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Van Ness Feldman is home to one of the premier hydropower law practices in the United States.

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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Bipartisan Infrastructure Bill Includes Substantial Appropriations for Hydropower

The Infrastructure Investment and Jobs Act, signed into law November 15, 2021, includes over $700 million in new spending for hydropower. The Act appropriates $200 million for hydropower production and efficiency incentives, with an additional $550 million available for projects that improve grid resiliency, dam safety, or environmental performance at existing dams. It also invests $200 million in rebalancing the Columbia River Treaty, with half of that appropriation for enhanced water storage and half for improved coordination on cross-border river and power flows. The Act also appropriates about $145 million for water and marine power research and development, including hydropower. Additionally, the bill appropriates $2 million per year for each fiscal year ("FY") between 2022 and 2026 for pumped storage demonstration projects. A summary of relevant hydropower provisions is included below.

Hydroelectric production incentives (Sec. 40331)

- This section authorizes $125,000,000 for FY22 for hydroelectric production incentives until expended.
- Eligible entities include any owner or authorized operator (with the written consent of the owner) of a hydroelectric generation facility. Such entities may apply for incentive payments for net electric energy generated by and sold from the facility's operation. See this Department of Energy ("DOE") guidance for specifics.

Hydroelectric efficiency improvement incentives (Sec. 40332)

- This section authorizes $75,000,000 for FY22 for hydroelectric efficiency improvement incentives until expended.
- Eligible entities include owners or operators of hydroelectric facilities at existing dams.
- Eligible projects include capital improvements to the facilities that are directly related to improving the efficiency of such facilities by at least 3%.

Maintaining and enhancing hydroelectricity incentives (Sec. 40333)

- This section directs the Secretary of Energy to make incentive payments to the owners and operators of hydroelectric facilities for capital improvements related to maintaining and enhancing hydroelectricity generation by improving grid resiliency, improving dam safety, and making environmental improvements.

- Qualified hydroelectric facilities must be licensed by the Federal Energy Regulatory Commission (FERC); placed into service before the date of enactment (of this section of the legislation); and in compliance with all applicable federal, Tribal, and state requirements (or would be brought into compliance as a result of the capital improvements carried out with the incentive payment).
- This section authorizes $553,600,000 for FY22 until expended.

Pumped storage hydropower wind and solar integration and system reliability initiative (Sec. 40334)

- This section directs the Secretary of Energy to establish a demonstration project for a pumped storage hydropower project to facilitate the long-duration storage of intermittent renewable electricity. The section authorizes $10,000,000 for the period of FY22-26.
- Projects must be designed to provide a minimum of 1,000 MW of storage capacity and be able to provide usage in more than one organized electricity market.
- Eligible entities include:
    - Tribal organizations
    - Electric utilities, including
        - Political subdivision of the state, such as a municipally owned electric utility
        - An instrumentality of the state composed of municipally owned utilities
    - Electric cooperatives
    - Investor-owned utilities
    - State energy offices
    - Institutions of higher education
    - A combination of the entities described above.

Authority for pumped storage hydropower development using multiple Bureau of Reclamation (BOR) reservoirs (Sec. 40335)

- This section creates a streamlined process under the BOR for pumped storage hydropower development projects and clarifies that certain pumped storage projects using multiple BOR reservoirs shall proceed through BOR's permitting process, not through both the FERC and BOR processes.

Limitations on issuance of certain leases of power privilege (Sec. 40336)

- This section provides requirements for the Secretary of the Interior concerning the issuance of a lease of power privilege for a proposed pumped storage project in Washington State.
- The requirements include a study plan agreement between the proposed lessee and the Confederated Tribes of the Colville Reservation and the Spokane Tribe of the Indians of the Spokane Reservation.

Willie Phillips Sworn in as FERC Commissioner

On November 16, 2021, Van Ness Feldman alumnus Willie Phillips was unanimously confirmed by the U.S. Senate to the Federal Energy Regulatory Commission, and was sworn in on December 1, 2021. Phillips has served as Chairman of the District of Columbia Public Service Commission since 2018. With Phillips' confirmation, FERC is now at its full complement of five Commissioners, three Democrats and two Republicans. Congratulations Commissioner Phillips!

EPA and Army Corps Announce Latest Update to Definition of "Waters of the United States"

On November 18, 2021, the Environmental Protection Agency ("EPA") and U.S. Army Corps of Engineers (collectively, the "Agencies") released a pre-publication version of their proposed rule defining "Waters of the United States" ("WOTUS") under the Clean Water Act ("CWA") (the "Proposed Rule"). The Proposed Rule unwinds much of the 2020 Navigable Waters Protection Rule ("2020 NWPR"), issued during the Trump administration and restores the regulations in effect prior to the Obama Administration's 2015 rule.

