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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.

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Hydro Newsletter

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FERC Responds to Impacts of COVID-19

The Federal Energy Regulatory Commission (FERC) has taken several actions in response to emergency conditions presented by the Novel Coronavirus Disease (COVID-19). On March 19, 2020, FERC issued a [Notice](#) extending, until May 1, 2020, the deadlines for most non-statutory filings required by FERC. The extended deadline applies to: (1) filings required by entities' tariffs or rate schedules; (2) other non-statutory submissions required by FERC (e.g., compliance filings, responses to deficiency letters, and rulemaking comments); (3) annual forms required by FERC; and (4) all pending, uncontested motions for extensions in individual FERC proceedings. Independent of the extensions listed above, FERC also will allow entities to seek expedited action on waivers and other extensions, including waivers of the requirements in FERC orders, regulations, tariffs, and rate schedules; extensions for other types of filings, such as interventions, protests, or answers; and other extensions and waivers of compliance filings, forms, and electronic quarterly reports. FERC has stated that it will act expeditiously on such requests. Importantly, deadlines for filings, such as a notice of intent to apply for a new license, final license application, or request for rehearing, are established by the Federal Power Act (FPA) and cannot be extended by FERC.

FERC also has made the following changes in response to COVID-19:

- The FERC headquarters building in Washington, D.C. is closed to all outside visitors, unless cleared for entry by the Office of Executive Director;
- Technical conferences will either be conducted via WebEx or postponed;
- All hearings are postponed until the Office of Administrative Litigation can reschedule them;
- Settlement conferences will be conducted by telephone;
- Oral arguments will be heard via WebEx; and
- All previously scheduled Office of Enforcement audit site visits and investigative testimony are postponed.

In addition, Chairman Neil Chatterjee named Caroline Wozniak, a Senior Policy Advisor in the Office of Energy Market Regulation, as FERC's point of contact for all industry inquiries related to COVID-19. Entities can email PandemicLiaison@ferc.gov to receive prompt responses to their questions from FERC staff. FERC also established a [landing page](#) on its website to provide regular updates and additional contact information.

FERC Commissioner Update

On March 12, 2020, the U.S. Senate voted to confirm James Danly, FERC's current General Counsel, as a FERC Commissioner. Danly was originally nominated by President Trump in October 2019. 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. President Trump reissued the nomination in February 2020, which was approved by the Committee in early March. Once he is sworn in, Mr. Danly will be the fourth member of the Commission and the third Republican, the maximum number of Commissioners permitted from one party. However, FERC Commissioner Bernard McNamee, a Republican, has announced that he will not seek another term. His current term expires on June 30, 2020.

FERC Issues Declaratory Order Finding Waiver of State Section 401 Authority

On March 19, 2020, FERC [issued](#) a declaratory order finding that the California State Water Resources Control Board (Water Board) waived its authority under Section 401 of the Clean Water Act (CWA) to issue a water quality certification in the ongoing license surrender proceeding of Pacific Gas and Electric Company's (PG&E) Kilarc-Cow Creek Project. PG&E filed its petition in response to the U.S. Court of Appeals for the D.C. Circuit's (D.C. Circuit) [decision](#) in *Hoopa Valley Tribe v. FERC* and FERC's subsequent [declaratory order](#) in *Placer County Water Agency*. PG&E initially filed its 401 application with the Water Board in March 2009, and subsequently withdrew and resubmitted its application each year between 2010 and 2018 at the direction of the Water Board. In April 2019, the Water Board denied PG&E's application without prejudice, and encouraged PG&E to file a new request. PG&E did not file a new request, but instead filed a request with FERC for a waiver determination. However, in November 2019, with no application pending before it, and while the waiver request remained pending before FERC, the Water Board issued a final water quality certification for the project. In January 2020, PG&E supplemented its waiver request asking FERC to find the 401 certification void and reject all conditions in the certification.

FERC granted PG&E's request, finding that the Water Board waived its Section 401 authority through the repeated withdrawal and refiling of PG&E's application for water quality certification. Consistent with its decisions in *Placer County Water Agency* and *Southern California Edison*, FERC held that a formal agreement between a licensee and a state is not necessary to support a finding of waiver. In response to arguments from the Water Board that PG&E voluntarily withdrew its application each year to avoid a denial without prejudice, FERC found that the Water Board expected and encouraged PG&E to "serially withdraw and resubmit an identical application to avoid the CWA's one-year waiver deadline." FERC also found that there is no evidence that the Water Board lacked the necessary environmental documentation to complete either the state environmental review or certification process.

FERC also rejected arguments that a finding of waiver will not prevent further delay, because the Water Board has issued the water quality certification. FERC found that while the Water Board purported to issue a 401 certification, the fact that it had previously waived its certification authority rendered that action legally irrelevant and invalid. As such, the water quality conditions are not mandatory and acceptance of the conditions is a matter within FERC's discretion when it acts on the surrender application.

