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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.

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.

Hydro Newsletter

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Draft Hydro Policy Reform Bill Released for Discussion in Congress

On April 24, 2015, Rep. Cathy McMorris Rodgers (R-WA) issued a [draft discussion bill](#) titled the "Hydropower Regulatory Modernization Act of 2015." The bill states that it is designed to improve federal regulation of non-federal hydropower, promote transparency and accountability in hydropower licensing decision making, and reduce redundancy and inefficiencies in non-federal hydropower administration. The bill, if enacted, would be the most comprehensive hydro licensing policy reform since the Energy Policy Act of 2005 (EPAAct 2005).

Among the most significant provisions of the bill are several measures that would advance the policy objectives of EPAAct 2005. According to the bill's findings, the objectives of EPAAct 2005 have not been realized, due to inefficiencies and evasion in implementation. For example, the bill shifts responsibility for evaluating the criteria for alternative mandatory conditions under Federal Power Act (FPA) section 33 from the conditioning Secretary to the Federal Energy Regulatory Commission (FERC). The bill also changes the procedures for trial-type hearings by allowing additional time for the hearings; consolidating all hearings before FERC; establishing burden of proof responsibilities; allowing factual disputes related to alternative mandatory conditions to be included in the hearing; prohibiting agencies from avoiding the trial-type hearing and alternatives procedures through other licensing requirements (e.g., biological opinions and water quality certifications); and ensuring that new mandatory conditions cannot be submitted for the first time after the period for seeking a hearing has passed.

The bill also includes other amendments to the FPA aimed at improving administrative efficiency and transparency in the licensing and regulation of non-federal hydropower projects under the FPA. For instance, the bill establishes FERC as the lead agency for all authorizations under federal law required for

the licensing and development of hydropower resources, and authorizes FERC in this capacity to establish and enforce an overall licensing schedule. The bill also grants FERC exclusive authority to administer and enforce all requirements of the FERC-issued license, regardless of the source of all license requirements. The bill seeks to reduce licensing time and costs by directing FERC to rely on existing information and authorizing new studies only when FERC determines that additional data is necessary to support its licensing decision.

Finally, the bill contains several provisions that stimulate development of new hydropower infrastructure. These include authorizing FERC to extend a license term for up to a total term of 70 years to account for any project-related investments that result in new development, construction, capacity, or environmental measures that FERC did not consider when last establishing the license term. The bill also proposes to exclude from FPA licensing jurisdiction certain hydropower facilities at non-powered dams of 5 MW or less, and authorizes FERC to issue exemptions for certain facilities at non-powered dams larger than 5 MW.

In an April 24, 2015 [press release](#), Rep. McMorris Rodgers stated that the bill will “address Federal laws that too often get in the way of utilizing [hydropower as a] renewable energy resource, to streamline the hydropower licensing and relicensing process to make it more efficient and transparent, and to encourage early environmental protection.” Also in an April 24, 2015 [press release](#), National Hydropower Association (NHA) Executive Director Linda Church Ciocci stated that “NHA commends and thanks Rep. McMorris Rodgers for her leadership in beginning a dialogue on how legislative changes can help drive investment in and expansion of this important clean energy resource while protecting environmental values.” There is no indication at this time when the bill will be formally introduced in the House of Representatives.

FERC Staff Finds Certain Hydropower Licensing Regulations Ripe for Reevaluation

Pursuant to a plan adopted in 2011 to review its significant regulations every 10 years for outmoded, ineffective, insufficient, or excessively burdensome requirements, FERC staff issued on April 10, 2015, a [memorandum](#) which identifies, among others, certain hydropower regulations that may warrant a formal public review. FERC staff identified five provisions of its Integrated Licensing Process regulations at 18 C.F.R. Part 5 that may warrant review. These are: (1) change the requirement for prior FERC approval to use the traditional licensing process (TLP) or alternative licensing process (ALP) to a prior notice regime in which requests to use the TLP or ALP are automatically granted unless FERC staff states within 15 days that it will review the request and issue a decision; (2) require applicants to distribute the Notice of Intent to file a license application and the Pre-Application Document on owners of property that would be affected by the application; (3) in the study plan development process, prohibit commenters on the Revised Study Plan from requesting modifications or new studies that could have been requested in comments on the Proposed Study Plan; (4) allow more time in the study plan development process for public comment and for the Director of the Office of Energy Projects to issue the Study Plan Determination; and (5) allow study dispute resolution panels discretion to decide whether a technical conference is necessary prior to its deliberative meetings.

Comments on the memorandum are due “at least 30 days after the memorandum is made public,” and the comments, along with staff’s recommendations, will inform FERC’s decision as to which, if any, regulations will be the subject of a formal public review, which could be initiated by a Notice of Inquiry or Notice of Proposed Rulemaking.

FERC Sends Advance Notice of License Expiration, Requests Relicensing Process Information

On April 1, 2015, the Director of FERC’s Division of Hydropower Licensing sent a letter to the licensees of 100 hydropower projects with licenses expiring between 2021-and 2023 requesting them to let FERC know by [June 1, 2015](#) which relicensing process they intend to use. Under FERC’s regulations, a licensee must notify FERC at least five years (but not more than five and a half years) before license expiration

that it intends to relicense a project. A request to use one of FERC's non-default processes—the TLP or ALP—must be made at that time. The selection of a licensing process is a strategic decision which depends on the complexity of resource issues, the licensee's relationship with relicensing stakeholders, and the licensee's goals and objectives in relicensing, among numerous other factors. While it does not require a binding commitment, FERC's letter requires licensees to consider relicensing process selection much earlier than normal—in some cases, more than three years early—to enable FERC staff to better manage a substantial increase in workload in the coming years, given the large number of licenses expiring.

