



Regulatory Matrix

2012: Issue 3

8/8/2012

National Hydropower Association

David Zayas

Manager of Regulatory Affairs & Technical Services

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

Table of Contents*

NHA Recommends Endangered Species Act Improvements to Fish & Wildlife Service	3
NHA Files Second Round of Comments on Reclamation’s Lease of Power Privilege.....	3
FERC Issues Notice of Proposed Rulemaking on Ancillary Services	4
FERC Issues Final Rule on Integration of Variable Energy Resources.....	5
House of Representatives Passes Hydro Bill with Unanimous Consent.....	5
NHA Soliciting “Hot Topics” Issues	5
New DOI and DOD MOU on Renewable Energy – Hydro Excluded.....	6
Army Corps Releases Final Large Scale Renewable Energy RFP – Hydro Excluded.....	6
Legal Update: Natural Resources Defense Council, Inc. v. County of Los Angeles, 636 F.3d 1235 (9th Cir. 2011).....	7
Miscellaneous Regulatory News	8
Department of Energy Seeking Input on Marine and Hydrokinetic Resource Data	8
FERC & Bureau of Ocean Energy Management Revise Guidelines for MHK Projects.....	8
Fish & Wildlife Service Issues New Proposed Listing and Critical Habitat	8
Executive Order 13610 – Identifying and Reducing Regulatory Burdens	9
Clear Your Calendars - NHA Regional Meetings Coming Soon!	9

*Underlined content represents new or updated information. All other information was included in Regulatory Matrix 2012: Issue 2.

NHA Recommends Endangered Species Act Improvements to Fish & Wildlife Service

On July 13, NHA filed comments on a Fish & Wildlife Service Advanced Notice of Proposed Rulemaking – Expanding Incentives for Voluntary Conservation Actions Under the Endangered Species Act. The FWS requested comments on how to create incentives for landowners to take voluntary conservation actions to benefit species that may become threatened or endangered, and how to ensure those who take voluntary actions will benefit in the future.

NHA’s comments, developed by a dedicated and diverse working group, applauded the FWS for taking this initiative; however, our comments encouraged FWS to first consider improving and revising existing FWS process and regulations, rather than developing a new regulatory scheme. Specifically, NHA recommended steps the FWS could take to improve the process for using Candidate Conservation Agreements, Safe Harbor Agreements, and Habitat Conservation Plans; and encouraged FWS to revise its policies for determining Critical Habitat Exclusions, and threatened and endangered listing determinations. Second, and alternatively, we provided specific comments on the questions raised in the Notice. Comments are available on NHA’s website under “Member Resources”.

NHA Files Second Round of Comments on Reclamation’s Lease of Power Privilege

In early June, NHA submitted a second round of comments on Reclamation’s Lease of Power Privilege (LOPP). NHA thanked Reclamation for clarifying the role of the 1992 MOU between Reclamation and FERC regarding jurisdiction, applauded the reduction of the annual LOPP charge from the original draft and clarification of projects eligible for a categorical exclusion under NEPA. However, we encouraged Reclamation to make a number of modifications. Specifically, we asked Reclamation to extend the 90-day timeframe provided to respond to LOPP solicitations, further reduce and clarify the LOPP annual charge, build in flexibility for small hydro projects to re-pay Reclamation’s LOPP related costs on a quarterly basis, provide LOPP scoring criteria, develop a procedure to challenge LOPP decisions, and consider developing a process to further expedite the smallest LOPP projects.

On April 5, Reclamation issued a Temporary Directive and Standard (TDS) for the LOPP. The TDS release was updated to reflect comments received during the first LOPP comment period, on which NHA submitted comments. NHA’s original LOPP comments encouraged Reclamation to provide clarification on several key items; 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.

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.

FERC Issues Notice of Proposed Rulemaking on Ancillary Services

On June 21, FERC opened the comment period on a Notice of Proposed Rulemaking (NOPR) - *Third-Party Provision of Ancillary Services; Accounting and Financial Reporting for New Electric Storage Technologies*. The NOPR was issued in response to a Notice of Inquiry (NOI) on the same issue from June 2011. The NOPR proposes to revise aspects of its market-based regulations, ancillary services requirements under the *pro forma* open-access transmission tariff (OATT), and accounting and reporting requirements. Specifically, the Commission proposes to revise its Avista Corp. policy governing the sale of ancillary services at market-based rates to public utility transmission providers.

Responding to the NOPR is crucial for the industry, especially for pumped storage development, and NHA is in the process of reviewing the NOPR and comparing the changes with the NOI, which will provide the basis for our comments. Comments are due the first week of September.

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.

