



# Regulatory Matrix

Update 11

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## Table of Contents

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FERC: Study on Grid Reliability Released, Comments Sought .....	3
CEQ: Final NEPA Guidance Document Released .....	3
FERC-Army Corps: Memorandum of Understanding .....	4
FERC: NOPR on Integration of Variable Renewable Energy Resources.....	4
Small Hydro Council.....	4
NMFS: Draft Penalty Policy.....	4
NMFS: ESA Listing of Atlantic Sturgeon.....	5
Bureau of Reclamation: Draft Hydropower Resource Assessment.....	5
FERC: ILP Effectiveness Conference .....	6
FWS: Expansion of Bull Trout Critical Habitat .....	6
DOE: Request for Information on Advanced Hydropower Technologies.....	7
DOE: Loan Guarantee Solicitation for Renewables Manufacturers .....	7
Colorado-FERC Memorandum of Understanding on Small Hydro.....	8
EPRI GHG Reservoir Emissions Study .....	8
FERC: Other Federal Agency Annual Charges.....	8
Department of Energy-National Park Service Hydrokinetic Report .....	8
NHA Tax Manual.....	9
DOE-ACE-DOI Memorandum of Understanding.....	9
Pumped Storage Development Council .....	9
Trial Type Hearings .....	10
NHA State RPS Report .....	11
Legal.....	11
PPL Montana, L.L.C. v. State of Montana, 2010 MT 64 (Mar. 30, 2010).....	11
Friends of the Everglades v. South Florida Water Management District.....	11
Hoopa Valley Tribe v. FERC.....	12
City of Idaho Falls, Idaho, et al. v. FERC.....	12
Miscellaneous Regulatory News .....	12
Obama Administration Energy Posts Nominations and Appointments .....	12
Regulatory Meetings .....	12
Ann Miles, FERC.....	12

## **FERC: Study on Grid Reliability Released, Comments Sought**

The Federal Energy Regulatory Commission issued for public comment a study undertaken by the Lawrence Berkley National Lab that examines frequency response of the bulk power system. The aim of the study is to develop an objective methodology to evaluate the reliability impacts of varying resource mixes, including increased amounts of renewable resources.

The Study suggests that renewable energy can be added to the country's electricity grid without harming reliability. It focuses on frequency response, the ability of the grid to respond to changes in system frequency. The study does not address how much renewable generation the domestic electric grid can accommodate without jeopardizing safety and reliability.

Comments will be due to FERC on March 7, 2010. To submit comments, follow the eFiling link on [www.ferc.gov](http://www.ferc.gov). The docket number is AD11-8-000.

## **CEQ: Final NEPA Guidance Document Released**

The White House Council on Environmental Quality (CEQ) released a draft guidance memorandum on Feb. 18 proposing to require federal agencies to consider greenhouse gas (GHG) emissions and climate change when conducting National Environmental Policy Act (NEPA) reviews.

NHA filed comments on May 24 with CEQ on its draft NEPA guidance document. In the comments, NHA urged CEQ to recognize the GHG reduction benefit of hydropower generation and the role of hydropower in integrating variable renewable resources. NHA also commented on the value and limitations of current climate change modeling.

Full comments can be found on the Regulatory Affairs side of the NHA website.

On January 6, 2011, CEQ released their final NEPA Guidance Clarifying Appropriateness of "Findings of No Significant Impact" and Specifying When There is a Need to Monitor Environmental Mitigation Commitments and Guidance Clarifying Use of Categorical Exclusions.

The Clarifying Guidance affirms that agencies should: a. commit to mitigation in decision documents when they have based environmental analysis upon such mitigation; b. monitor the implementation of and effectiveness of mitigation commitments; c. make information on mitigation monitoring available to the public, and; d. remedy ineffective mitigation when the Federal action is not yet complete.

The Categorical Exclusions Guidance clarifies requirements of NEPA, and the CEQ regulations implementing NEPA, regarding categorical exclusions. Specifically, it suggests that Agencies should: a. utilize information technology to inform the public about new or revised categorical exclusions and their justifications; b. remain alert to new conditions and information that would cause an agency to reconsider a categorical exclusion; c. consider further public documentation and disclosure in applying established categorical exclusions, particularly where they may implicate extraordinary circumstances; and d. in general, review their existing categorical exclusions at least every seven years to avoid the use of outdated NEPA procedures.

