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# Hydro Newsletter

## VOLUME 7, ISSUE 9: SEPTEMBER 2020

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### FERC Declaratory Order Finding Waiver of California Section 401 Authority Challenged in Ninth Circuit

The California State Water Resources Control Board (Water Board) and a group of environmental organizations, including the South Yuba River Citizens League, California Sportfishing Protection Alliance, Friends of the River, and Sierra Club and its Mother Lode Chapter, each have filed a petition for review with the U.S. Court of Appeals for the Ninth Circuit (Ninth Circuit) of Federal Energy Regulatory Commission (FERC) orders finding that the 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 Nevada Irrigation District's (NID) Yuba-Bear Hydroelectric Project. NID 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*. FERC issued its waiver determination on April 16, 2020 and a rehearing order on July 21, 2020.

As described in our [May newsletter](#), NID initially filed its 401 application with the Water Board in March 2012 and subsequently withdrew and resubmitted its application each year between 2013 and 2018 in coordination with the Water Board. In January 2019, the Water Board denied NID's application without prejudice on the basis that the California Environmental Quality Act (CEQA) process and consultation under the federal Endangered Species Act (ESA) were not yet complete, and encouraged NID to file a new request. NID 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.

FERC granted NID's request for a waiver determination, finding that the Water Board waived its section 401 authority through the repeated withdrawal and refiling of NID's application for WQC. Consistent with its other waiver 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 NID voluntarily withdrew its application each year to avoid a denial without prejudice, FERC found that the Water Board expected and encouraged NID to withdraw and resubmit its application to avoid the CWA's one-year waiver deadline. FERC also rejected arguments that the 401 certification process was held up by the CEQA and ESA processes.

## California Water Board Issues WQCs for Projects Subject to FERC Section 401 Waiver Determinations

In the month of August 2020, the California Water Board issued several final WQCs for hydropower projects for which FERC had already determined that the Water Board waived its CWA Section 401 authority. These included the relicensing proceedings for NID's Yuba-Bear Project, Yuba County Water Agency's (YCWA) Yuba River Development Project, and Merced Irrigation District's (Merced) Merced River and Merced Falls Hydroelectric Projects. None of these projects had a pending 401 application before the Water Board when it issued the WQC. The Water Board asserted in issuing these certifications that it did so in order to protect California's interests in the relicensing proceedings. The Water Board included conditions in each of the WQCs that would make the certification effective upon a FERC or judicial determination that FERC improperly found waiver of the Water Board's certification authority.

On August 14, 2020, YCWA filed a [Petition for Reconsideration](#) of its WQC asking the Water Board to vacate the WQC related to its relicensing. In addition to a number of legal and procedural arguments, YCWA submitted evidence in its petition that the conditions under the WQC could have a nearly \$500 million impact on the project over a 50-year license term. On August 28, 2020, Merced also filed a Petition for Reconsideration of its WQC asking the Water Board to vacate the WQC related to its relicensings.

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

As reported in our July [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 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.

A fourth [lawsuit](#) challenging the Final Rule was filed on August 26, 2020 in the U.S. District Court for the District of South Carolina by a group of environmental organizations, including the South Carolina Coastal Conservation League, South Carolina Native Plant Society, Amigos Bravos, Natural Resources Defense Council, Savannah Riverkeeper, and Waterkeeper Alliance. The complaint focuses on the Final Rule's limits on a state's review and action under section 401 to water quality impacts from a specific discharge, rather than the project as a whole. This same group also is challenging EPA's Waters of the United States rule in the same court.

Three other lawsuits challenging the Final Rule are pending in other courts. 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](#).

## DOE, USCOE, and BOR Sign MOU to Promote Renewable Energy Development

On August 24, 2020, in commemoration of National Hydropower Day, the Bureau of Reclamation (BOR), the U.S. Department of Energy (DOE), and the U.S. Army Corps of Engineers (USCOE) executed a [Memorandum of Understanding](#) (MOU) to enhance collaboration and leverage resources to ensure the continued strength of the federal hydropower fleet. The MOU was signed at Hoover Dam by DOE Assistant Secretary for the Office of Energy Efficiency and Renewable Energy Daniel Simmons, BOR Commissioner Brenda Burman, and Principal Deputy Assistant Secretary of the Army for Civil Works Ryan Fisher. Under the MOU, within 90 days, the agencies will collaborate to create an action plan designed to adapt hydropower to changing markets, environmental concerns, and water issues, and to facilitate the influx of non-dispatchable generation resources entering the bulk electric system. The

action plan will outline specific projects and activities under five topic areas: maximizing the value of investments in hydropower, quantifying the value of ancillary services provided by hydropower, workforce training, water supply reliability, and new methods and technologies to meet environmental standards at a lower cost. The MOU is effective for five years.

