Regulatory Matrix

2013 – Year in Review

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

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* All referenced NHA regulatory filings are available on our website under "Member Resources". If you have any questions or are interested in getting involved with NHA's Regulatory Affairs Committee please contact Dave Zayas at David@hydro.org.

Implementing the Hydropower Regulatory Efficiency Act of 2013

In August, just minutes before the adjournment for the summer recess, the United States Senate passed two hydropower regulatory improvement bills by unanimous consent. In the following days, President Obama signed both bills into law, marking the enactment of the first substantive energy policy in four years.

The bills, H.R. 267, the *Hydropower Regulatory Efficiency Act*, and H.R. 678, the *Bureau of Reclamation Small Conduit Hydropower Development and Rural Jobs Act*, sailed through Congress with broad bipartisan support. The quick passage and overwhelming vote totals represents a tremendous statement of support for hydropower by Congress. Both bills are aimed at creating a better regulatory environment for small hydropower and conduit projects, with less delays and lower costs for developers.

Key provisions of H.R. 267 include:

- Section 3, *Promoting Small Hydroelectirc Power Projects*, which increased the small hydro exemption from 5 to 10 MWs,
- Section 4, *Promoting Conduit Hydropower Projects*, which excludes qualifying conduit facilities from the FERC licensing or exemption processes,
- Section 5, *FERC Authority to Extend Preliminary Permit Periods*, which gave FERC the authority to extend preliminary permits on a one time basis for up to 2 years, and
- Section 6, *Promoting Hydropower Development at Nonpowered Dams and Closed Loop Pumped Storage Projects*, which directed FERC to investigate the feasibility of the issuance of a license at these classes of projects in 2 years.

In addition, H.R. 678:

- Authorizes small conduit power project (5 MW and under) on Bureau of Reclamation infrastructure, while providing irrigation districts and water users associations the first right to develop small hydropower on their conduits.
- Directs the Bureau of Reclamation to use its National Environmental Policy Act categorical exclusion process for small conduit applications.

Implementing H.R. 267

FERC Workshop

On October 22, pursuant to Section 6 of the bill, FERC held a public workshop on the feasibility of developing a two-year licensing process for adding hydropower at non-powered dams and for closed-loop pumped storage projects. The workshop covered a range of questions that could help in meeting a two-year process, from the use of new memorandum of understanding, to developing eligibility criteria, to examining redundancies and timelines in the pre-filing and post-filing process steps.

Significantly, all panelists agreed that a two-year licensing process for these classes of projects is feasible, in fact, FERC presented findings related to projects that have been licensed in less than 2 years.

A recurring theme was whether FERC needs to define a new 2-yr process, or whether the existing processes (ILP, TLP) are flexible enough and can be modified to fit a two-year process. There was no consensus among the panelists on this point; however, FERC was clearly interested in hearing more from stakeholders on this question.

NHA Comments on Two Year Licensing Process

Following the workshop, a working group comprised of NHA's Regulatory Affairs Committee, Small Hydro Council, and Pumped Storage Council drafted and submitted comments to FERC on the design of the two-year process.

Our comments discouraged the Commission from developing project-specific criteria to determine eligibility for an expedited process. We stated that establishing rigid project-specific criteria for NPDs and CLPS projects that do not bear on project-related environmental effects could unnecessarily limit the very class of projects that Congress and the President deemed eligible and ripe for expedited review.

Rather, NHA's comments encouraged the Commission to make a decision of whether a project is eligible for expedited review on a case-by-case basis and based on a single criterion: the sufficiency of existing information at the time an applicant files it Notice of Intent (NOI) and Preliminary Application Document (PAD), and if information gaps exist, the ability to satisfy those information requests within a single study season. Upon a positive determination, made by the Commission, NHA recommended a number of process modifications that would be triggered in order to meet a two-year timeframe.

NHA's comments were also endorsed by the American Public Power Association, the Edison Electric Institute, and the Northwest Hydroelectric Association.

