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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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Legislative Update

Before the 114th Congress adjourned in December 2016, the House and Senate were unable to agree on a conference report that would have represented the first comprehensive energy legislation to be enacted since 2007. As described in previous editions of the Hydro Newsletter, both the Senate-passed Energy Policy Modernization Act (S. 2012) and the House amendment to that legislation (which included H.R. 8, the North American Energy Security and Infrastructure Act) contained hydro licensing reform provisions, among other provisions of interest to the hydro sector. Although the hydropower provisions enjoyed broad bipartisan support, House and Senate conferees ultimately were unable to resolve legislative differences in their respective offers related to other provisions in the energy package, such as conservation, LNG exports, and wildfire mitigation, before time ran out on the 114th Congress.

The 115th Congress offers a new opportunity for legislative improvements to hydropower licensing and regulation. It is unclear at this time, however, whether comprehensive energy legislation will be a priority of Congressional leadership. With the incoming Trump administration, moreover, the Senate calendar in early 2017 will be crowded with confirmations needed to staff the new administration, a list of budget related actions, and repeal of agency regulations.

Treasury Department Updates Guidance on Investment and Production Tax Credits

As reported in the [January 2015 Hydro Newsletter](#), the December 2014 Tax Increase Prevention Act 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 (PTC) and investment tax credit (ITC) provisions, that expired in 2013. As reported in the [January 2016 Hydro Newsletter](#), the Protecting Americans from Tax Hikes Act of 2015 extended both the PTC and ITC for qualified hydropower to facilities that commenced construction before January 1, 2017.

As reported in the [June 2016 Hydro Newsletter](#), on May 5, 2016, the Treasury Department issued guidance for the PTC and ITC (Notice 2016-31), which provided 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 (or of the cost of new equipment at a retrofitted facility) (Safe Harbor). Both methods require a taxpayer to make continuous progress towards completion once construction has begun (continuity requirement).

On December 15, 2016, the Treasury Department issued Notice 2017-04, which updated and clarified the existing guidance with regard to, among other things, extension and modification of the Safe Harbor, and the costs that may be included in the Safe Harbor for retrofitted renewable energy facilities. Notice 2017-04 provides that a facility will be considered to satisfy the Safe Harbor if the taxpayer places the facility in service by the later of (1) a calendar year that is no more than four calendar years after the calendar year in which construction began, or (2) December 31, 2018. As to the costs that may be included in the Safe Harbor, Notice 2016-31 provided that a facility may qualify even if it contains some used property if the fair value of the used property is not more than 20 percent of the total value of the facility, and the Safe Harbor applies only to the value of new property used to retrofit an existing facility (80/20 rule). Notice 2017-04 clarifies that for purposes of the 80/20 rule, the cost of new property includes all costs properly included in the depreciable basis of the new property.

FERC Affirms Policy Against Preliminary Permits Where Federal Agency Opposes Development at Federal Dam

On December 15, 2016, the Federal Energy Regulatory Commission (FERC) issued an [order](#) denying rehearing of two orders issued by FERC staff dismissing applications for preliminary permits for projects at the U.S. Army Corps of Engineers' (Corps) Dworshak Dam in Idaho and McNary Dam in Oregon. In both instances, the Corps stated that it believed FERC does not have jurisdiction to issue a preliminary permit for the proposed project and that it would substantially interfere with the Corps' operation of its federal facility. The applicants argued on rehearing that FERC has jurisdiction to issue permits for the projects and that the Corps' contention that the hydroelectric projects would interfere with the Corps' operations are issues to be resolved during the term of a preliminary permit. In affirming the staff orders, FERC did not address the jurisdiction question or the merits of the Corps' arguments regarding interference with operation of the Corps facilities. Instead, FERC stated that its policy is to deny a preliminary permit for a proposed project at a federal facility if the agency that operates the facility opposes the project, because issuance of a permit would serve no purpose where the federal agency would refuse to issue separately required development permits for a project at its facility.

Obama Administration Amends Executive Order on Invasive Species

On December 5, 2016, President Obama issued an [amended version](#) of [Executive Order 13112](#) (originally issued February 3, 1999) with the intention of strengthening efforts to prevent the introduction and spread of invasive species and to support efforts to eradicate and control already established invasive species. Executive Order 13112 created a coordinating body – the National Invasive Species Council (Council) – to oversee implementation of the order, encourage proactive planning and action, develop recommendations for international cooperation, and take other steps to improve the federal response to invasive species. The amended order maintains the Council and the Invasive Species Advisory Committee established pursuant to the Federal Advisory Committee Act; expands Council membership by adding several new cabinet level officials, including the Secretary of Homeland Security, the Administrators of the U.S. Agency for International Development and National Aeronautics and Space Administration, U.S. Trade Representative, and the directors of various offices within the Executive Office of the President; adds several new duties for the Council; and incorporates consideration of human and environmental health, climate change, and technological innovation into federal efforts to address invasive species.

EPA and USGS Issue Technical Report on Protecting Aquatic Life from Effects of Hydrologic Alteration

On December 21, 2016, the U.S. Environmental Protection Agency (EPA) and U.S. Geological Survey (USGS) issued a [report](#), *Final EPA-USGS Technical Report: Protecting Aquatic Life from the Effects of*

Hydrological Alteration. The Report includes: (1) a literature review regarding the potential effects of flow alteration on aquatic life through changes in the physical, chemical, and biological properties of riverine ecosystems; (2) examples of narrative water quality criteria developed by several states to support natural water flows and healthy aquatic life; and (3) an eight-step non-prescriptive framework focused on process and information needs for the use of states and Indian tribes to quantify targets for flow regime components to protect aquatic life. The report is intended to help states and Indian tribes establish flow targets in order to increase a stream’s resilience to climate change by reducing or avoiding intensification of existing stresses.

NOAA Fisheries Issues Final Recovery Plan for Oregon Coast Coho

On December 16, 2016, the National Oceanographic and Atmospheric Administration (NOAA Fisheries) issued a [recovery plan](#) for Endangered Species Act (ESA) listed threatened Oregon Coast coho salmon. The goal of the recovery plan is to restore the species to the point where it is viable, self-sustaining, and no longer needs ESA protection within the next 10 years. The plan describes the current status of the species, limiting factors and threats to the full life cycle contributing to the species’ decline, recovery strategies and actions to address the limiting factors and threats, information needs, and a proposed research, monitoring, and evaluation program for adaptive management. The recovery strategy includes proposed actions and describes implementation, priority of actions, and adaptive management at the population, strata, and evolutionarily significant levels. The recovery plan relies heavily on public/private partnership efforts at the regional, state, and watershed levels. NOAA Fisheries estimates the cost of full recovery to be \$110 million.

FERC Extends Deadline for Comments on Proposed Rule to Require Electricity Market Rules to Accommodate Electric Storage Resources

On December 20, 2016, in response to requests of the National Hydropower Association and others, FERC [extended](#) until February 13, 2017, the deadline for comments on its November 17, 2016 Notice of Proposed Rulemaking (NOPR) to, among other things, require each regional transmission organization (RTO) and independent system operator (ISO) to revise its tariff to include market rules that recognize the physical and operational characteristics of electric storage resources and accommodate their participation in the organized wholesale electric markets. The proposed rule would supersede existing rules that do not always ensure that electric storage resources that are technically capable of providing specific services are permitted to do so. Each RTO or ISO participation model would have to satisfy specified requirements regarding services, bidding parameters, dispatch, minimum size, and pricing of resales back into the market of sales to the storage resource. For additional information on the NOPR, please see VNF’s [alert](#) on the proposed rule.

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