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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.

Hydro Newsletter

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- *President Biden Nominates Willie L. Phillips, Jr. to Join FERC*
- *Static Liquefaction Not Spillway Inadequacy Likely Caused Edenville Dam Failure*
- *FERC Includes Financial Assurances Reopener in Licenses*
- *FERC Grants Retroactive Relief for Skagit Project Land Charges*
- *Perspectives by Mike Swiger**

President Biden Nominates Willie L. Phillips, Jr. to Join FERC

On September 9, 2021, President Biden [announced](#) his intent to nominate Willie L. Phillips, Jr. to be a Commissioner of the Federal Energy Regulatory Commission (FERC or Commission). Mr. Phillips is currently the Chairman of the District of Columbia Public Service Commission. If confirmed by the Senate, Mr. Phillips would return FERC to its full slate of five commissioners and would give Democrats a 3-2 majority on the Commission. Senator Joe Manchin (D.-W.VA) has stated his intent to fast-track the nomination.

Earlier in his career, Mr. Phillips was an attorney with Van Ness Feldman.

Static Liquefaction Not Spillway Inadequacy Likely Caused Edenville Dam Failure

An Independent Forensic Team (IFT) convened by FERC has released its [Interim Report](#) on the May 2020 failures of the Edenville and Sanford Dams in central Michigan. The September 13, 2021 report addresses the physical causes of the dam failures while noting that its investigation of human factors is ongoing. In an unexpected finding, the IFT found that the failure of Edenville Dam, which led to the cascading failure of the downstream Sanford Dam, likely resulted from static liquefaction, possibly due to faulty original construction methods, rather than overtopping or internal erosion. FERC had previously revoked the Edenville license on the grounds the licensee had failed to upgrade the dam's spillway as required. It now appears the Edenville Dam failure was not due to an inadequate spillway but to an issue FERC never addressed in any of its inspections or compliance orders.

Van Ness Feldman was formerly FERC counsel to Boyce Hydro, LLC, the licensee of the Edenville and Sanford projects.

FERC Includes Financial Assurances Reopener in Licenses

In a group of license related orders issued on September 23, 2021, FERC included for the first time a reservation of authority to require financial assurance measures. In an order issuing a new license to Cornell University, an order issuing an original license to Pine Creek Mine, LLC, and a pair of orders approving license transfers to ReNew Hydro Power, LLC and North Bennington Hydroelectric LLC, FERC included a license article providing: "The Commission reserves the right to require future measures to ensure that the licensee maintains sufficient financial reserves to carry out the terms of the license and Commission orders pertaining thereto." Commissioner James Danly dissented in each of the cases, noting

that the Commission had recently issued a [Notice of Inquiry](#) (NOI) on financial assurances and that the record in that proceeding has “raised compelling complexities.” Commission Danly expressed concern that the new license article, which “reserves the Commission’s authority to impose financial assurance mechanisms without limiting principle” on licensees could have the “unfortunate effect of reinforcing the uncertainty faced by licensees.” In his dissent to the transfer order Commissioner Danly also questioned the legality of reopening the license to add financial requirements in a transfer proceeding. In perhaps a glimpse into the future of the NOI proceeding, Commissioner Danly expressed hope that FERC “will convene one or more technical conferences to offer more structured fora in which to explore these questions.”

Van Ness Feldman filed [comments](#) in response to the FERC NOI on behalf of a group of hydroelectric licensees.

FERC Grants Retroactive Relief for Skagit Project Land Charges

In a September 23, 2021 rehearing order, the Commission granted the City of Seattle a rare retroactive refund of over \$11 million for federal land fees improperly assessed against its Skagit Hydroelectric Project from 1996 to 2019. Although FERC asserted in its *Skagit* order that the Federal Power Act (FPA) and its own regulations, which render federal land charge bills final unless timely appealed, would have prevented it from issuing a retroactive refund even though the charges were mistakenly assessed, FERC concluded that the FPA and its regulations were superseded by a 1984 treaty between the United States and Canada specifically exempting the City of Seattle from the federal land fees at issue. In so concluding, FERC applied the legal principle that if a statute and a treaty conflict, the later-enacted authority controls.

Perspectives by Mike Swiger*



In his first appearance, on September 28, before the Senate Energy and Natural Resource Committee since assuming leadership of FERC, Chairman Richard Glick was questioned extensively by Senators on a range of topics relating to FERC’s review of natural gas projects. In response to questioning, Chairman Glick said that FERC must consider the social cost of carbon in its reviews. Chairman Glick and his fellow Commissioners also were questioned on the need to expedite and streamline the authorization of new hydropower projects.

These two concepts – the social cost of carbon and the need to streamline the FERC process for new hydropower – are closely related as different facets of a nation-wide movement toward decarbonization of the energy sector. As highlighted by the U.S. Department of Energy’s comprehensive 2016 Hydropower Vision Report, the nation could increase installed hydroelectric capacity by 50 gigawatts by the year 2050 through developing incremental capacity at existing hydroelectric dams, adding hydroelectric capacity at nonpowered dams, encouraging hydrokinetic and other emerging technologies, and promoting closed-loop pumped storage, all without building new dams on our river systems. Various legislative proposals introduced in the current Congress would provide tax and other incentives for such low-impact development and should be enacted. But, as highlighted in the recent Senate hearing, a key component of expanding development of low-impact hydro is to make the FERC licensing process simpler, faster, less expensive, and more predictable. That will attract the investment dollars needed to help move the country closer to an emissions-free future – and not to do so will come with its own “social cost.”

**The opinions expressed in this article do not necessarily represent the views of Van Ness Feldman or its clients, but only the views of the author.*

[Mike Swiger](#) and [Mealear Tauch](#) 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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