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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

- [Sharon White](#), NHA Southeast Regional Meeting, Panelist: "Regulatory Developments in the Southeast," Charleston, SC, February 12, 2019.
- [Julia Wood](#), Northwest Hydroelectric Association Annual Conference, Moderator: "Inside FERC" panel, Portland, OR, February 22, 2019.

Hydro Newsletter

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FERC Reinstates and Extends Preliminary Permit Under America's Water Infrastructure Act

On December 20, 2018, the Federal Energy Regulatory Commission (FERC) reinstated and extended for two years a preliminary permit for the proposed Banks Lake Pumped Storage Project, to be located in Grant County, Washington on federal lands administered by the U.S. Bureau of Reclamation (Reclamation). Because a portion of the project is FERC-jurisdictional, the project requires both a FERC license and a lease of power privilege from Reclamation. The initial three-year preliminary permit to study the feasibility of the project expired on July 31, 2016. After FERC extended the permit for an additional two years upon the permittee's showing of good faith and reasonable diligence in pursuing the project, it expired on July 31, 2018. In order to maintain its priority to file a license application while it continued to pursue the project before FERC and Reclamation, the permittee filed an application for a successive preliminary permit on August 1, 2018. On September 11, 2018, FERC denied this request, finding that Congress had recognized that five years should be a sufficient amount of time for a permittee to develop and file a license application, and that the permittee did not meet FERC's "extraordinary circumstances" test for granting a successive permit.

Following issuance of this order, however, on October 10, 2018, Congress passed the America's Water Infrastructure Act of 2018 (AWIA), which amends the Federal Power Act (FPA) to increase the initial term of preliminary permits from three years to four. The AWIA also increases the amount of time by which FERC may extend a preliminary permit from two years to four years beyond the initial four-year term, for a maximum permit term of eight years. While the President had not yet signed the bill into law, the permittee filed a request for rehearing, arguing that enactment of the AWIA is an extraordinary circumstance and that FERC denied the successive permit based on the premise, outdated by the AWIA, that a five-year permit term is a sufficient amount of time to prepare and file a license application.

FERC granted rehearing and reinstated the preliminary permit with an extended term of two additional years. Although FERC found that the enactment of the AWIA was not an extraordinary circumstance warranting issuance of a successive permit, it agreed that Congress has now recognized that longer

permit terms are needed to provide permittees with sufficient time to develop and file a license application. For that reason, FERC concluded that the permittee's request for a longer permit term should be granted because the permittee had carried out activities under the permit in good faith and with reasonable diligence. FERC therefore reinstated and extended the permit.

In its order, FERC also noted that FERC staff had recently revised Form P-1, which provides the standard terms and conditions for preliminary permits, to require the filing of a progress report annually. Previously, permittees were required to file progress reports every six months. This appears to be a prospective change, and does not appear to apply to existing preliminary permits.

Van Ness Feldman represented the permittee, Columbia Basin Hydropower, in its rehearing request.

Federal Agencies Release New "Waters of the United States" Rule

On December 11, 2018, the Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (USACE) (together, the Agencies) released their new Clean Water Rule (Proposed Rule). The Proposed Rule re-defines the regulatory term "waters of the United States" (WOTUS), which defines the scope of jurisdiction under the Clean Water Act (CWA). The Proposed Rule seeks to replace the definition in the 2015 Obama-era "WOTUS Rule." If implemented, it is expected that the Proposed Rule would narrow the scope of waterbodies subject to regulation under the CWA.

The 2015 WOTUS Rule raised a number of concerns for hydropower operators, which are addressed or affected by the Proposed Rule. The Proposed Rule significantly narrows the definition of tributary, by excluding ephemeral streams. Moreover, most ditches—defined as artificial channels used to convey water—are excluded from the definition of WOTUS under the Proposed Rule. In situations where jurisdictional status under the 2015 WOTUS Rule was established because ephemeral streams or ditches are connected to water conveyance and delivery systems that are part of a hydroelectric facility, including flumes, siphons, and/or canals, the Proposed Rule may eliminate jurisdictional status for those systems and alleviate some uncertainty surrounding permitting requirements.

Under the Proposed Rule, impoundments (such as a cooling pond for a power plant or forebay for a hydropower plant) of other jurisdictional waters are still considered WOTUS and altering a WOTUS by impounding it would not change the water's jurisdictional status. An impoundment, however, may be less likely to impound a jurisdictional water (and, therefore, come under the jurisdiction of the Agencies) because the Proposed Rule generally narrows the scope of waters that are deemed to be jurisdictional.