FERC Solicits Pilot Projects

On January 6, FERC issued a Notice soliciting pilot projects to test a two-year licensing process, which identified the following minimum criteria and process for developers interested in submitting a pilot project:

- The project must cause little to not change to existing surface and groundwater flows and uses;
- The project must be unlikely to adversely affect federally listed threatened and endangered species;
- If the project is proposed to be located at or use a federal dam, the request to the two-year process must include a letter from the dam owner that the applicant's plan of development is conceptually feasible;
- If the project would use any public park, recreation area, or wildlife refuge established under state or local law, the request to use the two-year process must include a letter from the managing entity indicating its approval of the site's use for hydropower development; and
- For a closed-loop pumped storage project, the project must not be continuously connected to a naturally-flowing water feature.

In addition to meeting the above criteria, an applicant for the two-year process must also include in its request a list of other information, including documentation that the prospective applicant has met with, described, and consulted with the affected federal and state resource agencies and other stakeholders regarding the project, statements regarding the availability of existing information and the need for additional studies, a process plan and schedule, and a list of environmental effects, among others.

Regarding the Notice specifically, NHA is very pleased with the outcome. We feel that FERC was responsive to our comments and adopted a process similar to what we recommended. Although FERC did adopt some criteria, the criteria adopted were very specific and narrow. Most importantly, FERC did not include as a criterion any requirement for consensus or approval from resource agencies.

Hot Topics Call

On January 7, the Regulatory Affairs Committee organized a Hot Topics call with FERC to discuss the Notice and the steps FERC has taken, or is taking, to implement other sections of HREA. NHA secured the participation of the leadership of the Division of Hydropower Licensing, the Division of Hydropower Administration and Compliance and the Office of the General Counsel.

Unfortunately, FERC did not provide any additional information or details regarding the eligibility criteria or how they would analyze projects under the criteria, but strongly encouraged potential applicants to speak with FERC to answer questions and address concerns as well as to assist them with identify viable projects. Although FERC stressed that developer experience will be an important factor in selecting an applicant, a well-developed and defined proposal that meets the Notice requirements is equally important. FERC staff stressed that the Commission, who is required to report back to Congress whether pilots are implemented or not, wants to see successful outcomes from the two-year process.

FERC's implementation of other Sections of HREA:

- Section 3, *Promoting Small Hydroelectirc Power Projects* – FERC has updated its website to reflect this change, however no applications have been received to date. A question was asked whether projects with existing licenses, who now qualify for a 10MW exemption, could retroactively apply for an exemption. FERC stated they have not encountered this situation and to contact FERC if you are considering this.

- Section 4, *Promoting Conduit Hydropower Projects* – FERC has provided information on its website on how to apply for a qualifying conduit project. To date, FERC has received 19 applications totaling over 10 MW. Fifteen projects have qualified, two applications are pending, and two applications have been rejected – though one of the rejected projects was later approved when additional information was provided by the applicant. The time between FERC receiving an application to a issuing a determination is around two months. FERC noted that none of the projects have encountered opposition. This section also increased the non-muni conduit exemption eligibility to 40 MW, but FERC has received no applications as of yet.

- Section 5, *FERC Authority to Extend Preliminary Permit Periods* – FERC has posted guidance on its website and to date they have received a number of requests asking for an extension.

NHA Secures Favorable Hydro Language in WRDA

As reported throughout 2013, NHA has been working on making improvements to the Army Corps of Engineers (Corps) hydropower review process. In March, the Senate Environment and Public Works Committee unanimously approved the *Water Resources Development Act* (WRDA), S.601, which contained provisions NHA supported and lobbied for to improve the review and approval processes at the Corps for projects that would add capacity to their existing non-powered dams.

Section 2009 of WRDA sent a clear message to the Corps that non-federal hydropower development should receive greater priority at the agency than it currently does and that these projects are consistent with authorized project purposes and with environmental protection goals. Other highlights include:

- Direction that reviews and approvals be completed in a timely/consistent manner,
- Language that encourages the Corps to develop clear and consistent lines of authority within and across the Corps on hydropower project development,
- Language that encourages the Corps to develop consistent and corresponding processes for hydro approvals,
- Language for developing a dispute process in the Corps for developers; and
- A required report in one year on the initiatives to implement these improvements, a list of new Corps activities on hydro, and a status update on pending applications.

On May 15, after much deliberation, the Senate passed S.601 by a broad bipartisan vote of 83-14, which included Section 2009.

