

Challenges of Hydroelectric Compliance: Best Management Practices for Licensees

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The owners and operators of hydroelectric projects face an increasingly costly and complex compliance regime imposed by the Federal Energy Regulatory Commission ("FERC" or "Commission") through licenses issued pursuant to Part I of the Federal Power Act ("FPA"). This paper provides an overview of the sources of those compliance obligations, FERC's oversight of hydroelectric projects, and the tools available to project owners and operators to overcome the challenges of hydroelectric compliance.

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Overview of Federal Regulation of Hydroelectric Power

The U.S. Constitution's Commerce Clause gives FERC the authority through the FPA to regulate the placement and operation of non-federal and privately-owned impoundment structures (dams and weirs) on waterways that affect navigable streams and waterways within the United States. Federally-owned impoundment structures are not subject to the FPA. As an independent federal agency, FERC has the specific authority delegated by Congress in the FPA and, in addition to the statute itself, that authority is expressed in (1) regulations issued by FERC, particularly Part 8 (Recreation) and Part 12 (Dam Safety); (2) licenses and permits issued by FERC (or its predecessor, the Federal Power Commission); and (3) various plans or protocols referenced in the project license that have been approved by FERC. The latter are considered to be license requirements and commitments of the licensee just as much as specific provisions spelled out in the license itself. In the event of apparent conflict among the statute, the license/permit and/or the plans/protocols approved by FERC, the hierarchy is that the statute is paramount, followed by the license and then the plan/protocol. Virtually all licenses are written to provide that their specific terms take precedence over any FERC regulation that may be interpreted to be in conflict.

Mechanisms for Licensee Compliance

The principle mechanisms by which a licensee complies with the FPA, the license and applicable regulations are (1) exercise of ownership rights in project property (i.e. property – particularly real property – defined as being within "the project boundary"); and (2) exercise of contractual rights under contracts with others by which some aspects of project construction or operation are carried out. Under the FPA, FERC can only hold the licensee accountable for compliance with the terms of the license or FERC's statute or regulations. FERC has no enforcement rights against any third parties who are not licensees.

Dictating the Terms of Compliance: The Project License

Although early licenses were much less detailed and contained few provisions relating to the environment or recreation, more modern licenses require compliance with a wide range of extensive and costly compliance obligations addressing a wide range of operational, environmental and recreational concerns. As a result of the 1986 amendments to the FPA, FERC relicensings and significant license amendments often result in the imposition of ever more costly conditions on the licensee, decreasing the total value of generation over the term of the license (which may vary from 30 to 50 years), and incorporate increasingly stringent compliance requirements proposed by other agencies, including agencies managing federally-owned lands, state and federal environmental resource agencies, and historic and cultural preservation offices. Moreover, the relicensing/license amendment process is responsive to the concerns of public interest groups and individuals over environmental, recreational and other impacts from hydroelectric projects.

Each license begins with standard license articles common to every license of a particular type (e.g. constructed or unconstructed). In addition to these standard articles (called "L-Forms"), the license contains additional articles that are crafted to fit the individual circumstances of the project.

Most compliance-intensive and costly license terms often result from mandatory conditions imposed under Sections 4(e) and 18 of the FPA, as well as protection, mitigation and enhancement ("PME") measures derived from the input of FERC Staff, resource agencies and stakeholders. Under Section 4(e) of the FPA, FERC is required by law to include license conditions proposed by federal land management agencies to protect the existing uses of any project lands held in federal trust. Section 18 of the FPA now enables the U.S. Fish and Wildlife Service and National Marine Fisheries Service each to exercise authority over fishway prescriptions that, if issued by these agencies, must be included in the FERC license to promote fish passage. Section 10(j) of the FPA also provides for resource agencies to recommend PME conditions for fish and wildlife resources, although inclusion of these conditions in the license is not mandatory.

