



Regulatory Matrix

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National Hydropower Association

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The Regulatory Matrix is also available electronically on the member-only side of NHA's website

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* All referenced NHA regulatory filings are available on our website under “Member Resources”.

NHA Weighs in on Proposed Revisions to Critical Habitat Designation

On October 16, NHA filed comments on a Fish and Wildlife Service and National Marine Fisheries Service (“Services”) proposed rule – *Revisions to the Regulations for Impact Analyses of Critical Habitat*. The proposed rule is seeking comments on how the Services can provide the public earlier access to both scientific analysis and draft economic analysis supporting critical habitat designations.

NHA supported the proposal to issue draft economic analyses for public comment at the same time as proposed critical habitat designations. Traditionally, the Services issued draft economic analyses for comment when they issued final critical habitat designations.

However, the proposed rule also attempts to clarify the critical habitat exclusion policies of the Services, and NHA expressed its concern that the Services’ proposal of codifying an incremental impacts analysis, coupled with unchecked discretion when deciding whether to grant or deny exclusions under Section 4(b)(2) of the Endangered Species Act, could lead to arbitrary decision-making and result in greater inconsistency and uncertainty. Specifically, NHA requested the Services to:

- Reconsider the use of the incremental impacts analysis method in favor of one that fairly characterizes the true economic impacts resulting from critical habitat designations, and
- Develop and promulgate regulatory standards or criteria that would govern decisions to grant or deny critical habitat exclusion requests – favoring exclusion where settlement agreements, habitat conservation plans, and other conservation commitments already protect and enhance habitat – and develop an appeals process for final exclusion decisions.

The proposed rule continues to receive attention from industry, NGOs and Congress. Most recently the Services granted a request by House Natural Resources Committee Chairman Doc Hastings (WA-04) to extend the comment period for 90 days. The new filing deadline is February 6, 2013.

Reclamation Issues Final Lease of Power Privilege (LOPP)

On September 28, the Bureau of Reclamation released the final requirements for the Lease of Power Privilege (“LOPP”), which can be found here: <http://on.doi.gov/SrhRrW>. A LOPP is a contractual right given to a non-federal entity to use a Reclamation facility for electric power generation that is consistent with the facility’s purpose.

Previous to the final release, NHA’s Small Hydro Council’s Reclamation Working Group filed two sets of comments on the LOPP, focused primarily on the LOPP charge and jurisdiction issues.

LOPP Timeline:

- November 4, 2011 – Reclamation Issues Draft LOPP for Comment
- November 17, 2011 – Reclamation Extends Comment Period to January 15, 2012
- January 13, 2012 – NHA Files First Round of Comments
- February 6, 2012 – NHA Meets with Dept. of Interior Officials to Discuss LOPP
- April 5, 2012 – Reclamation Issues Temporary Directive & Standard LOPP and Announces 60-Day Comment Period
- June 4, 2012 – NHA Files Second Round of LOPP Comments
- September 28, 2012 – Reclamation Issues Final LOPP

NHA Responds to Notice of Proposed Rulemaking on Ancillary Services

On September 7, NHA filed comments with FERC on a Notice of Proposed Rulemaking (“NOPR”): *Third-Party Provision of Ancillary Services; Accounting and Financial Reporting for New Electric Storage Technologies*. This was the second round of comments NHA has filed on this issue.

The NOPR proposed to revise portions of the Avista Corp. policy, revise Open Access Transmission Tariff provisions regarding Regulation and Frequency Response reserve requirements, and revise accounting and reporting requirements under FERC’s Uniform System of Accounts.

NHA generally agreed with the Commission’s proposed new rules pertaining to “pay for performance” and alleviating the most problematic effects of the Avista doctrine. However, NHA explained the NOPR does not come to grips with a critical obstacle identified by NHA and several other commenters – the need to establish rules that facilitate long-term contracts for energy storage services and to make it easier for market participants to value and enter into such contracts.

The “pay for performance” rules are a step in the right direction, because they lay the ground work for enabling markets to properly value the ancillary services that both conventional hydro and pumped storage projects provide. But NHA stressed that energy storage will continue to be a small player relative to its potential if it is obliged to rely on day-ahead and real-time markets for financing.

NHA highlighted two important issues that must be resolved to enable developers and existing hydro operators to plan ahead. First, NHA encouraged the Commission to make changes to FERC Form 1 in order to address the shortcomings of the form as applied to current operations of the existing hydro fleet. Second, NHA urged the Commission to provide guidance on how energy storage will be classified, rather than address the question on a case-by-case basis.

The NOPR was issued in response to a Notice of Inquiry (“NOI”) on the same issue from June 2011. NHA’s previous comments on the NOI highlighted 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 proposed a potential new asset class and treatment for electric storage technologies that borrows from the natural gas storage model.