These documents can be found on CEQ's website at [www.whitehouse.gov/administration/eop/ceq/initiatives/nepa](http://www.whitehouse.gov/administration/eop/ceq/initiatives/nepa)

### **FERC-Army Corps: Memorandum of Understanding**

The Federal Energy Regulatory Commission and the Army Corps of Engineers are weeks away from signing a memorandum of understanding (MOU) regarding hydropower development on Corps facilities.

### **FERC: NOPR on Integration of Variable Renewable Energy Resources**

The Federal Energy Regulatory Commission (FERC) will issue a Notice of Proposed Rulemaking (NOPR) on the Integration of Variable Energy Resources (VER). The NOPR proposes that public utility transmission providers be required to offer all customers the option to schedule transmission service at 15-minute intervals. It will also propose that customers whose generating facilities include variable energy provide meteorological and operational data to transmission providers. Transmission providers will be encouraged to implement power production forecasting and have the opportunity, through a newly proposed schedule, to recover costs associated with the integration of variable energy resources.

Comments are due January 31, 2011.

### **Small Hydro Council**

Sixty-four hydro professionals participated in the first-ever Small Hydropower Workshop sponsored by NHA's Small Hydro Council, held in Manchester, New Hampshire on Nov. 17. In the first session, Shana Murray from FERC and Rita Hayen from TRC Companies discussed the FERC Process for small hydro (covering licensing, permitting, exemptions and amendments). In the second segment, Maureen Winters from Normandeau and Randy Dorman from Kleinschmidt provided tips for working with state 401 agencies, resource agencies and the Army Corps. Segment three was led by Jeanne Hilsinger from Mavel and Rajesh Dham from the DOE, addressing enhancements in equipment and technology for small hydro. In the fourth segment, Chuck Alsberg from NAH and Paul Duchenev from HG&E provided tips on operations and maintenance. The fifth segment addressed dam safety issues for small hydro with Jerry Cross from FERC-NYRO and Jim Thrasher from AEP presenting. In the sixth segment, Dave Youlen from Free Flow Power and Sonya Reiser from Knight Piésold discussed financing small hydro. Attendees at the Workshop engaged in open discussion of the issues at the end of each segment's presentations.

FERC held a Small Hydropower Webinar on November 10, 2010. The purpose of the webinar was to introduce the new Small/Low-Impact Hydropower Program website and walk participants through all phases of the licensing and exemption processes using the website. Specifically, the webinar provided the opportunity for participants to learn about the small hydropower licensing process, find out how to get more information and assistance from FERC, and ask questions.

The Small Hydro Council has released its Initial Report on proposed solutions to remedy barriers to development of small hydro. Included in the document are policy or process changes, regulatory changes, and legislative changes. Policy changes contained within the report do not necessarily represent policies yet adopted by the NHA Board. The full report can be found on NHA's website.

### **NMFS: Draft Penalty Policy**

The National Marine Fisheries Service has issued its draft policy for the Assessment of Civil

Administrative Penalties and Permit Sanctions for public review and comment.

The draft penalty policy is intended to provide guidance for the assessment of civil administrative penalties and permit sanctions under the statutes and regulations enforced by NOAA.

The purpose of the policy is to ensure that:

- civil administrative penalties and permit sanctions are assessed in accordance with the laws that NOAA enforces in a fair and consistent manner;
- penalties and permit sanctions are appropriate for the gravity of the violation;
- penalties and permit sanctions are sufficient to deter both particular violators and the regulated community from committing violations;
- economic incentives for noncompliance are eliminated; and
- compliance is expeditiously achieved and maintained to protect natural resources.

Comments were due by **Dec. 20, 2010.**

### **NMFS: ESA Listing of Atlantic Sturgeon**

The National Oceanic and Atmospheric Administration and National Marine Fisheries Service (NMFS) proposed listing five distinct population segments (DPSs) of the Atlantic Sturgeon (*Acipenser oxyrinchus oxyrinchus*) as endangered: Gulf of Main, New York Bight, Chesapeake Bay, Carolina and South Atlantic.

NMFS sought comments concerning:

- The abundance of Atlantic sturgeon in the various river systems in the DPSs;
- The mixing of fish from different DPSs in parts of their ranges, particularly in the marine environment;
- Information concerning the viability of and/or threats to Atlantic sturgeon in the Carolina and South Atlantic DPSs; and
- Efforts being made to protect Atlantic sturgeon in the Carolina and South Atlantic DPSs.

