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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 7, ISSUE 2: FEBRUARY 2020

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### CEQ Proposes Revisions to Regulations Governing Federal Agency Implementation of NEPA

On January 9, 2020, the Council on Environmental Quality (CEQ) [issued](#) a Notice of Proposed Rulemaking (NPR) proposing major revisions to update its procedural regulations implementing the National Environmental Policy Act (NEPA) for the first time in over 40 years. CEQ is responsible for issuing regulations addressing federal agency compliance with the NEPA review requirements. CEQ promulgated its existing NEPA regulations in 1978.

A key precursor to the NPR was [Executive Order 13807](#), issued by President Trump in August 2017, which established a “One Federal Decision” policy to improve agency coordination and accountability in the environmental review of infrastructure projects. Twelve federal agencies, including the Federal Energy Regulatory Commission (FERC), subsequently executed a memorandum of understanding (MOU) to implement the policy with the goal of expediting infrastructure project environmental reviews through improved coordination.

The NPR includes proposed changes to many of the core elements of the NEPA review process. It would revise the definition of environmental “effects” by eliminating references to “direct,” “indirect,” and “cumulative” effects and focus the analysis on effects that are reasonably foreseeable and have a reasonably close causal relationship to the proposed action. It also proposes to eliminate the requirement that agencies analyze cumulative effects, which had become a means for requiring climate change analyses. The NPR also clarifies that “reasonable alternatives” must be “technically and economically feasible” and meet the purpose and need for the proposed action. It also establishes time limits of one year for environmental assessments (EAs) and two years for environmental impact statements (EISs), as well as page limits of 75 pages for EAs, 150 pages for a routine EIS, and 300 pages for an EIS covering a matter of “unusual scope or complexity.” Consistent with the One Federal Decision policy, where multiple federal agencies have discretionary decisions for a proposed project, the NPR would require the federal agencies to coordinate on scheduling and, where practicable, on the completion of a single environmental document.

Federal agencies will be required to develop or revise their NEPA procedures for consistency with CEQ’s new regulations within one year of publication of the final rule. As an independent agency, FERC has

held that it is not bound by CEQ's regulations. However, FERC executed the One Federal Decision MOU and could opt to revise its NEPA procedures to be consistent with CEQ's revised rules.

Comments on the NOPR are due by March 10, 2020. CEQ also will hold two public hearings: in Denver, Colorado on February 11, 2020, and Washington, DC on February 25, 2020. For more information, see our [issue alert](#).

## FERC Commissioner Update

On September 30, 2019, James Danly, FERC's current general counsel, was nominated by President Trump to become a FERC Commissioner. While the Senate Energy and Natural Resources Committee approved Danly's nomination, the full U.S. Senate failed to vote on the nomination by the end of 2019. Under Senate rules, nominations that are not acted on during the session in which they are made must be reissued by the President before the Senate can take up the nomination. To date, President Trump has not reissued his nomination of Mr. Danly. It has been reported that Senator Cramer (R-ND) planned to vote against Danly's nomination because of FERC's rejection of former Secretary Perry's grid resilience proposal, which would have provided financial support to coal and nuclear plants. Danly was general counsel when FERC rejected Secretary Perry's proposal.

On January 23, 2020, FERC Commissioner Bernard McNamee announced that he will not seek another term. His current term expires on June 30, 2020. McNamee's departure would leave FERC with only two sitting commissioners, Republican Chairman Neil Chatterjee and Democrat Richard Glick. If Commissioner McNamee departs before James Danly or another potential nominee is confirmed by the Senate and sworn in, FERC will lose its quorum. However, Commissioner McNamee has indicated a willingness to remain a commissioner until his replacement is confirmed and sworn in to avoid a quorum issue. If his seat is not filled by a new commissioner, McNamee is permitted to serve until Congress adjourns in December.

## EPA and U.S. Army Corps of Engineers Release Final Rule Re-Defining "Waters of the United States" under the Clean Water Act

On January 23, 2020, the Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers released a final rule re-defining the term "waters of the United States" under the Clean Water Act (Final Rule). The Final Rule narrows the scope of waters subject to regulation under the Clean Water Act. Specifically, the Final Rule removes interstate streams as a separate jurisdictional category; excludes ephemeral streams and water features; requires rivers, streams, and other natural channels to directly or indirectly contribute flow to a territorial sea or traditional navigable water; and excludes wetlands that are not adjacent to non-wetland jurisdictional water. Additionally, the Final Rule confirms that groundwater is not subject to regulation under the Clean Water Act, and thus, that surface water features connected only by groundwater are also not jurisdictional.