On October 23, the House of Representatives passed H.R. 3080, the *Water Resources Reform and Development Act* (WRRDA), advancing the measure with a strong bipartisan vote of 417-3. NHA closely monitored the progress of the House bill and had met with House Transportation and Infrastructure Committee staff urging them to include our Corps Section 408 permitting improvement language.

While the House bill contains provisions to improve the Section 408 approval process for all industries that seek the permit, including hydropower, the NHA language included in the Senate bill (Section 2009 of S.601) was ultimately left out.

A conference committee was established to resolve the differences between the two bills, but no agreement was reached before the holiday recess. NHA continues to meet and reach out to Senate and House committee staff to seek inclusion of the Senate hydro language in the final bill. However, negotiations have slowed considerably in January.

NHA Comments on Updated Gidelines for Federal Investments in Water Resources

In March, the Council of Environmental Quality (CEQ), pursuant to their obligations under WRDA of 2007, issued final Principles and Requirements (P&R) for Federal Investments in Water Resources and draft Interagency Guidelines (Draft Guidelines) for public comment.

The P&R's govern how Federal agencies evaluate proposed water resource development projects and are meant to accelerate project approvals, reduce costs, and support water infrastructure projects with the greatest economic and community benefits.

The P&R's and Draft Guidelines are intended to provide a common framework for analyzing a diverse range of water resources projects, programs, activities, and related actions involving federal investment as identified by the agencies in the context of their missions and authorities.

Federal investment is broadly defined and includes investments that by purpose, either directly or indirectly, affect water quality and quantity. Investment examples include grant programs, funding programs, studies and investigations leading to construction of infrastructure, and proposals and plans that affect the management of federal assets.

Hydropower generation was specifically mentioned; however, the P&R's do not apply to regulatory activities, such as the issuance of permits associated with Section 404 of the Clean Water Act.

NHA's comments asked CEQ for additional clarification regarding the applicability of the P&R's and Draft Guidelines, and NHA specifically recommended that FERC's licensing and administration of non-federal hydropower projects under Part I of the Federal Power Act (FPA) be excluded from P&R review and analysis.

Additional comments included the applicability of the P&R's to:

- The issuance of a Lease of Power Privilege (LOPP) for the construction of non-federal hydropower on Bureau of Reclamation infrastructure.
- The issuance of a Section 408 permit in conjunction with building non-federal hydropower on the U.S. Army Corps of Engineers infrastructure.
- Grant and incentive programs, such as the Production Tax Credit, Investment Tax Credit, the Rural Energy for America Program (REAP), and Department of Energy grants and loan guarantees.

NHA Comments on American Eel Addendum

In March, the Atlantic States Marine Fisheries Commission (ASMFC) announced a series of public hearings to gather comments on *Draft Addendum III to the Interstate Fishery Management Plan for American Eel*. The hearings took place in April throughout the Atlantic coastal states.

The Draft Addendum proposed a wide range of management options with the goal of reducing mortality, increasing the conservation of American eel stocks across all life stages, increasing monitoring, and improving eel habitat. The Draft Addendum was developed in response to findings made in a 2012 benchmark stock assessment indicating the American eel population in U.S. waters is depleted, and cited turbine mortality as one cause, among others, contributing to stock depletion.

NHA and the industry have been involved in the American eel issue since 2005. In November 2011, NHA filed comments with the U.S. Fish and Wildlife Service responding to a petition to list the eel as threatened under the Endangered Species Act (ESA). In those comments we argued that there was insufficient new scientific evidence to justify listing under the ESA.

Although it appears that the Fish and Wildlife Service does not have funding to start the 12-month finding/status review period, which would determine whether the eel listing is warranted under the ESA, actions taken by ASMFC and their recommendations could affect state actions related to section 401 certifications and settlement agreements. Therefore, on May 2, NHA fled comments on the Draft Addendum.

NHA's comments reiterated our previous positions on the American eel issue. Specifically, we noted the industry's many years of experience working with all stakeholders on improving the condition of the eel population and the progress being made in research and monitoring. We also explained that maintaining and restoring eel populations will take a holistic approach and mitigation options should be implemented before consideration of dam removal, further stating that the hydropower industry alone should not bear the brunt of the obligation to mitigate for adverse impacts that are clearly out of the industry's control and/or unrelated to the operations of the hydroelectric projects.

