

AWARD WINNER

## Clarke Recognized for Helping Guide Industry Through Regulatory Maze

*Few know their way around the hydroelectric industry regulatory maze better than attorney Donald H. Clarke. His passions for fair government and hydropower are indispensable as the industry works through complex project relicensing and dam removal issues. The National Hydropower Association has recognized Clarke's efforts and dedication by honoring him with its 1999 Kenneth Henwood Award.*

By Tom E. Zind

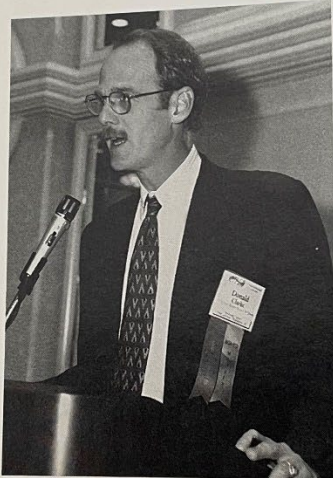
As a point person in the hydroelectric industry's struggle with thorny project relicensing and dam decommissioning issues, attorney Don Clarke is a good candidate for an industry "Medal of Honor."

Recently serving as chief legal counsel for the licensee in the important Edwards Dam relicensing and decommissioning case in Maine, Clarke has had to play a form of hardball that goes a little against his grain. But, like a soldier who does what's necessary to save others, Clarke has acted to ultimately support the industry's interests in what could be characterized as a life or death struggle with federal regulators, environmentalists, and others at odds with the industry.

"After fighting this dam removal battle that's been somewhat bloody, I look forward to a kinder and gentler mode of operation," Clarke said, a tinge of hopefulness in his voice. "It's the most adversarial position I've had to take with government and the environmental community. In most other instances, I've been able to work much more cooperatively."

*Tom Zind is a contributing writer/editor to Hydro Review.*

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### Playing Fair

Don Clarke received the 1999 Kenneth Henwood Award during the National Hydropower Association annual conference. In accepting the award, he explained that he has a "passion" for accessible, reasonable, and fair government, and has spent his entire professional life advocating for such fairness.

Clark has been a hydropower advocate for 25 years as both a Federal Energy Regulatory Commission (FERC) and private practice attorney. This advocacy has helped earn him what amounts to an industry Medal of Honor: the

National Hydropower Association's 1999 Kenneth Henwood Award.

The award, given since 1990, is named for a distinguished hydro engineer and project developer who died in a tragic accident, and recognizes those who have demonstrated dedication to the industry's interests.

Clarke's dedication has been amply demonstrated in the Edwards Dam case. An attorney with the Washington, D.C., law firm of Wilkinson, Barker, Knauer & Quinn, L.L.P., Clarke has challenged FERC's decommissioning authority on behalf of the dam owner, Edwards Manufacturing Company.

"I was fortunate to be in a position to represent a client who was prepared to take the issue on and challenge FERC's authority and that of other agencies," Clarke said. "It placed me in an adversarial posture with FERC, but there are times when that is appropriate. For the industry, this is one of largest issues that needs to be resolved."

That issue, and the larger one of working to ensure hydropower's fair treatment in the regulatory arena, has been a central part of Clarke's career, and undoubtedly one of the chief reasons NHA selected him for the industry's highest award.

### A History with Hydro

In his career with FERC from 1974 to 1989, Clarke was especially active in the licensing area. After eight years as a staff trial attorney, Clarke became deputy assistant general counsel for hydroelectric licensing. From 1986 through 1989, he served as senior legal advisor to Commissioners C.M. Naeve and Martha Hesse. In that role, he provided legal input on regulatory issues relating to hydropower licensing and other areas, and assisted in Congressional and intergovernmental relations.

Moving into private practice in 1989 with Wilkinson, Barker, Knauer & Quinn, Clarke took his FERC experi-

*Clarke*





**Growing Up in 'Hydro Country'**

Hydro projects like this one were frequent stops on driving vacations in the Pacific Northwest for Don Clarke's family. Clarke, shown here at a dam in a 1956 family photo virtually in his backyard gave him "hydro country" and having dams virtually in his backyard gave him "a respect for (hydropower) as integral to the functioning and prosperity of our society—a part of the mainstream."

ence and knowledge and put it to work helping clients navigate the federal regulatory process. Clients have included utilities, municipalities, irrigation districts, developers, consultants, investors, and others involved in electric generating projects.

Although his private practice work frequently has put him at odds with FERC, Clarke said his decision to leave government didn't stem from disenchantment with its policy stance on hydropower. "My move didn't relate to any disagreement with FERC; it was just that I was anxious to have a different challenge," he said. "I had a splendid experience as a civil servant."

