



June 4, 2012

ELECTRONICALLY FILED

Michael Pulskamp
U.S. Bureau of Reclamation
Denver Federal Center, Bldg 67
P.O. Box 25007
Denver, CO 80225
mpulskamp@usbr.gov

RE: Comments Regarding the Bureau of Reclamation's Temporary Reclamation Manual Release for Lease of Power Privilege at Bureau Facilities

Dear Mr. Pulskamp:

On May 4, 2012, the Bureau of Reclamation ("Reclamation") issued a Temporary Reclamation Manual Release Directives and Standards Document ("Temporary D&S") concerning the Lease of Power Privilege ("LOPP") Processes, Responsibilities, Timelines, and Charges. The Temporary D&S was issued after Reclamation reviewed public comments received on a Draft D&S that it had issued on November 4, 2012. Reclamation has set a deadline of June 4, 2012, for the filing of comments on the Temporary D&S.

On January 13, 2012, the National Hydropower Association ("NHA") filed comments on Reclamation's November 4, Draft D&S. NHA has reviewed the Temporary D&S and applauds Reclamation's expeditious and comprehensive revisions of the November Draft. NHA appreciates the opportunity to comment on the Temporary D&S.

NHA is a non-profit national association dedicated exclusively to advancing the interests of the U.S. hydropower industry, including conventional, pumped storage, and new marine and hydrokinetic technologies. NHA's membership consists of more than 180 organizations, including consumer-owned utilities, investor owned utilities, independent power producers, project developers, equipment manufacturers, environmental and engineering consultants, and attorneys. NHA's members develop, own and operate hydroelectric facilities located on federal lands, including lands under Reclamation's control.

I. Summary of Comments on Temporary D&S

NHA has reviewed the Temporary D&S carefully and we believe it is an improvement over Reclamation's November Draft. The Temporary D&S, combined with Reclamation's recent report, *Site Inventory and Hydropower Energy Assessment of Reclamation Owned Conduits* ("Conduit Assessment"), which identified 373 sites and over 300,000 MW-hours of hydropower annually, provides developers with certainty and guidance when developing projects, and also advances the Administration's goal to develop renewable energy.

The Temporary D&S goes a long way toward making the LOPP process more responsive to project sponsors needs and more consistent throughout Reclamation, thereby increasing its effectiveness. In particular, NHA applauds Reclamation's clarification that it will continue to follow the terms of the 1992 Memorandum of Understanding ("MOU") between Reclamation and the Federal Energy Regulatory Commission ("FERC") in its regulation of non-federal hydro development at Reclamation projects. NHA appreciates Reclamation reducing the annual LOPP charge as well as including additional annual charge flexibility. Finally, NHA welcomes the clarification of projects eligible for a categorical exclusion. However, NHA has identified sections where additional modifications or clarifications could be made that would further strengthen the Temporary D&S.

First, NHA continues to believe that the 90-day timeframe provided to respond to a LOPP solicitation is too short, and should be extended. Second, the annual charge, while reduced from the level proposed in the Draft D&S, is still high and its application should be clarified. Third, the obligation to pay Reclamation's projected LOPP-related costs in advance is an unnecessary burden on small projects. Fourth, even if LOPP solicitations incorporate site-specific scoring criteria, Reclamation should identify the general scoring criteria that all site-specific criteria must implement. Fifth, NHA continues to believe that Reclamation should identify some procedure by which LOPP decisions can be challenged within Reclamation. Finally, while NHA welcomes the proposal to utilize Reclamation's existing categorical exclusion rules to expedite licensing, NHA recommends that Reclamation explore ways to further simplify the regulatory process for the smallest hydro projects.

NHA welcomes the opportunity to continue to work with Reclamation to incorporate these ideas into the Temporary D&S, and into any final LOPP procedures that Reclamation subsequently develops.

II. The 90-Day Period to Respond to LOPP Proposals Should be Extended.

In the Draft D&S, Reclamation proposed to allow potential applicants up to 90 days to respond to LOPP solicitations. In its original comments, NHA urged Reclamation to lengthen this time period. However, Section 7(B) of the Temporary D&S continues to provide that the solicitation for LOPP proposals "will allow up to 90 calendar days from the date of publication for applicants to submit proposals." In its response to NHA's comments, Reclamation stated that the Regional Director can adjust this deadline "if justified."

The statement that the Regional Director has the ability to extend the deadline to submit proposals is apparently a reference to Section 5(A)(9) of the Temporary D&S, which provides that the Regional Director is responsible for "resolving requests for extensions of the timeframes for development under a LOPP that are outlined in this [Temporary D&S]." NHA believes that this structure does not adequately reflect the complexity of preparing a detailed proposal in response to a LOPP solicitation.

