



Regulatory Matrix

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National Hydropower Association

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

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*Underlined content represents new or updated information. All other information was included in Regulatory Matrix Update 15.

NHA Gets Hydro Included in ARPA-E Solicitation

On February 29, NHA filed comments on a funding opportunity announcement (FOA) released by the DOE's Advanced Research Projects Agency-Energy (ARPA-E). The purpose of the ARPA-E FOA is to identify "high-risk, high-reward concepts for energy-related technologies that may enhance our nation's energy and economic security." Although the FOA did include MHK and pumped storage technologies, it did not include conventional hydropower in the list of eligible renewable power projects and technologies.

NHA explained that our members are pursuing breakthrough hydro technologies, and as written, the FOA could be interpreted to exclude these projects. Therefore, NHA requested that ARPA-E amend the FOA to include conventional hydro in its Renewable Power category.

In early March, ARPA-E released its final FOA. NHA is pleased to report that the final FOA now includes "Hydro Energy" as its own subcategory. The final FOA included \$150 million in available grants that can range between \$250,000 and \$10 million.

Bureau of Reclamation Releases 2nd Round of LOPP Comments

On April 5, the Bureau issued a Temporary Directive and Standard (TDS) for the Lease of Power Privilege (LOPP). The TDS release was updated to reflect comments received during the first LOPP comment period, on which NHA submitted comments. The TDS comment period is open for 60 days and are due to Reclamation by June 4, 2012 at 5 p.m. NHA anticipates filing comments, if you are interested in participating please contact Dave Zayas at David@hydro.org.

NHA has worked with the Bureau since submitting our original comments and we look forward to continuing that dialogue. Specifically, we are working to ensure a fair and transparent LOPP process with proper stakeholder engagement.

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 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.

NHA's original LOPP comments 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 BOR and FERC; develop standards and criteria for granting LOPP's in competitive situations; develop an appeals process for final LOPP decisions; and, clarify the LOPP charge and indemnification issues, to name a few.

NHA Promotes Regulatory Improvements with CEQ

In March, NHA followed up on a meeting held last fall with the Council on Environmental Quality's rapid response team – a group chaired by the Department of Energy and the Department of Interior chartered to examine permitting and regulatory delays in the development of renewable energy projects. NHA provided high level administrative action items that would begin to address the issues that delay projects, as well as recommendations on how the federal government can continue to invest in hydropower growth. NHA also shared the Small Hydropower Council's 2010 report.

NHA continues outreach with members of the task force, particularly Laura Morton, senior advisor for renewable energy and the DOE co-chair of the group, to keep the lines of communication open so we can continue to advise CEQ staff as they identify opportunities to improve the regulatory environment for renewable energy project development, including hydropower.

NHA Urges the Army to Recognize Hydro in \$7 Billion RFP

On February 24, the U.S. Army requested comments on a draft RFP – *Large Scale Renewable Energy Production for Federal Installations*. Pursuant to the Department of Defense's goal to produce or procure from renewable resources at least 25% of its electricity consumption by 2025, the \$7 billion dollar draft RFP seeks to procure renewable and alternative energy through power purchase agreements (PPAs) for terms of up to 30 years. Projects are categorized based on their size – greater than 12 MW, 4 MW-12 MW, and less than 4 MW.

NHA's comments explained that the hydropower industry stands ready to provide the Army with renewable hydropower, highlighting its base load capability, ancillary benefits and tremendous growth potential. However, we expressed our disappointment that hydropower is not included in the draft RFP and recommended that the Army amend the RFP to include hydropower as an eligible renewable technology.

NHA hand-delivered our comments to John Lushetsky, Executive Director of the Army's Energy Initiatives Task Force (responsible for the RFP), and requested a follow-up meeting.

FERC Maintains Status Quo on Annual Charges

In January, FERC announced that the FY 2012 charges for the use of government lands will continue to follow the 2008 fee schedule.

Earlier this year NHA submitted comments on FERC's Notice of Proposed Rulemaking (NOPR) on Annual Charges for Use of Government Lands. In the NOPR, FERC proposed an annual charge based on a four-part formula that included a land value per acre, an encumbrance factor, a rate of return, and an annual adjustment factor.

NHA's comments encouraged FERC to further discount both the per acre land value and encumbrance factor, and pushed FERC to provide licensees the opportunity to submit their own land 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.

NHA Continues Regulatory & Compliance "Hot Topics" Series

In February, NHA held a compliance call on Shoreline Management Plans (SMP). The robust back-and-forth discussion included some of the nuances related to SMP compliance, FERC and state agency interaction, and stakeholder issues. Over 15 members participated on the call.

The Compliance "Hot Topics" series is for all interested members, but has been of particular interest to licensees undergoing relicensing and those in post-relicensing. The SMP call was the fourth in six months, and NHA intends to continue the series with our next call taking place in May. If you have "Hot Topic" suggestions please contact Dave Zayas at David@hydro.org.

