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HYDRO NEWSLETTER

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What's Inside?

- *FERC Announces Workshop on Financial Assurance Measures for Licensees*
- *Yuba Water Agency Releases Educational Video on Yuba River Development Project*
- *Cascade Water Alliance featured in Army Corps National Inventory of Dams Video*
- *FERC Issues Final Rule Regarding Safety of Water Power Projects and Project Works*
- *Sauk-Suiattle Tribe v. City of Seattle – Order Granting Defs’ Motion to Dismiss*
- *FERC Extends Waivers of Regulations on Non-Statutory Deadlines*
- *DOE Issues Notice of Availability of Guidance and Open Application Period for Hydroelectric Incentive Program*
- *Editorial by Mike Swiger*

FERC ANNOUNCES WORKSHOP ON FINANCIAL ASSURANCE MEASURES FOR LICENSES

BY STEVE BARUCH

At the Federal Energy Regulatory Commission's ("FERC" or "Commission") open meeting on December 16, 2021, Chairman Glick announced that the Commission is planning a staff-led technical workshop to discuss financial assurance measures for hydropower projects. FERC expects to hold the workshop in April 2022. Chairman Glick said it is important that the Commission ensure that licensees have sufficient resources to pay for repairs at dams in order to protect public safety. The announcement of the technical workshop follows FERC's [Notice of Inquiry](#) from January 19, 2021 inviting comments on whether FERC should require financial assurance measures in hydropower licenses and other authorizations. The NOI explores whether FERC should bolster financial requirements to ensure that licensees have the capability to carry out license requirements and maintain their projects in a safe condition, particularly in light of the May 2020 dam failures in Michigan, and various options for such requirements. VNF filed [comments](#) in response to FERC's January 2021 Notice of Inquiry on behalf of a group of licensees.

YUBA WATER AGENCY RELEASES EDUCATIONAL VIDEO ON YUBA RIVER DEVELOPMENT PROJECT

BY MIKE SWIGER

Yuba Water Agency has launched an educational video on its Yuba River Development Project ("Project"), a 362-megawatt, multi-development hydroelectric project located in the Yuba River basin in Northern California. The video, just shy of 30 minutes, provides the history and an overview of the Project. The Project provides important flood control, water supply, recreation, and fish and wildlife benefits in addition to clean, renewable hydropower generation. Through its sales of water and power, Yuba Water Agency invests earnings back into the community for educational, fire protection, habitat improvement, and other programs. VNF is assisting Yuba Water Agency in the ongoing FERC relicensing for the Project. The video can be found [here](#).

CASCADE WATER ALLIANCE FEATURED IN ARMY CORPS NATIONAL INVENTORY OF DAMS VIDEO

BY MIKE SWIGER

The U.S. Army Corps of Engineers (Corps) has published a [promotional video](#) for the [National Inventory of Dams](#) (NID), which documents all known dams in the U.S. and its territories that meet certain criteria. The NID serves as a resource to support awareness of dams and actions to prepare for a dam-related emergency. The video includes footage of the Lake Tapps Reservoir, which is owned and operated by VNF client [Cascade Water Alliance](#) (Cascade).

FERC ISSUES FINAL RULE REGARDING SAFETY OF WATER POWER PROJECTS AND PROJECT WORKS

BY MEALEAR TAUCH

On December 16, 2021 the Commission approved a [Final Rule](#) updating its hydropower project safety regulations under 18 C.F.R. Part 12. Projects will still be subject to a Part 12D safety inspection every five years, but the Final Rule adopts a two-tier independent consultant inspection cycle where the required scope of the inspection will alternate between a periodic inspection and a comprehensive assessment:

- Periodic inspections will focus on the performance of the project over the previous five years, and will include a field inspection, a review of project operations, an in-depth review of monitoring data trends and behavior, and an evaluation of whether any potential failure modes are occurring.
- A comprehensive assessment will include the elements of a periodic inspection and will examine every aspect of a project, including a detailed review of the design basis, analyses of record, and construction history, an evaluation of spillway adequacy, a potential failure mode analysis, and a risk analysis.

The Final Rule also revises the process by which FERC reviews and evaluates the qualifications of independent consultants who conduct the Part 12D inspections. Inspections will now be conducted by an independent consultant team that collectively has the expertise commensurate with the scale, complexity, and relevant technical disciplines of the project and the type of review being performed (period inspection or comprehensive inspection).

Notably, the Final Rule revises the definition of independent consultant team to clarify that the ten-year experience requirement applies only to the independent consultant and does not apply to the additional independent consultant team members. The goal of the revised process is to ensure that each project is inspected by an independent consultant team with sufficient experience and expertise for each project's site-specific conditions.

In addition, the Final Rule codifies an existing requirement that owners of high and significant hazard dams prepare and maintain an owner's dam safety program. The purpose of the owner's dam safety program is to formalize a licensee's policies and procedures related to organizational oversight and responsibility, internal communication, resource allocation, and continuous improvement. FERC believes this requirement has succeeded in raising dam safety awareness by licensees across the country.

