Regulatory Matrix

2014 – Year in Review

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

Table of Contents*

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NHA Regulatory Filings on Agency Actions and Administration Initiatives

Endangered Species Act – Critical Habitat & Adverse Modification

On October 9, 2014, NHA filed comments with the U.S. Fish & Wildlife Service and National Marine Fisheries Service (Services) on two proposed rules and a draft policy (Proposals) that would significantly alter the regulations implementing the Endangered Species Act (ESA). Specifically, the two proposed rules would change the process for designating critical habitat and redefine the term "destruction or adverse modification," and the draft policy sets forth the Services position regarding partnerships and conservation plans, Section 10 plans under the ESA, and consideration of economic impacts in the exclusion process under Section 4(b)(2) of the ESA.

NHA appreciated the Services attempt to clarify the procedures for designating and revising critical habitat and aligning definitions so that they are more consistent with the ESA, but we were ultimately concerned that the Proposals, as drafted, will result in even broader discretion when the Services designate or revise occupied and unoccupied critical habitat. In addition, NHA believes that the Services' revisions to the adverse modification definition are significantly more expansive than necessary to address the concerns raised in previous court decisions and would establish a much lower threshold when considering the effects of an action. Taken together, the Proposals will increase burdens on landowners and project proponents beyond what Congress intended, lead to more uncertainty in the regulated community and for species protection, create greater inefficiencies, reduce flexibility, and discourage innovation in the regulatory permitting process. All at a time when the Administration has laid out clear goals to modernize and streamline the federal regulatory and permitting process.

Therefore, NHA's comments strongly encouraged the Services to provide clarity and consistency throughout the Proposals and include clear factors and fair standards when designating and revising critical habitat and assessing when adverse modification occurs in the consultation process.

Quadrennial Energy Review (QER)

On January 9, 2014, President Obama, as part of his Climate Action Plan, announced the establishment of a Quadrennial Energy Review (QER) with the 2014 focus on "our Nation's infrastructure for transporting, transmitting, and delivering energy." The president's memorandum highlighted the challenges and transformations facing our energy infrastructure, such as "energy supply, markets, and patterns of end use; issues of aging and capacity; impacts of climate change; and cyber and physical threats." With these challenges in mind, the president directed the QER Task Force (Task Force) to "develop an integrated review of energy policy" and offer "recommendations on additional executive or legislative actions to address the energy challenges and opportunities facing the nation."

On November 21, NHA's Pumped Storage Development Council submitted comments on the QER, which provided a number of executive and legislative recommendations to increase the use of pumped storage

and improve the review, permitting, and licensing of pumped storage projects to meet the energy challenges and transformations outlined in the QER.

On the executive side, NHA made three recommendations. First, NHA encouraged the Task Force to make clear that hydropower and pumped storage is an eligible technology in the implementation of all previous and future energy policies and initiatives, and direct federal agencies to recognize and treat pumped storage equally with other storage technologies. NHA encouraged the issuance of an executive order or presidential memorandum to achieve this recommendation and specifically asked that hydropower and pumped storage be included in any federal procurement and policy proposals for renewable energy, and to include hydropower project development as an energy priority and compatible with agency missions. Second, NHA recommended that the Task Force work with the Federal Energy Regulatory Commission, Regional Transmission Organizations, and Independent System Operators in developing technology neutral market structures that incentivize and compensate asset owners of technologies that provide energy storage and strategic flexibility. Third, NHA encouraged the Task Force to direct the Department of Energy (DOE) to conduct an internal review across all offices to ensure that pumped storage is integrated as a storage technology throughout all of DOE's programs.

On the legislative front, NHA made two recommendations. First, NHA encouraged the Task Force to recommend the adoption of an energy storage investment tax credit to support the development of pumped storage projects and highlighted Senator Wyden's (D-OR) Storage Act (S. 1030) and Representative Gibson's (R-NY) Storage Act (H.R. 1465) as complementary bipartisan bills that would achieve this goal. Second, NHA recommended amending the Energy Policy Act of 2005 (EPAct) to recognize all hydropower, including pumped storage, as a renewable energy resource eligible for federal renewable energy procurement. Currently, EPAct defines hydropower as "new hydroelectric generation capacity achieved from increased efficiency or additions of new capacity at an existing hydroelectric project."

