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# HYDRO NEWSLETTER

BROUGHT TO YOU BY VAN NESS FELDMAN LLP



# What's Inside?

- *Ninth Circuit Affirms Dismissal of Tribe Suit in Gorge Dam Case*
- *Biden Administration Redefines “Waters of the United States,” Expanding Regulation Under the Clean Water Act*
- *Water Agencies Ask Supreme Court to Wade Into Water Certification Fray*
- *FERC to Convene Environmental Justice and Equity Roundtable*
- *FERC Updates Civil Penalty Amounts*

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# NINTH CIRCUIT AFFIRMS DISMISSAL OF TRIBE SUIT IN GORGE DAM CASE

The U.S. Court of Appeals for the Ninth Circuit (“Ninth Circuit”) on December 30 [affirmed](#) the district court’s decision to dismiss a lawsuit by the Sauk-Suiattle Indian Tribe seeking to force Seattle City Light to install a fish passage in Gorge Dam or cease operations.

The Ninth Circuit’s opinion affirmed that of U.S. District Court for the Western District of Washington Judge Barbara Rothstein in *Sauk-Suiattle Indian Tribe v. City of Seattle*. Judge Rothstein found that the district court did not have jurisdiction to review a challenge to a relicensing order by the Federal Energy Regulatory Commission (“FERC”). Judge Rothstein also decided not to remand the case back to state court, where the Sauk-Suiattle Tribe initially filed suit.

Gorge Dam is one of three projects in the Skagit River Hydroelectric Project operated by Seattle City Light. FERC relicensed the project for 35 years in 1995. The Ninth Circuit pointed out that Sauk-Suiattle Tribe was among the parties that FERC allowed to intervene in the relicensing process that produced several settlement agreements. One of the settlement agreements stated that all environmental impact issues stemming from relicensing were resolved, including Seattle City Light’s obligation as it relates to fishery resources. The agreement did not require fish passage. It also successfully requested FERC to end an examination of how the project has affected fishery resources.

The Ninth Circuit stressed that the FERC relicensing order itself did not contain a fishway requirement. Because FERC had already decided the issue of whether Seattle City Light was required to build a fish passage, the Tribe’s complaint challenging the resolution of the issue was a collateral attack on a FERC order. The Tribe also argued that the case should have remained in Skagit County Superior Court, but the Ninth Circuit reiterated that the Federal Power Act (“FPA”) allows only a federal court of appeals to review FERC challenges.

The Tribe petitioned the Ninth Circuit for an en banc rehearing, which the court has not yet decided. Among the Tribe’s arguments are that the district court should have remanded the case back to state court after finding that it had no jurisdiction.



# BIDEN ADMINISTRATION REDEFINES “WATERS OF THE UNITED STATES,” EXPANDING REGULATION UNDER THE CLEAN WATER ACT

On January 18, 2023, the Environmental Protection Agency (“EPA”) and the U.S. Army Corps of Engineers (collectively, the “Agencies”) published a final rule re-defining the term “waters of the United States”) (“WOTUS”) under the Clean Water Act (“[Final Rule](#)”). The Final Rule will become effective March 20, 2023.

The Final Rule reverses many of the regulatory changes during the Trump Administration which narrowed the scope of waterbodies subject to regulation under the Clean Water Act (“CWA”). In an effort to reach a “durable” WOTUS definition, the Final Rule adopted both the “relatively permanent” and “significant nexus” standards from the *Rapanos v. United States* case, and directs the Agencies to interpret “waters of the United States” to include:

- Traditional navigable waters, the territorial seas, and interstate waters;
- Impoundments of “waters of the United States”;
- “Jurisdictional tributaries”;
- “Jurisdictional adjacent wetlands”; and
- Intrastate lakes and ponds, streams, or wetlands not identified as traditional navigable waters, territorial seas, interstate waters, impoundments, jurisdictional tributaries, or jurisdictional adjacent wetlands that meet either the relatively permanent standard or the significant nexus standard.

The Final Rule also codifies several exclusions from the WOTUS definition, such as waste treatment systems, prior converted cropland, artificially irrigated areas, and artificial lakes or ponds. More information about the Final Rule is in our recent [alert](#).

As with the Obama-era and Trump-era rulemaking efforts, the Final Rule is already facing legal challenges in *State of Texas, et al. v. U.S. EPA* and *American Farm Bureau Federation, et al. v. U.S. EPA*, both of which were filed the same day the Agencies published the Final Rule. The U.S. Supreme Court is expected to issue an opinion in *United States v. Sackett* in 2023, which will inform the outcome of challenges to the Final Rule.



