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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.

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Hydro Newsletter

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FERC Proposes Financial Assurance Measures for Hydropower Licensees

On January 19, 2021, the Federal Energy Regulatory Commission (FERC) issued a Notice of Inquiry (NOI) inviting comments on whether FERC should require financial assurance measures in hydropower licenses and other authorizations. Triggered by recent public safety events, the NOI explains that a number of hydropower projects are non-operational or out of compliance with the license and the licensees cannot afford to address environmental or safety issues to meet FERC's standards. Based on concerns that inadequate financing may result in threats to public safety and environmental resources, FERC seeks comments on whether additional measures should be required to ensure hydropower operators have the financial resources needed to operate and maintain their projects over the license term, including under unforeseen circumstances.

The NOI proposes three potential options for establishing financial assurance mechanisms for licensees, including: (1) requiring licensees to obtain bonds to cover the cost of safety measures and project operation and maintenance over the course of the license; (2) establishing an industry-wide trust or remediation fund or requiring licensees to maintain an individual trust, escrow, or remediation fund; or (3) requiring licensees to obtain insurance policies for unforeseen safety hazards or dam failures. The NOI also solicits suggestions for alternative financial assurance mechanisms to address FERC's concerns. FERC suggested that such financial measures could be imposed in original and new licenses or in other authorizations, such as exemptions, amendments, and license transfers.

Comments on the NOI are due on March 29, 2021. If you are interested in assistance with filing comments, please do not hesitate to contact Mike Swiger, Julia Wood or Sharon White.

FERC Commissioner Update

On January 21, 2021, President Biden named Commissioner Richard Glick to be the new FERC Chairman. Chairman Glick has been a FERC Commissioner since November 2017 and is serving a term that ends June 30, 2022. Commissioner Glick has indicated some of his priorities as Chairman will be transmission reform, adequately compensating resources for the value they provide to the grid including storage and assessing greenhouse gas emissions and environmental justice impacts of infrastructure projects. Chairman Glick was previously employed as Director of Governmental Affairs for PacifiCorp which has a robust portfolio of hydroelectric projects. Chairman Glick replaces James Danly, who served as FERC

Chairman from November 2020 to January 21, 2021. Danly will remain a FERC Commissioner through the end of his term in June 2023. FERC currently has a full slate of five Commissioners for the first time since 2018.

FERC Declines to Find that Denials Without Prejudice Justify a Section 401 Waiver

On January 19, 2021, FERC declined to find that the State of California waived its authority to issue a water quality certification under Section 401 of the Clean Water Act (CWA) for the Don Pedro and La Grange Hydroelectric Projects where the California State Water Resources Control Board (Water Board) denied the licensees' applications without prejudice for two successive years. The licensees argued that denying certification without prejudice is the functional equivalent of the withdraw and resubmit practice that was invalidated by the U.S. Court of Appeals for the D.C. Circuit (D.C. Circuit) in *Hoopa Valley Tribe v. FERC*. FERC disagreed, finding that unlike a withdraw and resubmit scenario, the Water Board acted on the application in this case, even though it was not a substantive denial on the merits. FERC also found that unlike other Section 401 waiver cases, the licensees and the Water Board did not coordinate to circumvent the one-year deadline under Section 401. In response to the licensees' arguments that FERC was obligated to determine whether the Water Board's denial is valid as a matter of federal law, FERC held that it is not its role to review the appropriateness of a state's decision to deny certification.

Several conservation groups argued that FERC should dismiss the license applications because the state had twice denied the 401 application, the applicant did not appeal the denials, and there was no active 401 request pending 90 days after the State's denial of the certification in the second year. FERC acknowledged its policy that if an applicant's second 401 request is denied, FERC will dismiss the license application in the context of original licenses to free up the site for hydroelectric development. However, FERC clarified that this policy does not apply to relicensing or an original license for an existing, unlicensed project, in which FERC will provide the applicant greater flexibility with respect to circumstances that can cause a license application to be dismissed.