## FERC Commissioner Update

FERC Commissioner Bernard McNamee, a Republican, has announced that he will depart the Commission on September 4. McNamee previously announced that he would not seek another term after his current term expired on June 30, 2020. McNamee has remained at FERC past the expiration of his term to maintain a quorum. As reported last month, 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 attorney Allison Clements as FERC Commissioners. Once confirmed by the U.S. Senate, Christie would fill McNamee's seat, and Clements would fill the vacant Democratic seat on the Commission. They would join Neil Chatterjee (Chairman), Richard Glick (Democrat), and James Danly (Republican), returning FERC to a full slate of five Commissioners.

## Update on CEQ's Final NEPA Rule

As reported in last month's [newsletter](#), on July 15, 2020, the Council on Environmental Quality (CEQ) issued a [Final Rule](#) modernizing and clarifying its procedural regulations implementing the National Environmental Policy Act (NEPA). The Final Rule is the first major revision to CEQ's NEPA regulations in over 40 years.

The Final Rule is set to become effective on September 14, 2020; however, litigation challenging the Final Rule has already been filed, and this litigation could potentially delay the effective date. Several environmental groups filed lawsuits in federal district courts in Virginia, California, and New York, challenging the final rule under the Administrative Procedure Act. All three suits allege that CEQ was arbitrary and capricious in failing to respond to public comments, reversing agency position without adequate explanation, and creating a rule inconsistent with NEPA.

For more information on CEQ's Final Rule and recent litigation, see our [issue alert](#).

## USCOE Proposes to Reissue Nationwide Permits

On August 3, 2020, the USCOE released a pre-publication version of its [proposal](#) to replace the 2017 Nationwide Permits (NWP) by the end of 2020. NWPs are general permits issued by the USCOE that are designed to streamline the agency's review of certain categories of activities under Section 404 of the CWA and Section 10 of the Rivers and Harbors Act of 1899 that have no more than minimal individual and cumulative adverse environmental impacts. NWPs automatically expire every five years. The current 2017 NWPs are scheduled to expire on March 18, 2022, but the USCOE is now proposing to reissue and revise the NWPs two years early. The USCOE is taking this early action in response to several Executive Orders directing agencies to ease permitting burdens and promote economic growth as well as in response to pending litigation over a 2017 NWP.

The USCOE's proposal would add five new NWPs and modify several of the current NWPs. The USCOE proposes to split existing NWP 12, which broadly covers utility line activities, into three separate NWPs covering different types of utility lines: oil and gas pipelines, electrical/telecommunication lines, and water/sewer utility lines. The USCOE also proposes new NWPs covering activities not covered explicitly by any of the existing NWPs: activities associated with water reclamation facilities and certain types of mariculture activities not covered by NWP 48. The USCOE proposes to modify NWP 17 for hydropower projects to raise the generating capacity threshold from 5,000 kW to 10,000 kW. This change would align the NWP with the revised definition of "small hydroelectric power project" in the Hydropower Regulatory Efficiency Act of 2013.

After the USCOE publishes the proposal in the *Federal Register*, the public will have 60 days to provide comments. Once the USCOE finalizes its proposal, additional conditions may be imposed on the NWPs by USCOE district offices, State agencies, and Indian Tribes. The inclusion of these additional conditions could delay the effective date of the 2020 NWPs in some districts.

For more information on the USCOE NWP proposal, see our [issue alert](#).

## FERC Clarifies eFiling Process When Electronic Filing is Unavailable

Beginning on July 1, 2020, FERC has required that any physical filings or submissions to be delivered to FERC, other than by the United States Postal Service, must be sent to FERC's off-site security screening facility. An entity requested that FERC establish a back-up means of timely filing in the event FERC's electronic filing (eFiling) system malfunctions on the day a filing is due. On August 18, 2020, FERC [issued](#) an order clarifying that if an entity attempts to make a filing during a FERC eFiling system malfunction, the filer must take the following steps to ensure the filing is deemed timely. The entity must email FERC's Office of the Secretary to notify staff of the malfunction. The email must attach the public version of the filing and provide evidence of timely attempts to file, such as screenshots of error messages. The email does not, however, constitute a formal submission of the filing. If the eFiling system is not restored by 5 p.m. on the day the filing was attempted, the filer also must either submit the filing electronically or send a hard copy to FERC's off-site screening facility on the next business day, whichever is the most expedient option. If the filer meets each of these requirements, the filing will be considered timely filed by FERC.

*[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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