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FERC Revises Filing Requirements for Certain Small Hydroelectric Facilities.

On July 15, 2021, the Federal Energy Regulatory Commission ("Commission" or "FERC") issued a Final Rule amending its regulations pertaining to: (1) the information required to be filed with a notice of intent to construct a qualifying conduit facility and (2) the licensing requirements applicable to major projects up to 10 megawatts (MW). The Final Rule was issued to align the Commission's regulations with changes to the Federal Power Act ("FPA") that were made as part of the Hydropower Regulatory Efficiency Act ("HREA") of 2013.

Enacted in August 2013, the HREA amended section 30 of the FPA to create a subset of small conduit hydroelectric facilities that are excluded from the jurisdiction of the FPA. Under those amendments, any party proposing to construct a "qualifying conduit hydropower facility"—a facility that uses "only the hydroelectric potential of a non-federally owned conduit,"—must file a notice of intent with FERC, demonstrating that the proposed project meets certain qualifying criteria. In instances where a dam would be constructed as part of the facility, the Commission required an applicant's notice of intent to include a profile drawing showing that the conduit—rather than the dam—creates the hydroelectric potential. The Commission clarified this requirement in a 2015 order, Soldier Canyon Filter Plant, in which it concluded that the relevant factor in its consideration of qualifying conduit facilities is whether the facility would use water "within a conduit operated for the distribution of water for agricultural, municipal, or industrial consumption and not primarily for the generation of electricity," and that the presence of an upstream dam is not relevant to this determination, even where the head from the dam contributes to the facility's generating potential.

A separate provision of the HREA amended section 405 of the Public Utility Regulatory Policies Act of 1978 ("PURPA"), which provided that certain hydropower projects that produce 5 MW or less were exempted from the licensing requirements of Part I of the FPA. The HREA amended section 405 to increase the limit for exemptions to 10 MW.

On February 18, 2021, the Commission issued a Notice of Proposed Rulemaking ("NOPR") in which it proposed revisions to its regulations that would: (1) remove the requirement that a notice of intent to construct a qualifying conduit include a profile drawing depicting the source of hydroelectric potential, in cases where a dam would be constructed as part of the facility; and (2) extend the licensing requirements previously applicable to major projects up to 5 MW to major projects 10 MW or less, pursuant to the revised definition of a "small hydroelectric power project" enacted in the HREA 2013.

In its Final Rule, the Commission adopted the changes set forth in the NOPR. It noted that, based on the language in Soldier Canyon Filter Plant, the profile drawings of dams would no longer be required as part of the notice of intent submittal for qualifying conduits. The Final Rule also included changes to the licensing and amendment filing requirements in Parts 4 and 5 of the Commission's regulations to extend the requirements that previously applied to major projects up to 5 MW to major projects 10 MW or less, to be consistent with the revised definition of a "small hydroelectric power project" under the 2013 HREA. The Commission's Final Rule provided that such a change is

appropriate to “expedite hydropower development by easing the burden of preparing an application for license and by assisting the Commission in more rapid processing of applications.” As part of the Final Rule, the Commission made revisions to 18 C.F.R §§ 4.40–41; 18 C.F.R. §§ 4.50–51; 18 C.F.R. §§ 4.60–61; 18 C.F.R. §§ 4.70–71; 18 C.F.R. §§ 4.200–202.

As of this drafting, the Final Rule had not yet been published in the Federal Register. The Final Rule will be effective 60 days after such publication.

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