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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](#), NHA California Regional Meeting, "Regulatory and Legal Developments," Los Angeles, CA, December 4, 2018.

Hydro Newsletter

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

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FERC Moves to Implement America's Water Infrastructure Act

On November 13, 2018, the Federal Energy Regulatory Commission (FERC) issued a [Notice](#) Establishing Schedule Pursuant to America's Water Infrastructure Act of 2018 (AWIA). The AWIA was enacted on October 23, 2018. As reported in our November 2018 [newsletter](#), the AWIA includes measures to promote new hydropower development at existing nonpowered dams and development of closed-loop pumped storage projects. The law directs FERC to establish within 180 days an expedited licensing process for projects at existing, nonpowered dams which: (1) have not previously been authorized for hydropower; (2) use for generation the withdrawals, diversions, releases, or flows from an existing impoundment operated for nonpower purposes; and (3) do not materially change the operations of the nonpowered impoundment. The AWIA similarly directs FERC to issue a rule establishing an expedited process for licensing closed-loop pumped storage projects that cause little to no change to existing surface and groundwater flows and uses and are unlikely to adversely affect federally listed threatened and endangered species. FERC is required to convene an interagency task force (ITF) to coordinate regulatory processes associated with authorizations required to construct and operate qualifying projects. The AWIA also directs FERC within one year to jointly develop with certain federal agencies a list of existing nonpowered federal dams that have the greatest potential for non-federal hydropower development. Finally, the law directs FERC to hold within six months a workshop to explore potential opportunities for development of closed-loop pumped storage projects at abandoned mine sites and to issue within one year guidance to assist applicants for development of closed-loop projects at abandoned mine sites.

FERC's November 13 notice establishes three dockets to implement the requirements of the AWIA: RM19-6-000 (expedited licensing regulations); AD19-7-000 (nonpowered dams list); and AD19-8-000 (closed-loop pumped storage projects at abandoned mines guidance) and establishes a schedule for completing each of these requirements. The schedule anticipates issuance of a Notice of Proposed Rulemaking on the expedited licensing processes in January or February 2019 and a final rule in April 2019. It also provides for the workshop on closed-loop pumped storage projects at abandoned mine sites to be held in February 2019, with FERC's guidance to be issued in September 2019. FERC will provide the agencies with a draft list of existing nonpowered federal dams with the greatest potential for non-federal development in April 2019 and finalize the list in August 2019.

The next step in FERC's process is to hold a coordination session with the ITF on December 12, 2018. The meeting is not open to the public. The deadline for federal and state agencies and Indian tribes to request participation in the ITF was November 29, 2018. As of the issuance of this newsletter, requests

to participate have been made by several agencies within the Department of the Interior, the National Oceanic and Atmospheric Administration, the U.S. Forest Service, the Department of Energy, various state agencies, and five Indian tribes.

Supreme Court Rules on Dusky Gopher Frog ESA Case

On November 27, 2018, the U.S. Supreme Court issued its [decision](#) in *Weyerhaeuser Co. v. U.S. Fish & Wildlife Service*, which involved the designation of an unoccupied timberland area as critical habitat for the dusky gopher frog under the Endangered Species Act (ESA). Weyerhaeuser challenged the U.S. Fish and Wildlife Service's (USFWS) designation of unoccupied habitat on its lands, arguing that a dusky gopher frog had not been seen on the property since 1965 and that the frog could not survive there under current conditions. Weyerhaeuser also challenged USFWS's decision not to exclude the lands from the frog's critical habitat, arguing that it failed to adequately weigh the benefits of designating the land against the economic impact. Both the district court and the U.S. Court of Appeals for the Fifth Circuit upheld the designation and found that an agency's decision not to exclude lands from critical habitat is committed to the agency's discretion and is not judicially reviewable.

In a unanimous, 8-0 decision, the Court vacated the Fifth Circuit's decision and remanded, holding that: (1) only "habitat" of the species is eligible for designation as critical habitat; and (2) decisions not to exclude areas from critical habitat are judicially reviewable. Writing for the Court, Chief Justice John Roberts explained that satisfying the statutory definition of unoccupied critical habitat (i.e., the area is essential for the conservation of the species) is not dispositive, and an area cannot be designated as critical habitat unless it is also habitat for the species. While establishing this habitat requirement, the Court noted that the ESA provides no baseline definition of "habitat." On remand, the Fifth Circuit will consider what constitutes habitat, and determine whether the unoccupied area designated for the gopher frog satisfies the habitat standard.