The Agencies also narrowed the scope of wetlands covered by the definition WOTUS to "adjacent wetlands" that abut or have a direct hydrological surface connection to other WOTUS in a typical year. Therefore, the instances in which a hydropower developer will need to obtain a CWA section 404 dredge and fill permit when crossing wetlands for activities such as construction of powerhouses or transmission lines are likely to be reduced under the Proposed Rule.

For more information on the Proposed Rule, see our [alert](#).

FERC Update

On December 6, 2018, the U.S. Senate confirmed Bernard McNamee as a FERC Commissioner. He was sworn in as Commissioner on December 11, 2018, for a term to expire on June 30, 2020. McNamee replaces Robert Powelson, who resigned in August 2018. Prior to his confirmation as a FERC Commissioner, McNamee was the Executive Director of the Office of Policy at the Department of Energy. With McNamee sworn in, FERC has returned to a full slate of five commissioners to conduct the business of the agency.

FERC Continues Process to Implement the AWIA

FERC is continuing its efforts to implement the requirements of the AWIA. On December 12, 2018, it convened an interagency task force (ITF) among federal and state agencies and Indian tribes to coordinate the regulatory processes required for expedited licensing of qualifying hydropower facilities

at existing nonpowered dams and for closed-loop pumped storage projects, as required under the AWIA. The meeting was not open to the public.

A number of federal and state agencies and Indian tribes responded to FERC's invitation to participate in the ITF. Federal agencies participating in the ITF included: Reclamation, Department of Energy, Department of the Interior Office of Environmental Policy and Compliance, Department of the Interior Office of the Solicitor, National Marine Fisheries Service, National Park Service, U.S. Fish and Wildlife Service, and the U.S. Forest Service. State agencies participating in the ITF included: the Connecticut Department of Energy and Environmental Protection, Department of Arkansas Heritage, Maryland Department of the Environment, Massachusetts Department of Environmental Protection, Minnesota Pollution Control, Oregon Department of Environmental Quality, Pennsylvania Historical and Museum Commission, Vermont Agency of Natural Resources, Virginia Department of Environmental Quality, Washington Department of Fish and Wildlife, West Virginia Department of Natural Resources, and Wisconsin Department of Natural Resources. Indian tribes participating in the ITF included: the Confederated Tribes of the Colville Reservation, Modoc Tribe of Oklahoma, Muscogee (Creek) Nation, Nez Perce Tribe, and United Auburn Indian Community of the Auburn Rancheria. The USACE did not request to participate and thus its role in the rulemaking is uncertain at this time.

Under FERC's schedule to implement the requirements of the AWIA, it will issue a Notice of Proposed Rulemaking on the expedited licensing processes in January or February 2019 and a final rule in April 2019.

FERC Rejects Section 4(e) Mandatory Condition Requiring Direct Funding to Forest Service

On December 17, 2018, FERC issued a new 40-year [license](#) for the Poe Hydroelectric Project, located on the North Fork Feather River in California. The license application had been pending for 15 years, since December 2003. The Poe Project occupies land within the Plumas National Forest. Under section 4(e) of the FPA, when FERC issues a license for a project located within a federal reservation, the license must be issued subject to any conditions imposed by the Secretary of the department that supervises the federal reservation. Since the U.S. Supreme Court's 1984 decision in *Escondido Mutual Water Co. v. La Jolla Band of Mission Indians* that FERC has no authority to reject or modify section 4(e) conditions, FERC has routinely included all such conditions in its licenses. The new license for the Poe Project reflects an extremely rare instance of FERC staff refusing to include in a license a mandatory condition issued pursuant to FPA section 4(e).

FERC staff rejected a section 4(e) condition imposed by the U.S. Forest Service that requires the licensee to assist in annually funding a "River Ranger" position to provide additional light maintenance and visitor information and assistance, to maintain user safety, to collect information on recreation facility use, to conduct user surveys, to make use counts, and to perform Forest Protection Officer duties in the Project's bypassed reach and nearby reaches. In rejecting the 4(e) condition, FERC found that funding agreements must comply with the requirements of sections 10(e) and 17 of the FPA. FPA section 10(e) authorizes FERC to collect annual charges from licensees to reimburse the United States for the costs incurred in administering the hydroelectric provisions of the FPA, including costs incurred by other federal agencies. FPA section 17 provides that annual charges collected under section 10(e) must be paid into the Treasury of the United States and credited to miscellaneous receipts. FERC found that because the funding for a "River Ranger" contemplates the Forest Service setting and directly receiving annual charges, it is contrary to the annual charges provisions of the FPA. For this reason, FERC omitted the condition from the license.

