



Van Ness Feldman is home to the premier hydropower law practice in the United States and to one of the largest and most experienced teams of hydropower attorneys available.

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.

[Visit our COVID Client Help Center](#)

Recent Publications:

[Sharon White & Ani Esenyan](#). American Bar Association. Environment, Energy, and Resources Law: *The Year in Review* (Hydro Power Report)

Hydro Newsletter

VOLUME 7, ISSUE 6: JUNE 2020

To receive the Hydropower Newsletter on a regular basis, follow this link:

<http://www.vnf.com/KnowledgeCenter.aspx?SignUp=True>

- *FERC Issues Declaratory Order Finding Waiver of State Section 401 Authority*
- *FERC Reaffirms Policy for Extending License Term*
- *FERC to Hold Technical Conference on COVID-19 Impacts*
- *EPA Proposes Rule to Improve Transparency of Guidance*
- *DOE Solicits Applications for EPC Act Section 242 Hydroelectric Incentive Payments*
- *America's Water Infrastructure Act of 2020 Introduced in Senate*
- *Ted Craddock Named Deputy Director of State Water Project*
- *Rick Callender Named CEO of Santa Clara Valley Water District*

FERC Issues Declaratory Order Finding Waiver of State Section 401 Authority

On May 21, 2020, the Federal Energy Regulatory Commission (FERC or Commission) [issued](#) another 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 (WQC) in the ongoing relicensing of Yuba Water Agency's (YWA) Yuba River Project. YWA 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*.

YWA initially filed its 401 application with the Water Board in August 2017, and subsequently withdrew and resubmitted its application in August 2018 at the direction of the Water Board. In July 2019, the Water Board denied YWA's application without prejudice on the basis that the California Environmental Quality Act (CEQA) process and consultation under the Endangered Species Act (ESA) were not yet complete, and encouraged YWA to submit a new application. YWA did not submit a new application, but instead filed a request with FERC for a waiver determination.

FERC granted YWA's request, finding that the Water Board waived its Section 401 authority. Consistent with its decisions in *Placer County Water Agency*, *Southern California Edison Co.*, *Pacific Gas & Electric Co.*, and *Nevada Irrigation District*, 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 YWA voluntarily withdrew its application each year to avoid a denial without prejudice, FERC found that the Water Board directly asked YWA to withdraw and resubmit its application.

FERC also rejected arguments that the 401 certification process was held up by the CEQA process, for which YWA was the lead agency and controlled the timing. FERC concluded, as it did in *Nevada Irrigation District*, that the Water Board's contention that [YWA] alone is responsible for the delay in issuance of a [WQC] ignores the Board's own role in the process." Further, it found that the Water Board's "reliance on a state regulatory process (i.e., CEQA compliance) over which the Board has potentially limited control over timing and often takes more than one year to complete does not excuse the Board from complying with the statutory requirements of the CWA." FERC also rejected the contention that waiver would serve no purpose because FERC cannot issue the license until ESA consultation is complete. FERC found that "[r]egardless of whether a [WQC] decision is the sole factor

delaying a licensing proceeding, the general principle from *Hoopa Valley* still applies.” FERC explained in a footnote that while it “generally does not issue a license prior to the completion of ESA consultation,” it is “not prohibited from issuing a license that is contingent on the completion of consultation.” This is FERC’s fifth waiver determination issued for a hydropower project in 2020, and several other waiver requests currently remain pending.

FERC Reaffirms Policy for Extending License Term

On May 21, 2020, FERC [denied](#) rehearing of a staff order denying a licensee’s request to extend its 30-year license by 10 years. The project began relicensing in 2016, and the license was transferred to the current licensee in January 2017. After acquiring the project, the new owner refurbished and made repairs to project works damaged and rendered inoperable by ice and flooding in January 2018. In April 2019, the licensee notified FERC that it would be unable to file a new license application due to its inability to fund the costs associated with project improvements and relicensing. FERC staff initiated the orphaned project process and solicited license applications from potential applicants other than the existing licensee. In response, a third party filed a notice of intent to file an application for a subsequent license for the project.

