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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.

Hydro Newsletter

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Licensees Seek Waiver of Section 401 Certification under D.C. Circuit Precedent

On January 25, 2019, the U.S. Court of Appeals for the D.C. Circuit (D.C. Circuit) issued a [decision](#) in *Hoopa Valley Tribe v. FERC* in the Federal Energy Regulatory Commission (FERC) relicensing of PacifiCorp’s Klamath Hydroelectric Project in Oregon and California, holding that the withdrawal and resubmission of water quality certification requests under Section 401 of the Clean Water Act (CWA) does not trigger a new statutory period of review. Since that time, at least two other California licensees engaged in relicensing have requested FERC to find that the state has waived its Section 401 authority by engaging in the withdraw and resubmit process.

On February 19, 2019, Nevada Irrigation District (NID) filed a letter requesting FERC to confirm that the California State Water Resources Control Board (State Water Board) has waived its Section 401 authority by requiring NID to withdraw and resubmit its 401 application for six consecutive years. Like the licensee in the *Hoopa* case, NID filed identical 401 applications each year. Most recently, on January 25, 2019, the same day the D.C. Circuit issued its *Hoopa* decision, the State Water Board denied NID’s 401 application “without prejudice” and directed NID to file a new 401 application. NID states that the Board’s “denial without prejudice” seeks to accomplish the identical outcome of the previous withdrawal and resubmittal scheme – to circumvent the one-year deadline under the CWA and indefinitely delay the relicensing – and that in any case waiver had already occurred as a result of six years of withdrawals and resubmittals. NID seeks FERC confirmation that the State Water Board has waived its Section 401 authority, and that NID’s relicense application remains in good standing if NID does not reapply for Section 401 certification. The request is pending in Project No. 2266.

On February 22, 2019, Placer County Water Agency (PCWA) filed a petition for a declaratory order that the State Water Board has waived its Section 401 authority with respect to its Middle Fork American Project. Each year since 2012, PCWA has withdrawn and resubmitted its 401 application, as directed by the State Water Board. Like the licensee in *Hoopa*, PCWA sent a short letter to the Board each year indicating its withdrawal and resubmission, and did not change or even submit a new copy of the application itself. PCWA has requested that FERC declare that the State Water Board has waived its Section 401 authority and that FERC need no longer wait for the Board to act before issuing a new license. The petition is pending in Project No. 2079.

Other, similarly situated licensees will want to track FERC’s responses to these filings, as well as any actions FERC may take in the Klamath proceeding.

Upcoming Speaking Engagements

- [Shelley Fidler](#), National Hydropower Association Annual Meeting, Panelist: “NHA 2018 Policy Update and Policy Outlook,” Washington, DC, April 1, 2019.
- [John Clements](#) and [Sharon White](#), National Hydropower Association Annual Meeting, “The Hydro Brief: Examining Current Legal Issues and What They Mean to You,” Washington, DC, April 3, 2019.

FERC Issues Final Rule Implementing Provisions of the AWIA

On February 21, 2019, FERC issued a [Final Rule](#) revising its regulations to implement several provisions of the America’s Water Infrastructure Act of 2018 (AWIA). The revisions to FERC’s rules are ministerial in nature. First, the Final Rule revises FERC’s regulations to reflect that it may issue preliminary permits with a maximum term of four years, instead of the previous three-year limit. It may extend a preliminary permit term once for not more than an additional four years if the permittee has carried out activities under the permit in good faith and with reasonable diligence. It may also issue a new permit after the end of an extension under extraordinary circumstances. Second, the Final Rule revises FERC’s regulations related to qualifying conduit hydropower projects that are not subject to FERC’s jurisdiction. The revised rules reflect a reduction in time by which a facility is deemed a qualifying conduit facility from 45 to 30 days after filing a notice of intent to construct such a facility, and expands the maximum capacity of such facilities from 5 to 40 MWs.

