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# Hydro Newsletter

## VOLUME 6, ISSUE 11: NOVEMBER 2019

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### President Trump to Nominate James P. Danly to be FERC Commissioner

On September 30, 2019, President Trump [announced](#) his intention to nominate James P. Danly as a Commissioner of the Federal Energy Regulatory Commission (FERC or Commission). If confirmed, Mr. Danly will occupy the seat formerly occupied by Chairman Kevin McIntyre for a term to expire on June 30, 2023. Chairman McIntyre passed away on January 2, and his seat on the Commission has been vacant since then. FERC is composed of up to five commissioners, appointed by the President with the advice and consent of the U.S. Senate. No more than three FERC commissioners may be from the same political party. Currently, there are only three sitting FERC Commissioners, the minimum to establish the necessary quorum to conduct business. If even one current sitting Commissioner recuses himself from a case, the Commission will lack a quorum and cannot act on the matter. In announcing his intent to nominate Danly, it appears that President Trump has departed from the typical practice of nominating pairs of Republican and Democratic nominees together. If Danly is confirmed, there will be one remaining Commissioner vacancy, the seat formerly held by Commissioner Cheryl LaFleur, a Democrat.

Mr. Danly has been FERC's General Counsel since September 2017. Before joining FERC, he was an attorney in private practice at a major law firm. He also previously served as law clerk to Judge Danny Boggs at the U.S. Court of Appeals for the Sixth Circuit. In addition, Mr. Danly was the managing director of the Institute for the Study of War and was an International Affairs Fellow at the Council on Foreign Relations.

### CWA Section 401 Update

During October, there were several notable developments with regard to Clean Water Act (CWA) Section 401 matters.

### Upcoming Speaking Engagements

- [Mike Swiger](#), National Hydropower Association California Regional Meeting, Panelist: Clean Water Act Section 401 Developments, Sacramento, CA, December 9, 2019.

On October 17, 2019, FERC [denied](#) rehearing of its April 2019 order determining that the State of California waived its authority under CWA Section 401 to issue a water quality certification in the ongoing relicensing of the Middle Fork American River Project. On rehearing, the State and a coalition of conservation organizations argued that the licensee voluntarily withdrew and resubmitted its 401 application for reasons unknown to the State, and that the State would have timely denied the application had the licensee's withdrawals not deprived the State of that opportunity. FERC found that the record did not support the State's position, and that the State expected—and in certain years requested—the licensee to withdraw and resubmit its application to restart the one-year clock. FERC clarified that the one-year deadline under Section 401 cannot be tolled due to a state's alleged lack of resources. FERC also noted that a state's reason for delay or the fact that the delay was for a shorter period than in *Hoopa Valley Tribe v. FERC* is immaterial. Finally, FERC found that the State's 401 certification, which it issued one day before FERC's April 2019 order, was of "no legal significance," but noted FERC's general policy, where time permits, to review any conditions included in an ineffective 401 certification as recommendations under Section 10(a) of the Federal Power Act.

Additionally, several parties have filed briefs in response to the pending petition for a writ of certiorari to the U.S. Supreme Court in *California Trout v. Hoopa Valley Tribe*. On September 27, 2019, 21 states filed an amicus brief in support of certiorari, arguing that if the decision of the U.S. Court of Appeals for the D.C. Circuit is not reversed, hydropower projects are likely to be exempted from state water quality requirements for decades. On October 28, 2019, the Hoopa Valley Tribe, PacifiCorp, and FERC joined by the U.S. Department of Justice all filed briefs in opposition to certiorari. They argue that the petition for certiorari should be denied because the underlying order is correct as a matter of law, does not conflict with the decisions of other circuits, and even if review was otherwise warranted, is premature because the U.S. Environmental Protection Agency (EPA) is in the process of developing new regulations interpreting Section 401.

Finally, the hydroelectric industry weighed in at EPA on its proposed rule to implement Section 401. The National Hydropower Association, Northwest Hydroelectric Association, Edison Electric Institute, and a number of FERC hydropower licensees filed comprehensive comments in support of the proposed rule. EPA received nearly 1,000 public comments on its proposal. EPA is expected to issue a final rule by May 2020.