The Proposed Rule defines WOTUS as those waters identified as WOTUS before the 2015 rule, as informed by U.S. Supreme Court case law. In the Proposed Rule, the Agencies interpret WOTUS to include:

- traditional navigable waters, interstate waters, and the territorial seas, and their adjacent wetlands;

- most impoundments of "waters of the United States;"
- tributaries to traditional navigable waters, interstate waters, the territorial seas, and impoundments that meet either the relatively permanent standard or the significant nexus standard;
- wetlands adjacent to impoundments and tributaries, that meet either the "relatively permanent" standard or the "significant nexus" standard established by *Rapanos v. United States*, 547 U.S. 715 (2006); and
- "other waters" that meet either the "relatively permanent" standard or the "significant nexus" standard.

The Proposed Rule is part of a two-part rulemaking process to revise the definition of WOTUS. This first part is designed to restore the pre-2015 regulations, as amended to be consistent with U.S. Supreme Court decisions. The Agencies also anticipate developing a second rule that builds upon the regulatory foundation in this Proposed Rule with the benefit of additional stakeholder engagement. The second rule could consider more categorical approaches to jurisdiction as well as potentially defining key terms in the significant nexus standard. More information about the Proposed Rule is in our recent alert.

Comments on the Proposed Rule are due 60 days after publication in the *Federal Register*.

FERC Found Not Liable for Michigan Dam Failure

In response to the failure of the Edenville Dam on the Tittabawassee River in Michigan on May 19, 2020, two residents sued the federal government under the Federal Tort Claims Act ("FTCA"), alleging that FERC failed to ensure that the dam was being operated safely and should be responsible for the harm caused by the dam's failure. The Government filed a motion to dismiss the lawsuit on the grounds that the Government is entitled to sovereign immunity and is exempt from liability for the plaintiffs' damages. The U.S. District Court for the Eastern District of Michigan agreed and dismissed the lawsuit on November 16, 2021.

After a prior operator of the Edenville Dam became insolvent, the dam and license were purchased by Boyce Hydropower, LLC ("Boyce"). Boyce was unable to fund FERC-required improvements to the dam's spillway capacity, and FERC ultimately revoked Boyce's license in September 2018. The Michigan Department of Environment, Great Lakes, and Energy then assumed jurisdiction over the dam, though Boyce continued to operate it as a nonpower dam and was in the process of selling the property to a local governmental entity in 2019. Leading up to the dam failure in May 2020, the Tittabawassee watershed experienced unusually heavy rain and flash floods, leading to the collapse of the Tittabawassee portion of the Edenville Dam and the cascading failure of the downstream Sanford Dam. Thousands of people were evacuated from their homes and substantial property damage occurred.

The plaintiffs brought suit under the FTCA which waives sovereign immunity for certain tort actions and provides district courts with exclusive jurisdiction over these actions. Sovereign immunity is the principle that the United States cannot be sued without its consent, and for suit to be brought against the Government, there must be an unequivocal express waiver of this immunity. In a lengthy footnote explaining the history and various judicial views on sovereign immunity, the Court wrote: "In a nation built on liberty and the rule of law, the notion that the Government can harm its citizens with impunity is generally viewed with disdain—and not just by those who lack legal training….In a case such as this, it is helpful to remember that the law has its reasons, even if they seem uncompelling to some."

The plaintiffs alleged that FERC violated at least two statutory duties imposed by the Federal Power Act ("FPA"): (1) the duty to determine whether Boyce had the ability to manage, operate, and maintain the dam safely, and (2) the duty to monitor and investigate Boyce's compliance with the license. The Government raised three arguments in defense, but the Court ultimately dismissed the lawsuit based on the first defense, that section 10(c) of the FPA expressly exempts the Government from liability for the plaintiffs' damages. Section 10(c) exempts the Government from liability for damages caused by the construction, maintenance, or operation of projects works. The parties disagreed about the construction of section 10(c) and whether the Government would be exempt under the statute, and in analyzing the text under cannons of statutory construction and legislative history of section 10(c), the Court ultimately found that section 10(c) holds licensees, not the Government, liable for damages.

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Administration Proposes First Wave of Endangered Species Regulatory Revisions

On October 27, the Biden Administration proposed to rescind two final rules that were promulgated in December 2020 to improve and clarify the process for designating or excluding areas from critical habitat under the Endangered Species Act ("ESA"). The deadline for comments on the proposed rescissions has been extended to December 13, 2021.

