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Hydro Newsletter

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Federal Agencies Issue Revised Interim Final Rules for Trial-Type Hearings

On March 31, 2015, the Departments of Agriculture, the Interior, and Commerce issued [revised interim final rules](#) for expedited trial-type hearings and submission of alternative conditions under the Energy Policy Act of 2005. The trial-type hearings are conducted to resolve disputed issues of material fact with respect to mandatory conditions and prescriptions submitted by federal resource agencies for inclusion in a Federal Energy Regulatory Commission (FERC) hydropower license. The revised rules are substantially similar to those initially promulgated in 2005, but make several revisions to address issues not resolved in the initial rules. While providing some relief from the tight deadlines established in the initial rules, the Departments also reject a number of hydro industry and other public comments critiquing the initial rules. The revised rules will take effect on April 30, 2015. However, in response to a 2009 joint request from the National Hydropower Association and Hydropower Reform Coalition, the Departments have requested public comments on how the rules may be improved. The deadline for comments is June 1, 2015. Van Ness Feldman's [Alert](#) on the revised interim final rules provides additional information.

Governor Inslee Declares Drought in Washington State

On March 13, 2015, after a record-dry winter, Washington State Governor Jay Inslee (D) [declared a drought emergency](#) for three regions of the state: watersheds on the Olympic Peninsula; the east-central Cascade Mountain region including Yakima and Wenatchee; and the Walla Walla River watershed. The Governor's declaration followed meetings among hydrologists and state officials, who determined that snowpack statewide is averaging 26 percent of normal, with little to no snowfall forecasted into the spring and warmer-than-average temperatures expected in the summer. Under Washington State law, the Governor, together with the Department of Ecology (Ecology), may declare a drought emergency if two conditions are met: (i) an area experiences or is projected to experience water supplies that are below 75 percent of normal; and (ii) water users in those areas will likely incur undue hardship as a result of the shortage. Ecology has requested \$9 million from the State Legislature to prepare for the drought, money that would go toward deepening wells, changing existing water rights,

Upcoming Speaking Engagements

- [Charles Sensiba](#) and [Tyson Kade](#), National Hydropower Association Annual Conference, Washington, DC, April 29, 2015.
- [Mike Swiger](#), HydroVision International 2015, Portland, OR, July 17, 2015.

and facilitating water rights transfers, among other measures. Water suppliers in Seattle, Tacoma, and Everett are not anticipating a significant impact from the drought. After a drought was declared in California last year, FERC issued a letter to all California licensees indicating that FERC would entertain requests for temporary license amendments to conserve water resources at impacted projects. It is not yet clear whether such measures will be necessary for the Washington State drought.

Federal Agencies Renew Memorandum of Understanding for Hydropower Development among the Corps, Interior, and DOE

On March 24, 2015, the U.S. Department of Energy (DOE), U.S. Department of the Interior (Interior), and the U.S. Army Corps of Engineers (Corps) renewed their [Memorandum of Understanding for Hydropower](#) (MOU) for an additional five years. The revised MOU is the second phase of collaboration among the agencies to support hydropower development at federal facilities and on federal lands. Since the initial execution of the MOU in 2010, there has been increased interest in private hydropower development at federal facilities, including the installation of 10 new non-federal projects at Bureau of Reclamation (Reclamation) facilities and three new projects at Corps facilities, with many more currently in development. The renewed MOU provides a structure for coordination of agency activities in the following areas: (i) technology development, (ii) asset management, (iii) hydropower sustainability, (iv) quantifying hydropower capabilities and value in power systems, and (v) information sharing, coordination, and strategic planning. The MOU sets a number of action items for the agencies, including development of best practices guidance manuals for canal testing of hydrokinetic technologies, evaluating and testing superconductor technology for hydroelectric generators, continuation of the ongoing pumped-storage screening study at Reclamation reservoirs, and a DOE report on the state of the hydropower industry to be issued in Fiscal Year 2016. The MOU supports President Obama's goals for doubling renewable energy generation by 2020 and improving federal permitting processes for clean energy as set forth in the President's Climate Action Plan.

First Circuit Affirms FERC Order in Lowell Project Case

In February 2015, the U.S. Court of Appeals for the First Circuit affirmed a FERC order approving a licensee's proposal to replace the wooden flashboards at the Lowell Hydroelectric Project with a pneumatic crest gate system. Following local residents' complaints that the project was impacting flooding upstream of the project during periods of high flows, FERC ordered the licensee to conduct a study on the effect of the flashboards on upstream flooding. When the study revealed that the wooden flashboards operated unpredictably and inconsistently, FERC required the licensee to investigate options to mitigate the issue.

