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# Hydro Newsletter

## VOLUME 6, ISSUE 4: APRIL 2019

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- *Update on Hoopa Valley Tribe Case Regarding Waiver of Section 401 Authority*
- *Hydro Industry Files Comments on FERC AWIA Rulemaking*
- *FERC to Hold Workshop on Closed Loop Pumped Storage at Mine Sites*
- *NOAA Seeks Input on Changes to CZMA Consistency Regulations*
- *DOE Announces \$10 Million for Marine Energy Research and Testing*

### Update on Hoopa Valley Tribe Case Regarding Waiver of Section 401 Authority

On March 11, 2019, several environmental organizations filed a request for rehearing of the U.S. Court of Appeals for the D.C. Circuit's (D.C. Circuit) [decision](#) in *Hoopa Valley Tribe v. FERC* finding 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.

The organizations, including American Rivers, California Trout, and Trout Unlimited, seek rehearing of the decision by the original panel of three judges who issued the decision, or rehearing *en banc* by all active judges on the Court. Under the Court's rules, *en banc* hearings are granted only to decide questions of exceptional importance. The environmental organizations argue that the case is of exceptional importance because it "would effectively exempt dozens of dams undergoing licensing from compliance with water quality standards" and the decision conflicts with decisions of other Courts of Appeals with respect to the one-year deadline for 401 certifications. A number of states, tribes, and other environmental organizations have filed amicus briefs in support of the request for rehearing or rehearing *en banc*. As of the date of this publication, the rehearing request remains pending before the Court.

While the *Hoopa Valley Tribe* case is not yet final, it also continues to be raised by licensees before the Federal Energy Regulatory Commission (FERC). At least three licensees currently engaged in relicensing have requested FERC to find that the relevant state has waived its Section 401 authority by engaging in the withdraw and resubmit process. FERC has issued public notice of two of these requests, which were filed in the form of Petitions for Declaratory Order, and a number of parties have intervened and filed comments. The deadline for comments was March 28. It remains to be seen whether FERC will issue declaratory orders in these proceedings, issue new licenses finding waiver, or delay a decision until it acts on the D.C. Circuit's remand in the *Hoopa* proceeding.

The *Hoopa* case also has been raised in pending gas pipeline proceedings before FERC. In a case regarding a gas pipeline in New York, FERC in 2018 denied an applicant's request to find that the state had waived its 401 authority after it requested that the applicant withdraw and resubmit its 401 application for three years. FERC denied the request and the applicant sought judicial review before the D.C. Circuit. On February 28, 2019, the Court granted an unopposed voluntary remand of the case back to FERC to consider the implications of the *Hoopa* order on the case. FERC has requested the parties to file supplemental pleadings by April 1, with responsive pleadings due by May 1. The case is *Constitution Pipeline Company, LLC*, FERC Docket No. CP18-5.

### 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.
- [Mike Swiger](#), National Hydropower Association Northeast Regional Meeting, Moderator: "CWA 401 Issues," Lowell, MA, June 5, 2019.

## Hydro Industry Files Comments on FERC AWIA Rulemaking

As previously [reported](#), on January 31, 2019, FERC issued a [Notice of Proposed Rulemaking](#) (NOPR) proposing rules to establish a new expedited licensing process (ELP) for qualifying facilities at existing nonpowered dams (NPD) and closed-loop pumped storage (CLPS) projects, as required by the America's Water Infrastructure Act of 2018 (AWIA). The NOPR does not propose to alter FERC's existing licensing processes. Instead, it establishes procedures for FERC to determine, on a case by case basis, whether applications for an original license at a qualifying project meet the criteria to participate in the new ELP. The ELP would apply only to original license applications; it would not apply to relicensing proceedings. Applicants must include with their licensing application a request for authorization to use the ELP. FERC will act on the request to use the ELP within six months from the date of application filing.

