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# HYDRO NEWSLETTER

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## FERC GRANTS HYDRO GROUP'S APPEAL OF OTHER FEDERAL AGENCY ANNUAL CHARGES

On March 21, the Federal Energy Regulatory Commission (“FERC” or “Commission”) issued a letter granting in part the appeals of several hydroelectric project owners (“Idaho Falls Group”) of their administrative annual charges bills for fiscal years 2020 and 2021. The administrative annual charges bills include both FERC’s costs of administering Part I of the Federal Power Act (“FPA”) and the costs of other federal agencies (“OFA”) such as the U.S. Forest Service and National Marine Fisheries Service. The Commission agreed with the Idaho Falls Group that almost \$2 million of the costs submitted by the OFAs should have been disallowed, and on that basis agreed to refund proportionate amounts to the members of the Idaho Falls Group for the two years in question. Only licensees who appealed their bills will receive a refund.

Each year, OFAs that attribute any of their costs to participating in FERC’s hydroelectric licensing and compliance programs submit cost reports to the Commission stating whether the costs are related to municipal, non-municipal, or non-specific hydro-related costs. The Commission’s Office of the Executive Director reviews the costs to determine their reasonableness and issues an assessment stating the total amount accepted. The costs are then divided among FERC-jurisdictional project owners based on certain formulas. Over the past several years, the acceptance rate of these OFA costs has been between 94-99%. The Idaho Falls Group contended in its appeals that the OFA cost submissions lacked detail, were overly broad, and included disproportionately high non-specific costs. In addition to granting the refunds, FERC agreed to revise its cost submission guidance to the OFAs to request more specific information in support of their claimed costs in the future. Van Ness Feldman represented the Idaho Falls Group in its appeals.

## FERC REJECTS PRE-PROJECT ENVIRONMENTAL BASELINE IN ISSUING NEW LICENSE

In an [order](#) dated February 16, 2023, the Commission rejected arguments raised on rehearing by an environmental group challenging FERC’s order issuing a new license for the Hiram Hydroelectric Project on the Saco River in Maine. Among other claims, the Sebago Chapter of Trout Unlimited asserted that FERC should have required the licensee to study the movement of brook trout and other resident fish species over time as part of a cumulative impacts analysis that would take into account the past impacts of the dam’s construction and operation. The Commission held that both U.S. Courts of the Appeals for the D.C. Circuit and Ninth Circuit (“Ninth Circuit”) precedent support the view that under the FPA and National Environmental Policy Act (“NEPA”), the appropriate environmental baseline for evaluating potential impacts of a project at an existing dam is the existing condition at the project. At the same time, the Commission acknowledged its responsibility under recent precedent to take into account degraded baseline conditions from present-day operations of a dam as part of the cumulative impacts analysis. Nevertheless, the Commission dismissed Trout Unlimited’s argument that it was important to understand seasonal movement of resident brook trout in the absence of a dam because self-sustaining populations of brook trout were found both upstream and downstream of the project, negating any need for fish passage.

# NINTH CIRCUIT REINSTATES TRUMP 2020 CLEAN WATER ACT SECTION 401 CERTIFICATION RULE

The Ninth Circuit on February 21 [reversed](#) a federal district court order vacating the Trump Administration Environmental Protection Agency's ("EPA") 2020 regulations ("2020 Rule") implementing Section 401 of the Clean Water Act. Section 401 requires state water quality certifications for federal licenses and permits involving discharges into navigable waters. Several states, environmental groups, and Tribes had filed lawsuits challenging the 2020 Rule. The Biden Administration EPA promptly announced its intention to revise the 2020 Rule and requested remand of the case to the agency. The district court not only remanded the 2020 Rule but vacated it in advance of any judgment on the merits, asserting that the regulations on their face were so fundamentally deficient they would not survive remand. The Ninth Circuit held, however, that a court granting a voluntary remand lacks authority to also vacate the regulation without first holding it unlawful on the merits, and that to try to circumvent that process is a violation of the Administrative Procedure Act. The 2020 Rule thus remains in effect until such time as EPA issues a new, final rule to replace it.

## BIDEN EXECUTIVE ORDER PUSHES FOR STRENGTHENING EQUITY FOR FEDERAL AGENCIES

On February 16, President Biden issued [Executive Order 14091: Further Advancing Racial Equity and Support for Underserved Communities Through the Federal Government](#), a sweeping executive order directing federal agencies to increase efforts to advance their equity initiatives.

Executive Order 14091, the latest among the Biden White House's equity and environmental justice-related directives, furthers the administration's equity agenda by laying out an ambitious range of programs, from investing in rural and urban communities traditionally lacking access to the benefits of federal programs and policies, to eliminating unjust disparities in the criminal justice system, to rooting out discrimination in health and housing. Its multi-pronged approach includes:

- Requiring nearly every federal agency to create "Agency Equity Teams" tasked with coordinating the implementation of equity initiatives in their programs and policies.
- Establishing the White House Steering Committee on Equity, which will coordinate government-wide equity-advancement initiatives.
- Requiring the Office of Management and Budget ("OMB") Director to review its processes to support a more equitable decision-making process and to equitably distribute financial and technical assistance.
- Requiring federal agencies to ramp up engagement with underserved communities on programs and policies that impact them.
- Requiring agencies to expand procurement for socially and economically disadvantaged businesses under the Bipartisan Infrastructure Law, the Inflation Reduction Act of 2022, and other federal financial assistance programs.
- Requiring agencies to use their civil rights authorities to address discrimination, which includes "increas[ing] the effects of civil rights enforcement" and increasing public awareness of civil rights issues.