Specifically, we explained/suggested that:

- Existing policies such as the Avista restriction and limits on sales of ancillary services to third parties prevent the robust development of new energy storage facilities, as well as the deployment of existing storage and conventional hydropower into ancillary services markets.
- An adaptation of Avista that would (1) enable an energy storage facility to participate in an ancillary services market without having to prove it lacked market power; and, (2) permit a transmission provider to acquire market-rate ancillary services to meet its mandatory service obligations.
- The need to develop policies that would enable new energy storage facilities to compete and enter into long-term contracts with regional transmission organizations and transmission providers.
- The Commission's existing cost accounting and reporting rules do not properly address several unique features of pumped storage hydropower facilities, and recommended that the Commission take note of the similarities between electric energy storage and gas storage to develop a separate asset class that properly recognizes the unique features of electric energy storage.

FERC Issues Final Rule on Integration of Variable Energy Resources

Also on June 21, FERC issued a final rule on the *Integration of Variable Energy Resources*. The final rule adopts two reforms from a November 2010 NOPR by requiring transmission providers to offer customers the option of scheduling transmission service at 15-minute intervals and by requiring generators using variable energy resources to provide transmission owners with certain data to support power production forecasting. The final rule will take effect on September 11, 2012.

House of Representatives Passes Hydro Bill with Unanimous Consent

On July 9, by a unanimous vote of 372-0, the House passed H.R. 5892, the Hydropower Regulatory Efficiency Act of 2012. Specifically, the legislation would increase the exemption from 5 to 10 MWs, authorizes FERC to extend preliminary permits on a one-time basis for up to two years, increase the conduit exemption to 40 MWs, and directs FERC to study the feasibility of a two-year licensing process for development on non-powered dams and closed-loop pumped storage projects.

In less than 9 months, NHA worked with the offices of Representatives Cathy McMorris Rodgers (R-WA) and Diana DeGette (D-CO) as well as House Energy and Commerce Committee staff to have a bill introduced, conduct negotiations on revised language, re-introduce the legislation, hold a hearing and mark-up, and secure House passage. This is a tremendous result and a great show of momentum as NHA has now been focusing on discussions with Senate staff urging them to get a bill on the President's desk for signature this year.

NHA Soliciting "Hot Topics" Issues

The Regulatory Affairs committee is soliciting Hot Topics ideas for future conference calls among the membership. 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.

New DOI and DOD MOU on Renewable Energy – Hydro Excluded

On August 6, the Departments of Interior (DOI) and Defense (DOD) entered into a new Memorandum of Understanding – *Renewable Energy and a Renewable Energy Partnership Plan*. Unfortunately, to NHA’s great disappointment, hydropower was not included as an eligible renewable energy technology. NHA is currently reviewing the MOU and has reached out to both DOI and DOD with our concerns and to get more information.

The MOU’s purpose is to help the “DOD develop renewable energy in the interest of greater energy security and reduced energy installation energy costs and to help meet DOI goals of increasing renewable energy generation from public lands and the Outer Continental Shelf”. Specifically, the MOU aims to: 1) develop offshore wind for DOD use, 2) develop solar, wind, geothermal and biomass throughout the West on BLM land, and 3) develop renewable energy technologies in Alaska for both military installations and for remote, off-grid and isolated Native Alaskan villages.

The MOU and DOI press release can be viewed here: <http://www.doi.gov/news/pressreleases/Interior-and-Defense-Departments-Join-Forces-to-Promote-Renewable-Energy-on-Federal-Lands.cfm>

Please stay tuned for future communication on this issue, and do not hesitate to contact Dave Zayas at David@hydro.org, with any questions.

Army Corps Releases Final Large Scale Renewable Energy RFP – Hydro Excluded

On August 7, the Army Corps of Engineers released its final \$7 billion RFP for Large Scale Renewable Energy Projects. Unfortunately, even after in-person meetings with Army officials and multiple follow-up communications, hydro was the only renewable energy technology not included. Similar to NHA’s frustration, our outreach and education to the Department of Defense officials will not stop until hydropower is included as an eligible renewable technology.

The Army stated that hydropower was not included in the Final RFP because “Hydroelectric dams are covered by a separate NAICS code and will not be included as part of this planned contract. However, low head/ low flow water turbines and ocean energy technologies are included under the NAICS 221119 that was selected for this planned contract and are considered alternative energy sources provided dam construction is not necessary. Requirements specific to these technologies are considered to be too few to warrant separate categories for MATOC selection purposes.”

On February 24, the Army requested comments on a draft RFP. 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 was not included in the draft RFP, especially because the Army Corps is the largest generator of hydropower in the country, and recommended that the Army amend the RFP to include hydropower as an eligible renewable technology.

Legal Update: Natural Resources Defense Council, Inc. v. County of Los Angeles, 636 F.3d 1235 (9th Cir. 2011)

The United States Supreme Court has granted certiorari in the above mentioned case, of which NHA is a participant in an amicus brief, and concerns the scope of a “discharge” under section 402 of the Clean Water Act (CWA). Specifically, the Supreme Court has 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?

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.

