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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

## VOLUME 6, ISSUE 8: AUGUST 2019

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- *U.S. Supreme Court Extends Deadline for Petitions for Certiorari in Hoopa Valley Tribe Case*
- *FERC Affirms Policy that Project Economics Are Not Relevant to Compliance*
- *CEQ Extends Deadline to File Comments on Draft Guidance Addressing GHGs in NEPA Analyses*
- *Senate Energy Committee Passes Bill to Extend Hydropower Production and Efficiency Incentive Payments*

### U.S. Supreme Court Extends Deadline for Petitions for Certiorari in Hoopa Valley Tribe Case

On July 23, 2019, the U.S. Supreme Court extended the deadline by which parties may file a petition for a writ of certiorari of the U.S. Court of Appeals for the D.C. Circuit's (D.C. Circuit) January 25, 2019 decision in *Hoopa Valley Tribe v. FERC*. In that case, the D.C. Circuit held that the withdrawal and resubmission of a water quality certification request under Section 401 of the Clean Water Act does not trigger a new statutory period of review. The extension request was filed by California Trout and Trout Unlimited, who were both parties to the D.C. Circuit case. The new deadline for a petition for a writ of certiorari is August 26, 2019.

### FERC Affirms Policy that Project Economics Are Not Relevant to Compliance

On July 18, 2019, the Federal Energy Regulatory Commission (FERC) issued an [order](#) on the rehearing of a staff order which found that the co-licensees for the Green Island Hydroelectric Project No. 13 are in violation of numerous terms and conditions of the new license issued in 2012 pertaining to construction of a major expansion of the project's generating capacity and upstream and downstream fishways. The staff order found that despite many extensions of time, the co-licensees have made no progress toward meeting the requirements regarding both matters and have extensive violations of the license. The co-licensees were required to expeditiously address the license violations and file a plan and schedule to commence construction of the modified generating facilities.

In their rehearing request, the co-licensees contended that they have been prevented from moving forward with the powerplant upgrade and fishways by various unforeseeable factors. These include an approximately 50 percent drop in wholesale power prices since the relicensing process began, which they contended make the approved capacity increase uneconomic at this time. They requested a stay of the commencement of construction deadlines and that FERC convene a technical conference on the outstanding issues.

The July 18 order denied the co-licensees' request for rehearing in essentially all respects. Most notably, FERC held that the co-licensees failed to support their contention that the change in project economics merits relief from the license requirements and affirmed its prior holdings that economic viability is irrelevant to compliance. FERC also held that although a 2009 relicensing settlement agreement links the fishways to construction of the expanded generating capacity, the fishway prescriptions of the U.S. Fish and Wildlife Service, which executed the settlement agreement, are tied only to issuance of the license, and that the license conditions do not tie the fishway obligations to the construction of additional capacity.

### Upcoming Speaking Engagements

- [Matt Love](#), The Seminar Group: Hydropower Relicensing, Panelist: “Clean Water Act – One Year Deadline” and “Federal Environmental Regulatory Update,” Seattle, WA, October 3, 2019.

## CEQ Extends Deadline to File Comments on Draft Guidance Addressing GHGs in NEPA Analyses

On July 24, 2019, the Council on Environmental Quality (CEQ) [extended](#) the deadline for comments on its June 26, 2019 [Draft Guidance](#) on Consideration of Greenhouse Gas (GHG) Emissions. As reported in our June 2019 [newsletter](#), the draft guidance document would replace guidance issued in 2016 by the Obama administration by easing obligations on federal agencies to consider climate change impacts in National Environmental Policy Act (NEPA) analyses, directing agencies to assess indirect effects of an action only when a “sufficiently close causal relationship exists between the proposed action and the effect,” and indicating that agencies should attempt to quantify a proposed action’s projected direct and reasonably foreseeable indirect GHG emissions only when the amount of those emissions is substantial enough to warrant quantification and can practicably be quantified using available data and GHG quantification tools. Lastly, the draft guidance directs that an agency need not weigh the effects of the various alternatives under NEPA in a monetary cost benefit analysis using “social cost of carbon” estimates.

The extended deadline for comments is August 26, 2019.

## Senate Energy Committee Passes Bill to Extend Hydropower Production and Efficiency Incentive Payments

On July 16, 2019, the U.S. Senate Energy and Natural Resources Committee, by unanimous consent, favorably reported out [S. 859](#), the “Reliable Investment in Vital Energy Reauthorization Act” or “RIVER Act.” S. 859 is the reauthorization bill for the Energy Policy Act of 2005, which establishes hydropower production and efficiency incentive payments in Section 242 (for energy generated at new facilities added to existing dams) and Section 243 (for efficiency improvements to existing generating facilities). The bill would re-open the eligibility window, which ended on September 30, 2015, to allow new projects to qualify for payments under the programs if the programs are funded by Congress.

S. 859 also includes a new category of projects eligible under Section 242. Currently, Section 242 incentive payments apply only to added generation at existing non-powered dams and conduits. If the bill is enacted as reported out, the Section 242 incentives will also apply to generation at new projects that are not located at an existing dam or conduit and: (1) have a capacity of not more than 10 megawatts; (2) for which the non-federal entity has received construction authorization from FERC, if the project is FERC jurisdictional; and (3) are located in a region with inadequate electric service, as determined by the Secretary of Energy.

*[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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