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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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### DOE Issues Updated Guidance on Hydropower Production Incentive

On October 20, 2014, the Department of Energy (DOE) published [updated guidance](#) for implementing the Energy Policy Act of 2005 (EPAct 2005) Section 242 Program (Updated Guidance) on hydroelectric production incentives (HPI). As reported in the [March Hydro Newsletter](#) and [July Hydro Newsletter](#), the Fiscal Year (FY) 2014 Omnibus Appropriations bill allocated \$3.6 million in HPI for the development of new hydropower at existing dams and impoundments under the Section 242 Program. The HPI allows a facility to collect 1.8 cents per kilowatt hour, with a cap of \$750,000 per year, for up to 10 years. FY 2014 was the first year in which these funds were appropriated.

The Updated Guidance incorporates comments received by DOE on the [draft guidance](#) document it published in July. Among the changes reflected in the Updated Guidance is a clarification as to when a facility is first eligible for an incentive payment. Under the Updated Guidance, DOE has clarified that it considers the first year of eligibility to be the first fiscal year (between FY 2006 and FY 2015) that a qualified hydroelectric facility generates hydropower for sale. While the first year of eligibility will vary for each project depending on when the project first becomes eligible, the focus of the applications for payment for this financing opportunity will be for calendar year 2013. Comments on the Updated Guidance are due November 4, 2014.

### FERC Approves Conversion of Licensed Project Developments to Conduit Exemptions

In a case of first impression, the Federal Energy Regulatory Commission (FERC) on September 14, 2014 issued two orders granting applications for conduit exemptions for separate facilities which were already developments under a single licensed project. The project is the SWP Hydropower Project No. 2426, licensed to the California Department of Water Resources (DWR) and the Los Angeles Department of Water and Power. The project includes various hydroelectric developments which are associated with the California Aqueduct, which carries water from the Sierra Nevada Mountains to Southern California. The licensed facilities included the 17 megawatt (MW) [Alamo](#) and 32.4 MW [Mojave Siphon](#) Developments operated by DWR, which are located on the aqueduct, isolated from the other licensed facilities, and

## Upcoming Speaking Engagements

December 10-12, 2014

[Chuck Sensiba](#), National Hydropower Association's California Regional Meeting, "Recent Developments in Endangered Species Act and Clean Water Act Law," Los Angeles, CA

each individually met FERC's exemption requirements. FERC concluded that regulation of the two facilities as conduit exemptions would, under the circumstances of the applications, allow it to satisfy the comprehensive development standards of the Federal Power Act (FPA). Van Ness Feldman advised DWR in connection with this matter.

### FERC Reaffirms Mandatory Nature of State Water Quality Certifications, Noting Significant Delays in Many States

On October 16, 2014, FERC [denied](#) rehearing of its June 2014 order finding that a licensee has not failed to diligently pursue relicensing where state water resource agencies have not yet acted on pending applications for water quality certification. In 2012, the Hoopa Valley Tribe (Tribe) filed a petition for declaratory order asserting that FERC must commence decommissioning of the Klamath Hydroelectric Project in California and Oregon. The Tribe argued that the licensee had failed to diligently pursue relicensing, or, in the alternative, that the state water resource agencies had waived their authority to issue Clean Water Act (CWA) Section 401 water quality certifications for the project. In the pending relicensing proceeding, the licensee and a number of federal, state, and local groups have signed a settlement providing for the future removal of the project dams. While FERC's environmental analysis in the relicensing is complete, the licensee's applications for water quality certification remain pending before both state water resource agencies.

FERC denied the Tribe's request for rehearing, holding that it cannot issue a new license in the absence of state water quality certifications. Further, FERC observed that if it required decommissioning of the project, such action would likely require a water quality certification. Because the states are supporters of the settlement, FERC concluded that they likely would not issue certification. FERC noted that while delays in licensing proceedings are contrary to the public interest, they are at the same time very common. FERC stated that of the 43 pending license applications for which FERC staff has completed environmental analysis, 29 (67 percent) are awaiting water quality certification. Because the licensee has withdrawn and resubmitted its applications for water quality certification each year, FERC found that the states have not waived their authority to certify the project under Section 401(a)(1) of the CWA, under which states waive certification authority if they do not act on an application within one year.

### FERC Terminates Two Licenses for Failure to Comply with License Terms

In a series of two orders demonstrating the importance of complying with license requirements, on October 16, 2014, FERC terminated two project licenses for failure to comply with license terms. In the [first order](#), FERC terminated the license it issued in 2009 for a proposed 10 MW project to be constructed at a U.S. Army Corps of Engineers dam in Oregon. FERC concluded that because the licensee failed to file pre-construction plans and commence construction of project works by the Commission-imposed deadline, the licensee had violated Section 13 of the FPA, which mandates termination of a license for such a violation. In the [second order](#), FERC revoked the license for a small project in Georgia, for the licensee's failure to construct fish passage facilities as required by the license and the state's water quality certification. In 2002, FERC amended the license to authorize construction of an additional powerhouse, and required the licensee to install new fish passage facilities at the dam. In its termination order, FERC found that the licensee changed the design for its fish passage facilities multiple times over the next ten years, and failed to meet numerous FERC compliance deadlines.