In July 2019, the existing licensee requested a 10-year license extension to align the relicensing with other projects located on the same river, to allow the licensee to recoup its refurbishment costs from 2018, and because the license term should have been extended when the license was amended in 1996 under a prior owner to increase the size of the dam and reservoir. FERC staff denied the request in January 2020, finding that because of the distance between the projects on the river and that they operate independent of one another, a cumulative impacts analysis of the various projects would not be made simpler by aligning the license expiration dates. Staff also found that the refurbishments made in 2018 were required to maintain the project, rather than to upgrade it, and that the upgrades approved in 1996 are not justification for a license term extension. The licensee sought rehearing, restating its arguments in favor of an extension, and arguing that the additional revenue generated from the license term extension would help it finance repairs to a separate project located on the same river.

FERC denied rehearing. It found that where a licensee seeks cost amortization for past repairs made to restore project operation, which it was required to do under the license, rather than for upgrades to increase capacity or add new environmental measures, a license term extension is not warranted. It also found that FERC would only extend a license term to coordinate the environmental review of multiple projects on the same river if the projects have significant cumulative impacts that warrant unified study, which they did not in this case. FERC also denied the licensee’s equitable arguments, namely that revenues from the extended license term would allow it to repair and return to operation a separate project located immediately upstream and in the same mill complex as the project seeking an extension. FERC found that financial support of a separate project is not sufficient justification for a license extension, and further noted that the license extension lacked support from federal and state resource agencies.

FERC to Hold Technical Conference on COVID-19 Impacts

FERC has announced that it will hold a Commissioner-led technical conference on COVID-19 impacts to the energy industry on July 8-9, 2020. The purpose of the conference is to consider the ongoing impacts that COVID-19 is having on various segments of the U.S. energy industry. Through the conference, FERC intends to explore the potential longer-term impacts of COVID-19 on regulated entities to ensure the continued efficient functioning of energy markets, transmission of electricity, transportation of natural gas and oil, and reliable operation of energy infrastructure.

Multiple panels will discuss (1) the energy industry’s ongoing and future operational and planning challenges due to COVID-19; (2) potential impacts of changes in electric demand on operations, planning, and infrastructure development; (3) potential impacts of changes to natural gas and oil demand; and (4) issues related to access to capital, including credit, liquidity, and return on equity issues.

The conference will be open for the public to attend remotely. Attendees are encouraged to preregister [online](#). Additional information on the technical conference will be posted in advance on FERC’s [website](#).

EPA Proposes Rule to Improve Transparency of Guidance

On May 19, 2020, the Environmental Protection Agency (EPA) [proposed](#) regulations to establish general requirements and procedures for the issuance of EPA guidance documents. President Trump's [Executive Order 13891](#) to promote transparency through improved agency guidance served as the impetus for EPA's proposed rule. If finalized, EPA's rule would provide for public participation in the development of significant guidance documents. The proposed rule also would ensure that EPA's guidance documents are developed with appropriate review and are accessible and transparent to the public. Consistent with Executive Order 13891, the proposed rule provides that EPA will use an [online portal](#) to clearly identify active EPA guidance documents for the public. Finally, the rule proposes to establish a formal petition process for the public to request that EPA modify or withdraw an existing guidance document.

Comments on the proposed rule are due by June 22, 2020. Additional information on EPA's proposed rule can be found on EPA's [website](#).

DOE Solicits Applications for EPAct Section 242 Hydroelectric Incentive Payments

On May 7, 2020, the Department of Energy (DOE) issued [notice](#) of an open application period for incentive payments for power production by owners and operators of qualified hydroelectric facilities at existing dams and impoundments. The payments are available for electricity generated and sold in a specified 10-year period as authorized under Section 242 of the Energy Policy Act of 2005 (EPAct 2005). Congress appropriated and DOE allocated \$7 million for this purpose for federal Fiscal year 2020 (September 1, 2019 – August 31, 2020). At this time, DOE is only accepting applications from owners and operators of qualified facilities for power generated and sold in calendar year 2019. Additionally, the qualified hydropower facility must have begun operating between October 1, 2005, and September 30, 2015, for DOE to consider the application. DOE is accepting applications until July 13, 2020. Additional guidance on the incentive program is available on DOE's [website](#).