### FERC Revises Policy Statement on Consultation with Indian Tribes in Commission Proceedings

On October 17, FERC issued a [revised](#) policy statement on consultation with Indian Tribes in Commission proceedings, originally issued in 2003. Under the 2003 policy statement, FERC endeavors to work with tribes on a government-to-government basis and ensures that tribal issues and interests are considered in FERC's decisions. FERC's revisions respond in part to a March 2019 Government Accountability Office report recommending that FERC document in its tribal consultation policy "how agency officials are to communicate with tribes about how their input from consultation was considered in agency decisions on infrastructure projects." The revised policy statement makes clear that FERC will describe in its environmental documents and orders how a tribe's input from consultation was considered in its decision on an infrastructure project. The revisions also clarify that FERC will consider the effects of its actions on tribal treaty rights. Finally, FERC specified that its policies on tribal consultation extend to Alaska Native Corporations (ANCs). While the 2003 policy statement addresses consultation with federally-recognized Indian tribes (including Alaska Native tribes, villages, and communities), it did not include consultation with ANCs, because the policy statement was issued before Congress directed federal agencies to consult with ANCs on the same basis as Indian tribes in 2004.

The revised policy statement is effective November 25, 2019.

### FERC Issues Guidance for Projects at Abandoned Mine Sites and List of Non-Powered Dams with Development Potential

On October 17, FERC issued [guidance](#) for the development of closed-loop pumped storage projects at abandoned mine sites and a [list](#) of existing non-powered federal dams with the greatest potential for

hydropower development. Both documents were required under the America's Water Infrastructure Act of 2018 (AWIA).

FERC's guidance document includes information and identifies resources to assist prospective applicants proposing to develop closed-loop pumped storage projects at abandoned mine sites. Closed-loop pumped storage is defined by FERC as a project that utilizes a reservoir situated at a location other than natural waterways, lakes, wetlands, and other natural surface water features, and may rely on temporary withdrawals from surface waters or groundwater for the sole purpose of initial fill or the periodic recharge needed for project operation. The guidance includes general information on the licensing process, as well as best practices and considerations for projects at abandoned mine sites and issues to consider in selecting a site. The guidance also includes a listing of federal and state agencies that are involved with abandoned mines in the United States, and web links for maps and databases on abandoned mines and land records maintained by various agencies.

As directed under the AWIA, FERC developed the list of non-powered federal dams jointly with the Secretary of the Army, the Secretary of the Interior, and the Secretary of Agriculture. The agencies relied on existing sources to compile the list based on several criteria: the compatibility of hydropower generation with existing purposes of the dam; the proximity of the dam to existing transmission resources; the existence of studies to characterize environmental, cultural, and historic resources relating to the dam; and the effects of hydropower development on release or flow operations of the existing dam. The list includes 230 non-powered federal dams and is sorted by potential capacity. The vast majority of the federal dams are operated by the U.S. Corps of Engineers (Corps). The dams with the greatest development potential are located on the Mississippi and Arkansas rivers.

### **Ninth Circuit Remands ESA Issues to District Court in *Friends of the River v. NMFS***

On October 3, 2019, the U.S. Court of Appeals for the Ninth Circuit (Ninth Circuit) issued an [opinion](#) in *Friends of the River v. National Marine Fisheries Service* reversing in part and remanding the case to the U.S. district court. As described in our June 2018 [newsletter](#), the district court upheld the Corps' decision to limit its Endangered Species Act (ESA) Section 7 review to Corps activities where the Corps has discretion and excluded from its ESA review the effects of the ongoing existence of two Corps dams.

Friends of the River (FOR) is challenging a biological opinion and letter of concurrence (together, the 2014 opinions) by the National Marine Fisheries Service (NMFS) which do not treat ongoing operation of the Corps dams or operation of non-federal hydroelectric facilities near the Corps dams as part of the proposed action for consultation under ESA Section 7. FOR also contends that the Corps is liable under ESA Section 9 for unauthorized "take" of federally-listed threatened fish species as a result of its control of operation of the dams.

The district court granted summary judgment in favor of NMFS and the Corps. The Ninth Circuit reversed and remanded to the district court for further explanation, finding NMFS failed to provide a rational explanation in its biological opinion for changing its position on whether the continued existence of Corps dams is an element of the proposed action for Section 7 consultation purposes. The Ninth Circuit also found that the district court failed to consider all of the arguments before it regarding the alleged "take." It required the district court to remand the 2014 opinions to NMFS for further explanation and to consider the "take" argument on remand.

The Ninth Circuit affirmed the district court's summary judgment rejecting FOR's claims that changes in circumstances after the issuance of the 2014 opinions required the agencies to reinitiated Section 7 consultation.