FERC Issues After-Action Panel Report on Oroville Spillway Incident and FERC's Dam Safety Program

On December 6, 2018, FERC issued its "After-Action Panel [Report](#)" evaluating the performance of FERC's dam safety program at the Oroville Project, assessing the causes of the Oroville spillway incident, and issuing recommendations to improve the effectiveness of FERC's dam safety program. The Panel

concluded that recent dam safety related incidents can be tied directly to design and operational deficiencies not detected in FERC's Part 12 review process. To address this issue, the Panel recommends that FERC convene an Independent Board of Consultants to act as a Dam Safety Engineering Review Board for FERC, with the on-going charge of reviewing the Part 12 program, assessing the performance, and offering suggested improvements. Each year, FERC would select a small number of significant, high hazard dams that have recently completed the Part 12 process. FERC would engage the Board to review the Part 12 reports and develop recommendations based on the results of the reports. FERC would then conduct a review meeting with the dam owner and the Board to open a meaningful dialogue to improve dam safety at the projects.

The Panel also issued a number of recommendations to improve FERC's dam safety program. It recommended that FERC's Division of Dam Safety and Inspections issue a set of priority topics to its regional offices to be addressed in all Part 12 reviews. This would set a more uniform process across FERC for evaluation of key elements of each project that must be addressed in a Part 12 report. The Panel also recommended that the "as built" structure should be evaluated to ensure it meets the design intent, and all parties involved with the project should be aware of the original design and operational intent of the project components and any subsequent changes. The Panel recommended that FERC engineers should concentrate on dam safety issues and proper review of auxiliary/ancillary structures. This could be accomplished by creating a separate FERC division solely responsible for security aspects and other non-dam safety issues. Lastly, when licensees perform repairs designated as "routine maintenance," these items should undergo a rigorous review process to determine if they fall under that category or if the proposed work is a significant modification or improvement for the function of a particular structure related to safety. The Panel recommended that a licensee should submit to FERC all repair work items prior to the start of the repair work so that FERC can review and comment on the adequacy of the planned work.

The Panel also recommended that FERC compile a list of the highest dams and spillways which could be of significant hazard to downstream populations, and assign a team of FERC engineers to conduct FERC annual inspections at these dams. These evaluations would provide FERC with an independent assessment in addition to and separate from the Part 12 Safety Inspection Report evaluations for these projects.

FERC Eliminates FERC Form 80 Requirement

On December 20, 2018, FERC issued a final [rule](#) removing 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 proposed to eliminate Form 80 requirements because many licensed projects with significant recreation opportunities have project-specific license conditions that require licensees to prepare and implement a recreation management plan (RMP), conduct recreation monitoring, and/or file periodic updates to an approved RMP. While licensees will no longer be required to file a Form 80, 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. FERC also notes that it is currently developing a guidance document for licensees, which will provide general guidance on how to prepare an RMP in consultation with stakeholders.

The U.S. Forest Service provided comments on FERC's proposed rule indicating that it values the type of information reported by licensees in Form 80 submittals, and will use its mandatory conditioning authority under FPA section 4(e) to require recreational monitoring for individual projects during licensing proceedings, as it deems appropriate.

The final rule also amends sections 8.1 and 8.2 of FERC's regulations to modernize public notice practices, clarify recreational signage requirements, and provide flexibility to assist licensees' compliance

efforts with these requirements. 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 the project's recreation facilities.

With regard to section 8.1, in addition to publishing notice in a local newspaper, FERC will now require licensees to post notice of any recreation-related license conditions that FERC may designate in an order issuing or amending a license to the licensee's existing project website.

With regard to section 8.2(a), FERC has streamlined the amount of information that must appear on recreation signage to identify only the project name and number, a statement that the project is licensed by FERC, the licensee name and contact information, and permissible times of use and activities available. With regard to section 8.2(b), FERC will now 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. FERC will not require licensees to develop a project website, if none currently exists.

The final rule will become effective 90 days after its publication in the Federal Register.

[Julia Wood](#), [Sharon White](#), and [Jenna Mandell-Rice](#) 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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