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HYDROPOWER

In this issue:

CLIENT ALERT: FERC SEEKS COMMENTS ON PROPOSED REVISION TO HYDROPOWER RECREATION REGULATIONS AND DRAFT ENGINEERING GUIDELINES ON WATER CONVEYANCES

On May 17, 2018, the Federal Energy Regulatory Commission (“FERC” or “Commission”) announced that it is soliciting comments on two actions relating to its licensing authority over hydropower projects. First, FERC is proposing various revisions to its regulations regarding information on the use and development of recreation facilities at FERC-licensed hydropower projects.¹ As described in more detail below, FERC proposes to eliminate the requirement that licensees file Licensed Hydropower Development Recreation Reports (“FERC Form 80”), and to revise its regulations regarding public notice and signage for recreation facilities. Second, FERC is seeking comments on its Office of Energy Projects’ draft version of “Chapter 12—Water Conveyances,” *Engineering Guidelines for the Evaluation of Hydropower Projects*.²

Recreation NOPR

Elimination of FERC Form 80

Under the Federal Power Act (“FPA”), FERC is required to ensure that any licensed project is “best adapted to a comprehensive plan for improving or developing a waterway or waterways . . . for [among other things] beneficial public uses, including . . . recreational . . . purposes.”³ In 1966, the Commission created FERC Form 80, which provides a periodic inventory of the use and development of recreational facilities within a project boundary. Under current FERC regulations, on April 1 of every sixth year licensees are required to submit FERC Form 80, which contains the prior calendar year’s information on (1) the number of recreation visits to the project, (2) the use and capacity of each type of public recreation facility, and (3) the total cost of developing, operating, and maintaining these facilities.

¹ *Elimination of Form 80 and Revision of Regulations on Recreational Opportunities and Development at Licensed Hydropower Projects*, 163 FERC ¶ 61,122 (2018), <https://elibrary.ferc.gov/idmws/common/OpenNat.asp?fileID=14921764> (“Recreation NOPR”).

² Available at <https://elibrary.ferc.gov/idmws/common/OpenNat.asp?fileID=14921634>.

³ 16 U.S.C. § 803(a)(1).

In the Recreation NOPR, FERC states that it believes FERC Form 80 may no longer be necessary. Today, many licensed projects have project-specific license conditions that require preparation and implementation of recreation plans, including requirements for recreation monitoring and/or periodic updating of FERC-approved recreation plans.⁴ Even for those projects that do not have conditions requiring recreation plans or recreation-related monitoring, FERC staff uses other tools as the primary means of evaluating recreation use and development, not FERC Form 80.⁵ These include periodic project inspections and investigations of recreation-related complaints by resource agencies, recreation users, or local residents. Commission staff notes that compared to these sources of information, FERC Form 80 lacks specificity and presents data validity concerns.

As a result, FERC is proposing to eliminate the requirement that licensees file FERC Form 80. Licensees would still be required to fulfill any license-specific requirements relating to recreation facilities, and they would still be required under 18 C.F.R. § 2.7 to develop suitable recreation facilities, provide adequate public access, and determine public recreation needs. FERC also states it “expects that licensees will continue to monitor project recreation resources in a manner appropriate for the type, size, and quantity of public recreation opportunities provided by the project.”⁶ Where existing licenses contain provisions that link future actions or filings to the FERC Form 80 schedule (the first of April every sixth year), licensees would still be required to take such actions by those dates.

Revisions to Regulations on Public Notice and Signage

Under 18 C.F.R. § 8.1, licensees are required to publicize information about “the availability of project lands and waters for recreational purposes,” as well as any recreation-related license conditions. Currently, this notice must include publication in a local newspaper once each week for four weeks. FERC is proposing to modernize this notice requirement by mandating that licensees also post notice on their project websites, if they have them. Under this proposed rule, licensees that do not have a project website would not be required to create one.

Under 18 C.F.R. § 8.2, licensees are required to post signs at each public access point identifying, among other things, directions to project areas available for public recreation and a description of permissible times and activities. These signs must also include a statement that the recreation facilities are open to all members of the public without discrimination, and the licensee must make available at its local offices its FERC-approved recreation plan, if applicable, and the entire license order. FERC is proposing to “streamline” the amount of information that must be included on the sign, such as by eliminating the requirement to include directions to the recreation facilities. In addition, FERC is proposing to require that licensees include any FERC-approved recreation plans, recreation-related reports approved by FERC, and the entire license on their project websites. Again, licensees that do not have a project website would not be required to create one.

⁴ Recreation NOPR, P 5.

⁵ *Id.* PP 6, 7.

⁶ *Id.* P 10.

Draft Engineering Guidelines on Water Conveyances

FERC's Office of Energy Projects publishes engineering guidelines to help FERC technical staff in processing license applications and in evaluating dams under the Commission's safety regulations. The Office of Energy Projects has released a draft of a chapter on water conveyances, which addresses penstocks, canals, flumes, and tunnels. For each type of conveyance, it discusses typical features, failure modes and defensive measures, and recommendations for surveillance. FERC has requested comments and specific recommendations on appropriate updates and improvements that could be made to this draft.

Action Items

Comments on the Recreation NOPR are due **July 23, 2018**. Comments on the draft engineering guidelines on water conveyances are due **July 16, 2018**. Please contact Spiegel attorneys William Huang, Katie Mapes, Rebecca Baldwin, or Jeff Bayne for additional information.

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