# WATER AGENCIES ASK SUPREME COURT TO WADE INTO WATER CERTIFICATION FRAY

Several California water agencies have petitioned the U.S. Supreme Court to overturn decisions of two U.S. courts of appeals that would endorse practices designed to allow states to avoid the requirement in Section 401 of the CWA for timely state action on water quality certification requests in connection with issuance of federal permits.

Section 401 requires an applicant for a federal license or permit to conduct an activity that may result in a discharge into navigable waters to request a water quality certification from the state in which the discharge will originate that the discharge will comply with state water quality standards. For all federal licensing and permitting actions triggering Section 401, the state has a reasonable period of time in which to act on the certification request which shall not exceed one year. If the state fails or refuses to act within one year it waives certification authority. States have come up with various procedural “work arounds” to attempt to avoid the one-year deadline.

In a [petition](#) for certiorari filed on January 4, 2023, Turlock Irrigation District and Modesto Irrigation District (“Turlock and Modesto”) seek Supreme Court review of a [decision](#) of the U.S. Court of Appeals for the D.C. Circuit upholding FERC’s finding that the California State Water Resources Control Board (“State Board”) did not waive certification when it repeatedly denied their certification requests “without prejudice” to refiling of the same requests. In a second [petition](#) for certiorari filed on February 6, 2023, Merced Irrigation District, Nevada Irrigation District, and Yuba County Water Agency seek review of a [decision](#) of the U.S. Court of Appeals for the Ninth Circuit overturning FERC’s orders holding that the State Board did waive certification by engaging with the licensees in a practice of withdrawing and refiling their certification requests year after year to give the State Board more time to act. Both petitions argue that these types of procedural schemes by California and other states are contrary to Congressional intent in enacting Section 401 and threaten to make the one-year deadline for state action on a certification request meaningless, resulting in unacceptable delays for federally permitted projects.

The Supreme Court’s decision whether to grant review in one or both cases is expected in the next few months.

Van Ness Feldman filed an [amici curiae brief](#) on behalf of the hydropower industry supporting the Turlock and Modesto petition, and is co-counsel on the petition filed by the other California water agencies.

## FERC TO CONVENE ENVIRONMENTAL JUSTICE AND EQUITY ROUNDTABLE

On January 27, 2023, FERC issued a [notice](#) that it will hold a Commissioner-led roundtable on March 29th to discuss environmental justice and equity in its jurisdictional infrastructure permitting processes.

The roundtable will be open to the public for in-person and virtual attendance, and will provide an opportunity for environmental justice communities, advocates, and leaders to speak to the Commissioners and FERC staff.

Recently appointed Chairman Willie Phillips said the roundtable would help further the goals as outlined in the Commission's Equity Action Plan, which was released in April 2022 pursuant to President Biden's Executive Order 13985, Advancing Racial Equity and Support for Underserved Communities Through the Federal Government. According to Chairman Phillips, the roundtable will enable the Commission to "better incorporate environmental justice and equity considerations." Since the Equity Action Plan was released, several orders in hydropower proceedings, ranging from surrenders, to dam safety amendments of licenses, to issuances of new licenses, have included discussions on environmental justice, signaling the Commission's commitment to making sure environmental justice populations are not disproportionately adversely affected by projects in their communities.

The Commission is accepting nominations of panelists to participate in the roundtable. Nominations are due by February 17, 2023.

## FERC UPDATES CIVIL PENALTY AMOUNTS

On January 6, 2023, FERC issued a [final rule](#) amending its regulations governing the maximum civil monetary penalties for violations of statutes, rules, and orders within its jurisdiction. The rule adjusts the amounts pursuant to the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015. Section 31(c) of the FPA and FERC's implementing regulations authorize FERC to assess civil penalties for violations by permittees, exemptees, and licensees of any: (1) rule or regulation of Part I of the FPA; (2) term or condition of a permit, exemption, or license; (3) Section 31(a) compliance order; or (4) requirement of Part I of the FPA. The maximum penalty authority under Section 31(c) of the FPA is currently \$25,075 per violation, per day. The final rule increases that amount to \$27,017 per violation, per day.

Section 315(a) of the FPA authorizes FERC to impose forfeiture on any licensee for, among other things, failure to comply with any FERC order, failure to file any report required by Part III of the FPA, or failure to comply with any rule or regulation issued thereunder. The maximum penalty authority under Section 315(a) is currently \$3,275 per violation. The new rule increases that amount to \$3,529 per violation.

This final rule is effective as of January 12, 2023.

## 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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