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Hydro Newsletter

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- *Trump to Nominate Christie and Clements as FERC Commissioners*
- *FERC Proposes Changes to Dam Safety Regulations*
- *Update on FERC's Use of Rehearing Tolling Orders*
- *Update on EPA's Final Rule to Streamline CWA Section 401 Review*
- *FERC Issues Declaratory Order Finding Waiver of California Section 401 Authority*
- *FERC Approves Partial Transfer of Klamath Project License*
- *FERC Finalizes PURPA Rule*
- *CEQ Finalizes NEPA Rule*
- *Barton Named CEO of FirstLight Power*

Trump to Nominate Christie and Clements as FERC Commissioners

On July 27, 2020, President Donald Trump [announced](#) that he intends to nominate Virginia Corporation Commission Chair Mark Christie and former Natural Resources Defense Council (NRDC) attorney Allison Clements as Federal Energy Regulatory Commission (FERC) Commissioners. Christie was previously president of the Organization of PJM States Inc. and was elected president of the Mid-Atlantic Conference of State Utility Regulators. Clements currently serves as founder and president of Goodgrid, LLC, an energy policy and strategy consulting firm, and previously worked for a decade at the NRDC.

Currently the FERC Commissioners include Neil Chatterjee (Chairman), Richard Glick, Bernard McNamee, and James Danly. McNamee, a Republican, has announced that he will not seek another term. His current term expired on June 30, 2020, but he has previously indicated that he will remain a commissioner until his replacement is confirmed and sworn in. FERC has been operating for most of the year with four members—three Republicans and one Democrat. If Christie and Clements are confirmed by the U.S. Senate, FERC will return to a full slate of five Commissioners. Christie would fill the Republican seat that will be vacated when Commissioner McNamee steps down, and Clements would fill the vacant Democratic seat.

FERC Proposes Changes to Dam Safety Regulations

On July 16, 2020, FERC issued a Notice of Proposed Rulemaking (NPR) to revise its regulations governing its dam safety program, codified at 18 C.F.R. Part 12. The NPR was the result of feedback received from the Independent Forensic Team investigating the spillway incident at Oroville Dam in February 2017 and findings of the After-Action Panel on causes of the incident and recommendations to improve the effectiveness of FERC's Dam Safety Program. FERC noted that the NPR is not intended to address the Michigan dam failures that occurred in May 2020.

The NPR proposes several changes to the Division of Dam Safety and Inspections' Independent Consultant Inspection Program, commonly referred to as the Part 12D Program. First, FERC proposes to implement two tiers of Part 12 safety inspections. Under the two-tier scheme, projects would still be subject to a Part 12D Inspection every five years, but the required scope of the inspection would

alternate between a Periodic Inspection and a Comprehensive Assessment. The Periodic Inspection would focus on the performance of the project over the previous five years, and would include a field inspection, as well as an evaluation of whether any potential failure modes are occurring. The Comprehensive Assessment builds on a Periodic Inspection with a deep dive into every aspect of a project, including a detailed review of the design basis, analyses of record, construction history, and an evaluation of spillway adequacy.

FERC also is proposing to change the process by which it reviews and evaluates the qualifications of independent consultants that perform Part 12D Inspections. Currently, a licensee is required to retain a single independent consultant to conduct the inspection, subject to FERC's approval. Under the NOPR, the licensee must retain an independent consultant team comprised of one or more independent consultants and additional engineering or scientific personnel, as needed, subject to FERC's approval. The licensee must demonstrate to FERC that members of the team possess an appropriate level of expertise for the specific project. Under the NOPR, the designated independent consultant members of the team, but not the supporting members, must still have a minimum of ten years' experience in dam design and construction and the investigation of the safety of existing dams.

FERC also proposes to codify existing guidance related to the Owner's Dam Safety Program. Currently, licensees are not explicitly required to develop an Owner's Dam Safety Program, though it is recommended under FERC guidance issued in August 2012. The NOPR proposes to codify the requirement that licensees of one or more high or significant hazard potential dams must file and maintain an Owner's Dam Safety Program.