As this is a proposed rule, stakeholders will have until Jan. 4, 2011 to submit comments on the listing. To submit comments please see the Federal Register Vol. 75, No. 193 from Oct. 6, 2010.

### **Bureau of Reclamation: Draft Hydropower Resource Assessment**

Approximately 210 MW of installed capacity could be developed and 962,000 MWh of energy could be produced annually at 65 existing Bureau of Reclamation (Reclamation) facilities, according to Reclamation's draft assessment released this month.

The "Hydropower Resource Assessment at Existing Reclamation Facilities" (HRA) draft report is an assessment of the economic and technical potential for hydropower development at existing Bureau of Reclamation owned non-powered dams and structures. It identified a total of 530 sites, 192 of which have potential for hydropower development and 65 were found to be economically cost effective, with current "green incentives". However, 93 sites were excluded from the study because there was no available hydrologic data.

The report is available for public review and comment and can be found here:

<http://www.usbr.gov/power/>. NHA staff is currently working with the Regulatory Affairs Committee to file comments

**Written comments must be submitted by Jan. 27, 2010.** Send written comments to Mr. Michael Pulskamp, Bureau of Reclamation, Denver Federal Center, Bldg. 67, P.O. Box 25007, Denver, Colorado 80225, or e-mail to [mpulskamp@usbr.gov](mailto:mpulskamp@usbr.gov).

### **FERC: ILP Effectiveness Conference**

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Licensees, agency representatives, and stakeholders gathered on Nov. 3 at FERC headquarters for the final integrated licensing process (ILP) effectiveness workshop.

Facilitated by Kearns and West with Commission staff participating, the workshop examined several areas:

- Study Criteria
- Study Plan Development and Review
- Post-Filing Coordination
- General Good Process Ideas
- Other Issues, New Issues and Ideas

The goals of the workshop were to: share what the ILP review team has learned from the earlier regional workshops about implementing the integrated licensing process; seek additional input and build on the feedback already gathered; and identify what works and explore ideas and solutions to better implement the ILP within the framework of the existing regulations.

NHA staff attended the event and a FERC transcript of is available online. A good discussion was held on all the topics and could have lasted well beyond the half-day workshop. Of particular note were the comments of the agencies and stakeholders, which consistently focused on the large amount of up-front involvement needed, the lack of manpower and resources, and the challenges experienced in meeting various deadlines.

Calls for more flexibility by FERC on deadlines, or adjustments of timeframes within the process, came from several attendees, including industry members.

NHA filed comments with FERC in December in response to the conference. In the comments, NHA addressed concerns over proposals to expand the ILP timeframe, advocated for early participation on the part of all stakeholders, and urged FERC to step up education and outreach to ensure stakeholders are prepared adequately to go through the complex process.

### **FWS: Expansion of Bull Trout Critical Habitat**

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The U.S. Fish and Wildlife Service on October 13 expanded critical habitat protections for the bull trout, which will restrict federal approval of logging, mining and grazing on large areas of Western public lands.

The final rule extends the critical habitat of streams to five times that of the previous 2005 rule to up to

19,000 miles and increases the size of protected lakes and reservoirs by 3 times, to 490,000 acres. The protected waters are located in the states of Washington, Oregon, Idaho, Montana and Nevada.

For more detail on the exact changes made to the critical habitat, please visit [www.fws.gov/pacific/bulltrout](http://www.fws.gov/pacific/bulltrout) and click the “Critical Habitat” link.

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### **DOE: Request for Information on Advanced Hydropower Technologies**

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The DOE and the Bureau of Reclamation (BuRec) requested input from the public on new, advanced hydropower technologies that are ready for demonstration and testing, or that are worthy of additional research and development investments. The term “advanced technology” means products that are not already widely available commercially and that offer substantial energy and environmental benefits to renewable energy portfolios in the U.S.

DOE, BuRec, and the U.S. Army Corps of Engineers are studying ways to increase hydro generation and capacity in the U.S. Research and development activities are underway to promote new hydro technologies, including fish-friendly and low-head turbines. The information being sought under this RFI is intended to assist DOE, Reclamation, and the hydropower industry in further developing conventional hydropower in the U.S.

The RFI was intended to supplement the information received at two technology summit meetings that were held in April and June 2010 that explored new directions in hydropower development and requests input for three topic areas: small hydropower technology; environmental mitigation technology; and demonstration-ready hardware and software.

Comments were due October 1, 2010.