NHA’s New Expedited Licensing Initiative

NHA has taken the work of the Regulatory Affairs Committee and the Small Hydro Council and formed a new initiative focused on issues that would expedite the licensing process for hydro development, beyond those provisions included in current hydropower legislation. This new initiative includes outreach to the NGO community and to several D.C.-based policy think tanks to build allies for action, reach consensus and address such issues as:

- Better coordination of the U.S. Army Corps Section 404 and 408 approval process with the FERC process;
- Delays in state approvals of Section 401 applications; and
- Other general process improvements involving federal resources agencies and FERC.

The goal of the initiative is to develop and draft potential statutory or regulatory proposals that could be pushed on the Hill or in the agencies starting in the first quarter of 2013. Group discussions have commenced with a productive first meeting on USACE coordination issues.

Further, NHA staff, along with several industry members, met with Assistant Secretary of the Army Jo-ellen Darcy on November 28th to discuss the opportunities and the challenges with non-federal hydropower development at Corps of Engineers dams. NHA explained our vision to double hydropower’s current contribution to the national electricity portfolio, how that vision ties into the Administration’s goal to increase generation from clean and renewable energy resources, and how a large part of the hydro development opportunity is at USACE existing dams.

While complementing USACE on its current work to make improvements to their approval processes through the signing of MOUs with the Departments of Energy, Interior and with the Federal Energy Regulatory Commission, the attendees also noted that the framework set up by the MOUs is not being consistently implemented across USACE district offices.

FERC Rules on BPA Oversupply & Curtailment Policies

On December 20, FERC issued two orders related to Bonneville Power Administration's (BPA) curtailment practices and its Oversupply Management Protocol (OMP).

In the orders FERC 1) reaffirmed its authority under Federal Power Act (FPA) Section 211A and its exercise of that authority in this case in order to remedy BPA's unduly discriminatory practices against wind generation; and 2) directed BPA to revise its proposed oversupply curtailment policies and cost allocation mechanisms in order to ensure comparability and eliminate undue discrimination.

In May 2011, BPA adopted its Environmental Redispatch Policies, under which it unilaterally curtailed generators and utilized their firm transmission rights without compensation to deliver federal hydropower during certain high water situations. BPA stated that this policy was a necessary component of its compliance with organic and environmental statutory requirements.

In June 2011, a coalition of wind energy facility owners filed with FERC a complaint and petition for order under Section 211A of the FPA, requesting FERC order BPA to discontinue its discriminatory practices.

In December 2011, FERC granted the wind owners complaint, directing BPA to file revisions to its Open Access Transmission Tariff (OATT) to provide for transmission service on terms and conditions that are comparable to those under which Bonneville provides service to itself and that are not unduly discriminatory or preferential.

BPA and others filed a request for rehearing and/or clarification of the order. BPA also made a subsequent compliance filing, proposing a new protocol to govern during oversupply conditions, called the Oversupply Management Protocol (OMP).

In the December 20 orders, FERC denied BPA's request for a rehearing and ordered BPA to revise its proposed oversupply curtailment policies and cost allocation mechanisms in order to ensure comparability and eliminate undue discrimination. FERC's two orders can be viewed here:

- http://elibrary.FERC.gov/idmws/file_list.asp?accession_num=20121220-3044
- http://elibrary.FERC.gov/idmws/file_list.asp?accession_num=20121220-3057

NHA Soliciting “Hot Topics” Issues

On Thursday, October 11, the Regulatory Committee held its quarterly “Hot Topics” call. Over 25 members joined the call to discuss Hot Topics ranging from coordinating invasive species management between FERC and the states, to responding to annual compliance letters.

Are you experiencing licensing or compliance issues that would be beneficial to share? Are you noticing emerging trends/themes in the industry that should be discussed with a broader group? Please contact Dave Zayas at David@hydro.org with your ideas. With enough notice NHA will work to set up these calls with the appropriate FERC or other federal official for direct and unfiltered discussions.

Previous calls included discussion on shoreline management plans and FERC’s policy of labeling minor license deviations as violations.

Legal Update

Natural Resources Defense Council, Inc. v. County of Los Angeles

On December 4, the Supreme Court heard oral arguments in *L.A. County v. NRDC*, a Clean Water Act (“CWA”) case that involves the scope of a “discharge” of pollutants under Section 402. The case involves an L.A. County stormwater permit that is allegedly in violation because the pollutant levels specified in the permit have been exceeded, although through no fault of the permittee.