FERC Issues Rehearing and Clarification of Toledo Bend License Order

On April 16, 2015, FERC issued an [order on rehearing](#) of the new license it had issued last August for the 82 MW Toledo Bend Project. On rehearing, FERC revised the requirement for the licensees to maintain the reservoir at a level they argued would prevent them from meeting current and future water supply obligations. Because the primary purpose of the project is water supply, and the reservoir contains the largest unallocated fresh water supply in Texas, the reservoir level requirement was an issue of critical importance to the licensees. FERC on rehearing acknowledged the importance of the project for water supply, and stated that it had "no intent to interfere unduly with water supply operations." FERC therefore established a minimum reservoir operating level of nearly six feet lower than the level it had required in the license order. FERC found that such level would properly balance water supply with other purposes of the project, such as recreation and power development, while giving the licensees flexibility in operations. While the licensees may enter into future water supply contracts, the order notes that they must seek permission from FERC if such contracts will affect their ability to comply with license requirements. The order reflects FERC's challenge in establishing license requirements that reflect the multitude of public interest factors that FERC must balance under the FPA, with the practical operating conditions and purposes of individual projects.

FERC Holds Technical Conference for Other Federal Agencies' FY 2014 Costs

On March 26, 2015, FERC held a technical conference to review Other Federal Agencies' (OFAs) fiscal year (FY) 2014 costs for administration of Part I of the FPA. Section 10(e) of the FPA authorizes FERC to collect "reasonable" annual charges from 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. The OFAs reported about \$7.5 million in costs for FY 2014, a reduction of about 9 percent from FY 2013, which FERC staff attributed to sequestration and other cuts in federal funding. In the technical conference, FERC staff preliminarily accepted \$6.7 million of these costs to be passed through to licensees in this year's administrative annual charges bills. With the conclusion of the technical conference, interested parties now have an opportunity to prepare written comments to FERC and questions to the OFAs regarding their cost reports. The comment deadline is May 9, 2015. 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.

Center for Biological Diversity Files ESA Complaint

On April 15, the Center for Biological Diversity (CBD) filed an amended complaint in the United States District Court for the District of Columbia challenging the failure of the U.S. Fish and Wildlife Service (USFWS) to make timely decisions on petitions to list eight species as threatened or endangered under the Endangered Species Act (ESA). USFWS had previously determined that listing each of the species "may be warranted," but has not made the subsequent warranted/not warranted determination within the one-year deadline imposed by the ESA. Of the eight species petitioned for listing, six are fish (i.e., ashy darter, candy darter, frecklebelly madtom, longhead darter, sickle darter, and trispot darter) that reside in watersheds located in the mid-Atlantic and Southeastern United States. For many of these fishes, CBD has identified dams and other impoundments as posing a threat to the species.

DOE Issues Hydro Funding Opportunity

On April 9, 2015, the Department of Energy's (DOE) Office of Energy Efficiency and Renewable Energy issued a [funding opportunity announcement](#) (FOA) for the research and development of new innovations in hydropower drivetrain and civil works technologies for low impact hydropower development. These technologies can include: low impact civil structures, alternative construction methods, and new mechanical and electrical powertrain components. Applicants can be domestic or foreign entities, and may submit multiple applications so long as they are unique and distinct projects. DOE intends to issue seven awards that range between \$250,000 and \$1,500,000, for a total amount to be awarded of \$7 million. A webinar on this FOA was held on April 21; the [recording](#) is available for viewing. The submission deadline for concept papers is May 7, 2015; the deadline for full applications is June 15, 2015.

Norman Bay Assumes FERC Chairmanship

Norman Bay assumed the chairmanship of FERC on April 15, 2015, from former Chairman Cheryl LaFleur, who served as chairman for the past 17 months. Chairman Bay has been a Commissioner since August 4, 2014, after serving as Director of the Office of Enforcement since July 2009. In a deal brokered for his confirmation, Chairman Bay served for nine months as a commissioner before President Obama named him to replace former Chairman LaFleur as chair. At his first FERC meeting as chairman on April 16, 2015, Chairman Bay announced that Acting Director of the Office of Enforcement Larry Gasteiger would become his Chief of Staff and Larry Parkinson will slide over from his position as Director of the Division of Investigations to become Director of the Office of Enforcement.

Obama Administration Releases First Installment of Quadrennial Energy Review

On April 21, 2015, the Obama Administration [released](#) the first part of the Quadrennial Energy Review (QER), which focuses on energy transmission, storage, and distribution (TS&D) infrastructure to promote economic competitiveness, energy security, and environmental responsibility. The QER report identifies opportunities for TS&D infrastructure, such as pipelines, wires, storage, waterways, railroads, and other facilities, to provide for a clean and secure energy future and proposes policy recommendations and investments to replace, protect, expand, and modernize TS&D infrastructure. Notably, with respect to hydropower, the QER report briefly describes the interconnectedness of the electricity systems of the United States and Canada. The report notes that "[i]f the transmission projects filed with DOE in the last 5 years are constructed, they would add approximately 4,100 megawatts of additional hydropower to the U.S. electricity mix."

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