The Task Force is required to deliver its first QER report to the president by January 31, 2015. NHA will keep you updated on the release and content of this report, as well as the QERs focus in 2015 and opportunities to participate.

EPA's Clean Power Plan – Section 111(d)

On November 25, NHA submitted comments on the Environmental Protection Agency's Clean Power Plan (Plan) proposed rule under Section 111(d) of the Clean Air Act. NHA's comments discuss hydropower's role in reducing emissions; the opportunities to increase its growth across the country; its importance in meeting the policy goals of the Plan along with hydro-specific recommendations and accommodations that should be made; and the need for EPA to send stronger signals of support to the states for protecting and preserving the existing hydro system and promoting new generation.

The comments also highlight areas for further consideration by EPA: the role of pumped storage and MHK technologies, as well as the federal hydropower system; the need for more accurate modeling and analysis on hydropower opportunities; and the role the federal agencies have themselves in hydropower

project licensing and permitting; among others.

Update: In early 2015, the EPA announced that it will not release the final 111(d) rule until "mid-summer", which is a departure from President Obama's goal of finalizing the rule by June 1. Additionally, the Federal Energy Regulatory Commission announced a series of technical conferences to discuss the implications of compliance approaches to the Plan, such as electric reliability, markets and infrastructure. The first technical conference, the National Overview, will be Commission-led and taking place on February 19, 2015 at Commission headquarters. Following the National Overview, three additional staff-led technical conferences are scheduled for: February 25 in Denver, CO, March 11, in Washington, D.C., and March 31, in St. Louis, MO. More information is available here.

Section 242 of the Energy Policy Act of 2005

In the Energy Policy Act of 2005 (EPAct) Congress established a new program to support the expansion of hydropower energy development at existing dams and impoundments through an incentive payment procedure. Under Section 242, the Hydroelectric Production Incentive program (HIP), the Secretary of Energy was directed to provide incentive payments to the owner or operator of qualified hydroelectric facilities for electric energy generated and sold by a qualified hydroelectric facility for a specified 10-year period. The Department of Energy (DOE) has not made these incentive payments in the past due to a lack of appropriations for the program. However, for the first time, the conference report to the Fiscal Year 2014 Omnibus Appropriations bill included $3,600,000 for conventional hydropower under section 242.

In July, DOE invited public comment on draft guidance to implement and administer the Section 242 program. On July 17, NHA filed comments with Department of Energy's Energy Efficiency and Renewable Energy (EERE) office on the draft guidance. When commenting on any incentive program, such as the HIP, NHA is guided by two overarching goals. First, NHA advocates for the greatest benefit to as many of our member companies as possible, which includes both financial benefits and the opportunity to expand hydropower development and generation. Second, NHA strives for certainty and consistency in the administration of any incentive program. Therefore, NHA's comments focused on recommendations that will result in broad program applicability, eligibility, and certainty.

In response to comments received and after making a number of changes, on October 20, EERE opened a second round of comments on revised draft guidance. However, NHA was pleased to see EERE incorporate many of our recommendations in the revised guidance. For example, EERE provided additional clarity throughout the revised guidance regarding project eligibility, technology eligibility, and clarifying the definition of "sale", among others. NHA believes that the changes and clarifications in the revised guidance will benefit the industry and will assist both EERE and the industry as applications are prepared and filed.

Update: On January 15, 2015, EERE released the final Section 242 Guidance and opened the application period. EERE will accept applications until February 20, 2015.

Market Based Rates for Hydropower

On June 19, 2014, the Federal Energy Regulatory Commission issued a Notice of Proposed Rulemaking on *Refinements to Policies and Procedures for Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities* (NOPR). The NOPR, inter alia, addresses compliance by hydro licensees with FERC's Uniform System of Accounts (USofA). The NOPR can be found here; specifically, I direct your attention to pages 104-107 of the NOPR.