The NOPR also would update existing regulations related to public safety incident reporting. Currently, licensees are required to report deaths and serious injuries at their projects. Under the NOPR, licensees must report public safety incidents that are related to the operation of the hydropower project and report rescues in addition to deaths and serious injuries. Licensees must also prepare and maintain a public safety plan, which is the current practice under existing FERC guidance.

Finally, FERC is issuing plans to update and add new chapters to its engineering guidelines document. FERC is soliciting public review and comment on these guidelines in Docket Nos. AD20-20 through AD20-23.

Comments on the NOPR are due on September 22, 2020.

Update on FERC's Use of Rehearing Tolling Orders

As reported in last month's [newsletter](#), on June 30, 2020, in *Allegheny Defense Project v. FERC*, the U.S. Court of Appeals for the D.C. Circuit (D.C. Circuit) [held](#) that the Natural Gas Act (NGA) does not grant FERC the authority to issue a "tolling order" that serves solely to prevent a petitioner from seeking judicial review under a statutory 30-day "deemed denied" provision. Under the order, if FERC fails to act on the merits of a rehearing request within 30 days, the rehearing is deemed denied by operation of law and the party seeking rehearing may seek to obtain judicial review. Because the Federal Power Act (FPA) contains an identical provision requiring FERC action on a rehearing request within 30 days, the case appears to make FERC's use of tolling orders in hydropower proceedings vulnerable to a similar challenge.

On July 23, the D.C. Circuit granted FERC's motion to stay issuance of the mandate in the case.

FERC argued that a stay was necessary to assess how to revise its processes and allocate its resources to implement the Court's decision and to allow the federal government time to consider whether to file a petition for a writ of certiorari with the U.S. Supreme Court. As a result of the stay, FERC is not obligated to comply with the Court's order until October 5. However, while FERC may not have to comply yet with the *Allegheny* decision, arguably the decision now determines the deadline for filing a petition for judicial review of a FERC order, and will, unless the Supreme Court overturns the decision. Despite the stay of the mandate, FERC has adjusted its practices in response to the *Allegheny* decision. Rather than issuing tolling orders, in a number of cases FERC has issued a "Notice of Denial of Rehearing by Operation of Law and Providing for Further Consideration," noting that the rehearing request will be addressed in a

future order. In other proceedings, FERC has issued a substantive order on rehearing within the 30-day window, which was a rare occurrence prior to the *Allegheny* order.

Update on EPA's Final Rule to Streamline CWA Section 401 Review

As reported in last month's [newsletter](#), on June 1, 2020, the U.S. Environmental Protection Agency (EPA) released a [Final Rule](#) that significantly revises its regulations implementing section 401 of the Clean Water Act (CWA). The Final Rule is EPA's first comprehensive effort to promulgate federal rules governing the implementation of CWA section 401.

The Final Rule was published in the *Federal Register* on July 13, 2020, and will become effective on September 11. At least three lawsuits challenging the Final Rule have already been filed. On July 13, 2020, the Delaware Riverkeeper Network and the Delaware Riverkeeper filed a complaint in the U.S. District Court for the Eastern District of Pennsylvania. Also, on July 13, 2020, American Rivers, American Whitewater, California Trout, and Idaho Rivers United filed a complaint in the U.S. District Court for the Northern District of California. On July 21, 2020, a group of 20 states and the District of Columbia filed a separate complaint before the federal district court in the Northern District of California.

For more information on EPA's Final Rule, see our [issue alert](#).

