



Regulatory Matrix

Update 14

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National Hydropower Association
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FWS: Petition to List as Threatened the American Eel

On Sept. 29, the Fish and Wildlife Service (FWS) published a notice for a 90-Day Finding To List the American Eel (*Anquilla rostrata*) as Threatened under the Endangered Species Act.

FWS found that the petition presented substantial information that listing the species may be warranted. The basis on which to have this review is the potential for climate change to be affecting eels due to ocean warming.

Previously, the FWS reviewed the status of the American Eel in 2004 and 2007. Both times, they determined listing was not warranted. In those findings, they concluded that hydropower operations in the eels' habitat, while it resulted in mortality of sometimes thousands of eel, were not a significant contributor to the species' population. The noticed published in the Federal Register reinforced these findings.

NHA will discussed this issue as part of its next regular regulatory/compliance call on Oct. 12. A call will be held on October 21 to further discuss NHA's possible response. Please let contact NHA's Matt Nocella if you are interested in participating at matt@hydro.org.

FERC-Colorado Small Hydro MOU

The first approval of a small hydropower project under an agreement between the state of Colorado and the Federal Energy Regulatory Commission was issued Sep. 14. The project received approval in just two months as a result of the streamlined procedures contained in the memorandum of understanding (MOU).

The 23 kW project will be located on an existing irrigation pipeline near Meeker, CO.

FERC signed the MOU with Colorado in Aug. 2010 after it observed increasing interest to develop small, low head hydropower. Under the agreement, Colorado would develop a pilot program to test options for simplifying and streamlining procedures for authorizing conduit exemptions and small 5MW or less exemption projects while ensuring environmental safeguards.

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 agreed to waive the first and second stages of consultation and utilize an accelerated timeline for the exemptions.

The program will continue until 20 projects have gone through the process. After judging its successfulness, a decision will be made on whether the process will be continued.

NEPA: Categorical Exclusions

On Oct. 3, 2011, the Department of Energy (DOE) released a set of rule changes concerning the types of projects and methods by which it would issue categorical exclusions under the National Environmental Policy Act (NEPA). The last time the NEPA regulations were revised was in August of 2003. The rule changes announced on October 3rd amend the DOE's existing regulations at 10 CFR part 1021.

Below are three of the new categorical exclusions that are relevant to hydropower activities. These are summaries and do not necessarily capture every requirement of the exclusion. Please see the full Notice of Final Rule: http://energy.gov/sites/prod/files/DOE_NOFR_092711_FINAL%20signed.pdf

- 1) Drop in run-of-river hydropower projects are now eligible for categorical exclusions provided they meet three requirements:
 - a. The project must involve no water storage or diversion from the stream or river and must not have the potential to significantly impact water quality, flow, temperature, or volume
 - b. The project must be located up-gradient of an existing anadromous fish barrier that is not planned for removal and where fish passage retrofit is not planned.
 - c. The project must not have the potential to significantly impact threatened or endangered species.
- 2) Small-scale renewable energy research and development and pilot projects in aquatic environments are now eligible for categorical exclusions provided that:
 - a. Covered actions would not occur in areas of hazardous natural bottom condition or within an established marine sanctuary or refuge, or those proposed to be such areas, or area of high biological sensitivity (unless authorized).
 - b. If action has potential to affect such areas, though it is not in the boundaries, the responsible agency shall be consulted to determine impact and if authorization is needed.
 - c. No drilling as well as no permanent facilities or devices are eligible for this exclusion.
- 3) Energy system demonstration actions are now eligible for a limited exclusion.
 - a. For purposes of this category, "demonstration actions" means actions that are undertaken at a scale to show whether a technology would be viable on a larger scale and suitable for commercial deployment.

On December 29, 2009 the DOE initiated its periodic review of these procedures by publishing a Request for Information in the *Federal Register*. The DOE then published a notice of proposed rulemaking on January 3, 2011. The 45 day public comment period was extended until March 7, 2011 at the request of the National Wildlife Federation among other organizations.