The Draft Addendum also mentioned "changing climatic and ocean conditions" as one reason for eel population depletion. In response, NHA discussed the many public benefits of hydropower including low-cost power and reduced air emissions, to name a couple, and that hydropower should be viewed as part of the solution to restoring the eel population. If ASMFC is going to promote dam removal, NHA stated that the ASMFC decision process should take into full account these environmental and economic benefits, including what the profile of the replacement power from these facilities will be.

NHA Comments on California & FERC MOU

In June, the California State Water Resources Control Board (State Water Board) announced it was accepting comments on a draft memorandum of understanding between the State Water Board and FERC regarding the *Coordination of Pre-Application Activities for Non-Federal Hydropower Proposals in California.*

The purpose of the MOU is to coordinate the procedures and schedules prior to FERC's review of hydropower license applications and the State Water Board's review of water quality certification applications as each pertains to FERC's authorization of non-federal hydropower projects in the state.

The MOU applied to conventional hydropower as well as pumped storage projects and defined pre-application activities to include consultation, environmental scoping, study planning, and submittal of, and commenting on the applicant's preliminary licensing proposal.

The goal is to coordinate these pre-application activities, ultimately leading, to the extent possible, to the issuance of environmental documents that satisfy the legal requirements of National Environmental Policy Act (NEPA) and California Environmental Quality Act (CEQA) and otherwise meet both agencies' needs.

On July 8, NHA submitted its comments to the State Water Board, where we commended the Water Board and FERC for taking this positive first step and encouraged diligent implementation of the MOU, which could lead to realizing environmental benefits and more efficiently licensing projects. However, NHA noted that the MOU lacks enforcement mechanisms to fully realize the purpose and goals outlined, and we offered specific recommendations to strengthen the MOU. Specifically, NHA encouraged the Water Board and FERC to:

- Develop a public dashboard in order to make it easier to track progress on the license application and water quality certifications,
- Commit to jointly reviewing the MOU's progress and effectiveness on a mutually agreed upon timeframe, and
- Clarify the meaning of baseline conditions and project-related impacts.

In November, the MOU was signed and was a near identical version of the draft, unfortunately leaving out NHA's substantive recommendations for improvement.

NHA Responds to Proposed Revisions to Incidental Take Statement's

In November, NHA submitted comments to the National Marine Fisheries Service (NMFS) and the U.S. Fish and Wildlife Service's (FWS) (the "Services") on a proposal to amend the regulations governing the Services' issuance of incidental take statements (ITS) under Section 7 of the ESA. NHA generally supported the proposed regulations, but also recommended modifications to provide more clarity.

The proposed regulations addressed two specific aspects of ITSs. First, the proposed regulations would authorize the Services to use surrogate measures of incidental take when it is impractical to specify the amount or extent of anticipated take, for example, the use of habitat or closely related non-listed species. Second, the proposed regulations attempt to clarify the requirements applicable to ITSs by (i) establishing a definition for "programmatic action," (ii) establishing a definition for "programmatic ITS," and (iii) providing that a programmatic ITS is required for a programmatic action that is "anticipated to cause incidental take."

NHA supported the use of surrogates as it would introduce needed flexibility in the Services' administration of the ESA. However, NHA emphasized that surrogates should only be used when quantifying the amount of take of the protected species is impractical, and that the Services' have discretion in the selection of the appropriate surrogate.

With respect to the Services' attempt to clarify the requirements applicable to ITSs, NHA noted some inconsistencies among the new terms and definitions that needed improvement.

Hydro Included in Climate Action Plan

In June, President Barack Obama released his Climate Action Plan, which focuses on executive actions his administration can take to address climate change and lays out new initiatives to cut carbon emissions.

NHA was excited to report that the plan encouraged hydropower development at existing dams and in order to improve the permitting procedures for such projects, the Administration designated the Red Rock Hydroelectric Plant on the Des Moines River in Iowa (under development by NHA member Missouri River Energy Services) to participate in its Infrastructure Permitting Dashboard for high-priority projects.

