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HYDROPOWER

NEW HYDROPOWER LEGISLATION

On August 9, 2013, the President signed two new acts aimed at promoting and streamlining the development of small hydropower on existing dams and conduits.

- ▶ The Hydropower Regulatory Efficiency Act of 2013;¹ and
- ▶ The Bureau of Reclamation Small Conduit Hydropower Development and Rural Jobs Act.²

The changes introduced by these laws are incremental; but the bills represent a general, positive shift in policy towards hydropower and include provisions that could significantly speed development of small projects, particularly on existing conduits.³

If you have considered developing small hydro on an existing conduit, the new laws may now make it cheaper and easier for you to do so.⁴ FERC will also hold a public workshop on October 2, 2013, to discuss developing a faster, two-year licensing process for closed-loop pumped storage projects (i.e., those that are not continuously connected to a naturally-flowing water feature) and hydropower development at existing non-powered dams.

Hydropower Regulatory Efficiency Act of 2013

The Hydropower Regulatory Efficiency Act of 2013 modifies the licensing requirements for small hydropower projects in three ways:

¹ Hydropower Regulatory Efficiency Act of 2013, Pub. L. No. 113-23, 127 Stat. 493, available at <http://www.gpo.gov/fdsys/pkg/PLAW-113publ23/pdf/PLAW-113publ23.pdf>.

² Bureau of Reclamation Small Conduit Hydropower Development and Rural Jobs Act, Pub. L. No. 113-24, 127 Stat. 498, available at <http://www.gpo.gov/fdsys/pkg/PLAW-113publ24/pdf/PLAW-113publ24.pdf>.

³ A “conduit” for these purposes covers tunnels, canals, pipelines, ditches, and other manmade water conveyances that are primarily used for water supply rather than the generation of electricity. See 16 U.S.C. § 823a(a)(3)(A).

⁴ FERC has created a website that explains the new administrative processes it has established to implement these bills: <http://ferc.gov/industries/hydropower/indus-act/efficiency-act.asp>.

1. The Act waives licensing entirely for conduit projects 5 MW or less and allows FERC to issue conduit exemptions to private (as well as municipal) projects of 40 MW or less and small projects located on federal lands.

Previously, Section 30 of the Federal Power Act, 16 U.S.C. § 823a, allowed FERC to issue exemptions⁵ to projects that: (a) were located on non-federal lands; (b) generated electricity from a manmade conduit operated for the distribution of consumptive water and not primarily for the generation of electricity; and (c) had an installed generating capacity of 15 MW or less (40 MW or less in the case of a municipal water supply project).

The new law waives licensing and exemption requirements entirely for conduit hydropower facilities with a proposed installed capacity of 5 MW or less, so long as the conduit is not federally owned and does not currently have a FERC license or exemption. Developers of such facilities are now required only to file a notice of intent with FERC, which will determine whether the facility qualifies for the waiver; FERC must make that determination within 15 days of receiving the notice of intent. If FERC concludes that the facility qualifies, it must publish a public notice of the notice of intent; and if no one contests the facility's qualifications within 45 days, the facility shall be deemed to meet the statutory waiver criteria. This provision could expedite the development process, significantly improving the economic attractiveness of such small conduit generation.

The new law also allows FERC to grant exemptions for conduit facilities up to 40 MW to private developers (i.e., the same size restriction already applicable to municipal water supply conduit projects). It also removes the requirement that conduit exemptions only be granted to projects located on non-federal lands. FERC's regulations still contain such a requirement, but it now has the discretion to remove it if it chooses to do so.

2. The Act allows FERC to issue exemptions to non-conduit small hydroelectric projects of 10 MW or less.

Previously, under the Public Utility Regulatory Policies Act, FERC had the authority to grant exemptions to non-conduit, small hydroelectric projects of 5 MW or less. 16 U.S.C. § 2705(d). The new law increases the maximum capacity of such small hydroelectric projects eligible for an exemption to 10 MW.

⁵ Section 30(a) of the Federal Power Act, 16 U.S.C. § 823a(a), authorizes FERC to grant an "exemption" in whole or in part from the requirements of Part I of the FPA, including license requirements. Grant of an "exemption" is not equivalent to a waiver of the licensing requirement. Exemptions are subject to the terms and conditions specified by FERC in granting the exemption, as well as mandatory terms and conditions from the Fish and Wildlife Service, the National Marine Fisheries Service, and the state fish and wildlife agency. 16 U.S.C. § 823a(c). However, while FERC licensing typically takes at least five years to complete, the exemption process is considerably more streamlined. In addition, unlike licenses, exemptions do not expire and do not need to be renewed.

3. FERC may now extend a preliminary permit for an additional two years.

Preliminary permits give a potential license applicant priority over a site; the permit holder is supposed to use that time to study the site and to prepare its development application. Previously, FERC could issue preliminary permits for a maximum of three years. Although a permit holder could apply for a new permit when its existing permit expired, such sites were open to competitive applications at that time. The new law authorizes FERC to extend the term of a preliminary permit for up to two additional years if it finds the permit holder has “carried out activities under [the] permit in good faith and with reasonable diligence” (16 U.S.C. § 798(b)), eliminating that competitive risk. It is yet to be seen if the existence of this new option will result in FERC raising the standards for receiving a successive preliminary permit in cases in which a permit holder fails to complete its development application at the end of five years.

Bureau of Reclamation Small Conduit Hydropower Development and Rural Jobs Act

The Bureau of Reclamation Small Conduit Hydropower Development and Rural Jobs Act is aimed at facilitating hydropower development on certain Reclamation-owned conduits; it also creates a new preference for development of those conduits by certain water supply agencies.

The Reclamation-owned conduits in question are those statutorily authorized for federal hydropower development. In such cases, FERC has no licensing jurisdiction; instead, Reclamation can develop hydropower itself, or grant a “lease of power privilege” to a non-federal hydropower developer. 43 U.S.C. § 485h.

To encourage development on those conduits, the new law provides for a couple of things.

1. The Act creates a right of first refusal for the lease of power privilege to irrigation districts or water users associations.

Reclamation has existing authorization to enter into contracts to furnish water supply for miscellaneous purposes, including hydroelectric power; in doing that, it is required to give preference to municipalities, public corporations or agencies, and cooperatives and other nonprofit organizations financed in whole or in part by loans made pursuant to the Rural Electrification Act of 1936.

The new law leaves that existing preference in place while creating a new one. Any irrigation district or water users association operating a Reclamation conduit authorized for federal hydropower development or receiving water from it now has a right of first refusal for a lease of power privilege—i.e., the right to generate power—from that conduit.

2. The Act directs Reclamation to classify conduit hydropower development as a categorical exclusion under NEPA.

The new law directs Reclamation to apply its categorical exclusion process under the National Environmental Policy Act to small conduit hydropower developments (defined as projects up to 5 MW)

on its facilities that are authorized for federal development. This should generally mean that, barring a showing of significant adverse environmental consequences resulting from a particular project, most small hydropower development on the Reclamation conduits in question can proceed without preparation of NEPA environmental documents.

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