Sellers of electricity that have a FERC market-based rate (MBR) tariff are typically granted a waiver of FERC's USofA, which is set forth in Part 101 of FERC's regulations. In the NOPR, regarding changes to FERC's MBR program, FERC indicated that these waivers would not apply to a seller that is also a licensee of a hydro project under Part I of the Federal Power Act (FPA). FERC also clarified that if a hydropower licensee has received a waiver of Part 101 as part of its grant of MBR authority, that waiver does not exempt the licensee from complying with the USofA "to the extent necessary to carry out [its] responsibilities under Part I of the FPA, particularly sections 4(b), 10(d), and 14."

This change in policy could have a significant impact on licensees that currently track costs and funds by using Generally Accepted Accounting Principles (GAPP) rather than FERC's USofA. The Part 101 regulations are designed to track costs that utilities charge to their customers, which is not an issue in this case because the licensees covered by the NOPR would sell power at market-based rates.

NHA's comments 1) requested that hydro licensees with MBR authority not be required to comply with the USofA, but that GAPP are sufficient; and 2) in the alternative, FERC (i) clarify which accounts a licensee must keep in compliance with the USofA; (ii) only apply this policy prospectively; and (iii) provide sufficient time to allow affected licensees to bring their accounting ledgers into compliance.

New D2SI Requirement – Chief Dam Safety Engineer Statement

In August, the Federal Energy Regulatory Commission's Division of Dam Safety and Inspection (D2SI) issued a letter to all licensees that outlined a new requirement with the annual submittal of the Dam Safety Surveillance Monitoring Report (DSSMR). Beginning in 2015, pursuant to the DSSMR, FERC will require all licensees' Chief Dam Safety Engineer (CDSE) to provide a statement that the dam is safe for continued operation. If this statement cannot be clearly made a Justification for Continued Operation (JCO) will be required.

In response, NHA's Hydraulic Power Committee (HPC) submitted comments to D2SI outlining their concerns with the new requirement, asking for clarification and provided recommendations to improve the requirement. The HPC followed-up with a conference call to discuss the new requirement with D2SI's Director, Bill Allerton.

The HPC was pleased with one important modification related to the actual language required to be submitted by the CDSE. D2SI proposed the following language be submitted: "Based on my personal knowledge and meetings and discussions with my engineering staff and/or consultant(s), I conclude that

the subject dam(s) are safe for continued operation with the following issues noted…"

The HPC recommended the following: "Based on my personal knowledge and meetings and discussions with my engineering and operations staff and/or consultant(s), *along with review of the DSSMR, Part 12 Inspection Report, Dam Safety Inspection(s), and Dam Safety Studies*, I conclude that the subject dam(s) *are considered to be safe* for continued operation, with the following issues noted…"

Legislative Successes & Implementation Updates

FERC Finalizes Rule Implementing the Hydropower Regulatory Efficiency Act of 2013

On September 18, the Federal Energy Regulatory Commission issued Order 800, a Final Rule implementing the Hydropower Regulatory Efficiency Act of 2013 (HREA). The Final Rule, which amends Parts 4 and 380 of the Commission's regulations, "formalizes the Commission's compliance procedures in its revised regulations on preliminary permits, small conduit hydroelectric facilities, and small hydroelectric power projects, and in a new subpart on qualifying conduit hydropower facilities." **The rule becomes effective on February 23, 2015.**

The revisions in the Final Rule are intended to be "ministerial in nature" and do not make any regulatory changes related to Section 6 of the HREA that directed the Commission to investigate the feasibility of a two-year licensing process for projects on non-powered dams and for closed-loop pumped storage projects. The Commission is implementing the two-year licensing provision within their existing regulations; however, in the Final Rule, the Commission recognized that "Congress enacted the Hydropower Efficiency Act to encourage the hydropower industry to utilize non-power dams, noting that 97 percent of the 80,000 dams in the United States do not generate electricity", and that "Congress recognized that it could encourage hydropower development by reducing costs and regulatory burden during the project study and licensing stages."

Enacted in 2013, HREA made the following improvements:

1. Amended Section 5 of the Federal Power Act (FPA) to give the Commission, at its discretion, the authority to extend preliminary permits for two additional years beyond the current three-year term. **Update**: Since August 2013, the Commission has received 23 requests for a preliminary permit extension under HREA. Twelve requests have been granted, two are pending, and nine have been denied.