The licensee subsequently filed a license amendment application, which FERC approved, proposing to replace the wooden flashboard system with a modern pneumatic crest gate system. Despite FERC's requirement for the crest gates to mimic the appearance of the wooden flashboards, Interior alleged that their replacement would have an adverse effect on the Lowell National Historic Park, where the dam is located, and appealed FERC's approval. The First Circuit found that FERC's order was not inconsistent with the historic preservation standards at issue and neither arbitrary nor capricious. To the contrary, the court found that Interior simply disagreed with FERC's evaluation and conclusion, which the court found is insufficient to overturn FERC's order.

Treasury Department Updates Guidance on Investment and Production Tax Credits

As reported in the [January 2015 Newsletter](#), the Tax Increase Prevention Act enacted in December 2014 amended Section 45(d) of the Internal Revenue Code to extend retroactively for 2014 most of the tax incentives, including the hydropower production tax credit and investment tax credit provisions, that expired in 2013. On March 11, 2015, the U.S. Department of the Treasury issued Notice 2015-25, which updates the guidance provided in several prior notices to reflect the one-year extension.

The notice updates all references in the existing guidance to the date by which construction of a qualified facility must begin from January 1, 2014, to January 21, 2015. The existing guidance also provides that a taxpayer may establish the beginning of construction by either (1) starting physical work of a significant nature (Physical Work Test), or (2) paying or incurring five percent or more of the total cost of the facility (Safe Harbor). Under the existing guidance, both methods require a taxpayer to make continuous progress towards completion once construction has begun and, if a facility is placed in service before January 1, 2016, it will be considered to satisfy the Continuous Construction Test (for purposes of satisfying the Physical Work Test) or the Continuous Efforts Test (for purposes of satisfying the Safe Harbor). Consistent with the one-year extension of the beginning of construction date, Notice 2015-25 extends the placed in service date to January 1, 2017. Thus, if a taxpayer begins construction on a facility prior to January 1, 2015, and places the facility in service before January 1, 2017, the facility will be considered to satisfy the Continuous Construction Test (for purposes of satisfying the Physical Work Test) or the Continuous Efforts Test (for purposes of satisfying the Safe Harbor), regardless of the amount of physical work performed or the amount of costs paid or incurred with respect to the facility after December 31, 2014 and before January 1, 2017.

DOE Issues Hydro Funding Opportunities

On March 4, 2015, DOE's Office of Energy Efficiency and Renewable Energy (EERE) issued a [funding opportunity announcement](#) (FOA) for the formation of a Consortium to pursue five research and development topics regarding the nexus of energy and water. These topics include: water use reduction at thermoelectric plants, treatment and management of non-traditional waters, improving sustainable hydropower design and operation, climate change impacts, and data and analysis to inform planning, policy, and other decisions. The Consortium will be a technical track under the U.S.-China Clean Energy Research Center, which is a bilateral initiative to improve collaboration and new technologies between the two countries to face energy-related environmental challenges from greenhouse gas emissions. DOE intends to issue a single award worth \$25 million, consisting of \$12.5 of federal funds and \$12.5 million in recipient cost share. The submission deadline for optional questions is April 23, 2015; the deadline for applications is May 4, 2015.

On March 19, 2015, the EERE announced a [Notice of Intent](#) to issue a FOA called "Research and Development of Innovative Technologies for Low Impact Hydropower Development." The anticipated topics of the FOA include: design and laboratory testing of new rapidly deployable hydropower technologies that should be scalable in a range of head from 10 to 50 feet; research on innovative methods and materials for constructing hydropower facilities; and new and innovative conventional hydropower powertrain components. EERE anticipates that seven awards will be issued on these topics with the average award ranging from \$250,000 to \$1,500,000, depending on the topic. The FOA is likely to be issued in April.

Energy Storage Legislation Introduced in Oregon

Legislation has been introduced in the Oregon House of Representatives that would require certain retail electric companies (which are defined by Oregon law to exclude consumer-owned utilities) to own or acquire by January 1, 2020, the contractual right to use the capacity or energy of one or more "qualifying energy storage systems" that have the capacity to store at least five megawatts of electricity, but not more than one percent of the electric company's peak load for 2014 (H.B. 2193). The requirement would apply to electric companies that sell at least three percent of the electricity sold to consumers in Oregon.

The bill defines an "energy storage system" as "commercially available technology that is capable of retaining energy, storing the energy for a period of time and transmitting the energy after storage." To qualify, the energy storage system must be "cost-effective." The electric company may recover in its retail rates all costs prudently incurred in procuring such a system, including above-market costs.