FERC Issues Declaratory Order Finding Waiver of California Section 401 Authority

On July 16, 2020, FERC issued a finding that the California State Water Resources Control Board (Water Board) waived its authority under section 401 of the CWA to issue a water quality certification (WQC) in the ongoing relicensing of Pacific Gas and Electric Company's (PG&E) Upper North Fork Feather Hydroelectric Project. PG&E filed its request for determination of waiver in response to the D.C. Circuit's [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 October 2002 and subsequently withdrew and resubmitted the application each year for 16 years in coordination with the Water Board. In February 2019, the Water Board denied PG&E's application without prejudice on the basis that the California Environmental Quality Act (CEQA) process was not yet complete. In March 2019, PG&E filed a new request for WQC, which was again denied without prejudice in March 2020 on the same grounds. PG&E did not file a new 401 application, but instead sought a determination from FERC that the Water Board had waived its authority under section 401. In May 2020, with no application pending before it, the Water Board issued a draft WQC for the project.

FERC granted PG&E's request for a waiver determination, finding that the coordinated withdraw and refile process constituted a waiver of section 401 authority. Consistent with its prior decisions, FERC held that a formal agreement between a licensee and a state is not necessary to support a finding of waiver. In response to the Water Board's argument that the licensee 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 its application to avoid the one-year deadline. FERC also rejected arguments that the 401 certification process was held up by the need for additional information on the project's ability to comply with water quality objectives for temperature. FERC concluded, as it did in prior orders, that the "state's reason for delay is immaterial" and, in any event, the Water Board repeatedly raised the possibility of requesting further information but never did so. FERC further found that a state's reliance on a regulatory process like CEQA does not excuse compliance with the one-year deadline under the CWA. While the draft WQC was issued without an application pending before it, FERC held that it is not precluded from considering the conditions included therein in making its licensing determination.

FERC also has issued three rehearing orders in recent weeks affirming its prior section 401 waiver determinations in Yuba County Water Agency, PG&E's Kilarc-Cow Creek Project, and Southern California Edison Company. Any of these orders could be appealed to the Court of Appeals within 60 days of the respective order.

FERC Approves Partial Transfer of Klamath Project License

On July 16, 2020, FERC [issued](#) an order approving the partial transfer of the license for the lower four developments that comprise the Klamath Hydroelectric Project in California and Oregon. PacifiCorp's transfer application, filed in September 2016, proposed to transfer the license to the Klamath River Renewal Corporation (KRRC) which, upon FERC approval of the transfer, would oversee decommissioning and removal of the project dams. On the same day, KRRC filed an application to surrender the license and remove the four developments. Under its proposal, upon transfer of the project to KRRC, PacifiCorp would continue to provide management and operations services for the project until it was decommissioned, but would have no responsibility or liability as a licensee.

FERC approved the transfer, but found that because of the magnitude of the proposed decommissioning and uncertainties associated with it, PacifiCorp must remain as a co-licensee of the project, and conditioned approval of the license transfer upon it doing so. FERC found it "would not be in the public interest for the entire burden of these efforts to rest with [KRRC] should we approve the surrender application." It noted that while KRRC has limited finances and no experience with hydropower dam operation or dam removal, PacifiCorp has additional resources and experience in removing a major project. FERC noted that while its order does not provide liability protection to PacifiCorp as envisioned, the two parties may elect to amend their arrangement for KRRC to indemnify PacifiCorp for expenses it bears as a result of being a co-licensee.

This is the first instance in which FERC has granted an application to transfer a license to a new entity whose sole purpose is to surrender a license and decommission a project. FERC will act on the surrender application in a future order.

FERC Finalizes PURPA Rule

On July 16, 2020, FERC [issued](#) a Final Rule revising its regulations implementing the Public Utility Regulatory Policies Act of 1978 (PURPA). PURPA was enacted to encourage development of small power production facilities that do not rely on fossil fuels and cogeneration facilities (together, qualifying facilities or QFs). FERC has not comprehensively reviewed its PURPA rules since they were first enacted in 1980. With limited exceptions, the Final Rule largely adopts the proposals in FERC's September 2019 NOPR.