The Supreme Court granted certiorari on the following question:

When water flows from one portion of a river that is navigable water of the United States, through a concrete channel or other engineered improvement in the river constructed for flood and stormwater control as part of a municipal separate storm sewer system, into a lower portion of the same river, can there be a “discharge” from an “outfall” under the Clean Water Act, notwithstanding this Court’s holding in *South Florida Water Management District v. Miccosukee Tribe of Indians*, 541 U.S. 95, 105 (2004), that transfer of water within a single body of water cannot constitute a “discharge” for purposes of the Act?

In September, NHA filed an amicus brief focused on the larger legal implications of the case. The brief recommended that the court not disrupt longstanding precedent in other circuits that dams are not point sources, and dam owners, including FERC hydro licensees, are not required to obtain an NPDES permit for general dam operations.

Most of the oral arguments focused on the allocation of liability and interpretation of the L.A. County stormwater permit, and not the larger legal implications. There appeared to be agreement that the Ninth Circuit erred in finding that a “discharge”, as that term applies in the CWA, had occurred in this case.

Procedural History: This case is rooted in the discharge of stormwater runoff into navigable waters in Southern California collected by municipal separate stormwater sewer systems (ms4) owned and operated by the County of Los Angeles and the Los Angeles County Flood Control District (Defendants). The Natural Resources Defense Council brought suit alleging that the ms4 discharge exceeds the Defendants National Pollutant Discharge Elimination System (NPDES) permit and therefore violates the CWA. Both parties agree that numerous water-quality standards have been exceeded, but Defendants contend that there is no evidence establishing their responsibility for, or discharge of, stormwater carrying pollutants to the rivers.

The district court agreed with Defendants and granted them summary judgment. On appeal, the Ninth Circuit overturned the district court's ruling, and ruled that water originating from a navigable river and passing through a concrete, channelized portion of the river into the natural river below, is a discharge from a "point source" under the CWA. The Ninth Circuit also held that Defendants are responsible for pollutants even though they only conveyed polluted water through its structure, and did not add a pollutant to the water in the process. The Supreme Court then granted certiorari.

NHA decided to become involved in the amicus brief because if the Supreme Court upholds the Ninth Circuit's decision, beneficial case law (National Wildlife Federation v. Gorsuch and South Florida Water Management District v. Miccosukee Tribe of Indians) could be upset or narrowed. Under the Ninth Circuit's reasoning, it is logical to infer that any structure in a river, including a dam, through which water containing pollutants passes could be subject to an NPDES permit.

Arkansas Game and Fish Commission v. United States

Also on December 4, the Supreme Court ruled that temporary government-induced flooding can give rise to a takings claim under the Fifth Amendment. The 8-0 ruling came in *Arkansas Game and Fish Commission v. United States*, a case in which the Arkansas Game and Fish Commission argued that it is owed compensation by the Army Corps of Engineers for timber damage caused by flooding.

The court did not rule whether there was a taking in the Arkansas case. Instead, Justice Ruth Bader Ginsburg wrote in the opinion that there was no blanket exemption for takings claims involving temporary flooding, "recurrent floodings, even if of finite duration, are not categorically exempt from takings clause liability", ultimately leaving it up to the courts to conduct a takings analysis.

The Arkansas Commission claimed it deserved compensation for loss of revenue in timber sales in the Black River Wildlife Management Area in the northeast part of the state. The damage to the timber was caused by the Army Corps' management of the Clearwater Dam upriver. Between 1993 and 2000, the Army Corps tinkered with the water flow from the dam, which the commission said led to flooding that eventually killed many mature oak trees at the Black River site.

In 2009, the U.S. Court of Federal Claims awarded the Commission \$5.8 million. The U.S. Court of Appeals for the Federal Circuit reversed that decision in a March 2011 ruling.

Miscellaneous Regulatory News

NOAA's Lubchenco Steps Down

NOAA Administrator Jane Lubchenco announced that she will step down from the agency in February. In an email to employees, Lubchenco wrote that she was leaving the National Oceanic and Atmospheric Administration to return to her family and academic career in Oregon.

Replacements that have been discussed include Terry Garcia, Frances Ullmer and Andrew Rosenberg. Garcia is a lawyer and a former NOAA official who is currently a vice president at the National Geographic Society. Ullmer is the former lieutenant governor of Alaska. Rosenberg was head of the fisheries service under the Clinton administration and served on the U.S. Commission on Ocean Policy and the National Academy of Sciences Ocean Studies Board. He was recently named chief scientist at Conservation International.

Filling the leadership post at NOAA though may take a backseat to the appointment and confirmation of the Secretary of Commerce. The Secretary's post has remained empty since John Bryson resigned in June.