NHA worked for over a year meeting with officials from the Council on Environmental Quality (CEQ), the Office of Management and Budget (OMB), the Corps of Engineers, the Departments of Energy and Interior, and others to get a hydropower project included on the Dashboard.

The Inclusion of hydropower in both the Climate Action Plan and the Dashboard sends a clear message throughout federal agencies, whether working on new development or relicensing existing projects, about the importance of hydropower as a renewable energy resource and the need to increase efficiency in the licensing process to speed its deployment.

FERC Surprises with Municipal Preference Order

On December 19, FERC issued an Order that introduced a new geographic limitation to the statutory preference for municipal entities in hydropower licensing. If FERC's decision is not modified, challenged or overruled, municipalities may be denied preliminary permits or licenses for projects that in the past they would have been awarded.

The case involved competing preliminary permits between a municipal and non-municipal developer on the Saylorville Dam and Lake on the Des Moines River, in the City of Johnston in Polk County, Iowa. FERC granted the preliminary permit to the non-municipal developer based on a new interpretation of Section 7(a) of the FPA, and for the first time denied municipal preference based on geographic scope, i.e. the municipality's headquarters was nearly 400 miles away from the proposed project.

FERC stated "the record reveals no connection, beyond a business development interest, between the proposed project and the applicant. We conclude that granting municipal preference … in these circumstances would not be in the public interest."

FERC supported its finding by stating that:

"Section 7(a) of the FPA provides us no guidance as to the scope of municipal preference. Accordingly, we are left to develop a reasonable construction of the statute. We conclude that the best reading of the statute is that municipalities should be accorded preference only with respect to the development of water resources that are located in their vicinity. It is appropriate that a municipality be granted preference in developing nearby hydropower sites for the benefit of its citizens. However, it is difficult to discern what public interest is served by giving a municipality a preference with respect to a project that is far from the site of the municipality. To do so would effectively make municipalities super-competitors with respect to all new hydropower developments, regardless of their location. For example, if municipal preference were viewed as absolute, a municipal entity located on the east coast could claim preference over a private entity seeking to develop a project in Hawaii."

Miscellaneous Regulatory News

David Hayes exits, Commissioner Connor waiting on confirmation

In April, David Hayes, Deputy Secretary of the Department of the Interior (DOI), resigned after serving as its second in command for 4 years. Hayes moved on to California where he now teaches law at Stanford University and serves as an adviser to the Hewlett Foundation, which supports land conservation.

In July, President Obama nominated Michael Connor to serve as the new Deputy Secretary of DOI. Since 2009, Connor has served as Commissioner of Interior's Bureau of Reclamation, making water conservation, river restoration, and clean energy his top priorities. Previously, Connor served as Counsel to the U.S. Senate Energy and Natural Resources Committee and senior advisor to Chairman Bingaman. Connor is waiting on final Senate confirmation.

Chairman Wellinghoff steps down, La Fleur acting Chairwomen

In May, Chairman Jon Wellinghoff, a FERC commissioner since 2006, announced he would be leaving the Commission, but that he would stay in office until his successor was confirmed.

In June, President Obama nominated Ronald J. Binz to be chairman of the Commission. However, Binz's confirmation encountered insurmountable pushback and in October Binz officially withdrew his name from consideration.

In November, Chairman Wellinghoff announced he would be departing the Commission on November 24, and that Commission Cheryl LaFleur would serve as the acting chairwoman starting November 25.

LaFleur's appointment did not require Senate confirmation, and avoided the potential for another nomination battle. LaFleur was nominated by President Obama in 2010 and confirmed by the Senate for a term ending in June 2014. However, the move leaves FERC with four commissioners, two Democrats and two Republicans, which could lead to tie votes on controversial issues and orders.

The White House does not seem to be in any rush to nominate a new chairman, but rumors and frontrunners have surfaced. Leading this list is Colette Honorable, chairwoman of the Arkansas Public Service Commission, and Regina Speed-Bost, an attorney at the law firm Schiff Hardin, among others.