Proposed Rescission of the Definition of "Habitat"

The U.S. Fish and Wildlife Service ("FWS") and the National Marine Fisheries Service ("NMFS") (collectively, the "Services") are proposing to rescind the Trump Administration final rule that established a regulatory definition of "habitat." 86 Fed. Reg. 59,353. The Services previously promulgated the definition of habitat on December 16, 2020, in response to the Supreme Court's decision in *Weyerhaeuser Co. v. U.S. Fish & Wildlife Service,* 139 S. Ct. 361 (2018), which held that an area must be "habitat" before it can meet the ESA's narrower definition of "critical habitat." As applied to critical habitat designations, the Services defined habitat as "the abiotic and biotic setting that currently or periodically contains the resources and conditions necessary to support one or more life processes of a species."

As justification for the rescission, the Services assert that the definition of "habitat" inappropriately constrains their ability to designate areas that meet the definition of "critical habitat" under the ESA. The Services also found that the earlier attempt to create a "one-size-fits-all" definition of "habitat" resulted in the use of overly vague and unclear terminology (i.e., the phrases "biotic and abiotic setting" and "resources and conditions"), and that the definition is inherently confusing to implement. Finally, despite the express limitation on application to critical habitat, the Services expressed concern that the "habitat" definition may create conflicts or inconsistencies with other federal agency statutory authorities or programs that also have definitions or understandings of habitat.

Implications of the rule rescission: Without the prior definition of "habitat," there will be increased uncertainty for the regulated community, and the greater possibility of areas being designated as critical habitat that have no ability to support listed species or contribute to their recovery.

Proposed Rescission of Critical Habitat Exclusion Procedures

FWS is proposing to rescind its December 18, 2020, final rule that clarified how the agency would consider and evaluate particular areas for exclusion from a critical habitat designation pursuant to ESA Section 4(b)(2) due to economic, national security, and other relevant impacts. 86 Fed. Reg. 59,346. A previous 2016 joint policy issued by the Services described how they implement their authority to exclude areas from critical habitat ("2016 Policy"). The 2020 final rule expanded on the 2016 Policy, and sought to provide "transparency, clarity, and certainty to the public and other stakeholders" on how FWS conducts its discretionary exclusion analysis given the Supreme Court's conclusion in *Weyerhaeuser* that decisions not to exclude areas from critical habitat are judicially reviewable. FWS proposes to revert to making critical habitat exclusion determinations based on the 2016 Policy and its joint regulations with NMFS at 50 C.F.R. § 424.19.

As justification for the proposed rescission, FWS states that the 2020 final rule undermines its role as the expert agency for ESA implementation because it gives undue weight to outside parties, including proponents of particular exclusions, in guiding FWS's authority to exclude areas from critical habitat designations. FWS also is concerned that the final rule employs an overly rigid ruleset for when FWS will enter into an exclusion analysis, how weights are assigned to impacts, and when an area is excluded, regardless of the specific facts at issue or the conservation outcomes. Finally, FWS opines that the final rule does not fulfill its stated goal of providing clarity and transparency to the critical habitat exclusion process because it is now different than the processes and standards utilized by NMFS, which is still implementing the 2016 Policy.

Implications of the rule rescission: Ultimately, FWS's proposal would expand its discretion not to exclude areas from critical habitat by rescinding the recently adopted regulatory framework that would have guided the exercise of that discretionary authority.

In addition to the two proposed rule rescissions, in the coming months, the Services also anticipate:

- **Revising regulations for listing species and designating critical habitat**. 84 Fed. Reg. 45,020. The Services anticipate revising the regulations to reinstate prior language stating that listing decisions are made "without reference to possible economic or other impacts of such determination," and are considering other revisions as well.

- **Revising regulations for interagency cooperation**. 84 Fed. Reg. 44,976. The Services anticipate revising regulations governing ESA section 7 consultation by revising the definition of "effects of the action" and associated provisions and are considering additional revisions.

- **Reinstating protections for species listed as threatened under ESA**. 84 Fed. Reg. 44,753. FWS anticipates reinstating the blanket 4(d) rule it withdrew in 2019. The "blanket 4(d) rule" automatically applied the ESA section 9 take prohibitions to threatened species.

Update of CWA 401 Litigation

A plethora of cases are working their way through the U.S. district courts and courts of appeals challenging FERC decisions regarding state waiver of CWA section 401 certification authority. The cases arise out of FERC's implementation of *Hoopa Valley Tribe v. FERC* ("*Hoopa Valley*"), in which the U.S. Court of Appeals for the D.C. Circuit held that a hydroelectric licensee's repeated withdrawal and resubmission of water quality certification requests under section 401 pursuant to a written agreement with state water quality agencies does not trigger a new one-year period for state water quality review and results in waiver of the state's authority. FERC has applied the *Hoopa Valley* ruling in a number of hydroelectric licensing and natural gas pipeline certification cases, in some instances finding waiver and in other instances finding that the state agency did not waive its authority.