State environmental protection departments also play a significant role in the conditioning of licenses. Section 401 of the Clean Water Act requires a licensee to acquire a water quality certificate from the state in which the project will discharge water before FERC may issue an original or new license, unless the state does not act within a year of the certification request. The courts have held that the FERC license must include any conditions specified in the final Section 401 water quality certificate, and that FERC has no authority to revise or reject any such conditions.

In general, FERC Staff, in enforcing the license, is reluctant to interpret mandatory conditions that were imposed under Sections 4(e), Section 18 or under the Section 401 certificate. If interpretation of any of these provisions is required in the course of administering

a license, FERC's preference will be to seek the conditioning agency's interpretation of its own language. FERC's only legal duty regarding mandatory conditions imposed by states or other agencies is to exercise its own authority in light of them, or to refuse to issue a license if it finds that it cannot simultaneously include the conditions and fulfill its own legal obligations under the FPA.

Compliance Obligations and FERC Oversight

FERC expects (and the law demands) a licensee to understand, observe and monitor license compliance requirements throughout the life of the license, regardless of the extent or complexity of those requirements. Thus, if there is any question about what sort of requirements a particular provision of the license imposes, it may be better to seek Staff guidance rather than risk non-compliance. However, Staff guidance with respect to ambiguous license requirements carries its own legal risks, and thus any decision to seek such guidance should be carefully considered in consultation with legal counsel.

While specific terms and conditions vary based on project specifics, recently issued new — and significantly amended — licenses often include, among other things, articles governing (1) project operations, (2) land use restrictions, (3) monitoring studies, (4) dam and project safety, (5) engineering and construction, (6) recreational uses of project waters and lands, (7) economic requirements and (8) a variety of issues related to the environmental effects of the project. License terms and conditions related to environmental effects may require, among other things, state water quality standard compliance, fish and wildlife protection, shoreline management plans, minimum flows and erosion control. License articles addressing these and similar issues typically will require the licensee to file study plans, mitigation plans, study schedules or other compliance filings with the Commission throughout the course of the license.

Still other compliance obligations also will require a licensee to seek Commission approval from time to time. Significantly, a licensee cannot modify project works or operations under the license without prior approval by FERC. Furthermore, FERC requires licensees to have an emergency action plan ("EAP") in place. In addition to providing detailed instructions for the operation of the project during an emergency and plans for notifying agencies and affected persons, the EAP must include plans for training project operators and other responsible personnel in the proper emergency response procedures and for periodic retraining actions.

FERC Enforcement Authority and Compliance Activities

Compliance with the terms and conditions of the project license and the Commission's rules and regulations applicable to all licensees is of significant concern for licensees due to the potential for sanction under FERC's enforcement authority. Under the FPA, the Commission has exclusive civil enforcement authority as it relates to violations of hy-

hydroelectric license requirements. Part I of FPA authorizes the FERC to assess civil penalties for violations of the FPA, FERC's regulations or a compliance order, and establishes specific procedures for assessment of civil penalties. Significantly, FERC may assess a penalty of up to \$11,000 for each day that each separate violation continues. However, at least as great a threat to licensees would be a FERC determination that a licensee failure of performance justifies the Commission imposing increased levels of surveillance of, and reporting by licensees regarding project operations.

The Commission's Office of Energy Projects ("OEP") is primarily responsible for ensuring that licensees are effectively complying with the terms and conditions of their licenses and applicable FERC rules and regulations. Within OEP, the Division of Hydro-power Administration and Compliance ("DHAC") and the Division of Dam Safety and Inspections ("DDSI") are responsible for monitoring and investigating compliance. DHAC is the general enforcement division of OEP while DDSI is specifically tasked with ensuring that project works related to power production (dam, powerhouse, power canals, penstocks, etc.) and public safety are maintained according to general requirements in 18 C.F.R. Part 12, DDSI's guidelines and project-specific directives.

Dam safety is a major priority for the Commission, particularly since many licensed hydroelectric projects began operating more than 50 years ago. DDSI inspects projects during construction and during the operational period of the license. These inspections verify the structural integrity of the dam, identify needed maintenance and safety issues, and generally review a licensee's compliance with the terms and conditions of the license.