BOEMRE: Agency Reorganization

The Bureau of Ocean Energy Management, Regulation, and Enforcement (BOEMRE) was officially divided into three separate agencies on Oct. 1: the Bureau of Ocean Energy Management (BOEM), the Bureau of Safety and Environmental Enforcement (BSEE), and the Office of Natural Resources Revenue (ONRR).

BOEM will be responsible for energy leasing and planning on the Outer Continental Shelf. BOEM's programs include offshore leasing, resource evaluation, review and administration of oil and gas exploration and development plans, renewable energy development (including ocean and tidal technologies), National Environmental Policy Act (NEPA) analysis, and environmental studies. Tommy Beaudreau, current BOEMRE Senior Advisor, will take the reigns as director.

Michael Bromwich, the current head of BOEMRE, will serve temporarily as head of BSEE until a permanent director is found. There, he will be responsible for inspections, enforcement, and safety of offshore oil and gas operations. Its functions will include the development and enforcement of safety and environmental regulations, research, inspections, offshore regulatory programs, oil spill response,

and newly formed training and environmental compliance programs.

Finally, ONRR will manage revenues associated with federal offshore and federal and American Indian onshore mineral leases, as well as revenues received as a result of offshore renewable energy efforts. It will operate under the Assistant Secretary for Policy, Management and Budget.

FWS: Review of 374 Species

On Sept. 26, the U.S. Fish and Wildlife Service (Service) announced it will conduct an in-depth status review of 374 rare southeastern aquatic, riparian and wetland animal and plant species to determine if any or all of them warrant federal protection as a threatened or endangered species under the Endangered Species Act (ESA).

The Service made this decision, commonly known as a 90-day finding, after reviewing a petition seeking to add a total of 404 species to the Federal Lists of Endangered and Threatened Wildlife and Plants and analyzing information about these species in its files. While this initial review found evidence to suggest that ESA protection may be warranted for 374 of these species, the Service will now undertake a more thorough status review before determining whether to propose any of them for listing.

Based on the status reviews for these 374 aquatic-dependent species, the Service will issue 12-month findings for each species and determine whether to propose them for listing. At this time, however, the 12-month findings are not scheduled to be completed within the next six years due to the priorities detailed in this court-approved work plan, unless the Service is able to combine these findings with other actions already funded and/or scheduled.

For more information, please see Fish and Wildlife's Press Release here:

http://us.vocuspr.com/Newsroom/Query.aspx?SiteName=fws&Entity=PRAsset&SF_PRAsset_PRAssetID_EQ=128444&XSL=PressRelease&Cache=True

ESA: Petition to protect Alewife and Blueback Herring

The Natural Resource Defense Council (NRDC) is petitioning to have alewife and blueback herring listed as Threatened Species under the Endangered Species Act, according to a document filed with the Department of Commerce on Aug. 1.

According to the petition, the current alewife and herring populations are just a "tiny fraction of their historical abundance."

Short of full protection under ESA, NRDC has asked that the National Marine Fisheries Service (NMFS) designate four Distinct Population Segments (DPS) of alewife and three DPSs of blueback herring for protection. These DPS include Central New England DPS of alewives, Long Island Sound DPS of alewives, Chesapeake Bay DPS of alewives, and Carolina DPS of alewives; Central New England DPS of blueback herring, Long Island Sound DPS of blueback herring, and Chesapeake Bay DPS of blueback herring.

Some of the rivers listed in the petition for designation have hydropower projects on them, for example the Susquehanna, which is a part of the Chesapeake Bay DPS. Dams are listed in the petition as a major stressor affecting the herrings decline.

NMFS has not yet taken action on this issue. NHA will continue to monitor and bring you updates.

FERC: Transmission Planning Requirements (Order 1000)

The Federal Energy Regulatory Commission on Jul. 21 issued Order No. 1000, reforming its transmission planning and cost allocation requirements by enhancing the grid's ability to support wholesale power markets and ensuring transmission services are provided at just and reasonable rates.

Order No. 1000 requires public utility transmission providers to improve transmission planning processes and allocate costs for new transmission facilities to beneficiaries of those facilities. It also requires public utility transmission providers to align transmission planning and cost allocation. These changes will remove barriers to development of transmission facilities. Approved after considering more than 200 sets of public comments, Order No. 1000 builds on FERC's open access reforms of Order No. 888 (1996) and the planning reforms of Order No. 890 (2007).