Clarke also has contributed to the hydro industry through other involvements and activities. In addition to serving as NHA's general counsel, Clarke represents the Northwest Hydroelectric Association's interests with Congress, FERC, and other federal agencies. He also is executive director of the U.S. International Council for Hydropower Development. In that capacity, he has worked to promote development and support of U.S.-backed international hydro projects, particularly those in developing countries.

**The Fighter's Roots**

Clarke's most visible role in recent years has been serving as an advocate for the U.S. hydropower industry in the broad debate over dam licensing and removal.

In presenting the award to Clarke at

NHA's recent annual conference, Portland General Electric's Julie Keil praised him for "taking on the most difficult issue—dam removal." Keil also noted that throughout his 25 years of service, Clarke has "always been fighting the good fight."

For Clarke, going to bat for the hydropower industry, even if it occasionally involves heated clashes with government agencies and environmentalists, has been a virtuous endeavor.

Born and raised in the Seattle area, Clarke said he gained an early appreciation of hydropower's role in the mainstream of American life. Family driving vacations inevitably included stops at many of the numerous Pacific Northwest hydro projects built in the 1950s.

"I didn't grow up loving hydro, but I did grow up with a respect for it as integral to the functioning and prosperity of our society," he said in accepting the award. "It was part of the mainstream and, ironically, it would seem that I've spent 25 years trying to keep it in the mainstream."

Clarke's first exposure to the world of hydropower and government regulation came in 1972, when as a college student he worked as a Congressional intern for Washington State Senator Warren Magnuson. A year later, he landed a summer internship as a law clerk in the Federal Power Commission (the predecessor to FERC). After completing his education—a bachelor of arts degree from Stanford University in 1971 and a law degree from Cornell University in 1974—Clarke joined FERC as a staff trial attorney.

"I got a summer law clerk position in something called the hydroelectric licensing section of the General Counsel's office—little did I know how that temporary assignment would turn into my life's work," he told NHA conference attendees.

**Government, Hydro Views Mesh**

A strong believer in the fundamental value of hydropower, Clarke may have even stronger beliefs in the concept of responsive government, especially when it comes to regulation.

"In my 15 years at FERC—years and service I am very proud of and wouldn't trade for the world—I developed a passion for accessible, reasonable, and fair government—a passion that, notwithstanding my periodic bouts of sarcasm, I retain to this day," Clarke said in accepting the award.

In their dealings with the hydro industry in recent years, Clarke said, federal regulatory agencies have strayed from his notion of how good government should act. The Edwards Dam case offers convincing evidence of that slide, Clarke said.

In that case, FERC turned down the dam owner's relicensing application, and ordered the dam's removal. Although Clarke ultimately was able to

negotiate a settlement that relieved his client of the responsibility of paying to remove the dam, FERC denied a motion by NHA to vacate its order. As a result, precedent now exists for FERC to order a dam's removal, making no provision for compensating the owner, Clarke said.

"The primary issue is whether the commission has the

authority to tell people they must remove dams and do so at their own expense," Clarke said. "Although the case was settled and the legal action was stopped, the issue is waiting for another day."

**A Pledge To Persevere**

Although Clarke predicts the issue ultimately will have to be resolved in Congress, he believes the battle for the hearts and minds of the government and

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*Clarke*



the public over hydropower's role will continue to be waged, perhaps forcefully on both sides. While he hopes the debate can be addressed in a more calm and reasoned fashion, he acknowledges that may not be possible. If that's the case, Clarke said he's up to the task.

"Environmental groups would reduce, if not eliminate, a significant portion of existing hydro projects," Clarke said. "Although the overall environmental movement is not so aggressively anti-

hydro, there are elements within it whose views need to be opposed vociferously to let the public know what's at stake."

While conceding that hydropower isn't without some environmental downsides, Clarke said it has to be evaluated in light of alternatives and its overall value. In his view, government regulators have steadily moved away from a balanced evaluation of hydropower, choosing instead to listen more intently

to environmental opponents. Clarke said his main goal in representing numerous hydropower interests has been to promote a reasoned dialogue.

"In my work with the government I've wanted to be reasonable, practical, and fair, and I will continue to demand that they be that," he said. "But I think it's fair to say that in recent years the federal government has not been particularly hospitable to the hydro industry. The pendulum has traditionally swung back and forth, and I get some sense that federal decision-makers now are becoming more sophisticated about making decisions on environmental trade-offs."

Aside from the environmental aspect of the hydropower debate, the issue of government seemingly running roughshod over the industry and overstepping its bounds is one of Clarke's main concerns. The bureaucratic maze of red tape is shown in its worst light in the hydropower debate, he said.