The previous topic was a series of discussions on FERC's policy of labeling minor license deviations as violations. Culminating with a call where NHA invited Ed Abrams, Director of Hydropower Administration and Compliance, to join us in NHA's office, along with a handful of members in attendance and over 40 members calling in, the group was able to ask Ed questions and get clarification on FERC's minor violations and how the industry should interpret it.

NHA Comments on Oregon's Hydropower Development Assistance Program

On February 3, NHA submitted comments on Oregon's Hydropower Development Assistance Program. Our comments encouraged Oregon to proceed with their Assistance Program, highlighted the success of Colorado's first project under their MOU with FERC, and conveyed the many benefits hydropower provides. Specifically, NHA pointed out the nearly two dozen proposed hydroelectric projects in Oregon that would qualify under the DAP and the significant energy, economic and local job creation benefits the state would experience from these projects. Oregon, through the DAP, has a tremendous opportunity to provide leadership on hydropower policy and set a precedent for other states to follow.

Oregon released the comment opportunity in December, 2011, which followed 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.

New Executive Order – Improving Permitting and Review of Infrastructure Projects

In March, President Barack Obama issued a new executive order (EO) to improve federal permitting and review of infrastructure projects. To maintain our nation's competitive edge, the president recognized the importance of high- quality infrastructure, but that infrastructure projects experience delays related to multiple agency reviews and redundant processes, among others. To improve the process for these projects the president called for transparency, predictability, clear performance goals, and adherence to timelines for review. Some of the OE's highlights include:

- A new Steering Committee made up of Deputy Secretary's from 7 different federal Departments;
- The inclusion of water resource projects and renewable energy generation as eligible projects for review by the Steering Committee; and
- Aggressive timelines to develop a list of infrastructure projects of national or regional significance, and the development of a Federal Permitting and Review Performance Plan that will significantly reduce the aggregate time required to make Federal permitting and review decisions on infrastructure projects

NHA reached out to David Hayes, Deputy Secretary DOI, and has scheduled a meeting with Anne Castle, Assistant Secretary for Water and Science DOI, to learn more about the EO and its application to hydropower.

Read the EO here – <http://www.whitehouse.gov/the-press-office/2012/03/22/executive-order-improving-performance-federal-permitting-and-review-infr>

BPA Wind Curtailment Update

On February 7, the Bonneville Power Administration released a draft proposal to address seasonal electricity oversupply issues in the Northwest. NHA submitted comments on the draft encouraging a holistic approach to solving the oversupply issue, but focused its comments on the broader long-term integration and reliability policy issues and reiterated our 2011 “guideposts” statement. Specifically, NHA outlined the benefits of pumped storage and how it should play a major role in solving the oversupply puzzle.

In early March, after reviewing comments filed on the draft proposal, BPA filed with FERC its plan to address seasonal oversupply. BPA’s plan, if accepted by FERC, would be in place for one year, allowing stakeholders additional time to work out a long-term solution.

In times of oversupply, BPA proposes a tiered approach. First, BPA would work with the U.S. Army Corps of Engineers and Bureau of Reclamation to manage federal hydroelectric generation and spill water up to dissolved gas limits. Second, BPA would then offer low-cost or free hydropower to replace the output of thermal and other power plants. Finally, BPA would then reduce the output of remaining generation within its system, including wind energy, in order of least cost. BPA would compensate the affected generation for lost revenues, including renewable energy credits and production tax credits.

The FERC filing, press release, and a summary of changes from the February 7 proposal can be found on BPA’s website: <http://www.bpa.gov/corporate/AgencyTopics/ColumbiaRiverHighWaterMgmt/>

BPA’s proposal follows a FERC decision ordering the 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.” FERC’s decision came after the wind industry challenged the BPA’s actions to curtail wind generation in the spring of 2011 during times of high hydropower generation.

Legal Update: 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. The 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. The 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. The Court issued a unanimous (9-0) decision in favor of PPL Montana on February, 22.

Issues: The case involves the imposition of rent on PPL for the use of riverbeds for certain 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 U.S. Supreme Court decision was an important victory for PPL Montana and the industry as a whole. The state of Montana's demand for rent was based on its assertion that the rivers where PPL's facilities are located had been navigable for title at the time Montana became a State – in 1889 – and that the State therefore gained title to the riverbeds under the "equal footing doctrine." The Montana courts looked at the rivers as a whole, awarding summary judgment to the State on the question of navigability, and thus title.

However, the U.S. Supreme Court agreed with almost all of the industry's arguments challenging the Montana courts' conclusion. Distinguishing the test of navigability for title from the navigability test used to determine Congress' power to regulate interstate commerce, the Court ruled that the Montana courts should have considered the rivers on a segment-by-segment basis; that portages demonstrate non-navigability; that present-day use is of limited relevance; and that States' trust powers have no bearing on the federal law that determines riverbed title under the equal footing doctrine.

NHA had participated in an amicus brief before the Court, joined by the Edison Electric Institute, the Northwest Hydroelectric Association, the Electric Power Supply Association and Snohomish County PUD.

