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HYDROELECTRIC

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CLIENT ALERT: FERC SEEKS COMMENTS ON REQUIRING NEW FINANCIAL ASSURANCE MEASURES FOR HYDROELECTRIC PROJECTS

On January 19, 2021, FERC issued a Notice of Inquiry (“NOI”) on financial assurance mechanisms for hydroelectric projects.¹ In particular, FERC is considering whether to require additional mechanisms to ensure that licensees² have the financial resources necessary to be able to safely operate and maintain their projects and to respond to unanticipated events. The NOI seeks comments on how different types of licensees, including licensees of small projects and municipal licensees, may be affected by the financial assurance mechanisms being considered. Comments on the NOI are due March 29, 2021.³

Background

Historically, FERC’s analysis of project financing has been limited to: (1) evaluating the costs and benefits of proposed projects; and (2) ensuring that licensees can finance project construction and, when taking on new construction, finance anticipated operating and maintenance expenses.⁴ Currently, FERC generally does not “require a licensee to demonstrate the ability to finance unknown future obligations that may arise from environmental concerns or significant dam safety issues,”⁵ and only rarely requires licensees to demonstrate that they “can afford ongoing operation and maintenance expenses, required environmental or safety measures, or measures required to ensure the facility can meet future dam safety requirements.”⁶ But since it has found increasing numbers of licensees unable to “afford to operate or maintain [their] projects or implement required environmental

¹ *Financial Assurance Measures for Hydroelectric Projects*, Docket No. RM21-9-000, 86 Fed. Reg. 7081 (Jan. 26, 2021), 174 FERC ¶ 61,039 (2021). All citations in this Alert are to the Federal Register version of the NOI.

² According to the NOI (n.1), “Use of the word ‘license’ herein refers to both licenses and exemptions or licensees and exemptees, unless otherwise specified.”

³ *Id.* P 16.

⁴ *Id.* PP 3-4.

⁵ *Id.* P 4.

⁶ *Id.* PP 5-6.

or safety measures”⁷—and in light of the May 2020 failures of the Edenville and Sanford dams in Michigan⁸—FERC is now considering “whether additional measures should be taken to ensure licensees have the financial resources to operate and maintain their projects for the life of the project, including under unforeseen circumstances.”⁹

Potential Financial Assurance Requirements

The NOI identifies three potential financial requirements that could better ensure that licensees have the financial resources needed to adequately operate and maintain their projects: a bond requirement; an insurance requirement; and/or a trust, escrow, or remediation fund requirement.¹⁰

The Bond Requirement

Under this approach, FERC would require licensees to “obtain bonds to ensure they have sufficient funds to pay for operation, maintenance, environmental, and safety measures throughout the duration of the license.”¹¹ The NOI seeks comments on a number of questions regarding the bond requirement, including: whether FERC should adopt a bond requirement; whether all licensees could satisfy a bond requirement, and, if not, whether FERC could mitigate expenses; and how FERC should determine the bond amount.¹²

The Insurance Requirement

As described in the NOI, the insurance requirement is substantially similar to the bond requirement. Licensees would be required to “obtain insurance policies to cover costs in the event of a safety hazard or dam failure.”¹³ As with the bond requirement, the NOI seeks comments on whether FERC should adopt an insurance requirement, and how FERC should determine the amount of insurance coverage required.¹⁴

The Trust, Escrow, or Remediation Fund Requirement

Under this approach, FERC would: (1) “establish an industry-wide trust or remediation fund to pay for necessary repairs and remediation,” (2) “require licensees to maintain an individual trust or remediation fund,” or (3) require licensees to establish escrow accounts.¹⁵ As to the industry-wide trust, the NOI asks for comments on: whether FERC should create an industry-wide trust or

⁷ *Id.* P 8.

⁸ *Id.* P 7.

⁹ *Id.* P 10.

¹⁰ *Id.* P 12.

¹¹ *Id.* P 13.

¹² *Id.*

¹³ *Id.* P 15.

¹⁴ *Id.*

¹⁵ *Id.* P 14.

remediation fund; how FERC should determine the amount of money needed for the trust; how the trust should be funded, including whether FERC should use its annual charge authority to fund the trust; and how trust funds should be distributed.¹⁶ The NOI seeks comments on similar issues for individual trust and/or escrow account requirements, including: whether FERC should require licensees to maintain individual trusts or escrow accounts; how FERC should determine the amount of money needed for individual trusts; and whether FERC should “require licensees to retain a certain percentage of generation receipts in an escrow account.”¹⁷

Finally, the NOI seeks comments on the challenges each of the potential financial requirements might pose to “individual licensees, small hydroelectric project licensees, municipal licensees, the public, or the Commission.”¹⁸

How Additional Financial Requirements May Be Imposed on Licensees

The NOI asks for comments on how any additional financial requirements FERC adopts should be imposed, and, in particular, when and how additional financial requirements should be included in project licenses. Among other things, the NOI seeks comments on: whether additional financial requirements should be imposed during original licensing, during relicensing, or both; if the requirements are imposed during relicensing, whether they should apply to both new major project licenses and subsequent minor project licenses; and whether FERC should reopen existing licenses to impose these requirements.¹⁹ The NOI also asks for comments on whether additional financial requirements should be included in other types of authorizations—for example, for “exemptions, amendment requests, and transfers.”²⁰

Finally, the NOI seeks comments on whether FERC should require licensees to actively reaffirm that they have adequate financial assurance instruments at periodic intervals during the license term, and, if so, how often. The NOI also seeks comments on whether FERC should require licensees to notify it if the “circumstances underlying their financial assurance instruments have changed.”²¹

Opportunity to Submit Comments

While FERC’s consideration of these issues is still at an early stage, the potential financial assurance requirements identified in the NOI could significantly impact licensees. As is often the case, the devil will be in the details. For instance, some licensees may want to argue that they should not be subject to the financial assurance mechanisms identified in the NOI, either because they have access to different tools to assure adequate financial resources (e.g., municipal licensees); because their project

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.* PP 13-15.

¹⁹ *Id.* P 11.

²⁰ *Id.*

²¹ *Id.*

operations pose much less safety risk (e.g., licensees of projects at dams owned and maintained by the federal government); or because the burden is disproportionate given the size of their project. All these considerations would be appropriate to raise in comments.

Comments on the NOI are due March 29, 2021. Please contact Spiegel attorneys William Huang, Katie Mapes, or Rebecca Baldwin for additional information, or if you would like to submit comments.

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