



Regulatory Matrix

Update 15

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Underlined content represents new or updated information. All other information was included in Regulatory Matrix Update 14.

NHA Files Comments on FERC Annual Charges

On January 6, 2012, NHA submitted comments on FERC’s Notice of Proposed Rulemaking (NOPR) on Annual Charges for Use of Government Lands. FERC issued the NOPR on November 22, 2011 which followed FERC’s February 28, 2011 Notice of Inquiry (NOI) on the same issue.

Under the Federal Power Act, FERC has the authority to assess hydropower licensees annual charges for the use of federal lands; however, the fee must be reasonable. FERC is proposing to generate the annual charge based on a four-part formula that includes a land value per acre, an encumbrance factor, a rate of return, and an annual adjustment factor.

In order to reach a reasonable fee and accurate approximation of the fair market value of the land being used, NHA encouraged FERC to further discount the per acre value of the land used in the National Agriculture Statistical (NASS) Census, and further reduce the encumbrance factor. Additionally, we encouraged FERC to provide licensees the opportunity to submit their own assessments when FERC’s valuation results in an inaccurate land appraisal. Finally, we stressed the importance of adopting a single, statewide average land value for Alaska because of the inequities that would result under the proposed formula.

Annual charges are very important to the industry as they can substantially affect the economies of a project or facility. NHA appreciates the robust participation by members on a number of conference calls. The comments can be found on NHA’s website under “Member Resources”.

NHA Files Comments on Bureau of Reclamation’s Lease of Power Privilege

On January 13, 2012, NHA filed comments on the Bureau of Reclamation’s Draft Reclamation Manual Release on Lease of Power Privilege (LOPP). 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. Reclamation has the authority to issue LOPP’s at their facilities where there is a statutory right for power development.

Reclamation is the second largest generator of hydropower in the U.S. and a carefully worded LOPP is important in order to maximize hydro development on future and existing Bureau infrastructure projects.

The LOPP comments were evenly toned and mindful of existing water users, but in its comments NHA encouraged the Bureau to provide additional clarification on several key items included in the draft LOPP directive.

Specifically, NHA urged Reclamation to:

- Clarify the role of the 1992 MOU between the Bureau and FERC and jurisdiction determinations
- Develop standards and criteria for granting LOPP’s in competitive situations

- Develop an appeals process for final LOPP decisions, and
- Clarify a laundry list of other issues including the LOPP charge, developing an expedited LOPP process, and indemnification issues, to name a few.

NHA is looking forward to working with Reclamation on finalizing the LOPP process and participating in public engagement opportunities. The comments can be accessed through NHA's website under "Member Resources".

FWS: Petition to List as Threatened the American Eel

On November 28, 2011, NHA filed comments on the Fish and Wildlife Service's (FWS) 90-day finding to list the American eel as Threatened under the Endangered Species Act. The comments applauded the FWS for reinforcing the finding that hydropower operations are not a contributing factor to eel population decline, and point out that there is insufficient new data to make a listing determination.

The FWS published the 90-day finding on September, 29, 2011, based on the Council for Endangered Species Act Reliability's petition that presented substantial information that listing the species may be warranted because of the potential effect climate change will have on ocean warming and the eels. The FWS previously reviewed the status of the American Eel in 2004 and 2007. Both times, FWS 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 notice published in the Federal Register reinforced these findings.

FWS & NOAA: Requesting Comments on the Meaning of *Significant Portion of its Range* under the Endangered Species Act

On December 9, 2011, the Fish and Wildlife Service (FWS) and the National Oceanic and Atmospheric Administration (NOAA) released a draft policy and request for public comments on "Draft Policy on Interpretation of the Phrase *Significant Portion of its Range* in the Endangered Species Act's Definitions of *Endangered Species* and *Threatened Species*."

The purpose of the notice is to "provide a draft interpretation and application of *significant portion of its range* that reflects a permissible reading of the law and its legislative history and minimizes undesirable policy outcomes, while fulfilling the conservation purposes of the Act." Neither agency has had a policy providing a uniform interpretation of the phrase and in the policy they intend to address: 1) the consequences of a determination that a species is either endangered or likely to become so throughout a significant portion of its range, but not throughout all of its range; and 2) what qualifies a portion of a range as "significant."

Comments are due February 7, 2012. The federal register notice can be viewed here: <http://www.gpo.gov/fdsys/pkg/FR-2011-12-09/pdf/2011-31782.pdf>. At this time NHA does not anticipate filing comments.