## **National Hydropower Association and Other Industry Participants File Comments on Proposed ESA Reforms**

On October 9, the U.S. Fish and Wildlife Service and the National Marine Fisheries Service (collectively, the Services) received comments on two proposed rules and a draft policy that would significantly revise the designation and treatment of critical habitat under the Endangered Species Act (ESA). As previously reported in the [May Hydro Newsletter](#), the Services' proposals would: (1) change existing regulations and add new definitions for the identification and designation of critical habitat; (2) adopt a new definition of "adverse modification" as used in consultations on the effects of federal agency actions under ESA Section 7; and (3) institute a formal policy on when to exclude lands or waters from a critical habitat designation pursuant to ESA Section 4(b)(2).

Many stakeholders, including the National Hydropower Association, with Van Ness Feldman's assistance, among others, submitted comments on the proposed ESA revisions. The majority of commenters took issue with the scope and clarity of the Services' proposals and the anticipated impact on the regulated community. In addition, many commenters suggested substantial revisions to the proposed regulations and policies. As the Services review the submitted comments, it is currently unclear when any subsequent final rulemaking will be published.

## **FERC Begins OFA Annual Charges Proceeding for FY 2014**

On October 14, 2014, FERC began its FY 2014 other federal agencies (OFA) administrative annual charges proceeding by [issuing letters](#) soliciting OFAs' FY 2014 cost reports, which are due by December 31, 2014. Section 10(e) of the FPA authorizes FERC to impose "reasonable" annual charges on hydropower licensees to reimburse the United States for the costs for administration of Part I of the FPA. These administrative annual charges include FERC's own costs, as well as the OFAs' reported costs for their administrative responsibilities under the FPA. Under FERC's reporting standards, OFAs must certify all direct and indirect costs for the prior fiscal year, allocated to municipal and non-municipal hydropower development, for the administration of Part I of the FPA. After FERC receives the OFAs' cost reports by December 31 and makes them publicly available, it will hold a technical conference and set a deadline for public comments on the cost reports. Following the comment period, FERC staff will engage the OFAs on any remaining issues and issue administrative annual charges bills—likely in July or August 2015. On behalf of a group of licensees, Van Ness Feldman has pending before FERC two appeals challenging OFA costs for FY 2012 and 2013.

## **California Issues Draft Energy Storage Report**

On October 9, 2014, the California Energy Commission, the California Public Utilities Commission, and the California Independent System Operator (collectively, the California Agencies), released a jointly developed [energy storage roadmap](#) for the state. The roadmap addresses the challenges and barriers to the advancement of energy storage in California identified by industry participants and stakeholders. The barriers have been grouped into three main categories: (1) revenue opportunities; (2) cost of development and interconnection; and (3) uncertain regulatory requirements and processes. The California Agencies have devised action items to respond to these challenges, such as making interconnection processes more transparent, accessing best practices and methods of cost reduction, and finding a common methodology in terms of energy storage. A workshop on the roadmap was held on October 13. Through continued discussion and cooperation with stakeholders, the California Agencies hope to prioritize the various issues and create a meaningful roadmap to alleviate energy storage barriers. A final roadmap is expected to be issued by the end of this year.

## Quadrennial Energy Review to Focus on Energy Generation in 2015

DOE is in the process of developing its scope of work for the 2015 Quadrennial Energy Review (QER). In January 2014, President Obama directed several federal agencies to undertake a multi-year QER that will outline federal energy policy objectives, legislative proposals to Congress, Executive Branch actions, an agenda for research, development and demonstration programs and funding, and financing and incentive programs. The focus of the 2014 QER was on energy transmission, storage, and distribution infrastructure. DOE hosted 13 stakeholder meetings across the country in 2014 to gather public input for the QER, including a meeting on the water-energy nexus in June. On October 6, 2014, the Institute of Electrical and Electronics Engineers Joint Task Force on QER, upon request by DOE, submitted its final report on priority transmission, storage, and distribution infrastructure issues identified by DOE. A one-year progress report on the 2014 QER is expected to be issued by the federal agencies in January 2015. The second installment of the QER in 2015 will focus on energy generation. DOE is currently developing its scope of work for the 2015 QER and compiling a schedule for public meetings to solicit public input on energy generation issues. More information on the QER is available on DOE's [website](#).

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