Order No. 1000, and other information regarding the rule, may be found here:
<http://www.ferc.gov/industries/electric/indus-act/trans-plan.asp>.

FERC: Notice of Inquiry on Ancillary Services

The Federal Energy Regulatory Commission sought public comments on two sets of separate but related issues vital to pumped storage hydropower.

In a notice of inquiry (NOI) issued Jun. 16, FERC first sought ways in which it can facilitate the development of competitive markets for the provision of ancillary services from all resource types. Second, the Commission is interested in removing barriers to the expanded use of electric storage technologies.

Comments were due Aug. 22, 2011. NHA's Pumped Storage Development Council, working with NHA staff, filed comments.

In its comments, NHA highlights the importance of storage, particularly pumped storage, in providing the ancillary services necessary to maintain grid reliability and stability, along with the benefit of assisting greater integration of variable energy resources. NHA also proposes a potential new asset class and treatment for electric storage technologies that borrows from the natural gas storage model.

The following brief overview of the comments is taken directly from the filing itself:

- NHA believes that energy storage is vital to the successful, cost-effective integration of variable energy resources such as wind and solar generation. As explained in these comments, existing policies such as the **Avista** restriction and limits on sales of ancillary services to third parties prevent the robust development of new energy storage facilities, as well as the deployment of existing storage and conventional hydropower into ancillary services markets.
- Section II.A of these comments discusses the **Avista** restriction and suggests an adaptation of **Avista** that would (1) enable an energy storage facility to participate in an ancillary services market without having to prove it lacked market power and (2) permit a transmission provider to acquire market-rate ancillary services to meet its mandatory service obligations.

- Although these adaptations to **Avista** would make it easier for an energy storage facility (as well as conventional hydropower) to provide ancillary services, they would not solve the financing challenges faced by new energy storage, particularly grid-scale facilities like pumped storage hydropower. Section II.B therefore discusses the need to develop policies that would enable new energy storage facilities to compete to enter into long-term contracts with regional transmission organizations and transmission providers.
- Finally, Section II.C addresses the Commission's questions concerning cost accounting and reporting for energy storage facilities by (1) explaining that existing cost accounting and reporting rules do not properly address several unique features of pumped storage hydropower facilities, and (2) recommending that the Commission take note of the similarities between electric energy storage and gas storage to develop a separate asset class that properly recognizes the unique features of electric energy storage.

NHA would like to thank the Pumped Storage Development Council leadership for their assistance on the comments, as well as those members of the working group, and Stoel Rives, who assisted in the drafting of the document. A copy of the comments is available online on the NHA website at www.hydro.org under the Resources section.

Army Corps: Marine and Hydrokinetics Nation Wide Permits

The Army Corps of Engineers has issued a proposal that would create a new nationwide permit (NWP) for hydrokinetic or offshore wind pilot projects, with a half acre limit and 300 linear foot limit for streambed disturbances. A nationwide permit authorizes activities on a national level and activities that satisfy the requirements and conditions of the nationwide permit do not require individual processing or permits.

Comments were due April 18, 2011. In its comments, NHA expressed its general support for the Corps' action on new technologies and hopes that this NWP will bring consistency across the Corps' various regions.

NHA also offered recommendations. First, NHA disagreed with the use of the term "pilot" in characterizing the new process, without a more specific indication of its meaning. NHA also stated the Corps should not preclude longer term facilities as long as they conform to the conditions of the permit.

Second, the number of facilities placed in the water should not be limited to ten generation units, as some facilities may use a combination of technologies. Finally, NHA recommended that the NWP's applicability not restrict the burying of cable or other attendant features for up to and more than the ½-acre and 300 linear feet of stream bed limits for those projects that otherwise meet the requirements of the NWP.

The comments were drafted by NHA staff working with the Ocean, Tidal and New Technologies Council. They can be found on the resources page of the NHA website. The Army Corps has yet to finalize the NWPs.