2. Amended Section 30 of the FPA to allow small conduit exemptions to be located on federal lands and increased the maximum installed capacity for all small conduit exemptions to 40 MWs. Previously, the FPA distinguished the size of conduit exemptions between municipally owned and non-municipally owner, the later with a maximum capacity of 15 MWs.

3. Created a new subset of small conduit exemptions under 5 MW called "qualifying conduit hydropower facilities", which are not required to be licensed under Part I of the FPA. The

Commission added a new subpart to Part 4 of their regulations (Subpart N) to implement this provision. **Update**: The qualifying conduit provision has experienced tremendous interest since HREA's enactment. The Commission has received 50 applications, where 26 applications have qualified, 16 are pending, and 8 applications have been rejected. The qualifying and pending applications together represent over 19,000 kW's of new hydropower development.

4. Amended section 405 of PURPA to increase the small hydro exemption from 5 to 10 MWs.

5. Directed the Commission to investigate the feasibility of a two-year licensing process for projects on non-powered dams and for closed-loop pumped storage projects. **Update**: On August 3, 2014, the Commission accepted Free Flow Power's (Rye Development) two-year licensing process request to develop Kentucky River Lock & Dam 11 (FERC No. 14276).

For detailed information on the implementation of HREA and NHA's role, see article 1 in NHA's Regulatory Matrix 2013 – Year in Review.

Securing Favorable Hydro Language in WRDDA

In May, Congress passed the Water Resources Reform and Redevelopment Act (WRDDA) of 2014, and on June 10, the President signed the bill into law. NHA was pleased to see many of our original legislative recommendations proposed in 2013 included in the final bill.

Significantly, Section 1008 of WRDDA, *Expediting Hydropower at Corps of Engineers Facilities*, states it is the policy of the United States that:

1. The development of non-Federal hydroelectric power at Corps of Engineers civil works projects, including locks and dams, shall be given priority;

2. Corps of Engineers approval of non-Federal hydroelectric power at Corps of Engineers civil works projects, including permitting required under section 14 of the Act of March 3, 1899 (33 U.S.C. 408), shall be completed by the Corps of Engineers in a timely and consistent manner; and

3. Approval of hydropower at Corps of Engineers civil works projects shall in no way diminish the other priorities and missions of the Corps of Engineers, including authorized project purposes and habitat and environmental protection.

Further, Section 1008 requires that not later than two years after the date of enactment and biennially thereafter, the Corps shall submit to the Senate Committee on Environment and Public Works and the House Committee on Transportation and Infrastructure, and make publicly available, a report that shall include:

1. A description of initiatives carried out by the Secretary to encourage the development of hydroelectric power by non-Federal entities at Corps of Engineers civil works projects;

2. A list of all new hydroelectric power activities by non-Federal entities approved at Corps of

Engineers civil works projects in that fiscal year, including the length of time the Secretary needed to approve those activities;

3. A description of the status of each pending application from non-Federal entities for approval to develop hydroelectric power at Corps of Engineers civil works projects;

4. A description of any benefits or impacts to the environment, recreation, or other uses associated with Corps of Engineers civil works projects at which non-Federal entities have developed hydroelectric power in the previous fiscal year; and

5. The total annual amount of payments or other services provided to the Corps of Engineers, the Treasury, and any other Federal agency as a result of approved non-Federal hydropower projects at Corps of Engineers civil works projects.

Additionally, Section 1007 of WRRDA, *Expediting Approval of Modifications and Alterations of Projects by Non-Federal Interests*, focuses on Section 408 application improvements. Within one year of the passage of WRRDA, the Secretary must establish a process for the review of Section 408 applications in a timely and consistent manner, which must include "Benchmark Goals" related to the amount of time it takes for the Secretary to determine whether Section 408 applications are complete and the amount of time it takes to approve or disapprove an application. Failure to achieve the Benchmark Goals triggers reporting requirements to the Senate Committee on Environment and Public Works and the House Transportation and Infrastructure Committee.

