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Hydro Newsletter

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Legislative Update

On April 20, 2016, the U.S. Senate passed S. 2012, the Energy Policy Modernization Act of 2015, on a bipartisan vote of 85-12. As described in the [August 2015 Hydro Newsletter](#), the bill contains a number of hydro licensing reform provisions, including: (1) designating the Federal Energy Regulatory Commission (FERC) as lead agency for coordinating federal authorizations from all agencies needed to develop a hydroelectric project; (2) authorizing FERC to refer agency disputes to the Council on Environmental Quality; (3) requiring resource agencies to give equal consideration to developmental and non-developmental values when imposing mandatory conditions or prescriptions; (4) expanding the definition of renewable energy for federal programs to include all forms of hydropower; (5) extending the term of preliminary permits from three to four years and authorizing FERC to extend the initial permit term for an additional four years; (6) extending the start of construction date for new projects for up to eight additional years beyond the time set in the license. In addition, the bill would extend the eligibility window for the hydropower production incentives under the Energy Policy Act of 2005 to projects that add a turbine or other generating device between 2016 and 2025. The U.S. House of Representatives passed its comprehensive energy bill entitled the North American Energy Security and Infrastructure Act of 2015 (H.R. 8) on December 3, 2015, which also includes extensive reforms to improve hydro licensing.

Now that each chamber has passed its own comprehensive energy bill, a conference committee is likely to be convened between the chambers to draft a compromise bill that both houses can pass and send to the President. Chairman Murkowski and Ranking Member Cantwell have indicated that they want to move to conference as soon as possible, and have conference completed before Congress recesses for party conventions in mid-July.

FERC Rejects Water Quality Certification Condition

On March 30, 2016, FERC staff issued an original license to Clean River Power MR-1, LLC, to construct the four megawatt Devola Lock and Dam Project No. 13405, to be located at the Devola Dam on the Muskingum River in Ohio. The otherwise unremarkable order contains an extremely rare instance of

Upcoming Speaking Engagements

- [Chuck Sensiba](#), "NHA Legislative Update and Outlook," 2016 National Hydropower Association Annual Conference, Washington, DC, April 25, 2016.
- [Mike Swiger](#), "Hot Topics in the Southeast," 2016 National Hydropower Association Southeast Regional Meeting, Knoxville, TN, May 12, 2016.
- [John Clements](#), License Compliance Workshop, Midwest Hydro Users Group Spring Meeting, Wausau, WI, May 18, 2016.
- [Chuck Sensiba](#), "Relicensing: TLP vs. ILP," 2016 National Hydropower Association Northeast Regional Meeting, Philadelphia, PA, June 2, 2016.
- [Chuck Sensiba](#), "Return of the Basin Planning Concept: Issues and Perspectives." HydroVision International, Minneapolis, MN, July 26-29, 2016.
- [John Clements](#), "Jurisdiction Changes – Who's Responsible for What in the U.S.?" HydroVision International, Minneapolis, MN, July 26-29, 2016.

FERC staff refusing to include in a license a water quality certification condition issued pursuant to Section 401 of the Clean Water Act (CWA). Section 401(d) of the CWA provides that unless it is waived, a certification shall become a condition of any federal license authorizing construction or operation of a facility or a discharge into navigable water. Since the 9th Circuit's 1999 decision in *American Rivers v. FERC* that it has no authority to reject or modify such conditions, FERC has routinely included all such conditions in its licenses.

The certification for Project No. 13405 issued by the Ohio Environmental Protection Agency included a special condition providing that releases of water from Devola Dam, which is owned and operated by the Ohio Department of Natural Resources, "can only be determined by the U.S. Army Corps of Engineers" (Corps). FERC staff held that because the dam is a non-federal facility, all of the project facilities are subject to FERC's jurisdiction rather than the Corps', so a requirement for the Corps alone to determine water releases from a non-Corps dam conflicts with FERC's comprehensive licensing authority under the Federal Power Act. Therefore, FERC staff stated, the condition is unlawful and declined to include it in the license. All other conditions of the certification were included in the license.

Senate Energy and Water Appropriations Bill Supports Hydro R&D

On April 14, 2016, the U.S. Senate Appropriations Committee unanimously passed the energy and water appropriations bill. The bill includes funding for the U.S. Department of Energy (DOE), Bureau of Reclamation, and U.S. Army Corps of Engineers. The bill includes several provisions concerning DOE's Water Power program. These include recommendation of \$25 million for conventional and pumped storage hydropower, including up to \$3.9 million to implement Section 242 of the Energy Policy Act of 2005. Section 242 directs the Secretary of Energy to establish a program to support expansion of hydropower at existing dams and impoundments through incentive payments. Other provisions include \$3 million to analyze the technical and economic value of pumped storage at two sites to be determined with high levels of intermittent renewable energy generation, and more general funding of research and analysis of pumped storage. \$59 million is recommended for marine and hydrokinetic technology research and development and deployment. The Committee rejected DOE's request to limit future competitive solicitations to projects that would at least double the energy capture per unit of structural cost of wave energy conversion systems in favor of more flexible criteria. Included in the \$59 million is \$25 million for a balanced portfolio of competitive solicitations supporting R&D and demonstration projects for wave and current technologies. The Committee bill also directs DOE to provide cost-sharing for a proposed open-water, fully-energetic, grid-connected wave energy test facility.