BOEMRE: Notice of Proposed Rulemaking on Noncompetitive OCS Leasing

The Bureau of Ocean Energy Management, Regulation, and Enforcement (BOEMRE) issued a Notice of Proposed Rulemaking (NOPR) to eliminate a redundant step in the noncompetitive leasing process for commercial renewable energy development on the Outer Continental Shelf (OCS). This would affect the leasing process of offshore marine and hydrokinetic projects. BOEMRE is soliciting the public for comments.

The proposal would remove a second step in the leasing process. When BOEMRE receives an unsolicited request for a lease in a specified area, BOEMRE must determine if anyone else is interested in the same site. If no one responds to the first inquiry, BOEMRE must put out another solicitation for interests before they can proceed in issuing the lease in a noncompetitive fashion. This proposal would remove the second inquiry, cutting several months off the leasing process.

Comments were due March 18, 2011. Working with the Ocean, Tidal and New Technologies Council, NHA staff filed supportive comments that also suggest other ways to make the regulatory process better. These were drawn from previously approved NHA comments submitted to BOEMRE and its predecessor the Minerals Management Service (MMS). The comments contained no new policy positions for the association. Full comments can be found on NHA's website.

Smarter Licensing Process Working Group

The Expedited Licensing Working Group has finalized its matrix of prioritized potential solutions to regulatory barriers after holding three calls on the issue since the May Board Meeting. The final results were shared with the Small Hydro Council and the Legislative Affairs Committee leadership.

The Working Group will also prepare a comparison of hydro licensing times to other energy and water-based development projects for use by NHA staff in supporting the Hydropower Improvement Act (HIA). The results of the Working Group and Small Hydro Council efforts have been evaluated by a group composed of the Regulatory and Legislative committee leadership, Small Hydro Council chair, and NHA staff which together have begun to identify actions that the Legislative Committee can advance through the HIA and that the Regulatory Committee can advance outside of the HIA process.

NHA Tax Manual

A new version of the NHA Tax Manual is now available. 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.

Pumped Storage Development Council

The Pumped Storage Council is working to put together an agenda for a workshop in conjunction with the NHA Northwest Regional meeting in the fall, similar to the Small Hydro Workshop held in Manchester, NH last fall. They are also working to provide comments to FERC on ancillary services and barriers to pumped storage.

Over 70 attendees came together for a full day of presentations, panel sessions and networking at the NHA Pumped Storage Workshop on Oct. 3 in Bellevue, WA. A packed agenda included topics such as: an update on the FERC Notice of Inquiry (NOI) on ancillary services and the NHA comments; a presentation

on the DOE Waterpower program initiatives for pumped storage and the recent funding opportunity announcement; and status review of project development.

NHA State RPS Report

The NHA State RPS Report was updated on this summer and is available on the Regulatory Affairs webpage on the members' side of the NHA website. Thanks to Brookfield Renewable,,,

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 files petition for writ of certiorari with U.S. Supreme Court: August 12, 2010. NHA files amicus brief in support of PPL petition: September 15, 2010.

U.S. Supreme Court on November 1, 2010 sought a brief from the Obama Administration on the issues presented in the case. The Solicitor General filed the brief on behalf of the Administration on May 20.

U.S. Supreme Court issued a notice on June 20, 2011 agreeing to hear the case.

Issues: The case involves the imposition on PPL of rent for the use of riverbeds for certain of its hydro projects based on a determination that these riverbeds that historically were considered federal lands are instead state-owned lands for which rental payments are due in accordance with the Montana constitution and state law. Of particular interest to NHA is the Montana Supreme Court's application of the "navigability for title purposes" test in a manner that is inconsistent with previous U. S. Supreme court decisions. In misapplying this constitutional test, the Montana Supreme Court upheld the lower court's determination that PPL owes substantial land rents to Montana for the use of state lands for a federally-licensed purpose, which could cause federal preemption problems related to FERC's licensing authority under the Federal Power Act.

Update: The National Hydropower Association, along with several other energy industry organizations, filed a "friend of the court" brief with the Supreme Court on Sep. 7 in the case of PPL Montana, LLC, v. State of Montana. The case involves state court litigation over claims made by Montana seeking to require the utility to pay a portion of its revenues as "rent" and "back-rent" for its use of the streambeds under certain of its dams and reservoirs.