DHAC reviews licensees' compliance with the conditions specified in their licenses and with Commission regulations. DHAC also reacts to complaints alleging that a licensee has failed to comply with license conditions. With an increasing number of terms and conditions in new and amended licenses that require ongoing compliance, DHAC's compliance activity has increased. DHAC's increased focus on compliance involves a mix of preventive, proactive and reactive strategies. DHAC's preventive strategies are designed to reduce instances of non-compliance and complaints and primarily take the form of monitoring and pre-filing consultation with licensees. Monitoring activities include environmental and public use inspections, and monitoring compliance with recreational requirements. Through site visits, DHAC reviews and observes the licensee's compliance with license conditions and seeks to identify potential problems and develop strategies to prevent the problems from occurring. The frequency of inspection depends on the compliance record of the licensee, and the complexity and number of license terms and conditions, among other factors.

Another aspect of DHAC's preventive strategy is its Licensee Assistance Program. As part of this program, DHAC staff meet with licensees and their representatives at project locations or Commission offices to discuss compliance-related issues that may be as minor as providing an answer to a single license article question. In more complex matters,

DHAC may hold an on-site conference with licensees and interested resource agencies to provide explanations and guidance concerning settlement agreements, operations, filing requirements and other compliance-related issues. Increasingly, DHAC's staff maintains regular contact with licensees, federal and state agencies, and environmental organizations, to ensure continued compliance.

DHAC's proactive strategies are designed to provide clear guidance to licensees on complying with various license conditions. DHAC regularly publishes guidance documents and technical information on its Web site to help licensees stay informed about programmatic requirements and developments.

However, most of DHAC's compliance activities are reactive in nature. DHAC will investigate reported instances of non-compliance, whether it is a self-report from the licensee or a report by a third party (e.g., resource agencies, non-governmental organizations and the general public). Self-reporting of violations is often a condition of the project license. The Commission's regulations also mandate self-reporting in several instances. Part 12 of the Commission's regulations, for instance, requires a licensee to report to DHAC staff any "condition affecting the safety of a project or project works" or any "modification" to the project.

FERC's reaction to a report of potential non-compliance varies depending on the nature of the requirement, the degree to which the actions of the licensee do not comply with the license requirements, and the licensee's compliance history. If a licensee has a good compliance record and/or the infraction is minor, FERC is not likely to treat the matter as an enforcement issue, but simply direct the licensee to correct the deficiency. However, if the violation is severe and/or the licensee has a record of non-compliance, DHAC is more likely to conduct a comprehensive investigation or issue a compliance order, which may lead to an enforcement action.

Best Management Practices for Ensuring Compliance

A licensee's record of compliance with FERC requirements and license terms and conditions typically is considered within the context of future licensing actions, and similarly may affect the level of scrutiny and oversight to which a licensee is subject, thereby also having significant economic implications. Accordingly, licensees have a strong incentive to implement best management practices ("BMPs") and other proactive measures calculated to ensure and maintain exemplary compliance records.

One such BMP is to firmly assign responsibility for license compliance to a particular individual or group within the licensee's business organization. Having a written organization chart that reflects this information will facilitate being able to demonstrate that assignment of responsibility in the event of a compliance audit or FERC investigation.

Another BMP, which is increasingly becoming mandatory, is the implementation of a Hydropower Compliance Management Program ("HCMP"). An HCMP generally contains a list of all actions necessary to meet a particular project's license terms and conditions, a schedule clearly showing when each action will be completed, a schedule of consultations with the requisite government agencies, and the names of the specific individuals from each agency who must be consulted¹. While DHAC often requires an HCMP through standard license article 501 of a license, many existing licenses do not have such a provision and FERC does not have a standard for determining when an HCMP will be included within a license. If an HCMP is required as part of a licensing or relicensing, however, an applicant usually must develop one within four months of the issuance of a license. Licensees may wish to voluntarily implement HCMPs regardless of a FERC requirement to do so.