Although most hydropower projects are located on traditional navigable waters or their tributaries, the Final Rule has some potential implications for hydropower projects. For example, if an upstream or downstream waterbody is no longer a "water of the United States," dam structures may no longer be subject to Clean Water Act permitting. Additionally, because the Final Rule requires that impoundments must be impoundments of jurisdictional waters and have surface flow releases to a traditional navigable waterway to be jurisdictional, some impoundments may no longer be regulated under the Clean Water Act. Also, hydropower projects located on conduit systems or discharging to underground conveyance systems may not be jurisdictional under the Clean Water Act. On January 24, 2020, Van Ness Feldman issued a detailed Alert on the Final Rule, entitled "[Navigable Waters Protection Rule Substantially Narrows the Scope of Waterbodies Subject to Regulation under the Clean Water Act.](#)"

## FERC's Use of Rehearing Tolling Orders Challenged

In *Allegheny Defense Project v. FERC*, a group of homeowners challenged before the U.S. Court of Appeals for the D.C. Circuit (D.C. Circuit) several FERC orders authorizing the expansion of a natural gas pipeline in Pennsylvania. A key part of their challenge was FERC's use of tolling orders to extend the 30-day period under the Natural Gas Act (NGA) for FERC to act on a request for rehearing. In the underlying case, while the homeowners' request for rehearing and stay of an order authorizing the project was

pending before FERC, the district court authorized condemnation of homeowners' property based on the presumed validity of FERC's order, and construction of the pipeline commenced. FERC did not deny homeowners' rehearing request until three months after construction began. Homeowners appealed FERC's orders, and the court affirmed, based on existing circuit precedent construing the NGA to permit FERC to utilize tolling orders. Judge Millett issued a concurrence to the opinion, but noted that a second look at the constitutionality of the use of tolling orders is long overdue. Homeowners sought rehearing *en banc*, which was granted by the court on December 5, 2019.

On January 10, 2020, Homeowners filed their brief on rehearing *en banc*, requesting the court to overturn its precedent authorizing the use of tolling orders. They argue that this practice violates property owners' due process right to be heard before their property is taken. They also argue that under the NGA, if FERC does not act within 30 days of a request for rehearing, the rehearing request is deemed denied and an aggrieved party may seek judicial review.

The Federal Power Act contains a comparable provision requiring FERC action on a rehearing request within 30 days, and FERC routinely uses tolling orders to allow it additional time to act on rehearing requests of license and other hydropower orders. Thus, the D.C. Circuit's *en banc* decision in this ongoing case will be highly relevant to the hydropower industry.

### **Department of Energy Launches Energy Storage Grand Challenge**

On January 8, 2020, the Department of Energy [announced](#) the launch of the Energy Storage Grand Challenge (Energy Challenge), a program to promote the development, commercialization, and utilization of energy storage technologies. The program aims to establish global leadership in energy storage utilization and exports, through investments in research and development and addressing the challenges and barriers to deployment of energy storage sources in the United States. The Energy Challenge aims to achieve five goals by 2030: (1) technology development; (2) technology transfer from research to system design to private sector deployment; (3) models, data, and analysis to inform effective value propositions and use cases for storage technologies; (4) design of new technologies for manufacturing of storage technologies and reduction of dependence on foreign sources of materials; and (5) training of the workforce.

The first step in the Energy Challenge will be a request for information soliciting stakeholder comments on key questions and issues, following by a series of workshops with key stakeholders to discuss various storage technologies and barriers to their deployment.

### **House Committee on Energy and Commerce Releases Draft CLEAN Future Act**

On January 28, 2020, the House Energy and Commerce Committee released the legislative text of the draft [Climate Leadership and Environmental Action for our Nation's \(CLEAN\) Future Act](#) as well as a section-by-section summary of the [CLEAN Future Act](#). This new climate plan would achieve net-zero greenhouse gas pollution for the United States by 2050. The CLEAN Future Act is a comprehensive proposal of sector-specific and economy-wide solutions to address the climate crisis. The draft Act amends the definition of "renewable energy" in Section 203 of the Energy Policy Act of 2005 to include all hydropower production. The draft Act also reauthorizes Energy Policy Act Sections 242 and 243 to provide incentives for owners and operators of hydroelectric projects to make project efficiency improvements to hydropower facilities from FY 2021-2036, and to expand eligibility for this program to hydropower facilities at existing dams or conduits with generating capacities of 10 megawatts or less.

Additionally, the draft CLEAN Future Act adds a new section to the Federal Power Act to improve the hydropower licensing process, including directing FERC and the federal resource agencies to convene a negotiated rulemaking within 90 days of enactment and requiring that participants include state and local government representatives, tribes, and other stakeholders. The rulemaking would also develop a process to coordinate all necessary federal authorizations and enable FERC to make a final decision on a license *no later than three years* after receiving a completed license application. Further, the draft Act requires FERC and the Secretary of the Interior to issue guidance on best practices for engagement with Indian tribes in the hydropower licensing process, and provides delegated authority to tribes to apply mandatory conditions to hydropower licenses for projects located on tribal lands that would otherwise be applied by the Secretary of the Interior. The draft Act also would: mandate the use of existing studies

and data wherever practicable in the licensing process; require FERC to evaluate the feasibility of an expedited license amendment process for project changes that have insignificant environmental impacts or are environmentally beneficial; require FERC to establish a voluntary pilot program to consider multiple projects in the same watershed in a consolidated licensing process; and require the Secretary of Commerce and the Secretary of the Interior to consider the threat of invasive species when prescribing fishways under Section 18 of the Federal Power Act.

*[Sharon White](#) and [Rachael Lipinski](#) 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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