

Managing Compliance Investigations and Preparing for Litigation Related to a Flood or Other Significant Incident

NHA Panel on Emerging Legal Issues

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Common Realities, Themes, and Practices – Hydropower Projects and Offshore Drilling

- In the wake of recent incidents, high degree of public scrutiny
- Potential for high consequence, fatal incidents
- Federal oversight agency focus on incident response planning and safety culture
- Agency emphasis on going beyond compliance with the letter of the law
- Recent upgrade in investigative capabilities

Similarities in the Investigations of Significant Incidents

FERC - Office of Enforcement, Division of Investigations

- Staffed by experienced investigators
- Conducts investigations of incidents and potential violations
- Subpoena authority
- Penalty Assessments
- Recommends, where appropriate, referral to the U.S. Department of Justice for potential criminal violations

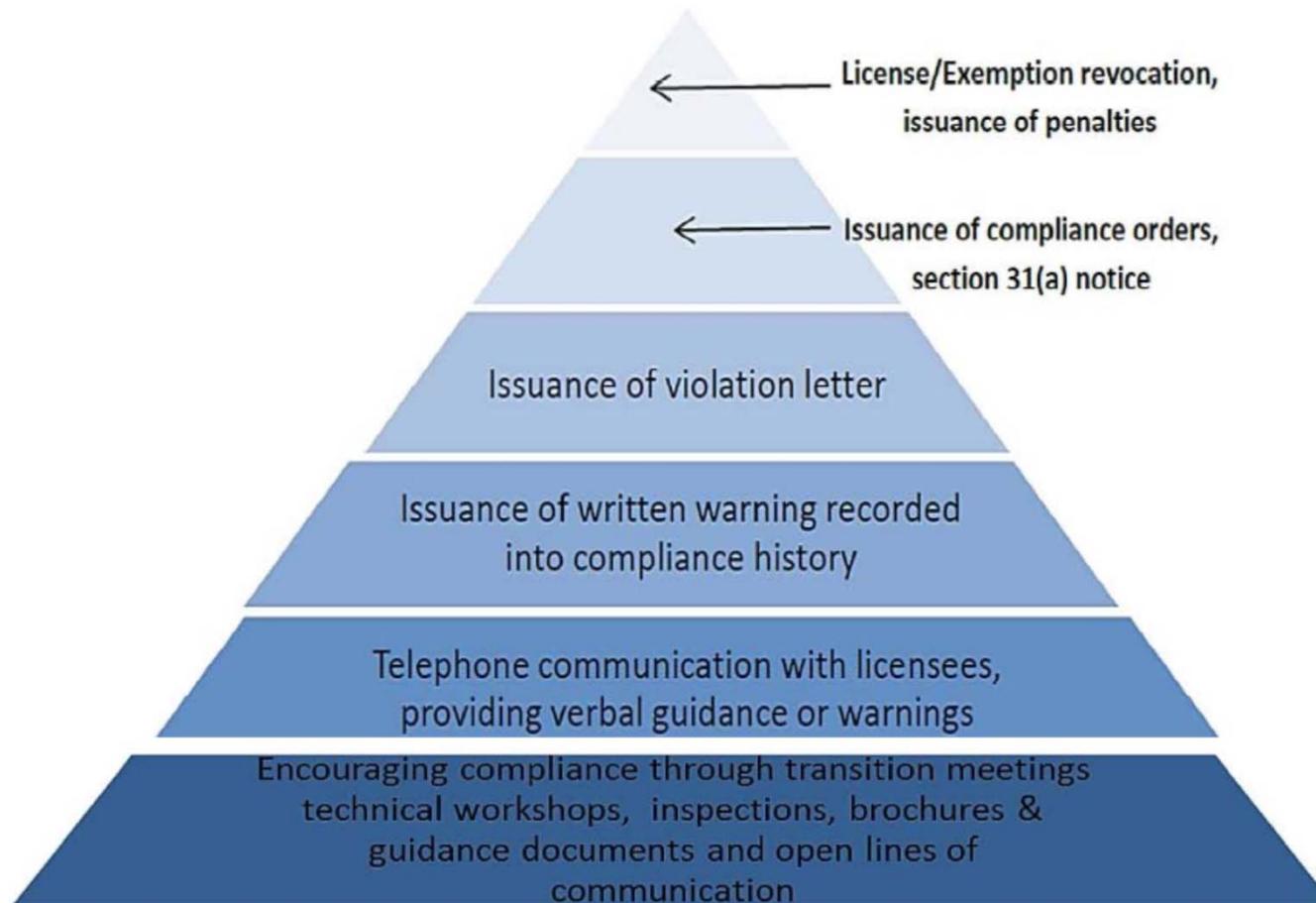
BSEE - Safety and Incidents Investigations Division

- Staffed by experienced investigators
- Thorough root cause investigation and analysis
- Authority to collect documents and other evidence
- Evidence gathered can be basis of enforcement action and/or referral to the U.S. Department of Justice for potential criminal violations

FERC Authority to Conduct Investigations of Incidents and/or Non-Compliance Allegations

- FERC has unreviewable discretion to determine: whether to investigate a compliance allegation, how to conduct any investigation, and whether to enforce license requirements. *Friends of the Cowlitz v. FERC*, 253 F.3d 1161 (2001).
- Informal Process
 - FERC will request written response, may conduct a site visit
 - Follow-up possibilities: finding of no violation; notice of no further action to be taken; request for additional information; or compliance order

The Division of Hydropower Administration and Compliance's Enforcement Pyramid



Non-Compliance May Lead to Imposition of a Hydropower Compliance Management Plan

■ HCMP Contents

- Identify and schedule completion of every action required by license
- Schedule to start and complete related agency consultation
- Identify consulted Agency officials for each action

■ May also include

- Annual Progress Report
- FERC-approved tracking system
- Staffing plan and training program
- Self-reporting for non-compliance

Assessment of Civil Penalties

- FERC has the authority to assess civil penalties in hydroelectric cases
- Maximum assessment of \$21,563 per violation, per day
- To determine the amount of an assessment, FERC considers the nature and seriousness of the violation, and the licensee's efforts to remedy the violation

Best Practices to Limit or Avoid Enforcement Actions and/or HCMP

- Self-reporting of incidents
- Immediate document and evidence preservation
- Cooperation with investigators, including making employees available for interviews
- Coordination with investigators on access to facilities and potential forensic testing of failed equipment

Managing the Company's Response

- Advise employees of the likelihood of a non-compliance investigation and potential litigation
- Immediately begin, post-incident, to develop a chronology of events, with back-up documentation
- Encourage employees to be complete and accurate in responding to questions from investigators, but not to speculate
- Document all instructions to preserve potentially relevant information

Preparing and Submitting the Incident Report to FERC

- Submission typically includes:
narrative/chronology of event and response;
rainfall information; river and reservoir gage data; spillway gate operations; project discharges; Emergency Action Plan procedures; public advisory notifications; and additional data and information
- Provide supporting data, documents, and information to allow FERC to conclude that operations were conducted in a manner consistent with the license.

Using FERC Findings in Litigation Following a Flood or Other Incident

- In litigation that follows a flood or other incident, the project can cite a FERC “consistent with the license” finding to counter allegations of negligence
- FERC finding may also support the removal of state law claims to federal court



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