



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.

# Hydro Newsletter

## VOLUME 6, ISSUE 6: JUNE 2019

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

<http://www.vnf.com/KnowledgeCenter.aspx?SignUp=True>

- *FERC Order Retroactively Extends Commencement of Construction Deadlines under AWIA*
- *EPA Accepts Comments on CWA Section 401 Guidance; to Issue Revised Guidance in June 2019*
- *New Requests Made to FERC to Find CWA Section 401 Water Quality Certification Waived*
- *DOE Solicits Applications for EPACT Section 242 Hydroelectric Incentive Payments*

### FERC Order Retroactively Extends Commencement of Construction Deadlines under AWIA

On May 7, 2019, the Federal Energy Regulatory Commission (FERC) issued an [order](#) which retroactively extended the deadlines to commence and complete construction of the Eagle Mountain Pumped Storage Project No. 13123. The license was granted in June 2014. In 2016, pursuant to Federal Power Act (FPA) Section 13 as it then read, FERC granted the licensee's request for a one-time two-year extension until June 19, 2018, of the deadline to commence construction. The licensee did not commence construction by the June 19 deadline, making the license subject to termination under FPA Section 13.

FERC had not commenced the license termination process when, on October 23, 2018, the America's Water Infrastructure Act of 2018 (AWIA) was enacted. Section 3001 of AWIA amended FPA Section 13 to allow FERC to grant extensions of time to commence construction for up to eight additional years beyond the initial two-year deadline, for a total of ten years. The licensee thereafter requested an additional two year extension of time to commence construction until June 2020. Two non-governmental organizations (NGOs) made submittals opposing the requested extension. They argued, among other things, that FERC lacked authority to grant an extension because AWIA was enacted after the licensee failed to meet the statutory deadline under FPA Section 13 as it read in June 2019. FERC rejected the NGOs' arguments, stating that Section 13 as amended by AWIA does not limit FERC's authority to grant additional extensions of time to projects licensed following passage of the legislation. FERC concluded that the requested two year extensions of time to commence and complete construction were justified and granted the extensions.

### EPA Accepts Comments on CWA Section 401 Guidance; to Issue Revised Guidance in June 2019

As previously [reported](#), on April 10, 2019, President Trump issued an Executive Order to promote efficient permitting of energy infrastructure projects, including requirements for the Environmental Protection Agency (EPA) to review its regulations and guidance on Clean Water Act (CWA) Section 401 water quality certifications. The Executive Order directs EPA to review and update, if necessary, its Section 401 guidance to states and tribes by June 9, 2019. The updated guidance would supersede the interim guidance document entitled "Clean Water Act Section 401 Water Quality Certification: A Water Quality Protection Tool for States and Tribes." EPA established a [public docket](#) to receive public comments in connection with the rulemaking and guidance efforts. The comment period closed on May 24, 2019. The National Hydropower Association (NHA) filed comments regarding revision of the interim

### Upcoming Speaking Engagements

- [Mike Swiger](#), National Hydropower Association Northeast Regional Meeting, Moderator: "CWA 401 Issues," Lowell, MA, June 5, 2019.
- [Julia Wood](#), National Hydropower Association Northeast Regional Meeting, Panelist: "Hot Topics in the Northeast," Lowell, MA, June 5, 2019.

guidance document. NHA recommended, among other things, that the guidance document state that the one-year time frame for states to act on an application for water quality certification begins when the application is filed, not when it is deemed by the state agency to be complete, and adopt a policy that withdrawal and resubmittal of the same application constitutes a waiver of certification.

### New Requests Made to FERC to Find CWA Section 401 Water Quality Certification Waived

As previously [reported](#), in the wake of the U.S. Court of Appeals for the D.C. Circuit's decision in *Hoopa Valley Tribe v. FERC (Hoopa Valley)* holding that the repeated withdrawal and resubmission of water quality certification requests under Section 401 of the CWA constitutes a waiver of certification by the state, several license applicants have received from, or have pending requests for, a determination from FERC that the state has waived certification with regard to specific new license applications. Two additional requests have been made to FERC to determine that state 401 certification was waived based on *Hoopa Valley*. In one case, Pacific Gas & Electric Company (PG&E) filed a petition for a declaratory order seeking a determination that the California State Water Resources Control Board (Water Board) has waived its 401 authority with respect to PG&E's pending application to surrender its license for the Kilarc-Cow Creek Project, FERC Project No. 606. PG&E filed its original request for a 401 certification with the Water Board in 2009. Since its first request, PG&E was required to annually withdraw and resubmit the same request for nine consecutive years. On April 5, 2019, the Water Board denied PG&E's 401 application without prejudice, and encouraged PG&E to file a new request. PG&E has opted not to file a new request for 401 certification. Instead, it has requested FERC to declare that the Water Board has waived its 401 authority and promptly issue a surrender order.

In the second case, Merced Irrigation District (MID) filed a letter requesting a determination from FERC that the Water Board has waived its 401 authority for the relicensing of the Merced Falls and Merced River Hydroelectric Projects, FERC Project Nos. 2467 and 2179. The Water Board denied MID's 401 applications without prejudice on April 22, 2019, after MID had withdrawn and resubmitted its 401 applications annually since 2015. MID has opted not to reapply for 401 certifications. Instead, it has requested confirmation from FERC that its relicensing applications remain in good standing, notwithstanding the absence of active 401 applications pending before the state.

As of the date of this publication, MID and PG&E's requests for waiver remain pending before FERC.

### DOE Solicits Applications for EPACT Section 242 Hydroelectric Incentive Payments

On May 21, 2019, the U.S. Department of Energy (DOE) issued [notice](#) of an open application period for incentive payments for power production by owners and operators of qualified hydroelectric facilities at existing dams and impoundments. The payments are available for electricity generated and sold in a specified 10-year period as authorized under the Energy Policy Act of 2005. Congress appropriated and DOE allocated \$6.6 million for this purpose for federal Fiscal year 2019 (September 1, 2018 – August 31, 2019). At this time, DOE is only accepting applications from owners and operators of qualified facilities for power generated and sold in calendar year 2018. Additionally, the qualified hydropower facility must have begun operating between October 1, 2005 and September 30, 2015. DOE is accepting applications until June 20, 2019.

[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>

© 2019 Van Ness Feldman, LLP. All Rights Reserved. This document has been prepared by Van Ness Feldman for informational purposes only and is not a legal opinion, does not provide legal advice for any purpose, and neither creates nor constitutes evidence of an attorney-client relation.