



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](#)

Hydro Newsletter

VOLUME 7, ISSUE 11: NOVEMBER 2020

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

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

- *Supreme Court Declines to Review FERC Jurisdictional Determination on Algae Project at Nuclear Plants*
- *FERC Declaratory Order Finding Waiver of California Section 401 Authority Challenged in Ninth Circuit*
- *New Request for Waiver of CWA Section 401 Authority Filed at FERC*
- *FERC Order Clarifies Policies on 401 Waiver, Section 18 Prescriptions, and Environmental Baseline under the ESA*
- *National Hydropower Association Announces Joint Statement of Collaboration with Environmental and River Communities*
- *DOE Announces Notice of Opportunity for Technical Assistance to Support Hydropower Decision Making*
- *President Signs Executive Order on "Modernizing America's Water Resource Management and Water Infrastructure"*

Supreme Court Declines to Review FERC Jurisdictional Determination on Algae Project at Nuclear Plants

On Monday, October 5, the U.S. Supreme Court declined to review a challenge to a Federal Energy Regulatory Commission (FERC) decision holding that it lacks jurisdiction to review preliminary permit applications for proposed algae cultivation and retention ponds. The proposed projects would use waste heat from the output water of adjacent nuclear power facilities to grow algae. The project developer argued that if it constructed the projects without FERC licenses, it would be subject to civil penalties, criminal sanctions, and stop orders. In February 2019, FERC issued an order dismissing the preliminary permit applications, finding that the proposed algae retention ponds did not constitute project works for the development of hydroelectric power under the Federal Power Act (FPA) and thus FERC lacked jurisdiction over the projects. The project developer sought rehearing on several grounds, including that FERC's dismissal of the applications was an attempt to block the proposals from moving forward. On rehearing, FERC clarified that while the projects do not fall within its licensing authority, this did not bar the developer from pursuing the projects before the appropriate regulatory entities.

In December 2019, the U.S. Court of Appeals for the D.C. Circuit (D.C. Circuit) dismissed a petition for review of FERC's order for lack of standing. The court found that the project developer had failed to show that it was harmed by FERC's orders, and that mere disagreement with an agency's rationale does not establish standing for judicial review. The developer sought review of the D.C. Circuit's order, which the Supreme Court denied on October 5.

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 California Sportfishing Protection Alliance, Friends of the River, and Sierra Club and its Tehipite Chapter, each have filed a petition for review with the U.S. Court of Appeals for the Ninth Circuit (Ninth Circuit) of 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 Merced Irrigation District's (Merced) Merced River and Merced Falls Projects. Merced filed

Upcoming Speaking Engagements

- [Sharon White](#), National Hydropower Association Post-Election Webinar, November 10, 2020 at 2 pm EST
- [Sharon White](#), National Hydropower Association California Regional Virtual Meeting, Panelist: Clean Water Act Section 401 Developments, December 16, 2020.

Join Us for Our Next Webinar

VNF Live – 2020 Election Debrief: Outcomes and Their Impacts on Public Policy.

November 5, 2020 at 2 pm EST

[Click here to Register](#)

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 June 18, 2020 and a Notice of Denial of Rehearings by Operation of Law on August 20, 2020.

As described in our [July newsletter](#), Merced initially filed its 401 application with the Water Board in May 2014 and subsequently withdrew and resubmitted the application each year for four years in coordination with the Water Board. In April 2019, the Water Board denied Merced's application without prejudice on the basis that the California Environmental Quality Act (CEQA) was not yet complete. Merced 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 Merced's request, finding that the coordinated withdrawal and refile process constituted a waiver of section 401 authority. 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 Merced voluntarily withdrew its application each year to avoid a denial without prejudice, FERC found that the Water Board expected and, in some years, directed Merced 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 process.

The appeals in the Merced case join challenges already pending in the Ninth Circuit to FERC's 401 waiver determinations in the ongoing relicensings of Yuba County Water Agency's Yuba River Development Project and Nevada Irrigation District's Yuba-Bear Hydroelectric Project.