Lastly, the Final Rule amends FERC’s regulations pertaining to the obligation for payment of annual charges. The payment of annual charges for unconstructed projects begins on the day by which the licensee or exemptee is required to commence project construction, which is two years after license issuance, or by any extension of that date. Under FERC’s prior regulations, FERC established the start day for payment of annual charges to no later than four years after issuance of the license or exemption, because the Federal Power Act (FPA) limited FERC to issuing one extension of the commencement of construction deadline for no more than two additional years. The AWIA revised the FPA to authorize FERC to extend the commencement of construction deadline for up to eight years. For this reason, FERC’s Final Rule eliminates the maximum four-year period before the commencement of annual charges. Instead, FERC will commence annual charges at the end of two years after license issuance or the expiration of any extended deadline. FERC’s Final Rule does not address application of the AWIA to state and municipal projects, which under FERC’s current regulations are completely exempt from annual charges during the construction period, except for charges for use of a government dam or tribal lands. Presumably, FERC did not make a change in this area because it does not interpret the AWIA to preclude state and municipal licensees from continuing to benefit by this exemption.

Proposed WOTUS Rule Comment Period Commences

As previously [reported](#), 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). On February 14, 2019, notice of the Proposed Rule was [published](#) in the Federal Register. The Federal Register notice establishes a comment deadline of April 15, 2019.

The Proposed Rule re-defines the regulatory term “waters of the United States” (WOTUS), which defines the scope of jurisdiction under the 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 water bodies subject to regulation under the CWA.

The 2015 WOTUS Rule raised several concerns for hydropower operators, which are addressed or affected by the Proposed Rule. The Proposed Rule excludes ephemeral streams from the definition of tributary, and excludes most ditches from the definition of WOTUS. This may eliminate jurisdictional status for such waters that are connected to water conveyance and delivery systems which are part of a hydroelectric facility. The Proposed Rule also narrows the scope of covered wetlands to “adjacent wetlands” that abut or have a direct hydrological surface connection to other WOTUS. This is likely to reduce the need to obtain a CWA Section 404 dredge and fill permit when crossing wetlands for project-related activities. For more information on the Proposed Rule, see our [issue alert](#).

Corps of Engineers Releases Memorandum Requiring “Nationwide Consistency” in CWA Section 404 Permitting

A recently disclosed 2013 internal [memorandum](#) from the USACE Assistant Secretary of the Army for Civil Works details a nascent effort to issue guidance that achieves “nationwide consistency” on issues

**Van Ness Feldman Welcomes Two
New Attorneys in Seattle Office**

We are honored to introduce our newest colleagues, Partner [Erin Anderson](#) and Of Counsel [Sara Leverette](#), who join VNF's Seattle team from Stoel Rives. Their experience, and significant understanding of the unique challenges inherent in permitting developments throughout the region, brings additional depth and expertise to our highly regarded team. [Click here for more information.](#)

routinely raised in dredge and fill permitting under Section 404 of the CWA. The memorandum directs USACE staff to draft guidance on: (1) the appropriate duration of jurisdictional determinations and individual Section 404 permits; (2) timelines for state water quality certifications under CWA Section 401; and (3) the level of specificity in project descriptions and activities needed for the alternatives analysis for individual Section 404 permits.

The memorandum notes inconsistent practices among the USACE's districts, such as some districts issuing five-year permits and others fifteen-year permits for the same kind of activities, and requires the USACE to prepare nationwide guidance on the identified matters. Notably, jurisdictional determinations are to be aligned with the duration of the permit and any extensions. The default review period for Section 401 permits needed for Section 404 permits will be set at sixty (60) days from the state's receipt of the applicant's request for certification and criteria will be established for extensions. The memorandum explicitly excludes workload or resource constraints as grounds for an extension. The memorandum also provides that the review of "practicable alternatives" to the proposed activity required by the agencies' Section 404 Guidance can allow some uncertainty regarding specifics of the proposed project as long as an appropriate alternatives analysis can be accomplished.

At this time, it is not certain when or in what format (e.g., a formal nationwide guidance directive to District Engineers or a Regulatory Guidance Letter) the guidance will be issued. For more information on the memorandum, see our [issue alert](#).

[John Clements](#) 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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