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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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President Trump's Nominee for FERC Commissioner Advances

On November 19, 2019, the Senate Energy and Natural Resources Committee approved the nomination of James Danly, the Federal Energy Regulatory Commission's (FERC or Commission) General Counsel, to be a member of the Commission. The 12-8 vote was largely on party lines, with only Democratic Senator Joe Manchin of West Virginia joining the Republican majority. If confirmed, Mr. Danly will be the fourth member of the Commission and the third Republican, the maximum number of Commissioners permitted from one party. Confirmation of Mr. Danly will leave the Commission one short of a full slate of five. As previously [discussed](#), the nomination of Mr. Danly departs from the typical practice in such circumstances of nominating a Republican and a Democrat together. The next step in the confirmation process will be a vote of the entire Senate, which has not yet been scheduled by Senate Majority Leader Mitch McConnell.

FERC Staff Identifies Cyber Security Program Priorities

At the Commission's November 21, 2019 open meeting, FERC staff made a [presentation](#) addressing the Commission's efforts to respond to cybersecurity challenges. The presentation identified organizational changes, including a new security-focused group composed of physical and cybersecurity specialists within the Office of Energy Projects' Division of Dam Safety and Inspections (D2SI). The intent of the action is to allow D2SI dam safety engineers to remain focused on dam safety while the new cybersecurity group focuses on physical and cybersecurity concerns. Its responsibilities will include:

- Maintaining technical expertise, mentoring, and performing as team leaders for analyses and resolution of cyber and physical security issues;
- Performing special security inspections, both physical and cyber, and participating as an evaluator during security exercises; and
- Conducting surveys and risk analyses to assess security needs, identifying vulnerabilities and ensuring effective implementation of protection measures.

In addition to establishing the new cybersecurity group in D2SI, the Commission's Office of Electric Reliability, which helps FERC oversee reliability standards for the bulk power transmission grid, will establish a division focused exclusively on cybersecurity.

Van Ness Feldman's cybersecurity and emerging technologies team advises clients on a multitude of cyber-related vulnerabilities that threaten critical infrastructure across the entire spectrum of onshore and offshore energy facilities. For more information, visit our [website](#).

Decision on Petition for Certiorari in *Hoop Valley Tribe* Case Expected

On August 26, 2019, California Trout and Trout Unlimited filed a [petition](#) for a writ of certiorari with the U.S. Supreme Court to the U.S. Court of Appeals for the D.C. Circuit's January 25, 2019 decision in *Hoop Valley Tribe v. FERC*. Briefing on the petition is now complete. The case has been set for conference on December 6, 2019, at which time the Justices are expected to decide whether to grant the petition. In most cases, the disposition of a petition discussed at a conference of the Justices is announced the Monday after the conference, which would be December 9.

FERC Reaffirms Requirement to Include All State Water Quality Certification Conditions in Licenses, Even When a Condition Is Unenforceable

On November 21, 2019, FERC issued an [order](#) on rehearing of an order issuing a new license for the Eugene Water and Electric Board's (EWEB) Smith Hydroelectric Project. The license order incorporated all of the conditions of the Oregon Department of Environmental Quality's (ODEQ) Clean Water Act Section 401 Water Quality Certification (WQC) except Condition 12, which requires EWEB to pay fees to ODEQ and the Oregon Department of Fish and Wildlife (ODFW) to recover costs of overseeing EWEB's implementation of the WQC. Condition 12 was excluded on the basis that it is inconsistent with Federal Power Act (FPA) Sections 10(e) and 17, pursuant to which FERC collects annual charges from licensees to reimburse the United States for the costs of administering the FPA. On rehearing, ODEQ and ODFW advanced several arguments in support of their request that FERC include Condition 12 in the license. FERC granted rehearing and modified the license order to include Condition 12 on the basis that it was required to do so, but reaffirmed its statement in the license order that, because the funding measure is contrary to the terms of the FPA, FERC cannot enforce Condition 12. Under the Environmental Protection Agency's proposed revisions to its Section 401 regulations, FERC would solely be responsible for enforcing Section 401 conditions once they are incorporated into a license, so it remains to be seen how a state would enforce a 401 condition that FERC deems to be unenforceable.

[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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