USFS Seeks Input on Mitigation Policy

In late March, the U.S. Forest Service (USFS) released a [white paper](#) seeking recommendations for its development of a policy on the mitigation of adverse impacts to National Forest System (NFS) lands. The USFS is one of a number of agencies tasked by a November 3, 2015 [presidential memorandum](#) to "adopt a clear and consistent approach for avoidance and minimization of, and compensatory mitigation for, the impacts of their activities and the projects they approve." The USFS white paper requested stakeholder feedback by April 18 on thirteen key questions to help frame its mitigation policy, such as what mechanisms within existing law are necessary to effectively avoid, minimize, and compensate for adverse impacts to NFS lands.

The National Hydropower Association (NHA) filed comments on the white paper, noting among other things that any USFS policies on mitigation must recognize and be consistent with the well-established framework provided by the Federal Power Act (FPA) for mitigating impacts of hydropower projects on NFS lands. NHA also emphasized that the principle of a "no net loss" or "net benefit" mitigation standard—set forth in the presidential memorandum and echoed in the white paper—is fundamentally inconsistent with the FPA's requirement to balance power and non-power values in setting license conditions.

Recent Publications

- Mike Swiger and John Clements, "A benefit to industry? US Federal permitting reforms for major infrastructure – will they provide relief for new hydro projects?" International Water Power & Dam Construction magazine, March 2016. Article available [here](#).
- Mike Swiger, John Clements, and Sharon White, "Revised Rules for Trial-Type Hearings: Room for Improvement," Hydro Review magazine, April 2016. Article available [here](#).

In addition to directing the USFS to develop and implement manual and handbook guidance to address its mitigation approach, the presidential memorandum also directed the USFS to finalize a mitigation regulation by November 2017. USFS anticipates publishing a proposed mitigation regulation for public comment on or before June 1, 2016, and a final regulation by October 15, 2017. It also anticipates issuing updated directives to reflect its mitigation policy by November 2017.

Stakeholders Execute New Klamath Dam Removal Agreements

On April 6, 2016, the U.S. Department of the Interior, U.S. Department of Commerce, PacifiCorp, and the states of Oregon and California signed an [agreement](#) providing for the decommissioning and removal of the Klamath Hydroelectric Project dams in California and Oregon. Under the agreement, PacifiCorp, the current licensee of the Project, will transfer its FERC license to the Klamath River Renewal Corporation (KRRRC) which, upon FERC approval of the transfer, will oversee dam removal. The agreement provides that PacifiCorp and KRRRC will jointly file an application with FERC for dam removal and request to transfer the license to KRRRC on or around July 1, 2016. PacifiCorp will continue to operate the Project until the dams are decommissioned under FERC authority. Federal and state officials also signed a separate agreement with irrigators and other parties, the 2016 Klamath Power and Facilities Agreement (KPFPA), to help irrigators avoid impacts associated with dam removal.

In 2010, Klamath Basin stakeholders signed dam removal and basin restoration agreements, both of which required Congressional authorization. After Congress failed to enact authorizing legislation, and the basin agreement expired in December 2015, the parties reconvened to negotiate a new path forward. The agreements executed this month are the result of those efforts.

FERC Announces Policy on Hydropower Projects at Contaminated Sites

On April 21, 2016, FERC [denied](#) rehearing of its orders dismissing competing preliminary permit applications for a pumped storage project located at a contaminated site in the Columbia River Basin. Both applicants proposed a 1,200-megawatt closed-loop pumped storage project utilizing the former Columbia Gorge Aluminum smelter site as a lower reservoir. The former aluminum smelter site is a Resource Conservation and Recovery Act (RCRA) contaminated site, and is undergoing a cleanup process to address soil and groundwater contamination. FERC denied the permit applications, stating that "as a matter of policy, it is not prudent to issue a preliminary permit for a contaminated site that is still undergoing a cleanup process, regardless of whether that site is a RCRA site or a Superfund site." Despite the applicants' arguments that there is a schedule in place for site cleanup, FERC held that it will only consider preliminary permit applications for contaminated sites after the relevant agency certifies that cleanup of the site is complete.

[John Clements](#), [Julia Wood](#), and [Sharon White](#) contributed to this issue.

John Clements	202.298.1933	jhc@vnf.com
Tyson Kade	202.298.1948	tck@vnf.com
Matt Love	206.829.1809	mal@vnf.com
Brian McManus	202.298.3720	bzm@vnf.com
Michael Pincus	202.298.1833	mrp@vnf.com
Chuck Sensiba	202.298.1801	crs@vnf.com
Mike Swiger	202.298.1891	mas@vnf.com
Sharon White	202.298.1871	slw@vnf.com
Julia Wood	202.298.1938	jsw@vnf.com