Finally, Section 1007 requires the Secretary to develop and maintain a publically available database on all Section 408 applications received and the current status of each application.

Throughout the fall of 2014 the Army Corps held a series of listening sessions to inform the agency's implementation of specific provisions of WRRDA. Unfortunately, Section 1008 was not included as part of the listening sessions. In 2015, NHA will be re-engaging with the Army Corps to ensure Section 1008 is fully implemented and is not only seen as a reporting requirement.

Legal Update: NHA Amicus Briefs

In 2014, NHA filed amicus briefs in two legal cases the outcome of which could have significant regulatory impacts on the hydropower industry.

Water Transfer Rule

In March, in *Catskill Mountains Chapter of Trout Unlimited, Inc. v. EPA, (Catskills) 08-cv-*5606, the United States District Court for the Southern District of New York (SDNY) vacated the Environmental Protection Agency's (EPA's) 2008 Water Transfers Rule under the Clean Water Act. The decision, if upheld, could affect thousands of water supply projects, including some hydro operations, by requiring these projects and facilities to obtain National Discharge Elimination System (NPDES) permits.

Following the decision, NHA, with a small group of our member companies, met with EPA's General Counsel, Avi Garbow, to discuss the importance of the Water Transfer Rule to the hydropower industry and urged EPA to appeal the SDNY decision to the Second Circuit Court of Appeals. NHA was pleased to report that on May 29, EPA did in fact appeal the SDNY decision.

Following EPA's appeal, NHA, along with several member companies and other hydropower organizations, filed an amicus brief in the Second Circuit Court of Appeals. The brief emphasized that without the Water Transfer Rule in place, hydropower projects that have inter-basin transfers could become subject to NPDES permitting, with enormous regulatory and operational implications.

Delta Smelt

In *San Luis & Delta-Mendota Water Authorities v. Jewell, 747 F.3d 581, 659* (commonly referred to as the "delta smelt" case), the Ninth Circuit Court of Appeals heard a challenge to a biological opinion issued by the Fish & Wildlife Service (F&WS), specifically the review of reasonable and prudent alternatives (RPAs) that are required under Section 7 of the Endangered Species Act.

NHA's main issue of concern was with the Ninth Circuit's 3-judge panel decision, which concluded that the F&WS had no obligation to demonstrate in the record how certain factors in their analysis of the RPAs were met – particularly whether the proposed RPAs were technologically or economically prudent.

The future impact of this decision, which involved distribution of water by various irrigation projects, could have a substantial impact for the hydropower industry, particularly those existing projects that may face ESA jeopardy opinions and RPAs. Under the 3-judge panel decision, the F&WS, and presumably other agencies, would have no obligation to explain why an RPA is economic (or even feasible). The decision could also pave the way for dam removal RPAs or onerous and cost prohibitive fish passage requirements.

In July, the Ninth Circuit denied the petition for en banc rehearing of the 3-judge panel decision. On November 5, NHA, along with other hydropower interests, filed an amicus brief with the U.S. Supreme Court supporting the petition for certiorari.

Update: Unfortunately, on January 12, 2015, NHA learned that the Supreme Court denied certiorari in the Delta Smelt case.

Matrix Spotlight: Department of Energy's Hydro Visioning Initiative

At NHA's Annual Conference last April, the Department of Energy announced the development of a long-range national Hydropower Vision. The Vision will establish the basis for an ambitious future for the hydropower industry over the next 50 years. In order to realize this future, the DOE is developing a roadmap report which will analyze and describe the current state of the industry, new and emerging technologies, environmental and regulatory considerations, needed policy and market signals, benefits like grid integration, transmission and reliability, and operations and maintenance optimization

opportunities, to name a few.

NHA is the association partner with the DOE on this initiative. Over the past year NHA has actively participated in, and closely monitored, activities and development. NHA's Executive Director, Linda Church Ciocci, sits on the Senior Peer Review Group and NHA staff have participated on numerous Vision Task Forces. Although the draft Vision report will not be released until later in 2015, we are excited to see the Vision continue moving forward. If you have questions about the Vision please contact NHA.

Additional information on the Hydropower Vision can be found here.