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### **DOE: Loan Guarantee Solicitation for Renewables Manufacturers**

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The U.S. Department of Energy (DOE) issued a solicitation on Aug. 12 inviting renewable energy manufacturers to apply for loan guarantees to finance projects and facilities located in the United States.

DOE will guarantee loans on projects that manufacture commercial technology products that support the generation of electricity or thermal energy from renewable resources; have project costs greater than \$75 million; are able to obtain a credit rating equivalent of ‘BB’ or better from Standard & Poor’s or Fitch, or ‘Ba2’ or better from Moody’s, as evaluated without the benefit of any DOE guarantee or any other credit support; and will create or retain jobs in the United States.

The Loan Guarantee Program for renewables was established under section 1705 of the American Recovery and Reinvestment Act of 2009.

NHA staff met with the staff of the Loan Guarantee Program in August. They expressed great interest in working with the hydropower sector to receive applications for this solicitation and others through the LGP.

The first Part I submission deadline was September 30, 2010. To find the solicitation, go to [www.fedconnect.net](http://www.fedconnect.net) and search using the reference number DE-SOL-0002197.

### **Colorado-FERC Memorandum of Understanding on Small Hydro**

On Aug. 25, 2010, FERC and the State of Colorado entered into an MOU to streamline and simplify the authorization of small scale hydropower projects.

The purpose of the MOU is to simplify the regulatory review of small hydro projects, using a pilot program proposed by Colorado to identify and test opportunities to streamline procedures. As such, Colorado will become a “proving ground” for responsible development of small hydropower projects.

Through its pilot program, Colorado will prescreen projects, based on criteria agreed to in the MOU, to ensure that they qualify for either conduit or 5MW exemptions that FERC has licensing authority over. Additionally, Colorado will consult with relevant federal and state agencies, tribes, and interested stakeholders in order to ensure an efficient process. In response, the Commission agrees to waive the 1st and 2nd stages of consultation and utilize an accelerated timeline for the exemptions. The program will continue until 20 projects have gone through the process, and after judging its successfulness, a decision will be made on whether the process will be continued.

### **EPRI GHG Reservoir Emissions Study**

In June, the Electric Power Research Institute (EPRI) completed and released its report entitled “The Role of Hydropower Reservoirs in Greenhouse Gas Emissions”.

In the EPRI report, they found that “actual or potential reservoir GHG emissions by the U.S. hydropower industry are currently indefinite. The data clearly indicates that reservoir gross emissions of GHG are not zero. Whether there is a net emission of GHG (defined as gross emissions from current reservoir operation minus gross emissions from the former river and terrestrials ecosystems replaced by the reservoir) is less certain because few studies have measured or estimated both emission and uptake.” The full report can be found online at [www.epri.com](http://www.epri.com) searching for report number 1017971.

EPRI’s next step will be field sampling of reservoirs, a project funded by the Department of Energy, and will take place between 2011 and 2012. Although targeted to private and public utilities, any other company, public agency or non-profit can participate in the project. Industry contribution to the project is targeted at \$500,000. If your company is interested in participating, please contact Doug Dixon at [ddixon@epri.com](mailto:ddixon@epri.com) or 804.642.1025.

### **FERC: Other Federal Agency Annual Charges**

The Federal Energy Regulatory Commission has released its annual charges for the Other Federal Agencies for FY 2009.

The Commission receives an annual appropriation from Congress to defray its operating costs and recovers 100 percent of this appropriation through the collection of annual charges and filing fees. These annual charges and filing fees are assessed to recover costs incurred by the Commission in the performance of its regulatory responsibilities.

For a full listing of charges, please visit <http://www.ferc.gov/industries/hydropower/annual-charges.asp>.

### **Department of Energy-National Park Service Hydrokinetic Report**



The Department of Energy (DOE), National Park Service (NPS) and Hydropower Reform Coalition (HRC) invited stakeholders to review the “Hydrokinetic Energy Projects & Recreation: A Guide to Assessing Impacts” and submit input. This paper provides guidance on how to study and minimize recreation impacts from hydropower technologies.

The report reviews several recreation management and impact assessment concepts, including:

- providing opportunities for recreation experiences through management of social, biophysical, and managerial setting conditions;
- distinctions between descriptive and evaluative information;
- the importance of assessing trade-offs between potential alternative projects;
- distinctions between direct and indirect effects; and
- a “progressive approach” of analysis that matches the amount of study, monitoring, and mitigation proportional to a project’s likely impact.