President Biden Issues Executive Order Directing Review of Trump Regulatory Reform Initiatives

On his first day in office, President Biden issued an Executive Order directing the heads of all federal agencies to immediately review all existing regulations, orders, guidance documents, policies, and agency actions issued during the Trump administration that are inconsistent with the policies of the Biden administration, which include protecting and improving the environment and ensuring access to clean air and water. For any agency actions that are identified as inconsistent, the Executive Order directs the head of the agency to "consider suspending, revising, or rescinding the agency actions" as appropriate and consistent with applicable law. President Biden's Executive Order also revoked President Trump's Executive Order No. 13868 of April 10, 2019 (Promoting Energy Infrastructure and Economic Growth), which directed the Environmental Protection Agency (EPA) to revise its Section 401 rules. In furtherance of President Biden's directives, on January 21, 2021, the acting General Counsel of EPA issued a letter requesting the Department of Justice (DOJ) to seek and obtain abeyances or stays of proceedings in pending litigation seeking judicial review of EPA regulations promulgated during the Trump presidency. EPA's CWA Section 401 and Waters of the United States rules are currently being challenged in multiple courts across the country.

DOE Releases Hydropower Market Report and Hydropower Value Study

During the week of January 18, 2021, the U.S. Department of Energy Water Power Technologies Office (WPTO) released two important reports: an updated U.S. Hydropower Market Report and the Hydropower Value Study (HVS): Current Status and Future Opportunities. The Hydropower Market Report combines data from public and commercial sources to provide a comprehensive picture of developments in the U.S. hydropower and pumped-storage hydropower fleet and industry trends during the period of 2017-2019. The last edition of the Hydropower Market Report was issued in 2017. The report highlights in particular that pumped-storage hydro capacity in the United States has grown over

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the past decade, as a result of upgrades to existing projects, by almost as much as all other U.S. energy storage combined, and that interest in pumped storage in the U.S. and internationally continues to grow significantly. The report also notes that hydropower capacity increased by 431 MW since the publication of the last Hydropower Market Report, and hydropower generation represented 6.6% of U.S. electricity generation in 2019. It also notes that almost $8 billion has been invested in refurbishments and upgrades of the U.S. hydropower and pumped storage fleet since 2010.

The Hydropower Value Study explores current hydropower operations and resulting value across the country. The report notes that hydropower generators are important contributors to grid reliability, but there is wide variation in hydropower plant conditions and capabilities to provide grid services. It also notes that conventional value streams, such as energy and ancillary services prices, are exhibiting declining trends in some parts of the country which have impacted hydropower resources, particularly for conventional hydro in the Northeast and pumped storage in the Midwest. Finally, the report highlights new market mechanisms that are emerging that could compensate hydropower flexibility, including for frequency response services.

EPA Issues Memo on Best Professional Judgment Framework for Applying CWA Section 316(b) to Hydroelectric Facilities

On January 13, 2021, EPA issued a memorandum presenting a framework to evaluate whether, based on EPA's best professional judgment (BPJ), additional measures may be necessary at hydroelectric generating facilities to minimize impingement and entrainment of fish and other aquatic organisms at cooling water intake structures. Section 316(b) of the CWA requires facilities with cooling water intake structures to ensure that the location, design, construction, and capacity of the structure reflect the best technology available (BTA) to minimize adverse impacts on the environment from impingement and entrainment of fish and other aquatic organisms. In 2014, EPA promulgated regulations to implement Section 316(b) which establish BTA requirements for existing cooling water intake structures. In March 2020, EPA determined that these regulations do not apply to cooling water intake structures at hydroelectric facilities and instead, such structures at hydroelectric facilities must meet requirements established on a case-by-case, BPJ basis. At that time, EPA issued a framework to consider various technologies currently installed at hydroelectric facilities to establish case-by-case, BPJ conditions, and solicited comments on the proposed framework. The January 13, 2021 EPA memorandum presents a revised framework in response to the comments it received.

The revised framework sets forth criteria for a BPJ analysis that can be satisfied for most hydroelectric facilities through existing project attributes. EPA presents four factors it may use in its BPJ analysis to determine whether BTA requirements have been satisfied. These include: (1) efficiency of cooling water used for power generation; (2) cooling water withdrawn relative to waterbody volume or flow; (3) location of the intake structure; and (4) technologies at the facility. Any one or a combination of these factors can be used to satisfy the BTA requirement to minimize entrainment and impingement mortality. EPA notes that it generally does not expect project owners to develop new information or additional studies for EPA to make a BTA determination.

Sharon White 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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