Van Ness Feldman LLP
vnf.com

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 12: DECEMBER 2020

To receive the Hydropower Newsletter on a regular basis, follow this link:
http://www.vnf.com/KnowledgeCenter.aspx?SignUp=True

FERC Commissioner Update

On November 5, 2020, President Trump named James Danly as Chair of the Federal Energy Regulatory Commission (FERC). Danly has served as a FERC Commissioner since March 2020, and previously served as general counsel to FERC since 2017. Danly replaces Neil Chatterjee, who served as FERC Chairman from August to December 2017 and since October 2018. Chatterjee will remain as a Commissioner through the end of his term in June 2021.

As reported in our September newsletter, President Donald Trump has nominated Virginia Corporation Commission Chair Mark Christie and former Natural Resources Defense Council attorney Allison Clements to be FERC Commissioners. On November 18, 2020, the U.S. Senate Energy and Natural Resources Committee voted to advance the nominees to the Senate floor. If the Senate is able to schedule a confirmation vote before the end of the year and the nominees are confirmed, Christie would fill the seat previously held by Republican Bernard McNamee, and Clements would fill the seat previously held by Democrat Cheryl LaFleur. They would join Neil Chatterjee (Republican), Richard Glick (Democrat), and James Danly (Republican), returning FERC to a full slate of five Commissioners.

Section 401 Updates

On November 19, 2020, FERC declined to find that the State of Vermont waived its authority to issue a water quality certification under Section 401 of the Clean Water Act (CWA) for the Morrisville Hydroelectric Project where the applicant voluntarily withdrew its certification request prior to the one-year deadline to avoid what FERC characterized as a certification with unfavorable conditions. FERC found that there was no evidence that the licensee had a functional agreement with the Vermont Agency of Natural Resources (Vermont ANR) to coordinate withdrawal and resubmittal of its 401 application to allow the state additional time to act. Instead, FERC found that the licensee withdrew and refiled in 2014 to allow Vermont ANR to consider new flow conditions, and again in 2015 to give itself more time to review study reports, consider alternatives, and conduct a cost-benefit analysis. On this basis, FERC found that the licensee withdrew and refiled unilaterally for its own benefit and by its own initiative to avoid potentially unfavorable water quality certification conditions, which did not constitute a waiver. FERC found that the state's "mere acceptance" of the licensee's requests to withdraw and refile the application was not evidence of an agreement between the parties to circumvent the one-year deadline. FERC distinguished the case from the recent orders where it has found waiver on the basis that the state agency functionally agreed to a withdrawal and refiling scheme by either requesting or directing the licensee to withdraw and resubmit to restart the one-year clock.

In other 401 news, on November 20, 2020, Pacific Gas and Electric Company (PG&E) and the City of Santa Clara filed a Petition for Reconsideration of the water quality certification for the relicensing of the Bucks Creek Project asking the California State Water Resources Control Board (Water Board) to delete certain conditions from the certification. In addition to a number of legal and procedural arguments, PG&E argued that certain of the conditions conflict with mandatory conditions issued by the U.S. Forest Service, are overly burdensome and duplicative, unrelated to water quality, and allow the Water Board

Van Ness Feldman LLP
vnf.com

Upcoming Speaking Engagements

- Sharon White, National Hydropower Association California Regional Virtual Meeting,
  Panelist: Clean Water Act Section 401 Developments,
  December 16, 2020.

- Julia Wood, Law Seminars International, Electric Power in the Northwest Conference,
  Panelist: Noteworthy Issues Before the Federal Administrative Agencies,
  January 28, 2021

Join Us for Our Next Webinar

VNF Live – Addressing Historic Trauma in Indian Country: Funding and Implementing Trauma-Informed Programming in the Wake of the COVID-19 Pandemic.
December 4, 2020 at 3 pm EST
Click here to Register

unilateral authority to modify the certification during the term of the license in violation of the Environmental Protection Agency's recent final rule revising its regulations implementing Section 401. PG&E did not seek a waiver determination at FERC in this case because the Water Board acted on its application by the one-year deadline.

LIHI Proposes New Recertification Process for Existing Low Impact Projects

In October 2020, the Low Impact Hydropower Institute (LIHI), a nonprofit organization dedicated to certifying low impact projects, announced that it is recommending a new approach to LIHI Certificate recertifications and has opened a public comment period on the proposed approach. LIHI's Certificate Program is voluntary and designed to help recognize hydropower dams that minimize their environmental impacts. If the proposed changes to the recertification process are adopted, they would go into effect on January 1, 2022.

The original LIHI Criteria for certification were published in 2000, and LIHI published a comprehensive update to the Certification Handbook in 2016. Each project with an existing LIHI Certificate was required to undergo a two-stage recertification process pursuant to the 2016 Handbook. In 2019, LIHI started a dialogue with certificate holders, conservation organizations, and agencies to discuss the benefits and drawbacks of the current recertification approach. LIHI developed the proposed approach for recertification after a review of stakeholder input. The recertification process would apply only to those projects that have gone through a new certification or recertification under the 2016 Handbook.

LIHI has created a flow chart of triggers that would require full or partial review for recertification. Full recertification review would be required under a limited number of circumstances, such as whether the facility received a new FERC license. Partial recertification review would be required based on certain triggering events, including whether: (1) the facility's regulatory status changed in a way that may affect compliance with the LIHI criteria (e.g., license or exemption amendment); (2) the facility received a notice of FERC or other permit violations, compliance warnings, or complaints; (3) a resource agency made a formal new recommendation under prior reserved authority and outside of licensing; (4) there have been substantive changes in the watershed surrounding the facility, or substantive changes in resource agency policies that may affect the facility's adherence to the LIHI criteria; (5) there have been material changes in facilities or operations that may affect adherence to the LIHI criteria; or (6) other special circumstances or newly identified facility-specific triggers that might warrant targeted review.

LIHI asserts that the proposal offers a number of benefits including reduced application costs, longer certificate terms, increased stakeholder involvement, improved transparency, and retention of LIHI independence and program credibility. LIHI seeks public input on a number of specific issues, including whether it should consider other triggers for full or partial recertification; whether six months is sufficient time for a LIHI Certificate holder to prepare a full or partial application; and whether the proposal adequately retains the ability for the public to comment on LIHI Certified facilities.

Stakeholder comments on the proposal will be accepted until January 27, 2021.

Sharon White and Ani Esenyan contributed to this issue.

Van Ness Feldman LLP
vnf.com

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)