New Request for Waiver of CWA Section 401 Authority Filed at FERC

On October 2, 2020, Turlock Irrigation District and Modesto Irrigation District (the Districts) filed a petition for a declaratory order with FERC seeking a determination that the Water Board has waived its 401 authority with respect to the Districts' pending license applications for the Don Pedro and La Grange Hydroelectric Projects, FERC Project Nos. 2299 and 14581. The Districts filed their original request for a 401 certification with the Water Board in January 2018. The Water Board denied the request without prejudice, asserting procedural inadequacies with the application because FERC's environmental analysis remained ongoing and CEQA was not yet complete. In April 2019, the Districts submitted a second request for 401 certification, which was substantively unchanged from the first request. In April 2020, the Water Board again denied the application without prejudice on grounds that the CEQA process was incomplete and the Projects do not comply with water quality standards, and encouraged the Districts to reapply. In July 2020, in response to prompting by FERC staff, the Districts filed a third request for 401 certification. The Water Board acknowledged that the Districts' application was complete but indicated that proposed activity remains unchanged and does not comply with water quality requirements.

On October 2, 2020, the Districts requested FERC to declare that the Water Board has waived its 401 authority. The Districts argue that the Board's new practice of repeated denials without prejudice employed in their case is indistinguishable from the withdrawal and resubmit scheme rejected by the D.C. Circuit in *Hoopa* and inconsistent with CWA Section 401(a). The Water Board has filed a response arguing that *Hoopa* does not provide a basis for determining that denial is a "failure or refusal to act" that results in waiver of certification.

In other Section 401 news, on October 29, 2020, the U.S. Court of Appeals for the Second Circuit heard oral argument in *New York State Department of Environmental Conservation v. FERC*, a judicial challenge to a FERC waiver determination in the gas pipeline context. The hydropower industry filed an amicus brief in support of FERC in the case. A link to a recording of the oral argument is available on the court's [website](#).

FERC Order Clarifies Policies on 401 Waiver, Section 18 Prescriptions, and Environmental Baseline under the ESA

On October 15, 2020, FERC [denied](#) a licensee's request for rehearing of the subsequent license issued to operate and maintain the Barker's Mill Project in Maine. The order makes several important rulings with respect to CWA section 401, section 18 of the FPA, and the Endangered Species Act (ESA).

First, FERC declined to find that the State of Maine waived its section 401 authority where the applicant voluntarily withdrew its certification request prior to the one-year deadline to avoid what it apparently believed would be an adverse result, and to facilitate settlement discussions with relicensing stakeholders. FERC found that there was no evidence that the Maine Department of Environmental Protection directed or orchestrated the withdrawal, but that it simply helped facilitate what the applicant desired to do. FERC distinguished the many other recent cases where it has found waiver on the basis that the states in those cases directed withdrawal and refiling of the 401 request so the state could take more time to act. This suggests there may be some flexibility for an applicant to avoid forcing the state to act prematurely and thereby render an adverse certification decision.

Second, FERC rejected the applicant's argument that FERC was obligated to refuse to include in the license FPA section 18 fishway prescriptions submitted by the U.S. Fish and Wildlife Service and National Marine Fisheries Service (NMFS) (collectively, the Services) because the Services failed to provide an analysis of how they gave equal consideration to developmental factors pursuant to FPA section 33. Under section 33, whenever the U.S. Departments of the Interior or Commerce prescribes a fishway under section 18, the Secretary must issue a written statement demonstrating that it "gave equal consideration to the effects of the prescription adopted and alternatives not accepted on energy supply, distribution, cost and use; flood control; navigation; water supply; and air quality (in addition to the preservation of other aspects of environmental quality)." FERC agreed with the Services' interpretation of the statute that the "equal consideration" requirement is only triggered if the applicant submits an alternative fishway proposal under section 33. In this case, the applicant did not submit an alternative. This interpretation thus suggests that a licensee may want to propose an alternative, not just dispute a section 18 prescription, if it intends to trigger the agency's statutory obligation to consider economic factors.

Finally, FERC rejected the applicant's argument that it was improper for NMFS to compare project operations with a pre-project baseline, and that the continuing effects of the dam should be analyzed as part of the baseline, not the proposed action. FERC, analyzing the new ESA regulatory definition of environmental baseline, ruled that in relicensings under the FPA where continued operation of the dam is not a given but within FERC's discretion, it is not unreasonable to consider continued operations as part of the proposed action. As a practical matter, FERC reasoned that whether the dam's existence and operations are analyzed as part of the baseline or proposed action, the effects must be considered under the ESA.

National Hydropower Association Announces Joint Statement of Collaboration with Environmental and River Communities

On October 13, 2020, the National Hydropower Association, along with the environmental and river communities, announced their "[Joint Statement of Collaboration on U.S. Hydropower: Climate Solution and Conservation Challenge](#)." The Joint Statement is the result of a two-and-a-half-year dialogue among the U.S. hydropower industry and the environmental and river conversation communities through Stanford University's Uncommon Dialogue process. In their Joint Statement, the parties recognize the role of U.S. hydropower as an important renewable energy resource to address climate change as well as the need to create new opportunities to reduce the environmental and safety impacts of dams.

