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FERC Seeks Industry Input on Financial Assurances for Hydro Projects

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On January 19, 2021, the Federal Energy Regulatory Commission ("FERC" or "Commission") issued a ***Notice of Inquiry*** (NOI) requesting industry input regarding the scope and necessity of potential financial assurances that it should impose on hydroelectric projects seeking FERC licenses.[1] In opening this NOI, the Commission noted recent experiences where a lack of funding for needed dam safety repairs led to the recent dam failures near Midland, Michigan in May of 2020. This proceeding has been instituted to determine whether additional Commission requirements for financial assurances by licensees might ensure, or at least increase the probability, that funds would be available for dam safety and repairs throughout the term of the license.

The NOI noted that the Commission currently requires licensees to file financing plans prior to beginning project construction to ensure the project will remain financially viable during the construction phase as well as for maintenance after construction has been completed. Although in rare instances the Commission requires licensees to file a "financial assurance plan" wherein the project owner is required to obtain a bond or a bond-equivalent to ensure that the licensee has the economic means to continue operation, normally the Commission does not do that. Rather, the Commission evaluates the economics of a project when the license is issued, as well as the licensee's financial well-being, and relies upon the licensee's acceptance of the license, together with the investment commitments inherent in that, as sufficient incentive for there to be money in the future to cover needed repairs.

This NOI seeks information to assist the Commission in determining whether it might incorporate, either in licenses or in regulations, additional mechanisms that would provide financial resources for licensees to deal with unexpected safety or environmental issues. The Commission proposes three possible alternatives for action, but also encourages commenters to propose other alternatives. The three possible solutions include (1) requiring licensees to obtain bonds to cover the costs of safety measures and project operation and maintenance, (2) establishing an industry-wide trust or remediation fund or requiring licensees to maintain an individual trust, escrow, or remediation fund, or (3) requiring licensees to obtain insurance policies for unforeseen safety hazards or dam failures.

Although ensuring that licensees will have the funds necessary to do dam safety repairs or remediate unforeseen environmental problems with a project represents a real policy issue, it is unclear how much leeway the Commission will have in devising a solution given the existing structure of Part I of the Federal Power Act. All of the mechanisms proposed in the NOI entail imposing additional costs on new licensees, which of itself could hinder additional growth in new hydro renewables, and the Commission's authority to impose additional regulatory requirements on existing licensees is limited. Striking a balance will be a challenge.

If you have additional questions about how this Notice could impact you or your business, the Bracewell team has significant experience in the hydroelectric space and would be happy to address your questions or concerns.

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[1] *Financial Assurance Measures for Hydroelectric Projects*, Notice of Inquiry, 174 FERC ¶ 61,039 (2021)