The document was sponsored by the United States Government (DOE and NPS) in cooperation with the Hydropower Reform Coalition.

After reviewing the report, NHA staff and the Ocean, Tidal, and New Technologies Council decided not to submit comments at this time, but encouraged individual members to respond if interested.

### **NHA Tax Manual**

NHA partnered with Ernst and Young to create a Hydropower Tax Manual. This manual can serve as an important tool to begin your research into how to utilize the various federal incentives and grow your hydropower resource. NHA members may purchase the manual for \$75. To order, or for more information, contact Diane Lear at [diane@hydro.org](mailto:diane@hydro.org).

### **DOE-ACE-DOI Memorandum of Understanding**

On Wednesday March 24, the Department of the Interior, Department of Energy and the Army Corps of Engineers signed a Memorandum of Understanding, agreeing to focus on increasing energy generation at federally-owned facilities and explore opportunities for new development of low-impact hydropower.

The MOU signed by the three agencies establishes a particular plan of action with specific deadlines. It includes a realistic assessment of growth opportunities on the federal system with a report by October of this year; a commitment to upgrade federal facilities and demonstration of new technologies at existing locations; coordination of research and development on advanced technologies; and increasing generation through low-impact and sustainable development.

The text of the MOU can be found here: <http://www.hydro.org/Federal%20Hydro%20MOU%202010.pdf>

On June 14<sup>th</sup>, NHA sent a joint letter with the Hydro Reform Coalition to Interior, Energy and the Corps urging them to support the creation of a National Hydropower Coordinating Collaborative as an open, neutral forum that would promote transparent dialogue and collaboration among federal and state agencies, environmental NGOs, the hydropower industry, and other stakeholders with an interest in hydropower.

### **Pumped Storage Development Council**

In association with the Northwest Hydroelectric Association (NWA) and the Bonneville Power Administration (BPA), NHA's Pumped Storage Development Council held a meeting on Feb. 18 in Portland, OR to examine the need and potential for new projects in the Northwest.

MWH's Michael Manwaring presented the findings of a Council survey on ancillary benefits that described the various markets, or lack thereof, across the country's regional transmission organizations.

In further discussion, the group decided to move forward on a white paper highlighting the ancillary benefits pumped storage projects provide, the need for incentives to support development of new projects, and to increase the recognition for the support current projects already supply the grid.

Mark Jones of BPA discussed the ongoing studies Bonneville is conducting to evaluate the feasibility of new projects. NHA's Jeff Leahey reported on the Bureau of Reclamation's examination of two potential new Northwest pumped storage projects as well. Leahey also provided an update on NHA's work to secure an investment tax credit (ITC) and Clean Renewable Energy Bonds (CREBs) program eligibility for pumped storage development costs.

NHA staff and Council leadership participated in the DOE's 2-day summit on pumped storage barriers. Discussed at the meeting were financial markets, technology research and development, and regulatory treatment of pumped storage.

Currently, the Council leadership is working with NHA staff to get comments to DOE and the Energy Information Agency on hydro project cost estimates to better inform how the agency calculates growth potential in the industry.

### **Trial Type Hearings**

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The Government Accountability has been asked by the majority staff of the Senate Energy and Natural Resources Committee to draft a report on the implementation of trial-type hearings. On July 15, 2009 NHA staff met with GAO to answer their questions and encouraged them to speak with industry members.

The GAO has completed its work and gave NHA Staff and members two opportunities to view the report in mid-June 2010. The report sought to determine the extent to which licensees and other non-federal stakeholders used section 241 provisions and their outcomes and describe federal and non-federal stakeholders' views on section 241's impact on the process. It also offered two recommendations: to direct agencies where proposed alternatives were not adopted to include in the written statement filed with FERC its reasons for not doing so and; issue final rules governing the use of section 241 after providing an additional period for notice an opportunity for public comment.

After careful review, NHA filed comments with the GAO on July 9, 2010. NHA strongly endorsed these recommendations because they offer further comment on a process that the industry now has experience with and adds greater accountability and transparency to the alternative proposals process. NHA's comments will be included in the report to Congress and the GAO will include its comments on our comments in the report.