The National Hydropower Association and several industry participants filed [comments](#) by the deadline of March 11, 2019. The industry comments expressed strong support for expediting the licensing process for NPD and CLPS projects, but indicated that FERC's proposed rule, although it might result in minor improvements to the timeliness of post-application processing, will not result in a material reduction in the overall licensing period of 5-7 years because it does not address the lengthy and burdensome pre-application process. They also urged FERC to determine eligibility for the ELP early in the pre-filing consultation process rather than well into the post-application process, to take a broadly inclusive approach to defining CLPS projects, and to apply the eligibility requirement that CLPS projects cause little or no change to surface or groundwater flows in a common sense manner to ensure that most or all CLPS projects are not excluded.

Comments were also filed by various resource agencies which generally seek a narrow definition of CLPS and a broad approach to determining whether a proposed project would change surface or groundwater flows.

## FERC to Hold Workshop on Closed Loop Pumped Storage at Mine Sites

On April 4, 2019, from 1:00 p.m. to 4:45 p.m., as directed by Section 3004 of the AWIA, FERC staff will conduct a workshop on development of CLPS projects at abandoned mine sites. The workshop will be held in the Commission Meeting Room at FERC's headquarters. The public will also be able to view the workshop via webcast. The workshop format is roundtable discussions among panelists moderated by FERC staff. There will be time for audience questions and comments following each agenda discussion topic. Those interested in attending the workshop or viewing the webcast are encouraged to register on FERC's [website](#). An agenda for the workshop is available [here](#).

## NOAA Seeks Input on Changes to CZMA Consistency Regulations

On March 11, 2019, the National Oceanic and Atmospheric Administration (NOAA) published an [Advance Notice of Proposed Rulemaking](#) (ANOPR) seeking comments on changes to NOAA's Coastal Zone Management Act (CZMA) federal consistency regulations. Specifically, NOAA is looking for comments on: (1) how the existing Federal Consistency with Approved Coastal Management Programs regulations at 15 C.F.R. Part 930 can be streamlined for oil and gas projects on the Outer Continental Shelf (OCS) as well as renewable energy projects; (2) how the process for appeals of state denial of consistency certification can be improved to increase efficiency and predictability, such as by limiting the scope of the Secretary of Commerce's review of certain appeals of state objections; and (3) the potential costs that could be incurred by "small entities" during CZMA consistency appeals if the appeals process is revised to provide for such increased efficiency and predictability (i.e., in connection with compliance with the Regulatory Flexibility Act). Comments are due April 25, 2019.

## DOE Announces \$10 Million for Marine Energy Research and Testing

On March 22, 2019, the Water Power Technologies Office of the U.S. Department of Energy [announced](#) funding to establish a new program for testing and research for marine energy technologies. The U.S. Testing Expertise and Access for Marine Energy Research (TEAMER) Program is intended to establish a network that uses the capabilities of universities, the U.S. national laboratory system, and the National Marine Renewable Energy Centers to provide marine energy developers access to testing facilities and

expertise, with the goal of simplifying access and reducing costs of testing for marine and hydrokinetic technology developers.

The TEAMER program is being initiated with a \$10 million Funding Opportunity Announcement that will disburse funds to university and private members of the network and select the network director. The network director will provide independent validation and verification for the establishment and operations of the program, including establishment of the Test Facility Network and development of TEAMER test protocols and technical processes, as well as make funding available on an as-needed basis. More information on the funding opportunity is available on DOE's [website](#).

*[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.

John Clements	202.298.1933	<a href="mailto:jhc@vnf.com">jhc@vnf.com</a>
Robert Conrad	202.298.1927	<a href="mailto:rac@vnf.com">rac@vnf.com</a>
Matt Love	206.829.1809	<a href="mailto:mal@vnf.com">mal@vnf.com</a>
Jenna Mandell-Rice	206.829.1817	<a href="mailto:jrm@vnf.com">jrm@vnf.com</a>
Brian McManus	202.298.3720	<a href="mailto:bzm@vnf.com">bzm@vnf.com</a>
Mike Swiger	202.298.1891	<a href="mailto:mas@vnf.com">mas@vnf.com</a>
Sharon White	202.298.1871	<a href="mailto:slw@vnf.com">slw@vnf.com</a>
Julia Wood	202.298.1938	<a href="mailto:jsw@vnf.com">jsw@vnf.com</a>

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