### **USFS Seeks Comments on Notice of Proposed Alaska Roadless Area Rule and DEIS**

On October 15, 2019, the U.S. Forest Service (USFS) issued a [public notice](#) seeking comment on a proposed rule to exempt the Tongass National Forest from the 2001 Roadless Area Conservation Rule, which prohibits tree harvest and road construction/reconstruction within inventoried roadless areas with

certain limited exceptions. The proposed rule also would provide an administrative procedure for correcting and modifying inventoried roadless area boundaries on the Chugach National Forest. The USFS also issued a [Draft Environmental Impact Statement](#) (DEIS) associated with the proposed rule. The DEIS examines six alternatives, including the proposed Tongass exemption, which would provide differing levels of regulatory protection for timber harvest of old-growth and young-growth acreage. The USFS will schedule a series of public meetings in connection with comments on the proposed rule and DEIS. The deadline for comments is December 16, 2019 (December 17 in Alaska). Procedures for commenting may be found [here](#).

## **President Trump Issues Executive Orders on Federal Agency Guidance Documents**

On October 9, 2019, President Trump issued two executive orders intended to reduce the impact of federal agency guidance documents, which the Administration believes have been used to circumvent formal rulemaking requirements. Guidance documents may be in the form of memoranda, circulars, bulletins, or letters. Although not legally binding, such documents have been used to support agency enforcement actions.

The first order, "[Promoting the Rule of Law Through Improved Agency Guidance Documents](#)," is intended to increase transparency regarding guidance documents. "Guidance document" is defined under the executive order as "an agency statement of general applicability, intended to have future effect on the behavior of regulated parties, that sets forth a policy on a statutory, regulatory, or technical issue, or an interpretation of a statute or regulation," subject to exclusions for internal guidance and legal advice or opinions. The executive order directs the Office of Management and Budget to issue a memorandum within 120 days on implementation of the rule. Thereafter, each executive branch agency must establish a page on its website where all of that agency's guidance documents can be found. The executive order also states that any guidance document not found on the issuing agency's website is considered no longer in effect. Further, the executive order requires agencies to make draft versions of new, major guidance available for public input at least 30 days before the guidance is finalized.

The second executive order, "[Promoting the Rule of Law Through Transparency and Fairness in Civil Administrative Enforcement and Adjudication](#)," addresses penalties stemming from guidance documents and other unannounced policy interpretations. It requires agencies engaged in administrative enforcement actions to establish a violation of law with reference to statutes or regulations. It also seeks to prevent agencies from "unfair surprise" enforcement actions—primarily through citing violations of guidance documents—and provides recipients of a notice of violation with an opportunity to respond to the agency's proposed legal and factual determinations.

Since the orders apply on their face to executive branch agencies, it is unclear whether FERC, an independent federal agency, will take actions consistent with the executive orders.

## **FERC Accepts Changes to Energy Imbalance Market, Benefitting Hydro**

On September 30, 2019, FERC [accepted in part and rejected in part](#) proposed revisions to the California Independent System Operator's (CAISO) open access transmission tariff "designed to facilitate participation of fast ramping hydroelectric resources in the western energy imbalance market (EIM)." In effect, the approved proposals establish a price floor reflecting the opportunity costs of hydropower resources that are capable of selling into multiple markets.

FERC approved two measures. Under the mitigation timing proposal, FERC eliminates a rule under which CAISO mitigates a resource in all subsequent market intervals for the balance of the hour when local market power mitigation is triggered in a 15-minute market interval. This change limits the instances in which CAISO dispatches resources at mitigated bid prices when local market power mitigation is not actually triggered. The default energy bid (DEB) proposal implements a new DEB option that applies to all hydroelectric resources with storage capabilities which participate in the CAISO day-ahead and real-time markets or in the EIM. FERC determined that the new DEB option will enable hydroelectric resources with storage to reflect their opportunity costs in their DEBs, ensuring that hydroelectric resources are dispatched when they are most needed.

FERC rejected CAISO's net export limit proposal to allow an EIM entity balancing authority area in the real-time market to limit dispatch of incremental net exports during market intervals when its participating resources' bids are mitigated. FERC found the proposal to be inconsistent with the market power mitigation framework and that the DEB proposal sufficiently addresses concerns regarding market participation by hydro resources.

### **FERC Delays Effective Date of Rule on Physical Delivery of Filings and Submittals**

On October 11, 2019, FERC issued a public [notice](#) indefinitely postponing the effective date of a [final rule](#) issued in August 2019 that requires hand deliveries of filings and submissions other than by the U.S. Postal Service to an off-site facility for security screening and processing. In support of the indefinite delay, FERC cited a need to ensure an effective transition to use of the off-site facility.

*[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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