In September, the report was released to Senator Jeff Bingaman, the Congressional requestor of the report and was thus released publicly. NHA staff distributed the report to the membership. It may also

be found on GAO's website under the reference number GAO-10-770

## **NHA State RPS Report**

The NHA State RPS Report was updated on September 1, 2010 and is available on the Regulatory Affairs webpage on the members' side of the NHA website. The next update will be available in advance of the NHA Conference in April.

## **Legal**

### **PPL Montana, L.L.C. v. State of Montana, 2010 MT 64 (Mar. 30, 2010)**

**Procedural History:** District Court Decision: Jun. 13, 2008; Argued before the MT Supreme Court: September 16, 2009; Submitted: October 27, 2009; **Decided: March 30, 2010.** PPL filed a petition of certiorari with the U.S. Supreme Court: August 12, 2010. NHA filed a joint amicus brief supporting the cert petition: September 15, 2010.

**Issues:** The case involves interpretation of the Montana constitution and state law regarding whether hydropower project owners are required to pay the State for the use of state-owned lands (riverbeds) while appropriating water for the beneficial use of hydropower production. PPL claimed that the right to appropriation includes the right to the means of appropriation—in this case, the dams – and asserted it cannot be assessed rent for its occupancy of state lands, as such occupancy is an incident of its lawful right to appropriate water. The District Court had found that PPL was required to compensate the State.

**Result:** The Montana Supreme Court affirmed the decision of the District Court, finding that PPL is required to pay the State compensation for the use of state-owned riverbeds. The court disagreed with PPL that its use and appropriation of the water, and the incidents necessary to enjoy such appropriation, affect or limit the State's ownership interests in the riverbeds, the State's ability to subject such use to the requirements of Montana law, or its ability to seek compensation for an appropriation of water occurring entirely upon public lands.

**Update:** After PPL's cert petition, NHA along with Edison Electric Institute and Snohomish County PUD filed an amicus brief urging the Court to take the case. The brief argued that the MT Supreme Court erred in its analysis of the "navigability" issue, when it ruled that present-day navigability was the test for state ownership of the riverbed instead of navigability at the time the State was admitted to the Union.

On November 1, 2010, the Supreme Court sought the view of the Obama Administration on the case. The fact that the Court did so indicates a high interest in the case and may also indicate a preference to take the case for oral argument. The Administration has yet to file its response.

### **Friends of the Everglades v. South Florida Water Management District**

The Supreme Court on November 29, 2010 rejected a petition for cert in this case, which concerns the question of whether the Clean Water Act requires permitting in order to pump water from one body of water to another – an inter-basin water transfer.

NHA has monitored this issue and participated in various forums including the filing of an amicus brief in

a related case, *South Florida Water Management District v. Miccosukee Tribe of Indians*, as well as providing comments on the EPA's proposed rule for water transfers.

### Hoopa Valley Tribe v. FERC

The United States Court of Appeals for the D.C. Circuit on December 28 denied the Hoopa Valley Tribe's petition for review of a FERC order denying interim conditions at the Klamath Hydroelectric Project. The Tribe had requested that FERC immediately impose in the annual license the ramping rate and minimum flow requirements that Interior had filed as section 4(e) conditions during relicensing.

FERC had determined that a request for interim conditions on an annual license should be examined in the same manner as a request to reopen an existing license. Under that standard, FERC will impose interim conditions if the project has "unanticipated serious impacts" on fishery resources.

The Tribe sought judicial review of FERC's order denying interim conditions, but the D.C. Circuit denied the Tribe's petition on several grounds.

### City of Idaho Falls, Idaho, et al. v. FERC

The U.S. Circuit Court of Appeals for the D.C. Circuit on January 4, 2011 held that FERC should have opened up the process to notice and comment when it changed its methodology for calculating the federal land use fees that operators have to pay.

The three-judge panel ruled unanimously that when FERC abandoned the methodology it had used since 1987 it was required to seek public comment. When FERC adopted a different schedule in order to reflect the changes in land values over the years, it was significant enough of a shift to constitute a rulemaking, which therefore warranted notice and comment, Judge David Tatel wrote in the court's opinion.

## **Miscellaneous Regulatory News**

### Obama Administration Energy Posts Nominations and Appointments

#### Regulatory Meetings

#### Ann Miles, FERC

Staff met with Ann Miles of FERC on January 6, 2011 to discuss several issues, including the FERC/Corps MOU, FERC/BuRec MOU, update on licensing issues, as well as outcomes of the ILP review.

As a result of this meeting, FERC will begin to provide information on new generation to come on line each year. Information of this nature has never been available publicly before.