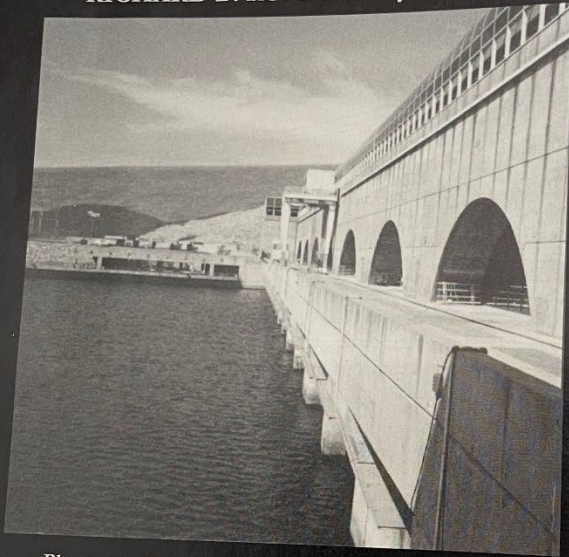
"One of the big issues surrounding relicensing revolves around the authority held not only by FERC, but other state and federal resource agencies, and the extent to which they must take into account the economic impact of their recommendations and decisions," Clarke said. "The politics of the issue are such that every agency wants authority, so you can end up with 20 agencies with authority over your project. It should be our goal to have reasonable, workable government regulatory programs."

In addition to working closely with NHA and clients on the dam removal issue, Clarke also has played an instrumental role in the introduction of new legislation. Five years of work in the licensing and regulatory reform arena culminated in the introduction of legislation this year to amend the Federal Power Act, Clarke said. His work with both NHA and the Northwest Hydroelectric Association has helped advance that issue, he said.

#### International Work

In addition to working to advance the efforts of the U.S. hydropower industry, Clarke has devoted his time and skills to promoting hydropower internationally. As executive director of the U.S. Hydropower Council for International Development, Clarke assists in market assessments and project opportunity identification in emerging markets. He works with foreign governments, federal agencies, and the financial community on behalf of U.S.

Normandeau Associates was pleased to perform a fish passage survival study at the RICHARD B. RUSSELL Hydro Station



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development interests.

The work, Clarke said, gives him a welcome break from the seemingly endless task of having to justify the overall advantages of hydropower in the U.S.

Under his direction, the council has provided policy input in Brazil, Pakistan, India, Guatemala, and Ecuador, among others. "It's satisfying to go into some of these countries that are in dire need of generating capacity and to find them receptive to what I think are the overriding benefits of hydropower generation," he said. "I find that in many emerging markets, decision-makers are more willing to make intelligent trade-offs when it comes to hydropower—something I've spent my entire career trying to encourage people to do in this country."

Clarke's numerous activities revolving around electrical industry regulation have made him a popular guest speaker. He regularly addresses energy industry, bar association, and international conferences. He also has authored a number of articles on the subject, one of the most recent being "Relicensing Hydropower: The Many Faces of Competition" published in the Fall 1996 issue of *Natural Resources & Environment*.

When he's not working, Clarke enjoys playing the piano, cooking, painting, traveling, and studying foreign languages, including German, Italian, and, most recently, Spanish.

#### Getting Goose Bumps

Being selected the 1999 recipient of the Henwood Award was a pleasant surprise, Clarke said. It's especially meaningful because he knew Ken Henwood.

"In the past when the award has been given it's often given me goose bumps, because it's an awareness that the whole industry is recognizing one selected person in the field," he said. "Having the industry recognize and comment on my work has been the high point of my professional life."

The award, he said, has given him the opportunity to reflect on the wisdom, or luck, of his career choice, and served to reaffirm his dedication to working on the industry's behalf.

"The beauty of the hydropower industry is that the kinds of issues you get involved with include a broad cross section of the community, from small meetings in elementary school cafeterias to having to deal with the White House—and everything in between," he said. "It

crosses all of these levels of government, because water is inherently controversial; it's so essential to life and to prosperity."

Although the future promises to hold many more challenges for the industry and himself, Clarke said he's hoping for more reasonable and rational debate as it relates to relicensing and decommissioning. Few issues lend themselves as well to the fundamental concepts involved in field he was

trained in, he said.

"I've always believed that the practice of law is basically an exercise in intelligent common sense, and I still insist that it is," he said. "I'm the kind of person who basically likes to get things done, so I look forward to continuing my work as a reasonable spokesman for the industry. I see extremes on both sides of the equation in this issue, but you have to be willing to march in and try to get everyone toward the middle." ■



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