NOAA: Petition to list as Threatened the Alewife and Blueback Herring

On November 2, 2011, NOAA published a 90-day finding to list the Alewife and Blueback Herring as Threatened under the ESA, based upon a petition filed by the Natural Resource Defense Council (NRDC) on August 5, 2011. The petition alleges that river herring populations are a “tiny fraction of their historical abundance”, citing, among other threats, hydroelectric facilities. In the alternative, NRDC asks the National Marine Fisheries Service (NMFS) to designate four Distinct Population Segments (DPS) of Alewife and three DPS’s of Blueback herring for protection. The DPS’s are throughout the Eastern seaboard, including central New England, Long Island Sound, the Chesapeake Bay, and Carolina.

NHA continues to monitor this issue and has had discussions with a handful of members. Some members will be filing comments individually and NHA is evaluating whether to file comments on behalf of the industry. The filing deadline is February 3, 2012.

National Ocean Council: Draft Ocean Policy Implementation Plan

On Thursday, January 12, the White House released its Draft National Ocean Policy Implementation Plan. NHA is still digesting the plan, and we participated in a stakeholders’ call the afternoon of the plan’s release. The plan can be viewed here:

<http://www.whitehouse.gov/administration/eop/oceans/implementationplan>

In 2009, NHA in conjunction with an extremely broad coalition, submitted comments on this issue encouraging the Obama administration to balance the protection of the ocean ecosystem with the rapid deployment of ocean energy technologies.

Minor License Violations: NHA Holds Meeting with FERC’s DHAC

In response to FERC’s new policy of labeling minor license deviations as violation, NHA scheduled a minor license violations conference call with Ed Abrams, Director of Hydropower Administration and Compliance, on December 19. Ed joined us at NHA as well as a handful of members, while over 40 members called-in.

The call was a fact-finding discussion where we were able to ask Ed questions and get clarification on FERC’s policy on minor violations and how the industry should interpret it.

Subsequently, NHA held a follow-up call with membership exploring specifically how FERC’s new policy affects the industry and whether we need to respond. At this time NHA is collecting more information from membership and considering a couple research projects before crafting a response, if at all.

Lengthy summaries were sent to the Regulatory Committee and Compliance listservs, please refer to those emails on the hydro industry forum for more detailed information.

Oregon's Department of Energy: Hydropower Development Assistance Program

On December 23, 2011, Oregon's Department of Energy released a comment opportunity on whether the state should pursue a hydropower development assistance (HDA) program similar to the Colorado pilot program. Specifically, the DOE is "interested in whether strategic technical support for development proposals, pre-screening to prioritize projects, and widespread public outreach could materially benefit the development of small hydropower facilities." Comments are due on February 3, 2012, by 5:00 p.m. For more information and a list of questions the DOE is looking to receive information on, visit: http://www.oregon.gov/ENERGY/RENEW/Hydro/Hydro_index.shtml.

NHA has alerted membership of this opportunity and has received interest from a few members. We will be submitting comments in support of Oregon's HDA.

The HDA follows on the heels of Colorado's first small hydropower project approved under their MOU with FERC. The Meaker Wenschhof Hydro Project, a 23 kW project located on an existing irrigation pipeline, received approval on September 14, 2011, only two months after filing its application because of the pilot project outlined in the MOU. The Colorado/FERC MOU was signed in August of 2010, where Colorado agreed to develop a pilot program to simplify and streamline 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, FERC agreed to waive the first and second stages of consultation and utilize an accelerated timeline for the exemptions. View the Colorado/ FERC MOU here: <http://www.ferc.gov/legal/maj-ord-reg/mou/mou-co.pdf>.

Department of Energy: Hydropower Advancement Project

On December 21, 2011, the DOE released a Request for Information (RFI) seeking input from hydropower owners, operators, technology developers, manufacturers, and consultants on efficiency, capacity and water utilization improvements at existing hydropower facilities.

The Department of Energy (DOE) estimates that approximately 8 to 16 GW of additional capacity and approximately 55 TWh of annual generation can be added through cost effective and sustainable upgrades at existing hydropower facilities. DOE has developed the Hydropower Advancement Project (HAP) to support development of this resource and is requesting information from hydropower owners, operators, project and technology developers, equipment manufacturers, consultants and other stakeholders (stakeholders) concerning the identification of efficiency, capacity and water utilization improvements at existing U.S. hydropower facilities.