FERC also recommends that licensees conduct ongoing environmental monitoring and inspection of their facilities so that FERC does not make a finding of non-compliance when it conducts environmental inspections of its own. The purpose behind FERC's environmental inspections is to evaluate a licensee's compliance with license requirements that obligate a licensee to enhance environmental resources associated with its project. FERC conducts environmental inspections regularly for projects with ongoing non-compliance issues or where there are significant environmental/public use issues, such as fish passage and wildlife mitigation areas. Training relevant personnel in proper monitoring measures may assist in avoiding compliance problems during an inspection by FERC. It also may be helpful to conduct additional training on how personnel should respond to an announcement of an upcoming inspection by FERC.

In addition to environmental monitoring, FERC conducts recreational monitoring to ensure compliance with FPA requirements for reasonable public access and recreational use of lands and waters associated with the project and any associated reservoir. In particular, FERC will rely upon information submitted by licensees as the starting point for its own investigations. For example, a Licensed Hydropower Development Recreational Report, also known as a Form 80, is required to be submitted by a licensee every six years, and FERC Staff will use the information in that report to track recreation at a project.

FERC also recommends, and in modern licenses requires, that licensees prepare and submit to FERC for approval a Shoreline Management Plan ("SMP"). SMPs are intended to provide a template to assist licensees in balancing recreation and environmental preservation in the ever-increasing development pressure on a project's shorelines. The preparation of an SMP should involve all stakeholders in the project, including non-governmental organizations, neighboring residents, state agencies, local municipalities,

¹. Although there are commercial software offerings designed around license compliance, each such program requires input of each license's unique requirements and conditions. A number of licensees have simply utilized generic spreadsheet programs with the same information, which appears to work equally well.

This memorandum is intended only as a general discussion of these issues. It is not considered to be legal advice. We would be pleased to provide additional details or advice about specific situations. For additional information on this important topic, please feel free to call upon your Dewey & LeBoeuf relationship partner.

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Indian Tribes and federal agencies such as the FWS, National Park Service, Forest Service and others with jurisdiction over the project's recreational activities. Generally, an SMP should include a description of the shoreline use classifications, monitoring programs, management policies and permit programs.

As regards Part 12 compliance, FERC recommends that dam owners implement an Owner's Dam Safety Program that sets forth the safety measures and related maintenance necessary to ensure safe operation of their dam. FERC has cited to the lack of an adequate Owner's Dam Safety Program as a significant contributing factor in the recent failure of several dams and has stated that owners who do not have adequate dam safety programs require a higher level of review by regulators. An Owner's Dam Safety Program generally is comprised of five elements: (1) acknowledgment that dam safety is primarily the responsibility of a dam owner; (2) establishment of open lines of communication to facilitate the reporting of safety concerns; (3) designation of a chain of responsibility for the components of ensuring dam safety; (4) recognition that a dam is a company asset that presents a potential hazard and creates a duty of care; and (5) creation of an institutional knowledge base regarding safety concerns. FERC has developed a self assessment tool designed to assist owners in evaluating the effectiveness of their own dam safety programs.

In order to help ensure successful compliance with all monitoring requirements and other BMPs, licensees may wish to become actively involved in FERC's Licensee Assistance Program. The program is not necessarily formulaic in nature, but rather consists of establishing open lines of communication between the licensee, FERC and other regulatory agencies, thereby creating a flexible resource for any licensee seeking to be proactive in maintaining a high standard of compliance.

Conclusion

Hydroelectric licenses issued pursuant to Part I of the Federal Power Act impose a wide range of both short and long-term compliance obligations that are driven by often conflicting mandates to authorize the generation of power while also protecting the environment and recreational resources. Reflecting the licensing process that produced them, the challenges of ongoing compliance faced by FERC licensees are increasingly complex and the failure to meet those challenges can be increasingly costly. A coordinated and proactive approach by a licensee that incorporates one or more of the emerging BMPs discussed above can assist in understanding intimately and then planning for the myriad of obligations attendant to a modern FERC license.

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