First, since Section 5(A)(9) says “under a LOPP,” it can be read to allow deadlines to be extended only after a LOPP has been awarded, as suggested in Section 8. Second, Section 5(A)(5) appears to contradict Section 5(A)(9), in that it states the Regional Director is responsible for “ensuring that the processes outlined below are carried out in the defined timeframes.” When read with the narrow flexibility allowed by Section 5(A)(9), Section 5(A)(5) would seem to prevent the Regional Director from granting extensions of the time to submit proposals on a solicitation. Third, and more important, 90 days is simply not enough time to prepare a complete and detailed LOPP proposal. Note in this regard, that Reclamation has declined to include detailed scoring criteria in the Temporary D&S, which will greatly limit a potential applicant’s ability to develop a properly responsive proposal.

By contrast, FERC allows an applicant six months to prepare and file a development application in competition with a previously filed preliminary permit application. Reclamation should clarify (i) that the Regional Director has the authority to extend the deadline to submit a LOPP proposal, and (ii) that the requestor need only show that the additional time, up to 90 days, is required to prepare a complete LOPP proposal responsive to the criteria specified in the LOPP solicitation.

III. The Proposed Annual LOPP Charge Is a Disincentive to New Development.

In the Draft D&S, Reclamation proposed an Annual LOPP Charge of \$5.50/kW of installed capacity plus 6% of gross revenue from the proposed project. NHA and many other parties commented that this charge was excessive and that it would make many projects at Reclamation facilities uneconomic. In Section 11(B)(2) of the Temporary D&S, Reclamation has established a “standard LOPP charge” of \$3/kw plus 6% of gross revenue, and a “discounted LOPP charge” of \$2/kw plus 4% of gross revenue. This discounted rate would be applicable to entities “that are already responsible for project O&M repayment for the site of the LOPP project.” While NHA commends Reclamation for reducing the charge, both of the proposed charges are still high; and the applicability of the discounted charge is not clearly defined. NHA urges Reclamation to reduce both of the proposed annual LOPP charges, and to clarify who will be entitled to the discounted rate, particularly in situations where there are joint applications, for example, a private developer and entity responsible for O&M repayment.

First, in its response to comments on the Draft D&S, Reclamation states that the proposed annual LOPP charge is required by Section 9(c) of the Reclamation Act of 1939. However, Reclamation does not specify what provision of the Reclamation Act mandates a particular fee or fee structure, and it appears that Reclamation’s existing practice is inconsistent with the proposed requirement for a capacity charge plus a charge against gross revenues. Reclamation’s Technical Report: *Possible Methodologies for Use in Developing Lease of Power Privilege Rates* provides examples of annual charges established under existing LOPPs. None of the examples employ a fixed capacity charge and none are calculated against gross revenues. It is, therefore, unclear why Reclamation now believes that it is required to impose a capacity fee.

Second, the burden on project finances caused by a fee of this magnitude creates a strong disincentive against developing hydro projects at Bureau facilities, specifically the smaller hydro projects. For example, of the 373 sites identified by Reclamation in the Conduit Assessment, 205 of them would be less than 100 kW of installed capacity. 6% of gross revenue is a very high load that many projects will not be able to support, particularly given current power prices, and works against the majority of projects Reclamation has taken the time to identify as eligible for development. In addition, the large fee creates a perverse incentive to undersize facilities, particularly where flows are seasonal and the developer has no control over the flows, as is often the case at Reclamation facilities. Finally, the proposed fee may constitute a barrier to fully implementing the President's and Secretary Salazar's strategy to increase renewable energy generation by hampering a majority of these attractive smaller projects.

Third, even the reduced annual LOPP charge proposed in the Temporary D&S is significantly greater than the comparable annual charge that would apply if the identical project were licensed by FERC. NHA is unclear on the basis for Reclamation's conclusion that the FERC rate "does not adequately recover" the necessary costs outlined in the Reclamation Act. Accordingly, NHA requests that Reclamation provide additional clarification on this point. Given that projects developed under a LOPP will be providing an additional revenue stream, we question whether the proposed fee structure would lead to decisions *not* to develop projects at Reclamation facilities.

Fourth, regardless of whether Reclamation reduces the annual LOPP charge, it should clarify the applicability of the discounted rate available to entities that are already responsible for O&M payments at the site of the proposed project. Reclamation's preference rules for selecting among competing LOPP proposals allow for "hybrid" proposals submitted jointly by a preference and non-preference applicant. However, the Temporary D&S does not indicate what annual LOPP charge would be applicable if the preference applicant were entitled to the discounted LOPP rate. Specifically, would the discounted rate be the only rate charged, or would Reclamation charge a "blended" rate that was a combination of the standard rate and the discounted rate?