NHA and many members participated in a webinar on the HAP on January 10. Comments are due February 6, 2012, and a robust response from the industry will show DOE our interest in, and demonstrate the importance of, the HAP.

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The RFI is available at: <https://www.fedconnect.net/FedConnect/?doc=DE-FOA-0000629&agency=DOE>

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 issues a notice on June 20, 2011 agreeing to hear the case. NHA files amicus brief on the merits in support of PPL Montana on September 7, 2011. Oral arguments held December 7, 2011. A decision is expected by June 2012.

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: NHA was joined by the Edison Electric Institute, the Northwest Hydroelectric Association, the Electric Power Supply Association and Snohomish County PUD on the amicus brief. In summary, the group urged the U.S. Supreme Court to reverse the Supreme Court of Montana's decision that the State held title to the streambeds and lands. Agreeing with PPL Montana, the hydropower industry brief argues that the Montana Supreme Court's decision conflicts with U.S. Supreme Court precedent.

The brief also states that if the State court's decision is not corrected, it has the potential to be adopted by other states, thereby imposing even more burdens on the nation's hydropower and other infrastructure, as well as disturbing their settled expectations of property ownership.

In a notable development, the Obama Administration also filed a brief in the case siding with PPL Montana. In its earlier filing with the Court, the Administration had urged it not to take the case for consideration.

NHA staff attended the oral arguments on December 7. Staff also attended a luncheon event held by PPL after the arguments in appreciation of all the work PPL's staff, consultants, and the organizations they are members of put into the case. The Legal Work group held a conference call to discuss the oral arguments in December, in which PPL's attorneys participated. In addition, the audio from the arguments was distributed to the membership via the Listserv and an article written for the newsletter.

Miscellaneous Regulatory News

Agency Reorganization & Consolidation

On Friday January 13, 2012, President Obama proposed reorganizing multiple agencies and departments involved in commerce in order to make government leaner, smarter, and more consumer-friendly. Notably, the plan would move NOAA, including the National Marine Fishery Service (NMFS), to the Department of Interior, which has sparked opposition from the National Weather Service Employees Union. The President needs approval from Congress before any reorganization takes place.

Nomination: Assistant Secretary of the Interior for Fish, Wildlife and Parks

In June of 2011, President Barack Obama nominated the leader of American Rivers, Rebecca Wodder, as Assistant Secretary of the Interior for Fish, Wildlife and Parks. Wodder was chosen to replace Tom Strickland after he left for the private sector. She has been the chief executive officer of American Rivers since 1995. Since the nomination, Senators have announced they would place holds on the nomination should it reach the Senate floor.

On Friday, January 20, it was reported that Wodder asked the White House not re-nominate her for the position, citing the “prolonged nomination process”. Wodder will remain with Interior however, as a senior adviser to Secretary Ken Salazar to oversee conservation issues and the President’s Great Outdoors initiative. Rachel Jacobson will continue to serve as acting assistant secretary until the President picks a new nominee.

FERC Commissioner Spitzer Retires

On Monday, December 12, 2012, Commissioner Marc Spitzer resigned from FERC. Spitzer was a George W. Bush appointee whose 5-yr. term ended on June 30, 2011. On January 23, President Obama nominated Tony Clark to replace Spitzer. Tony is the former president of the National Association of Regulatory Utility Commissioners, and chairman of the North Dakota Public Service Commission. FERC is a bipartisan five-member commission and by law cannot have more than three Republican or Democratic members. Currently, the Commission has one Republican, Philip Moeller, and three Democrats - Cheryl LaFleur, John Norris and its chairman, Jon Wellinghoff.

Bonneville Power Association: Wind Curtailment

On December 7, 2011, FERC ordered the Bonneville Power Association (BPA) to revise its transmission tariffs for wind generators to make the terms and conditions “comparable to those under which Bonneville provides transmission services to itself and that are not unduly discriminatory or preferential.” The BPA has 90-days to file its tariff revisions, or appeal the FERC’s ruling. FERC’s decision comes after the wind industry challenged the BPA’s actions to curtail wind generation in the spring of 2011 during times of high hydropower generation. On January 9, 2012, BPA asked FERC for a rehearing.

FERC’s decision can be found here: <https://www.ferc.gov/EventCalendar/Files/20111207083529-EL11-44-000.pdf>.

2011 NHA Tax Manual

The 2011 NHA Tax Manual is still available. NHA is investigating a 2012 update; however few changes have been made. 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.