The Executive Order has broad implications, leading environmental justice efforts across federal agencies and seeking to ensure that disadvantaged communities fully participate in the economic opportunities presented by previous Biden Administrative actions (see previous VNF alerts for information on the Inflation Reduction Act and Bipartisan Infrastructure Law). This also means applicants for federal permits or federal funding should take into account environmental justice considerations in agency actions, including funding decisions.

See our full alert on Executive Order 14091 [here](#).

## WASHINGTON STATE COURT REVIVES TRIBE'S NUISANCE CLAIMS AGAINST FERC-LICENSED DAMS

In yet another development in the Sauk-Suiattle Tribe's ongoing challenges to the City of Seattle's Skagit River Hydroelectric Project ("Project"), a Washington State court of appeals on March 6, 2023 [upheld](#) a lower court's dismissal of the Tribe's Consumer Protection Act ("CPA") claim against the City and its claim of nuisance per se, but reversed the lower court's dismissal of the Tribe's public and private nuisance claims. The appeals court agreed with the trial court that the City is not subject to the CPA. It also found that the City's environmental statements about being the "Nation's Greenest Utility" and its assertions that it has improved conditions for the Skagit River anadromous fisheries do not constitute false advertising designed to sell a product, but are "mere puffery." However, the appeals court held that the Tribe is entitled to pursue its public and private nuisance claims, which allege that Seattle's misrepresentation of the State of the Skagit River anadromous fisheries while concurrently taking credit for a purported improvement in their condition has wrongfully shifted blame from Seattle to the Tribe. The complaint alleges this deflection of blame has caused the Tribe to be the target of public ire, harassment, and vandalism and that the Tribe has suffered damage to its "brand and reputation" for supporting sustainable fisheries, undermining its valuable property interest in the fishery. Whether the Tribe has a property interest in fishing on the Skagit River will be litigated before the trial court.

## BLM PROPOSES RULE ON CONSERVATION AND LANDSCAPE HEALTH

On April 3, 2023, the Bureau of Land Management ("BLM") published in the Federal Register a [Notice of Proposed Rulemaking](#) ("Proposed Rule") establishing a new paradigm for how it will manage its 247.3 million acres of public lands, traditionally managed under the concepts of "multiple use" and "sustained yield." BLM characterizes the change in approach as prioritizing the health and resilience of ecosystems. To ensure those objectives, the Proposed Rule provides that the BLM will protect intact landscapes, restore degraded habitat, and make wise management decisions based on science and data. The Proposed Rule would apply land health standards to all BLM-managed public lands and uses, clarify that conservation is a "use" within the multiple-use framework, and revise existing regulations regarding protection of Areas of Critical Environmental Concern. The Proposed Rule would develop a conservation leasing program that would limit use of certain lands, adopt policies to create more meaningful consultation with Tribes and Alaska Native Corporations

and to include Indigenous Knowledge in decisions that affect their interests, and create a mitigation hierarchy and new mitigation requirements for use of public lands. These policy changes could create both opportunities for new development of public lands based on the concept of compensatory mitigation, and significant uncertainties regarding the availability of lands for development, including renewable energy development, and the mitigation required for such development. Comments on the Proposed Rule are due by June 20, 2023, or fifteen days after the last public meeting.

## MEMO TO AGENCIES INTENDS TO SPEED UP FEDERAL PERMITTING

On March 6, the OMB and Council on Environmental Quality issued a [memo](#) to the heads of federal agencies with an implementation guidance for the Biden-Harris Permitting Action Plan (“Action Plan”). The aim of the Action Plan is to leverage the permitting provisions in the Infrastructure Investment and Jobs Act and accelerate federal permitting, and therefore timely delivery of upgrades to infrastructure projects. The memo provides implementation guidance to agencies by covering issues including:

- early cross-agency coordination;
- establishing clear timeline goals and tracking key project information;
- engaging in early and meaningful outreach and communications with Tribal Nations, states, territories, and local communities;
- improving responsiveness, technical assistance, and support;
- adequately resourcing agencies and using the environmental review process to improve environmental and community outcomes; and
- preparation of specific agency actions plans.

## BIPARTISAN INFRASTRUCTURE LAW – UPDATE ON HYDRO PROVISIONS

### Section 247

- On February 8, the U.S. Department of Energy’s (“DOE”) Grid Deployment Office (“GRO”) issued a draft application guidance for the Maintaining & Enhancing Hydroelectricity Incentive Program (EPAAct 2005 Section 247). DOE held an informal public webinar to discuss the draft guidance with interested parties, and the recordings are available on DOE’s [website](#).
- DOE is currently reviewing comments on the draft guidance, and plans on releasing the final guidance and solicitation in the second quarter of 2023.
- This provision will apply to dam safety, environmental, and grid efficiency capital improvements at existing dams that have a FERC license or FERC-issued exemption.
- Successful applicants will have up to 30% of capital cost covered for their proposed project, up to \$5 million.

## **Section 243**

- GRO issued the [application guidance](#) for Hydroelectric Efficiency Improvement Incentives (EPAct 2005 Section 243) on March 22, and at the same time opened the solicitation. DOE held an informational webinar on April 5, and a transcript will be publicly available by April 21, 2023.
- Applicants under this provision are those who propose improvement projects at existing hydroelectric facilities (including pumped storage) that will increase their efficiency by least 3%. These projects do not have to be FERC-licensed or exempted but DOE may have to take steps to comply with NEPA to issue grants for such projects.
- Successful applicants will have up to 30% of capital cost covered for their proposed project, up to \$5 million.
- Applications will be accepted through the Clean Energy Infrastructure Funding Opportunity Exchange and are due by June 20, 2023 at 5:00 pm EST.

## 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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