Finally, NHA requests more clarification of §11(B)(2)(c), *Offsetting Reclamation Project Use Power*. In particular, NHA questions what the LOPP charge plus the "additional benefit of the marketed generation" must total to allow a reduction of the LOPP charge. In addition, NHA questions why the possible reduction of annual charges is not available if a project to be developed under a LOPP allows the operator of the Reclamation facility to reduce its power purchases from sources other than Reclamation.

IV. Advance Payment of Processing Costs Is an Unnecessary Burden on Small Projects.

Section 11(A) of the Temporary D&S provides that a Preliminary Lessee (or Lessee) must provide "the necessary funding to cover all Reclamation costs" prior to the initiation of any work by Reclamation. NHA does not question the obligation to reimburse Reclamation's costs, but notes that, for the smallest projects payment in full in advance may

represent an insurmountable burden that would lead a developer to decide *against* the project in the first place. NHA recommends that Reclamation allow very small projects to pay Reclamation's anticipated costs on a quarterly basis. Reclamation could use the Conduit Assessment to identify a category of projects that would be eligible for quarterly payments. Such a repayment stream would be more consistent with the limited resources of such developers.

V. Reclamation Should Identify General Scoring Criteria that Will Be Incorporated into Site-Specific LOPP Solicitations.

The Draft LOPP directive stated that Reclamation would give more favorable consideration to proposals that are well-adapted to developing, conserving, and utilizing the water and natural resources at a Reclamation project. NHA commented that the final LOPP procedure should spell out the scoring criteria and their relative weights. However, Section 7(E)(1) of the Temporary D&S simply provides that a LOPP solicitation "must include the scoring criteria for how proposals will be evaluated." In its response to comments on the Draft D&S, Reclamation stated: "Due to the variability of site specific conditions, Reclamation will retain the flexibility to tailor the scoring criteria to best address the most important aspects of the project site. Additional guidance outside of the D&S may be created to more specifically address the various scenarios of the competing proposals."

NHA acknowledges that LOPP solicitations should reflect site-specific considerations and agrees that Reclamation should have some flexibility in drafting LOPP solicitations. NHA also believes that Reclamation's stated goal of ensuring consistency in the LOPP program requires that general scoring criteria be established and included in the Temporary D&S and in any final LOPP procedures that are developed. In this regard, NHA offers its assistance in developing these criteria.

VI. Reclamation Should Identify a Process to Appeal a Decision Granting a LOPP.

The Draft LOPP directive stated that the decision to grant a LOPP is to be made by the Regional Director. NHA recommended that the final LOPP procedure should include a formal appeals process. However, the Temporary D&S did not include any such process. NHA continues to believe that some appeal process is necessary and that such processes already exist within Interior. In its original comments, NHA did not mean to suggest that Reclamation should create a new appeals process, but rather that it should identify the appropriate existing process that could be used should appeals arise. NHA continues to recommend that the Temporary D&S includes such a provision.

VII. Reclamation Should Establish an Expedited Process for the Smallest Projects.

Section 9(A) of the Temporary D&S provides that a proposed project with a capacity not greater than 15 MW will be considered for a categorical exclusion under NEPA. NHA welcomes this proposal and believes that it will, in a responsible manner, greatly reduce the regulatory timeframe for some projects and encourage development. However, NHA

urges Reclamation to explore ways to further streamline the LOPP process for the smallest projects. Reclamation could, for example, identify a class of small, low-impact projects by utilizing the Conduit Assessment. By using such an approach, NHA believes Reclamation can create an expedited LOPP process that balances appropriate regulatory review with the economics of smaller projects.

VIII. Conclusion

NHA commends Reclamation's efforts to improve the LOPP process through the Temporary D&S, which will further advance development of clean and renewable hydropower on Reclamation infrastructure. With additional clarifications and modifications as outlined in these comments, the Temporary D&S will provide a more transparent and responsive process for project developers, Reclamation officials, and existing water users.

In the Temporary D&S there are multiple references to broad stakeholder engagement when granting LOPP's. NHA remains committed to working with Reclamation to develop a holistic LOPP process, which includes input and early engagement from all interested parties, including project developers, water users and other stakeholders in proposed hydro development and the use of existing Reclamation infrastructure. Further, NHA reiterates its commitment to actively participating in any additional forums to further address and resolve the issues raised in the Temporary D&S and these comments.

Respectfully submitted,

A handwritten signature in cursive script that reads "Linda Church Ciocchi".

Linda Church Ciocchi
Executive Director
National Hydropower Association