On the issue of reviewability of a decision not to exclude an area from designation, the Court rejected USFWS's arguments that the Secretary of the Interior has unreviewable discretion regarding an exclusion decision. Instead, the Court pointed to the basic presumption of judicial review afforded by the Administrative Procedure Act, recognized that exceptions to review of agency decisions are "quite narrow," and found that a decision not to exclude an area is subject to judicial review regarding whether the decision was arbitrary, capricious, or an abuse of discretion. In remanding to the Fifth Circuit, the Court also explicitly directed that the scope of judicial review includes both the assessment of the designation's costs and benefits and the ultimate decision not to exclude.

While narrow, the Court's holdings are important guideposts to the determination of areas that can be designated as critical habitat. They also provide a clear avenue by which parties can challenge a decision by the USFWS not to exclude specific parcels or areas from critical habitat. While the Fifth Circuit will further consider the habitability and judicial review components, the USFWS may also take action to address these issues. For example, the USFWS anticipates issuing a proposed rule in April 2019 to clarify the regulations regarding consideration of the benefits of including or excluding areas from critical habitat. The USFWS could also implement additional policies or pursue further rulemaking to address the definition of habitat.

California DWR Meets Public Safety Milestone for Oroville Spillway Reconstruction

On November 1, 2018, the California Department of Water Resources (DWR) [announced](#) that it has successfully met its goal of complete reconstruction of the main spillway at Oroville Dam in preparation for the upcoming winter. This was an important public safety construction milestone and a component of the Lake Oroville Spillways Emergency Recovery Project, a massive reconstruction effort after high inflow and releases in February 2017 damaged the main and emergency spillways at Oroville Dam. Phase 1 of the project, completed on November 1, 2017, included repairing and reconstructing the main, gated flood control spillway at the Oroville Facilities to handle flows of 100,000 cubic feet per second (cfs). The recently completed main spillway is now built to its original design capacity of 270,000 cfs.

During reconstruction, DWR placed 1,215,600 cubic yards of concrete in the main and emergency spillways, enough to fill 372 Olympic-sized swimming pools.

Work on the emergency spillway will continue into 2019, including completion of a concrete buttress to bolster the emergency spillway weir and an underground secant pile wall and splashpad on the hillside below. These features should prevent uphill erosion should the emergency spillway ever be used again.

DWR also has completed an operations plan to guide reservoir operations in the 2018-19 flood season. Under the plan, DWR will maintain lower-than-average lake levels during the winter to ensure operational flexibility for flood protection and other purposes.

GAO Issues Report on FERC Dam Safety Program

On November 5, 2018, the Government Accountability Office (GAO) released a [report](#) analyzing FERC's approach to overseeing dam safety. The report was requested by Congress after an independent review team investigating the Oroville spillway incident raised questions about the thoroughness of FERC's oversight of the project. The GAO report found that while FERC generally follows established guidance in collecting safety information from dam inspections, FERC has not used the information to analyze dam safety across FERC's portfolio of dams. The GAO found that FERC lacked standard procedures specifying how and where staff should record safety deficiencies, and as a result, staff uses multiple systems to record inspection findings, making information difficult to analyze. The GAO recommended that FERC develop standard procedures for recording information collected as part of its inspections and that it uses inspection information to assess safety risks portfolio-wide. FERC agreed with the GAO's recommendations.

Alaska's "Stand for Salmon" Measure Defeated

On November 6, 2018, Alaska voters struck down a ballot measure, known as the "Stand for Salmon" initiative, which would have strengthened protections for salmon habitat in Alaska. The measure would have established new requirements and a new permitting process for projects affecting bodies of water related to the activity of anadromous fish, including salmon and steelhead. The measure provided for three types of permits for development in anadromous fish habitat. First, the state agency could issue a general permit applying to a class of applicants for certain activities. Second, it could issue a minor permit for activities that have little impact on fish habitat. Third, it could issue a major permit for projects with the potential to cause significant adverse effects on fish habitat. For such projects, the state agency must avoid or minimize adverse effects through mitigation measures and permit conditions. The measure also would have repealed a provision of state law providing that if a fishway over a dam is deemed cost prohibitive, a dam owner must construct a fish hatchery or fund existing hatcheries within a reasonable distance of the dam to mitigate for the dam's impacts.

Opponents of the "Stand for Salmon" measure, who formed a coalition under the name "Stand for Alaska" to campaign against it, argued that it was too burdensome and would eliminate jobs and potential Alaska resource development projects. Prior to the measure being placed on the ballot, the state challenged the initiative in state court, arguing that it would effectively allocate the use of waters for fish while excluding other uses, such as for roads, mines or other projects. In August, the Alaska Supreme Court ruled that portions of the initiative were unconstitutional because they would have required the state agency to prohibit projects that would cause "substantial damage" to anadromous fish habitat. The court ordered the unconstitutional provisions be removed from the initiative and allowed the remainder of the initiative to be included on the ballot.

[John Clements](#), [Tyson Kade](#), 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.

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