NHA staff and attorneys who participated in the case held a conference call of the legal workgroup on the case. NHA staff also participated in an American Bar Association conference call on the case.

Miscellaneous Regulatory News

David Danielson Named DOE Assistant Secretary for EERE

David Danielson won Senate approval on March 29 to take over the reins as the DOE's Assistant Secretary for Energy Efficiency and Renewable Energy. Previously vacated in 2011 by Cathy Zoi, Danielson brings his previous DOE experience as a program director at the Advanced Research Projects Agency-Energy (ARPA-E) to EERE.

Recently, NHA's Executive Director, Linda Church Ciocci, met with Danielson at a White House forum on R&D. NHA is working on scheduling a meeting with Danielson in order to introduce him to the industry.

Reclamation Names McCalman Senior Hydropower Advisor

Commission Michael Connor announced that Kerry McCalman has been selected as Reclamation's Senior Advisor for Hydropower and Electric Reliability Compliance Officer. As Senior Advisor, McCalman will serve as the liaison on intergovernmental initiatives associated with hydropower delivery and be responsible for Reclamation's overall compliance with Federal Energy Regulatory Commission Mandatory Bulk Electric System Reliability Standards. He will also coordinate implementation of corporate partnership efforts involving Reclamation's power functions and activities in collaboration with the U.S. Army Corps of Engineers, Bonneville Power Administration, Western Area Power Administration and the Tennessee Valley Authority.

Vermont Proposes Hydro Assistance Program

The Vermont Legislature has taken up a bill that aims to streamline approval of small scale hydropower projects. The bill, which has already passed the state Senate, authorizes Vermont to enter into a pilot program with FERC to expedite the approval of up to 20 small hydro projects.

The Vermont bill follows in the footsteps of a similar and successful FERC / Colorado MOU, as well as a proposed Oregon small hydro development assistance program.

FWS Voluntary Conservation Actions

In March, the FWS issued an Advance Notice of Proposed Rulemaking seeking comments on Expanding Incentives for Voluntary Conservation Action Under the ESA. FWS is soliciting comments on how ESA regulations can be amended to create incentives for landowners to take voluntary conservation actions that benefit species prior to them becoming threatened or endangered. Specifically, how the FWS can assure landowners who take voluntary actions will be recognized and benefit after a species is listed.

NHA is preparing to file comments and has held one conference call with interested members. If you are interested in participating on the drafting group, please contact Dave Zayas at David@hydro.org.

House Passes Conduit Hydropower Bill

The House of Representatives on March 7, passed H.R. 2842, *the Bureau of Reclamation Small Conduit Hydropower Development and Rural Jobs Act of 2011*, a bill to promote small conduit hydropower development.

The bill amends the Reclamation Project Act of 1939 to authorize the Secretary of the Interior to contract for the development of small conduit hydropower at Bureau facilities and makes the Bureau's Power Resources Office the lead office on small conduit hydropower policy and procedure-setting activities, excluding such projects from the jurisdiction of the Federal Energy Regulatory Commission.

H.R. 2842 was introduced by Colorado Rep. Scott Tipton (R-CO) back in September, 2011. NHA commends the work of the bill's bipartisan co-sponsors – Representatives Tipton (R-CO), Coffman (R-CO), Costa (D-CA), Gosar (R-AZ), McClintock (R-CA) and Smith (R-NE) – and the leadership of Natural Resources Committee Chairman Doc Hastings (R-WA).

Events to Watch

- FERC Technical Conference on Reactive Power Resources, Tuesday, April 17, at FERC's headquarters beginning at 9:00 a.m. (EST). The Conference will address a broad range of issues including, but not limited to, transmission and energy storage resources and design options for and cost of installing reactive power equipment. More information can be found on FERC's e-library website: http://elibrary.FERC.gov/idmws/file_list.asp?accession_num=20120217-3004
- The Clean Defense Briefing (CLEANDEF5) will be held in Washington, D.C. on Monday, April 30. CLEANDEF 5 is a great opportunity to learn about renewable energy contracting with the Department of Defense and to meet the key contracting decision-makers within each branch of the military. For more information visit: <http://www.cvent.com/events/cleandef5-the-clean-defense-briefing/invitation-2bd791ea72204670a17de33d0ef36c51.aspx?i=d590ca47-09ec-4e6c-b62c-b290afed3338>

Clear Your Calendars - NHA Regional Meetings Coming Soon

- Midwest Regional Meeting, May 15-16, 2012, Green Bay, WI - **REGISTRATION NOW OPEN!**
- Alaska Regional Meeting, August 21-22, 2012, Sitka, AK
- Southeast Regional Meeting, September, 2012, Charleston, W.V.
- Hydraulic Power Committee Fall Meeting, October 1-3, 2012, Chattanooga, TN
- Northwest Regional Meeting, October 18, Boise, ID
- Hydro Finance Summit, November, 2012, New York, N.Y.