Finally, the Final Rule modifies licensee reporting and preparedness requirements related to public safety at or near hydroelectric projects. Currently, licensees are required to maintain public safety devices and report any project-related deaths or injuries. The Final Rule revises the definition of "project-related" incidents to clarify that licensees are required to report only those public safety incidents that occur at project works or are related to project operations. Licensees are now also required to report rescues in addition to deaths and serious injuries. The Final Rule also codifies existing guidance to prepare, maintain, and submit a public safety plan to FERC.

The Final Rule will become effective 90 days after publication in the Federal Register.

SAUK-SUIATTLE TRIBE V. CITY OF SEATTLE - ORDER GRANTING DEF'S MOTION TO DISMISS

BY MIKE SWIGER

On December 2, 2021, the U.S. District Court for the Western District of Washington [dismissed](#) the Sauk-Suiattle Tribe's complaint seeking declaratory and injunctive relief that the Gorge Dam violates the constitutions of the State of Washington and the United States, as well as state and federal law, by blocking the passage of migratory fish. The Gorge Dam is one of three dams that make up the Skagit River Hydroelectric Project, owned and operated by Seattle City Light pursuant to a FERC license.

The Court dismissed the lawsuit based on lack of subject matter jurisdiction, deeming it a collateral attack on the 1995 Skagit River Hydroelectric Project FERC license. Under the Federal Power Act ("FPA"), challenges regarding a FERC license can only be appealed to the appropriate U.S. Court of Appeals. The license itself was based on a comprehensive settlement agreement addressing fishery and other issues, which the Tribe signed. The settlement agreement did not include a fish passage requirement. The Court held that the question of fish passage is one that Congress explicitly directed FERC to consider in its licensing decisions, pointing out that FERC declined to impose fish passage in the 1995 license. The Court also concluded that the question of fish passage was "inescapably intertwined" with FERC's licensing authority and noted that the Tribe would have the opportunity to advance its fish passage arguments before FERC as the project is currently undergoing FERC relicensing. Because the Court dismissed the complaint based on lack of jurisdiction, it did not reach the defendants' arguments that the Washington state law claims were preempted by the FPA under the Supremacy Clause of the U.S. Constitution.



FERC EXTENDS WAIVERS OF REGULATIONS ON NON-STATUTORY DEADLINES

BY MEALEAR TAUCH

On December 8, FERC issued a [supplemental notice](#) waiving the regulations that require that certain filings be notarized or supported by sworn declarations. This regulation was first waived in May 2020 in response to the ongoing situation caused by the Novel Coronavirus Disease and will continue to be waived through and including March 31, 2022. The Commission will continue to monitor developments but does not anticipate extending the blanket waiver beyond March 2022.

DOE ISSUES NOTICE OF AVAILABILITY OF GUIDANCE AND OPEN APPLICATION PERIOD FOR HYDROELECTRIC INCENTIVE PROGRAM

BY MEALEAR TAUCH

On December 27, the U.S. Department of Energy's (DOE) Water Power Technologies Office published a notice of availability of an update to their guidance on the Energy Policy Act of 2005 Section 242 program and an open application period for interested parties. In compliance with Section 242, the DOE Secretary is directed to issue incentive payments, subject to the availability of appropriations, for certain "qualified hydroelectric facilities" that generate and sell electric energy for a specified 10-year period. Qualified hydroelectric facilities are ones that began operations at an existing dam or conduit between October 1, 2005, and September 30, 2027. For fiscal year 2021, Congress appropriated to DOE \$7,000,000 for this purpose. In addition, DOE has updated the guidance for this process, available [here](#).

DOE is accepting applications starting December 27, 2021 through February 10, 2022 to be considered as timely filed for calendar year 2020 incentive payments.

EDITORIAL BY MIKE SWIGER

We have all heard about state and local opposition to new energy project developments, with much of the controversy centering on interstate natural gas pipelines. However, the "not in my back yard" syndrome is hardly limited to fossil fuel projects. Large-scale renewable energy projects also have encountered vigorous opposition. These projects range from wind turbine developments off the shores of New Jersey and Massachusetts, to large-scale solar projects in Nevada, California and elsewhere, to a 145-mile, high-voltage transmission line in Maine for bringing Canadian hydropower to New England. Building new energy infrastructure, even to meet state and national clean energy goals, is not always easy, particularly when state or local opposition can delay or veto a project. Of course, even development of utility-scale "clean" or "emissions free" energy usually has some kind of environmental consequences. In this regard, however, according to the U.S. Department of Energy's 2016 *Hydropower Vision report* hydropower in the U.S. could grow from 101 gigawatts of capacity in 2015 to 150 gigawatts of capacity in 2050 utilizing primarily existing dams and water conveyance facilities. With more than 80,000 dams in the U.S., the vast majority of which are currently non-powered, many of us already have a dam in our "back yard." Putting a turbine on that dam, or on a water supply pipeline that is going to a consumptive use, typically has insignificant environmental consequences. Hydropower offers the potential to substantially expand our clean energy infrastructure with few environmental impacts. And, because hydropower projects are licensed by the FERC under the FPA, which generally preempts state and local environmental regulation, FERC is able to look at the "big picture" of the energy and environmental benefits of hydropower without being second guessed by state and local regulatory agencies. Add to that, the fact that water power from storage can be used to balance intermittent sources of renewable energy like wind and solar on the electric grid, and hydropower becomes an even more important part of our clean energy future than it would be based on megawatts alone.

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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