Finally, FERC rejected the Water Board's arguments that there should be no waiver because PG&E failed to pursue administrative and judicial remedies under state law. FERC found that PG&E is challenging the Water Board's authority to issue the certification, not the certification itself, and the issue of whether the Water Board waived its certification authority is a federal question to be determined by FERC, not the state.

While unrelated to its waiver determination, FERC also noted in the order that "[n]ot all applications to surrender a licensed project require a water quality certification because certification is required only in connection with an application for a license or permit to conduct any activity that may result in a discharge." FERC's language is significant as it addresses longstanding confusion as to whether Section 401 applies in a license surrender proceeding. FERC ultimately required a 401 certification in this case because construction associated with the surrender could result in a discharge.

U.S. District Court Rejects Argument on Application of FPA Section 20 in Challenge to Retail Rates

On March 12, 2020, in *Blocktree Properties LLC et al. v. Public Utility District No. 2 of Grant County, Washington*, the U.S. District Court for the Eastern District of Washington granted summary judgment to Grant County Public Utility District (Grant PUD) in a lawsuit challenging Grant PUD's new retail rates applicable to cryptocurrency mining operators. On cross motions for summary judgment, the district court dismissed all of the cryptocurrency mining operators' federal claims, including a claim based on Section 20 of the FPA, and declined to retain supplemental jurisdiction over the state law claims.

Cryptocurrency miners use specialized computer equipment that requires substantial amounts of electricity. Grant PUD operates the Priest River Rapids Project on the Columbia River in central Washington. In response to unprecedented demand for inexpensive electric service from the cryptocurrency industry, in 2018 Grant PUD developed and implemented a new rate schedule designed to account for the risk of serving the potentially volatile load of this emerging industry. This new rate schedule allowed Grant PUD to serve the cryptocurrency industry, while mitigating the risk of potential cost shifts to other customers. A group of cryptocurrency mining operators filed a lawsuit in December 2018, challenging the new rate schedule. Plaintiffs asserted both state and federal constitutional and statutory claims, including federal law claims under the due process clause, the commerce clause, and Section 20 of the FPA.

Among their claims, plaintiffs argued that Grant PUD's new retail rates violated FPA Section 20, which provides that when any part of the power from a licensed hydropower project enters interstate commerce, "the rates charged and the service rendered by any such licensee . . . shall be reasonable, nondiscriminatory, and just to the customer and all unreasonable discriminatory and unjust rates or services are prohibited and declared to be unlawful." Grant PUD argued, among other things, that FPA Section 20 should not be read to govern retail sales from a project to customers in the same state, and that the structure of FPA Sections 19 and 20 only contemplated a Federal role where the relevant states had not provided oversight of rates or there was a disagreement among affected states. The district court rejected plaintiffs' Section 20 claim based on a finding that Section 20 does not create a private right of action for challenges to rates charged by licensees. The district court held that any remedy must be from FERC or the relevant state commission.

Van Ness Feldman represented Grant PUD in the case.

EPA Provides Guidance on Application of CWA Section 316(b) on Hydroelectric Facilities

On March 18, 2020, the Environmental Protection Agency (EPA) Region 10 issued draft National Pollutant Discharge Elimination System (NPDES) permits for eight federal hydroelectric dams operated by the U.S. Army Corps of Engineers on the Lower Columbia and Snake Rivers. In the [fact sheets](#) supporting the permits, EPA took the opportunity to clarify the applicability of its performance standards for the regulation of cooling water intake structures under Section 316(b) of the CWA to hydroelectric facilities. Section 316(b) of the CWA requires facilities with cooling water intake structures to ensure that the location, design, construction, and capacity of the structure reflect the best technology available (BTA) to minimize adverse impacts on the environment from impingement and entrainment of fish and other aquatic organisms. In 2014, EPA issued performance standards for the regulation of cooling water intake structures at existing power plants and other facilities. The 2014 standards apply to existing facilities that are a point source, with a cooling water intake structure with a design intake flow greater than 2 million gallons per day, and that uses 25 percent of the withdrawn water for cooling.

In the draft fact sheets, EPA acknowledges that the 2014 rule is ambiguous as to its application to hydroelectric facilities, and that "EPA never intended that the rule's substantive provisions would apply to" such facilities. Instead, all cooling water intake structures at hydroelectric facilities must meet requirements established on a case-by-case, best professional judgment (BPJ) basis. EPA states that it generally expects that a hydroelectric facility's existing controls are technologies that can be determined to satisfy the BTA requirements to minimize entrainment and impingement mortality. It also notes that

many hydroelectric facilities are required to implement measures to reduce the impacts of a dam on aquatic life under the FERC license or a biological opinion. EPA established four factors it may use in its BPJ analysis to determine whether BTA requirements have been satisfied. These include: (1) efficiency of power generation; (2) cooling water withdrawn relative to waterbody volume or flow; (3) location of the intake structure; and (4) technologies at the facility. Any one or combination of these factors can be used to satisfy the BTA requirement to minimize entrainment and impingement mortality. EPA notes that in most circumstances, BTA determinations can be made based on existing documentation.

Comments on the draft permits and fact sheets are due by May 4, 2020.

[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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