NRECA Names Congresswoman Jo Ann Emerson New CEO

The National Rural Electric Cooperative Association (NRECA) announced that Congresswoman Jo Ann Emerson will assume the role of Chief Executive Officer, effective March 1, 2013. Emerson replaces long-time CEO Glenn English, who announced his retirement earlier this year.

Emerson was first elected to the U.S. House of Representatives in 1996 from Missouri's Eighth Congressional District. She serves on the House Appropriations Committee and Chairs the Subcommittee on Financial Services and General Government Appropriations.

"Energy has a direct relationship with the vitality of rural America. Without reliable, affordable electricity delivered by electric cooperatives serving thousands of communities, millions of Americans would be left without the energy that brings economic opportunity, unsurpassed quality of life, and the promise of growth in the future," said Emerson. "NRECA is committed to the electric cooperatives of this great nation that fulfill this vital need, and work so hard every day to improve the quality of life for their member-owners. I am so very honored to join an outstanding organization to work on their behalf."

Emerson is the first Republican woman from Missouri to serve in the House. She graduated from Ohio Wesleyan University and held executive roles in communications and government affairs positions with the National Restaurant Association and the American Insurance Association before being elected to the first of nine terms in Congress.

NRECA represents the nation's more than 900 private, not-for-profit, consumer-owned electric cooperatives, which provide service to 42 million people in 47 states.

Beal Named ASMFC Executive Director

In October, the Atlantic States Marine Fisheries Commission named Robert Beal as the Commission's new Executive Director. Beal has been with the Commission for than 15 years and has served as the Director for the Interstate Fishery Management Program for the past 10 years.

Upon acceptance of the position, Beal stated he was "honored and privileged to serve" as Executive Director, and that over the years the Commission has "achieved many impressive accomplishments from species rebuilding, improved data collection, to sound stock assessments for data poor species such as American Eel and shad and river herring."

Fish & Wildlife Service Designates Critical Habitat – Lost River and Shortnose Sucker

On December 11, the Fish and Wildlife Service announced the designation of critical habitat for the Lost River sucker and Shortnose sucker under the Endangered Species Act. In total, approximately 146 miles (234 kilometers) of streams and 117,848 acres (47,691 hectares) of lakes and reservoirs for Lost River sucker and approximately 136 miles (219 kilometers) of streams and 123,590 acres (50,015 hectares) of lakes and reservoirs for Shortnose sucker in Klamath and Lake Counties, Oregon, and Modoc County, California, fall within the boundaries of the critical habitat designation.

For more information see - <http://www.gpo.gov/fdsys/pkg/FR-2012-12-11/pdf/2012-29332.pdf>

NMFS Alaska office seeks preliminary climate change assessment on hydro vulnerability

On August 30, the National Marine Fisheries Service (NMFS) issued a Request for Quotation for a Preliminary Assessment for Vulnerability of Hydropower Production in Alaska to Climate Variability and Change.

The RFQ states that "hydro facilities in Alaska manage their water resources with little or no information about water stored in the snowpack or streamflows feeding the reservoirs" and that other "scientifically credible" information is "underutilized in planning, managing and licensing hydro facilities."

The RFQ is asking for a review of existing literature to conduct analysis of historical climate and hydrologic variability using the Susitna-Watana project as a case study. Ultimately, the review will assist NMFS with the development of protection, mitigation and enhancement measures.

To learn more, see the Fed Biz opportunity here: <http://1.usa.gov/OT7Btx>.

NHA Attends EPA Technical Workshop

On Wednesday September 19, the EPA held a technical workshop to discuss the Importance of Water to the U.S. Economy. With over 75 in attendance ranging from private industry to federal and state agencies, think-tanks and NGO stakeholders, the workshop consisted of presentations from multiple sectors of the economy on what water means to them. Presentations ranged from the importance of water to energy production, agriculture, tourism and manufacturing, to name a few.

Hydropower is minimally included in the discussion and NHA wants to ensure hydro's true value to the economy is represented and we will work with EPA as this initiative evolves.

The EPA is conducting this study because current information on the subject is dispersed and/or incomplete, and they hope to summarize and condense existing knowledge, develop information that supports private and public sector water decision-making, and identify areas for additional research.

Additional information on EPA's initiative can be found here - <http://water.epa.gov/action/importanceofwater/study.cfm>

Clear Your Calendars - NHA Events Coming Soon!

Check NHA's website for the latest updates on our Annual Conference and Regional Meetings:

- California Regional Meeting, March 5, 2012, San Ramon, CA
- NHA Annual Conference – *Hydro: America's Economic Engine for Growth & Innovation*, April 22-24, 2013, Capital Hilton, Washington, D.C.
- Hydro Finance Summit, June 3, 2013, New York, NY