NHA was joined in the brief by the Edison Electric Institute, the Northwest Hydroelectric Association, the Electric Power Supply Association and Snohomish County PUD.

In the brief, NHA and the others urge the Court to reverse the Supreme Court of Montana's decision that the State held title to the streambeds and lands. Under this decision and the methodology developed by the State, Montana determined it was owed 50 percent of the net revenues from the hydroelectric generation of the projects multiplied by the State's percentage ownership of overall project lands.

Agreeing with PPL Montana, the hydropower industry brief argues that the Montana Supreme Court's

decision conflicts with Supreme Court precedent. The brief also states that if the State court's decision is not corrected, it has the potential of being adopted by other states, thereby imposing even more substantial and disruptive burdens on the nation's hydropower and other infrastructure. Finally, the decision also has the potential to disturb settled expectations of property ownership for hydropower project and other riparian infrastructure owners across the country.

The Obama Administration also filed a brief in the case. Though the Administration had previously urged the Supreme Court not to take the case for consideration, in its filing they also sided with the utility.

Oral arguments have been scheduled for Dec. 7, 2011.

Miscellaneous Regulatory News

Obama Administration Energy Posts Nominations and Appointments

David Danielson, Assistant Secretary for Energy Efficiency and Renewable Energy

President Barack Obama in July nominated David Danielson to replace Cathy Zoi as assistant secretary for Energy Efficiency and Renewable Energy (EERE). The Senate Energy and Natural Resources Committee held hearings in September on the nomination, during which Danielson made positive statements regarding hydropower's role in America's renewable energy future.

Danielson would bring his previous DOE experience as a program director at the Advanced Research Projects Agency-Energy (ARPA-E) to his new post in the office that oversees the administration's research and funding of clean and efficient energy technologies.

Danielson has also worked as a clean energy venture capitalist, handling projects in the solar, wind, advanced biofuels, bio-gas, carbon capture and storage and advanced lighting sectors. He is the co-founder of the New England Clean Energy Council and helped spearhead the Massachusetts Institute of Technology's Energy Club and Energy Conference during his time as a graduate student there.

John Bryson, Secretary of Commerce

President Barack Obama announced his intent to nominate John Bryson as Secretary of Commerce on May 31. He will replace outgoing Secretary Gary Locke, who has been nominated to be the U.S. Ambassador to China. Bryson's nomination was reported by the Senate Commerce Committee and awaits full Senate approval.

Bryson has a long history working in the renewable electric and electric utilities industry. Previously, he was Chairman and Chief Executive Officer of Edison International, the parent company of Southern California Edison and Edison Mission Group, from 1990 to 2008. Bryson also served as president of the California Public Utilities Commission, chairman of the California State Water Resources Control Board, and on the board of the Council on Foreign Relations. At the start of his career, he was a co-founder and attorney for the Natural Resources Defense Council (NRDC), a national and international environmental group. He is a graduate of Stanford University and Yale Law School.

Rebecca Wodder, Assistant Secretary of the Interior for Fish, Wildlife and Parks

President Barack Obama nominated the leader of American Rivers, Rebecca Wodder, as Assistant

Secretary of the Interior for Fish, Wildlife and Parks.

Wodder, picked to replace Tom Strickland after he left for the private sector, has been the chief executive officer of American Rivers since 1995.

Prior to joining American Rivers, Wodder served at The Wilderness Society in several capacities, including as Vice President for Organizational Development, and Vice President for Membership, Marketing and Development. She had previously served as legislative assistant to U.S. Senator Gaylord Nelson (Wisconsin) on environmental and energy issues, from 1978-1980.

As of Oct. 7, two senators have announced they will place holds on the nomination should it reach the Senate floor. Neither Senate committee reviewing the nomination have scheduled a vote to advance the nomination.

Regulatory Meetings

Federal Energy Regulatory Commission

The Pumped Storage Council Leadership and NHA staff met with FERC's Office of Energy Policy and Innovation (OEPI) in September 2011. The group discussed the NOI on ancillary services and NHA's comments in response to that NOI. NHA also met with Commissioner John Norris' technical advisor regarding the same issue.