The Final Rule includes several significant changes to FERC's implementation of PURPA. First, FERC will allow states more flexibility to incorporate market pricing in avoided cost rates. The Final Rule also clarifies when and how a legally enforceable obligation (LEO) for the sale of power to utilities is established. Specifically, the Final Rule requires a QF to demonstrate commercial viability and financial commitment to construct the project to obtain a LEO. In a change from the NOPR, the Final Rule states that a QF relying on permitting to support the establishment of a LEO need only show that it has applied for all required permits and paid all applicable fees, and not that it has obtained such permits.

FERC also broadened the ability of utilities to terminate their mandatory purchase obligation from small power production QFs. Under PURPA, a utility may seek to terminate its mandatory purchase obligation by demonstrating that QFs have non-discriminatory access to wholesale markets. FERC's current rules establish a rebuttable presumption that QFs with a capacity of 20 MW or less do not have non-discriminatory access to wholesale markets. In the NOPR, FERC proposed to reduce the rebuttable presumption for small power production QFs to 1 MW or less. In response to comments filed by the National Hydropower Association and others, the Final Rule limits application of the rebuttable presumption to small power production QFs with a capacity of 5 MW or less. This change will allow utilities to terminate their mandatory purchase obligation from small power production QFs with a capacity between 20 MW and 5 MW.

The Final Rule will become effective 120 days after publication in the *Federal Register*. Changes adopted in the Final Rule are effective prospectively and are not intended to affect existing contracts or LEOs or existing facility certifications. For more information on the Final Rule, see our [issue alert](#).

CEQ Finalizes NEPA Rule

On July 15, 2020, the Council on Environmental Quality (CEQ) issued a Final Rule revising its procedural regulations implementing the National Environmental Policy Act (NEPA). CEQ is responsible for issuing regulations addressing federal agency compliance with the NEPA review requirements. The Final Rule is the first major revision to CEQ's NEPA regulations since 1978, and is the latest in a series of efforts by the Trump Administration to streamline federal agency processes for permitting infrastructure projects.

The Final Rule changes many of the core elements of the NEPA review process. It revises the definition of environmental "effects" by eliminating references to "direct," "indirect," and "cumulative" effects and focuses the analysis on effects that are reasonably foreseeable and have a reasonably close causal relationship to the proposed action. The Final Rule also clarifies that "reasonable alternatives" must be "technically and economically feasible" and meet the purpose and need for the proposed action. Specifically, when the agency's action involves a non-federal applicant, the development of reasonable alternatives must consider the goals of the applicant. It also establishes time limits of one year for the federal agency to issue 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 decision-making authority for a proposed project, the agencies must coordinate scheduling and, where practicable, issue a single environmental document.

The Final Rule will be effective September 14, 2020. At least one [complaint](#) has been filed challenging the Final Rule in the U.S. District Court for the Northern District of California. The revised regulations apply to all NEPA processes that begin after September 14, 2020. Agencies have the discretion to apply the revised regulations to ongoing activities and environmental reviews. Federal agencies must revise their agency-specific NEPA implementing regulations by September 14, 2021. As an independent agency, FERC has held that it is not bound by CEQ's regulations. However, FERC executed the One Federal Decision Memorandum of Understanding and could opt to revise its NEPA procedures to be consistent with CEQ's revised rules.

For more information, see our [issue alert](#).

Barton Named CEO of FirstLight Power

On July 15, 2020, FirstLight Power [named](#) Alicia Barton as its new chief executive officer, effective August 3, 2020. Ms. Barton served most recently as President and CEO of the New York State Energy Research and Development Authority and previously as CEO of the Massachusetts Clean Energy Center. Ms. Barton will succeed John Shue, who has been CEO of FirstLight since 2016 and is retiring. FirstLight is the owner and operator of the Northfield Mountain pumped storage hydroelectric facility and a number of other energy assets in Massachusetts and Connecticut.

[Sharon White](#) contributed to this issue.

Special thanks for April Rose Knight, a Van Ness Feldman summer associate, for her contributions to this issue of the hydro newsletter.

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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