

FERC & National Hydropower Update

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Topics of Discussion

- FERC leadership
- FERC license term policy
- FERC dam safety focus
- Alaska federal land use annual charges
- Litigation updates:
 - Ownership of underlying lands
 - Challenge to EPA water transfers rule
- CWA § 401 certification: changes ahead?



FERC Quorum Restored!

- For 6 months in 2017 (February – August), FERC lacked a quorum.
- Quorum restored in August with arrival of two new Commissioners:
 - **Neil Chatterjee** (R) – Named as Chairman; former energy advisor to Senate Majority Leader Mitch McConnell.
 - **Robert Powelson** (R) – Former chairman of Pennsylvania PUC; former president of NARUC.
- Full FERC Commission restored in December 2017:
 - **Kevin McIntyre** (R) – Named as Chairman (replacing Chatterjee); former energy law partner with Jones Day.
 - **Richard Glick** (D) – Former staff of Senate Energy and Natural Resources Committee; formerly director of governmental affairs with PacifiCorp.
- Commissioners have cleared backlog of orders that had amassed during the loss of quorum.
- Grappling with several major policy issues (e.g., grid resiliency; energy storage; new hydro license term policy).

FERC Revises License Term Policy



- In October 2017, FERC issued revised policy on establishing length of license terms for hydro projects.
- New general rule: “Default” term of 40 years.
 - Both original and new licenses.
 - Projects at federal dams will continue to receive 50-year licenses.
- Longer or shorter license term under three circumstances:
 - To coordinate license terms in same river basin;
 - To defer to license term explicitly agreed upon in settlement;
 - Based on significant measures under new license or prior license (i.e., “early action”).
- Open question: How will this new policy be implemented over time?

FERC Intense Focus on Dam Safety



- Recent events spotlighting dam safety concerns nationwide and more serious consequences for violations.
- Increased focus by FERC Regional Engineers to elevate project safety throughout licensee organization through Owners Dam Safety Program.
- Circulation of report on Oroville Facilities incident to all licensees.
- FERC enforcement authority under sections 31 and 309 of the Federal Power Act—cease generation orders; civil penalties; license revocation.
 - Case Study: Edenville Project (4.8 MW; Michigan).
 - ***“The Commission’s primary concern has been the licensee’s longstanding failure to address the project’s inadequate spillway capacity, which currently is designed to pass only approximately 50 percent of the PMF. Failure of the Edenville dam could result in the loss of human life and the destruction of property and infrastructure.”***
 - *Boyce Hydropower, LLC, 162 FERC ¶ 61,115 (2018); Boyce Hydropower, LLC, 162 FERC ¶ 61,116 (2018).*
 - Ongoing legal dispute on FERC’s authority to order a licensee to cease generation.



Alaska Annual Charges

- On December 21, FERC issued a final rule revising its methodology for calculating annual charges for use of government lands in Alaska.
- Rule was issued in response to petition for rulemaking filed by group of Alaska hydropower licensees after their annual charges increased by 71%.
- New method will use statewide average per-acre land value, rather than regional per-acre land values based on data published in NASS Census.
- Reduces per-acre land values from \$57 to \$37.

North Carolina v. Alcoa, 853 F.3d 140 (4th Cir. 2017)



- The U.S. Supreme Court’s decision in *PPL Montana, LLC v. Montana*, 565 U.S. 576 (2012), has prompted additional claims related to state ownership of riverbeds underlying FERC-licensed hydropower projects.
- The State of North Carolina filed a lawsuit in 2013, claiming ownership of the riverbed underlying the Yadkin Project.
- North Carolina claimed that the Yadkin River was navigable when the State joined the U.S. in 1789, so state retained title to the riverbed.
- The State also asserted that the “navigability for title” test from *PPL Montana* and other cases does not apply, because the “equal footing” doctrine does not apply to the original 13 states.
- The U.S. Court of Appeals for the 4th Circuit held that the federal “navigability for title” test does apply and ruled that, on the facts, the applicable reach of the Yadkin River was not navigable upon statehood.
- North Carolina sought review by the U.S. Supreme Court, but it was denied.

Another Challenge to EPA's Water Transfers Rule



- EPA's water transfers rule: Water transfers between navigable waters that do not subject the water to an intervening industrial, municipal, or commercial use are not subject to NPDES permits under Section 402 of CWA.
 - Important rule for hydropower, particularly in West.
- 2009: EPA rule upheld in *Friends of the Everglades v. South Florida Water Mgmt. Dist.*, 570 F.3d 1210 (11th Cir. 2009).
- 2014: Federal district court in New York held that the rule was unlawful and vacated it.
- 2017: U.S. Court of Appeals for 2nd Circuit overturned district court and reinstated the rule. *Catskill Mountains Chapter of Trout Unlimited, Inc. v. EPA*, 846 F.3d 492 (2d Cir. 2017).
- Cases turn on EPA's interpretation of the CWA and the level of judicial deference the courts give to EPA's interpretation (*Chevron* doctrine).
- Several States and NGOs have filed a writ of certiorari with the U.S. Supreme Court.
- Supreme Court is meeting today (February 23) to decide whether to grant certiorari.

Changes Ahead for CWA § 401 Certification?

- Several recent FERC-related cases (natural gas) concern deadlines for state certification under CWA § 401:
 - *DC Circuit*: FERC has authority to determine if state has waived for failure to act within 1 year. 860 F.3d 696 (D.C. Cir. 2017).
 - *Millennium Pipeline*: NY agency interpretation that 1 year starts upon receipt of complete application denied; FERC found agency waived 401 authority. 160 FERC ¶ 61,065.
 - *Constitution Pipeline*: NY agency denied 401 after three one-year periods for lack of information. FERC upheld. 162 FERC ¶ 61,014.
 - **“Since 1987 the Commission has consistently determined . . . that the reasonable period of time for action under section 401 is one year after the date the certifying agency receives a request for certification. We see no reason to alter that determination.”**
- *White House Infrastructure plan*: proposes to establish time period for completeness determination and state decision to reduce delays.

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