Clean Water Act & Case Law Background: The CWA section 402 prohibits “the discharge of any pollutant” into waters of the United States, defined as an addition of a pollutant from any “point source,” without a NPDES permit. Under longstanding precedent in other circuits, (*National Wildlife Federation v. Gorsuch*) dams are not point sources, and dam owners including FERC hydro licensees, are not required to obtain a NPDES permit for general dam operations. Moreover, the Supreme Court in *South Florida Water Management District v. Miccosukee Tribe of Indians* held that a transfer of water from one portion of a single body of water into another portion does not constitute the “addition” of pollutants for purposes of the CWA.

NHA decided to become involved in the amicus brief because if the Supreme Court upholds the Ninth Circuit’s decision, beneficial case law mentioned above 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.

Miscellaneous Regulatory News

Department of Energy Seeking Input on Marine and Hydrokinetic Resource Data

DOE issued an RFI seeking public input regarding lacking data and technologies for characterization of marine and hydrokinetic (MHK) energy resources in support of deployment of MHK technologies. Specifically, DOE is looking for comments regarding the advancement of wave and tidal resource characterization and data gathering for characterization of far-field hydrological and wave environment interactions with MHK energy devices. The information gathered will be used to help inform future strategic considerations and will inform the Water Power Program's research and development portfolio with regards to offshore marine and hydrokinetic resource efforts. For more information see the Solicitation at: <http://www07.grants.gov/search/search.do?&mode=VIEW&oppld=188573>

FERC & Bureau of Ocean Energy Management Revise Guidelines for MHK Projects

In July, FERC and the Bureau of Ocean Energy Management (BOEM) released revised guidelines on Regulation of Marine and Hydrokinetic Energy Projects on the Outer Continental Shelf (OCS). The revised guidelines replace existing guidelines that were issued in 2009 by BOEM's predecessor, the Minerals Management Service (MMS), and FERC. The new guidelines provide information about respective responsibilities of each agency and how best to navigate the process of obtaining an MHK lease and license on the OCS. They cover topics such as: provisions for obtaining leases and licenses, fee structures, and hybrid (e.g., wind and marine hydrokinetic) project considerations. The guidelines were developed as part of a Memorandum of Understanding between the Department of the Interior and FERC.

For more information, please see FERC-BOEM's joint release - <http://ferc.gov/media/news-releases/2012/2012-3/07-19-12.pdf>, and the revised guidelines - <http://ferc.gov/industries/hydropower/gen-info/licensing/hydrokinetics/pdf/mms080309.pdf>.

Fish & Wildlife Service Issues New Proposed Listing and Critical Habitat

- The Fish and Wildlife Service (FWS) proposed listing the Diamond Darter as endangered under the Endangered Species Act and proposes to designate critical habitat. FWS is accepting public comments on its proposed listing until September 24th. In total, approximately 122.5 river miles are being proposed for designation as critical habitat. The proposed critical habitat is located in Kanawha and Clay Counties, West Virginia, and Edmonson, Hart, and Green Counties, Kentucky. More information is available at – <http://www.gpo.gov/fdsys/pkg/FR-2012-07-26/pdf/2012-17950.pdf>
- Recently, the FWS reopened the comment period on a proposed rule to designate critical habitat for the Lost River Sucker and Shortnose Sucker. Comments are now being accepted until August 27th. FWS is proposing to designate approximately 146 miles of streams and 117,848 acres of lakes and reservoirs for the Lost River Sucker, and approximately 128 miles of streams and 123,590 acres of lakes and reservoirs for the Shortnose Sucker in 2 units located in Klamath and Lake Counties, Oregon, and Modoc County, California, as critical habitat. More information is available at - <http://www.gpo.gov/fdsys/pkg/FR-2012-07-26/pdf/2012-18198.pdf>

Executive Order 13610 – Identifying and Reducing Regulatory Burdens

In May, President Obama issued Executive Order 13610, *Identifying and Reducing Regulatory Burdens*, which emphasizes the “importance for agencies to conduct retrospective analyses of existing rules to examine whether they remain justified and whether they should be modified or streamlined in light of changed circumstances.” Because the public has the experience and examples to share related to the effects of existing regulations the E.O. directs the agencies to invite, “...on a regular basis, public suggestions about regulations in need of retrospective review and about appropriate modifications to such regulations.”

Agencies will give priority to initiatives that will produce significant monetary savings or reductions in paperwork, with an emphasis toward small businesses. Agencies are required to submit the status of their reviews to the Office of Information and Regulatory Affairs (OIRA) by Sept. 10, 2012.

The EO is available at: <http://www.gpo.gov/fdsys/pkg/FR-2012-05-14/pdf/2012-11798.pdf>

Clear Your Calendars - NHA Regional Meetings Coming Soon!

Check NHA’s website for the latest updates on Regional Meetings and registration information.

- Alaska Regional Meeting, August 21-22, Sitka, AK
- Southeast Regional Meeting, September 12-13, Charleston, W.V.
- Hydraulic Power Committee Fall Meeting, October 1-3, Chattanooga, TN
- Northwest Regional Meeting, October 18, Boise, ID
- Hydro Finance Summit, November 12, New York, N.Y.
- SAVE THE DATE: NHA Annual Conference, April 22-24, 2013, Washington, D.C.