America's Water Infrastructure Act of 2020 Introduced in Senate

On May 4, 2020, Chairman John Barrasso (R-WY) and Ranking Member Tom Carper (D-DE) of the Senate Environment and Public Works Committee introduced before the U.S. Senate S. 3591, the [America's Water Infrastructure Act of 2020](#). The bill would authorize \$17 billion in new infrastructure projects and includes several provisions to promote non-federal hydropower at U.S. Army Corps of Engineers (Corps) projects. Specifically, Section 1509 of the draft bill would require the Corps and FERC to develop and implement an environmental review process which includes conducting the Corps' environmental review of a proposed non-federal hydropower project at a Corps dam concurrent with the FERC pre-licensing process. It also directs FERC and the Corps to complete timely environmental review so that FERC is able to issue a license not later than two years after receipt of a completed license application.

Section 1052 of the bill provides that, upon the request of an existing owner and operator of a non-federal hydropower project at a Corps dam, the Corps must complete a study of operational changes at the Corps dam to facilitate production of non-federal hydropower. Operational changes under the bill could include changes to seasonal pool levels, modifying releases from the project, and other changes consistent with authorized project purposes to enhance the usage of the project to facilitate hydro production. The Corps would be required to complete the evaluation within one year and the non-federal hydropower owner must pay all costs associated with the evaluation. Upon completion of an evaluation, the Corps must submit a report to the House and Senate on the effects of the proposed operational changes on the authorized purposes of the Corps project.

On May 11, the bill was reported out of committee and has been placed on the Senate legislative calendar. A section-by-section analysis of the draft bill is available on the Senate Environment and Public Works Committee [website](#).

Ted Craddock Named Deputy Director of State Water Project

California Governor Gavin Newsom has announced the appointment of Ted Craddock as the deputy director of the State Water Project at the California Department of Water Resources. The California

State Water Project is a water storage and delivery system of reservoirs, aqueducts, power plants, and pumping plants that extends more than 700 miles. Mr. Craddock has been acting in the deputy director position since 2019. Mr. Craddock's experience includes over 25 years of service in multiple other positions at the California Department of Water Resources, including assistant deputy director of the State Water Project, project manager of Oroville Spillways Emergency Recovery, chief of utility operations for the Hydropower License Office, program manager of the East Branch Extension, advisor to the State Water Project deputy director, and civil engineer.

Rick Callender Named CEO of Santa Clara Valley Water District

On May 26, 2020, the board of Santa Clara Valley Water District, also known as Valley Water, named Rick Callender as its new CEO. Callender is currently serving as Valley Water's Chief of External Affairs. He will assume the CEO position effective July 11 when the current CEO, Norma Camacho, retires. Valley Water provides drinking water and flood protection to 2 million residents in Santa Clara County, and holds a FERC exemption for the Anderson Dam Hydroelectric Project. Callender is the former president of the San Jose-Silicon Valley NAACP and a longtime water executive. He joined Valley Water in 1996. Callender is a graduate of Northwestern California University School of Law and a member of the California bar.

[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.

Practice Group Co-Leaders:

Mike Swiger	202.298.1891	mas@vnf.com
Julia Wood	202.298.1938	jsw@vnf.com

Other Hydro Team Members:

Rachael Lipinski	202.802.3843	rlipinski@vnf.com
Matt Love	206.829.1809	mal@vnf.com
Jenna Mandell-Rice	206.829.1817	jrm@vnf.com
Brian McManus	202.298.3720	bzm@vnf.com
Sharon White	202.298.1871	slw@vnf.com (Editor-in-Chief)