form 80 requirement due to its duplicative nature and concerns surrounding the reliability and sufficiency of the form to accurately document recreation use and facility capacity. FERC expects that licensees will continue to monitor project recreation resources in a manner appropriate for the type, size, and quantity of public recreation opportunities provided by the project.

The proposed rulemaking also seeks to amend sections 8.1 and 8.2 of its regulations to modernize public notice practices, clarify recreational signage requirements, and provide flexibility to assist licensees' compliance efforts. Section 8.1 requires licensees to publicize information about the availability of projects lands and waters for recreational purposes, while section 8.2 requires licensees to post signage at public access points and make its FERC-approved recreation plan and license order available for public viewing at its local offices. These regulations were originally promulgated in an effort to put prospective purchasers of land in the project vicinity on notice of the project's public access and recreation purposes and to inform the general public of the location and terms of use of project's recreation facilities.

With regard to section 8.1, FERC is proposing to require signs to identify the project name and number, a statement that the project is licensed by FERC, the licensee name and contact information, and permissible times and activities. These revisions seek to reduce the information that must be included on recreation signage and provide licensees with greater flexibility to design signs that effectively communicate the appropriate information needed by the public. With regard to section 8.2(b), FERC is proposing to require licensees with existing project websites to post copies of approved recreation plans, FERC-approved recreation-related reports, and the entire license instrument on their website to provide greater public access to license requirements. The proposal would not require licensees to develop a project website, if none currently exists.

FERC will accept public comments on the proposed rulemaking through July 23, 2018.

### **DOE Issues 2017 Hydropower Market Report**

On April 30, 2018, the DOE's Office of Energy Efficiency and Renewable Energy issued its [2017 Hydropower Market Report](#) (Report) providing information on hydropower industry trends in the United States. DOE issued its first market report in 2015. The Report is divided into six sections, which

summarize capacity changes and trends in the U.S. fleet since 2006; place the U.S. hydropower fleet in the global context; present trends in operation and maintenance costs; discuss supply chain trends; and discuss market developments shaping the context in which hydropower development and operation decisions are made. The Report highlights the flexibility and reliability services that conventional and pumped storage hydropower provide to the grid.

*[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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