The bill would require the Oregon Public Utility Commission (Oregon PUC) to adopt guidelines by January 1, 2017, for electric companies to use in developing an energy storage project proposal, including cost-effectiveness and potential benefits in terms of specified environmental values, demand

management, system reliability, and other factors. By January 1, 2018, each affected electric company would be required to submit an evaluation of the potential to store energy in the company's electric system and one or more specifically described and evaluated project proposals including technical specifications, costs and cost-effectiveness, benefits to the company's electric system, and the public interest. If it is authorized to develop the project, the electric company must do so in accordance with any competitive bidding guidance provided by the Oregon PUC.

In 2010, California established commercially available and cost-effective energy storage requirements for utilities. Under the California Public Utilities Commission's (CPUC) implementing regulations, bidding by pumped storage projects to utility solicitations was limited to 50 megawatts owing to concerns that a single large pumped storage facility could be used to reach the energy storage target in a large utility's territory and thereby inhibit the CPUC's goal of supporting emerging storage technologies.

FERC Seeking Experts to Serve on Study Dispute Resolution Panels

On March 3, 2015, FERC issued a [notice](#) seeking interested applicants to serve as technical experts on dispute resolution panels under the integrated licensing process (ILP). FERC's regulations provide that state and federal agencies or Indian tribes with mandatory conditioning authority who dispute a proposed study under the ILP may request a formal study dispute resolution process. Under this process, the disputed study is submitted to a dispute resolution panel consisting of one member from FERC staff, one member from the disputing agency or tribe, and a third panel member (TPM) selected from a pre-established list of experts in the disputed resource area. Together, the panel members determine the extent to which each study criteria is met and why, and make a recommendation to the Director of FERC's Office of Energy Projects (OEP).

FERC is seeking additional TPMs to be added to the pre-existing list, first established in 2004. Applicants must demonstrate technical expertise in a resource area, knowledge of the effects of construction and operation of hydroelectric projects, working knowledge of relevant environmental laws, and ability to promote constructive communication about a disputed study. Applications must be filed electronically with FERC by July 1, 2015.

FERC Names Dr. Jennifer Hill as Director of Division of Hydropower Administration and Compliance

FERC has named Dr. Jennifer Hill to be the Director of the Division of Hydropower Administration and Compliance (DHAC) in the OEP. Dr. Hill, whose doctorate is in fish ecology, has been with the FERC hydropower program for over 25 years. For many years prior to her appointment as Director of DHAC, Dr. Hill served in OEP's Division of Hydropower Licensing, most recently as Director of the Northwest Branch.

FERC Issues Final Rule in Attempt to Curb Disruptive Conduct at Commission Meetings

On March 9, 2015, FERC issued a [Final Rule](#) amending its regulations to specify the roles available to the public at FERC open meetings. Recently, organizations and individuals opposing natural gas pipeline projects have been protesting FERC and disrupting FERC open meetings. FERC issued this Final Rule in response. According to the Final Rule, FERC adopted language from the open meeting regulations of the Federal Communications Commission (FCC) and the Rural Telephone Bank to clarify that the term "observe" does not include disruptive behavior. The Final Rule also uses language from the FCC's open meeting regulations to clarify that communications made or presented by unscheduled presenters will not be considered by FERC. Finally, the Final Rule uses language similar to the Consumer Product Safety Commission's open meeting regulations, to clarify that members of the public may use electronic audio and visual equipment to record open meetings in a non-disruptive manner.

Prior to the start of the February 19, 2015 meeting, FERC Secretary Kimberly Bose read a statement outlining the appropriate conduct for attendees of FERC meetings. Secretary Bose stated that "actions that purposely interfere, or attempt to interfere, with the commencement or conducting of the meeting

or inhibits the audience's ability to observe or listen to the meeting, including attempts by audience members to address FERC while the meeting is in progress, are not permitted. Any person engaging in such behavior will be asked to leave the building." Although Secretary Bose recited roughly the same thing before the March 19, 2015 meeting, this did not stop protestors from disrupting that meeting, as well. The Final Rule goes into effect April 13, 2015.

Julia Wood, John Clements, Michael Pincus, Sharon White, and Mealear Tauch contributed to this issue.

John Clements	202.298.1933	jhc@vnf.com
Tyson Kade	202.298.1948	tck@vnf.com
Matt Love	206.829.1809	mal@vnf.com
Brian McManus	202.298.3720	bzm@vnf.com
Michael Pincus	202.298.1833	mrp@vnf.com
Chuck Sensiba	202.298.1801	crs@vnf.com
Mike Swiger	202.298.1891	mas@vnf.com
Sharon White	202.298.1871	slw@vnf.com
Julia Wood	202.298.1938	jsw@vnf.com

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