Zichal moves on, White House names Utech as top energy advisor

In October, the White House confirmed that Heather Zichal, deputy assistant to the president for energy and climate change, will be leaving her post. Zichal served President Obama for five years in the White House and also worked for him on his campaign team. In addition to her recent work on the president's climate action plan, Zichal helped to secure fuel economy standards for vehicles, developed rules to limit mercury and other pollutants from power plants, and guided the response to the Gulf oil spill.

In November, the White House confirmed that Dan Utech will succeed Zichal as the president's top energy advisor. Previously, Utech was Zichal's deputy, and also served as senior advisor to former Energy Secretary Chu and Senator Hillary Clinton, and served on the Senate Energy and Public Works Committee for 10 years as a Senate staffer.

Department of Energy release long awaited 9505 report

In August, the Department of Energy submitted to Congress a report detailing the potential effects of climate change on the federal hydropower system. DOE completed the report, in consultation with the federal Power Marketing Administrations and other federal agencies, as directed by Congress in Section 9505 of the SECURE Water Act of 2009.

The report found that nationally, federal hydropower projects' annual generation would see a median decrease of 2 billion kWh, about 2 percent of total federal hydropower generation. Extreme water years, both wet and dry, will present greater challenges to water managers, especially in systems with limited reservoir storage and operational flexibility. By law, DOE is required to update the report every five years, and because of the late release of the first report, work is underway on the second report.

President Obama Doubles Down on Renewable Energy

In December, President Obama issued a memorandum that more than doubled the renewable energy procurement goal for the federal government, raising the goal to 20% by 2020 to the "extent economically feasible and technically practicable…" The president's memo is a follow-up to Executive Order 13514 from October 2009 that set aggressive goals for reducing greenhouse gas emissions and increasing energy efficiency, among others.

Unfortunately, in terms of the types of renewable energy projects eligible to meet the new federal procurement goal, the president's memorandum used the same "renewable energy" definition as provided in Executive Order 13514 – *energy produced by solar, wind, biomass, landfill gas, ocean (including tidal, wave, current, and thermal), geothermal, municipal solid waste, or new hydroelectric generation capacity achieved from increased efficiency or additions of new capacity at an existing hydroelectric project*.

The memorandum did provide a new definition for hydrokinetic renewable energy – *energy from free flowing water in rivers, lakes, and streams or free flowing water in man-made channels and does not include energy from any source that uses a dam, diversionary structure, or impoundment for electric power purposes*.

The new memorandum is particularly troubling in light of the President's Climate Action Plan that highlighted the importance of adding hydropower to existing non-powered dams. Under the memorandum and existing definitions, these projects will not count towards achieving the federal government's new renewable energy procurement goal.

NHA is working on expanding the definitions for hydropower so that they recognize and include a broader spectrum of hydropower projects and has reached out to both the Office of Management and Budget and the Council on Environmental Quality in order to work on finding a solution.

Secretary Jewell issues Mitigation Memo

At the end of October, Interior Secretary Sally Jewell issued a Secretarial Order (Order 3330) on mitigation practices within the department – *Improving Mitigation Policies and Practices of the Department of the Interior*.

The Order states that "we are in the midst of an unprecedented Government-wide focus on infrastructure permitting and development in the United States" and directs Interior's Energy and Climate Change Task Force to coordinate a "Department-wide mitigation strategy that will ensure consistency and efficiency in the review and permitting of infrastructure development projects and in conserving our Nation's valuable natural and cultural resources." The Task Force was directed to develop a report within 90 days of the Order that outlines the strategy for making improvements to DOI's mitigation practices and policies.

The Order is the latest in the Obama administration's effort to improve the review, coordination and consistency of federal permitting related to infrastructure development while also ensuring the nation's natural and cultural resources are protected.

Clear Your Calendars - NHA Events Coming Soon in 2014!

Check NHA's website for the latest updates and registration information for our Annual Conference and Regional Meetings:

- **Southeast Regional Meeting** – February 5-6, 2014, Atlanta, GA
- **NHA Annual Conference** – *Hydro: America's Renewable for a Resilient Grid*, April 28-30, 2014, Capital Hilton, Washington, D.C.
- **NHA Midwest Regional Meeting with MHUG**, May 13-14, 2014, Green Bay Area, WI
- **Hydraulic Power Committee Meeting Fall Retreat**, October 6-8, 2014, Holyoke, MA