Here is a current rundown of the cases in the U.S. courts of appeals:

- In *North Carolina Department of Environmental Quality v. FERC*, the State of North Carolina challenged FERC's determination of waiver of water quality certification for an original license where FERC found that the applicant withdrew and refiled its certification request to avoid the one-year deadline in coordination with the State water quality agency. In a decision issued July 2, 2021, the U.S. Court of Appeals for the Fourth Circuit vacated FERC's waiver finding, holding that FERC failed to provide substantial evidence that the State coordinated with the applicant for the purpose of extending the State's time to act on the certification request. The Court also questioned whether the statute requires a state water quality agency to take final action on a certification request within the one-year deadline. For a detailed summary of the opinion please see our previous newsletter.

- Six proceedings before the U.S. Court of Appeals for the Ninth Circuit were consolidated on May 20, 2021. The California State Water Resources Control Board ("California Board") and environmental groups are challenging FERC orders finding waiver of 401 certification for the Yuba-Bear, Yuba River Development, Merced River, and Merced Falls hydroelectric projects based on a coordinated process of withdrawal and refiling of certification requests to avoid the one-year deadline. Briefing will be completed in late January 2022.

- On May 21, 2021, the Turlock and Modesto Irrigation Districts filed petitions for review before the D.C. Circuit. The licensees for the Don Pedro Project and applicants for the unlicensed La Grange Project are challenging FERC's declaratory order finding that the California Board did not waive section 401 authority by denying certification "without prejudice" within the one-year period. Briefing of the case is in progress.

Here is a current rundown of the cases in U.S. district court:

- In November 2020, the Yuba County Water Agency ("YCWA") and Nevada Irrigation District ("NID") filed complaints against the California Board in the U.S. District Court for the District of Columbia, which were eventually transferred to the U.S. District Court for the Eastern District of California. YCWA and NID filed similar lawsuits in state court. The suits challenge the California Board's issuance of CWA 401 certifications to YCWA and NID for their hydroelectric projects following FERC's findings of waiver, and when neither licensee had an application for certification pending before the California Board. The lawsuits also challenge the certifications on a range of substantive and other procedural issues. On October 27, 2021, the Court stayed both cases pending the outcome of the Ninth Circuit challenges to FERC's waiver findings, described above, and/or the state court litigations.

In other CWA section 401 litigation:

- On October 21, 2021, the U.S. District Court for the Northern District of California vacated the EPA's 2020 CWA Section 401 "Certification Rule," with the effect of the Court's ruling being to reinstate EPA's previous rule which had been in effect since 1971. For more details on this litigation, please see our newsletter and alert. Intervenor-Defendants comprised of certain states, natural gas and petroleum trade associations, and the National Hydropower Association appealed the Northern District of California's ruling to the Ninth Circuit, and filed a motion with the Northern District of California to stay its decision pending the Ninth Circuit appeal. The Court has not yet acted on the stay motion.

Notice of RFI on Energy Sector Supply Chain Review

In response to Executive Order 14106 "America's Supply Chain" issued February 24, 2021, the DOE is seeking public input to inform DOE on approaches and actions needed to build resilient supply chains for the energy sector. To meet the U.S jobs, economic, and emissions goals, DOE has identified technologies and crosscutting topics for analysis to meet the timeframe established by Executive Order 14106. These technology sectors include: solar photovoltaic; wind; electric grid, including transformers and high-voltage direct current; energy storage; hydropower, including pumped storage hydropower, and several others.

For each technology sector, DOE will be taking in-depth looks at: its supply chains; existing and future threats, risks, and vulnerabilities; major barriers including financial and commercial, scientific, technical, regulatory and market; how to help incentivize the energy sector to transfer energy manufacturing back to and scale up domestic supply chains; and areas of possible collaboration between the government and private sector.

In particular to hydropower and pumped storage technology, the DOE is focused on several questions, including:

- What are the current supply chain vulnerabilities?
- Are there hydro generation plant components that are critical to operation and dependent on extended supply chains? Will the extended supply chain have a high risk of failure?
- Are there components with long lead times because they must be fabricated, i.e., "extinct" supply chains?
- What challenges limit the United States' ability to realize these opportunities for domestic hydropower technology component manufacturing? What conditions are needed to help incentivize companies involved in the hydropower technology components manufacturing to build and expand operations in the United States?
- How can the federal government support a resilient supply chain of hydropower technology?

Responses are due no later than 5 p.m. (ET) on January 15, 2022.

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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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