To advance those goals, the parties identified seven areas for joint collaboration, including: (1) accelerate development of hydropower technologies and practices to improve generation efficiency, environmental performance, and solar and wind integration; (2) advocate for improved U.S. dam safety; (3) increase basin-scale decision-making and access to river-related data; (4) improvement the measurement, valuation of and compensation for hydropower flexibility and reliability services and support for

enhanced environmental performance; (5) advance effective river restoration through improved off-site mitigation strategies; (6) improve federal hydropower licensing, relicensing, and license surrender processes; and (7) advocate for increased funding for U.S. dam rehabilitation, retrofits, and removals. The parties will collaborate with other key stakeholders, including tribal governments and state officials, over the next 60 days to create an action plan to guide their joint efforts in these areas.

DOE Announces Notice of Opportunity for Technical Assistance to Support Hydropower Decision Making

On October 13, 2020, the U.S. Department of Energy (DOE), Water Power Technologies Office (WPTO) announced a [Notice of Opportunity for Technical Assistance](#) (NOTA) for improving hydropower's value through informed decision making. This opportunity is a part of the [Water Innovation for a Resilient Electricity System Initiative](#) (HydroWIRES Initiative) aimed at understanding, enabling, and improving hydropower's contributions to reliability, resilience, and integration within the U.S. electricity system. For more information on the HydroWIRES Initiative, please see our previous [newsletter](#).

The intent of the opportunity is to provide hydropower decision makers, like utilities and operators, with National Lab expertise and capabilities to address current challenges and capture new opportunities for their systems. Additionally, the NOTA will help to validate National Lab-led modeling, analysis, and tools developed under the HydroWIRES Initiative as well as furthering collective understanding of roles for hydropower under evolving U.S. power system conditions.

Through the NOTA, WPTO anticipates providing technical assistance to up to six recipients. Each recipient will receive assistance valued up to \$400,000. The NOTA provides only technical assistance, not financial assistance—WPTO will not purchase hardware, software, or provide direct funding under the NOTA. There is no cost share requirement for recipients; however, in-kind contributions for data information and critical review of results would be necessary for a successful project.

WPTO will hold a [webinar](#) on Wednesday, November 4 at 2 pm EST. Concept paper submissions are due on [December 18, 2020](#). Applicants who have submitted an eligible concept paper will then be eligible to submit a full application by [January 29, 2021](#). Additional information on the application process is available at [DOE's website](#).

President Signs Executive Order on “Modernizing America’s Water Resource Management and Water Infrastructure”

On October 13, 2020, President Trump signed an Executive Order (EO) on “[Modernizing America’s Water Resource Management and Water Infrastructure](#).” The intent of the EO is to (1) modernize America’s water infrastructure, (2) improve water resource management, and (3) create opportunities for America’s water workers. A new Water Subcabinet of senior federal agency officials will work to achieve these objectives by facilitating efficient and effective management and modernization of water supplies and systems while also eliminating duplication between agencies.

The Water Subcabinet will develop a national water strategy addressing:

- Enhancement of water storage, water supply, and drought resiliency;
- Improvement of water quality, source water protection; nutrient management, and restoration activities;
- Modernization of water systems for drinking water, wastewater, water reuse, desalination, and flood control; and
- Advancement in water data management, research, modeling, and forecasting.

The Water Subcabinet will be co-chaired by the Department of the Interior Secretary and U.S. Environmental Protection Agency Administrator, and will include senior officials from the U.S. Department of Agriculture, the Department of Commerce, DOE, and the Department of the Army (Civil Works). The Water Subcabinet will work in close coordination with senior officials from the White House Council on Environmental Quality, the Office of Management and Budget, the Office of Science and Technology Policy, and other federal agencies as appropriate.

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
Jenna Mandell-Rice	206.829.1817	jrm@vnf.com
Sharon White	202.298.1871	slw@vnf.com (Editor-in-Chief)

© 2020 Van Ness Feldman, LLP. All Rights Reserved. This document has been prepared by Van Ness Feldman for informational purposes only and is not a legal opinion, does not provide legal advice for any purpose, and neither creates nor constitutes evidence of an attorney-client relation.