

Energy Committees Newsletter

Vol. 2, No. 1

December 2004

COMMITTEE NEWS

Energy Facilities and Siting Committee

The Energy Facilities and Siting Committee is planning a series of Brown Bag teleconferences in 2005 on emerging issues associated with the siting and development of liquefied natural gas (LNG) import projects. Issues that will be examined include the interplay between state and federal (*i.e.*, FERC) jurisdiction over on-shore projects, requirements for siting facilities under the Deepwater Port Act, update on LNG supply sources and end-markets, and safety and security considerations. For further information or to participate in the series, please contact Mark Kalpin, Wilmer Cutler Pickering Hale and Dorr LLP, at (617) 526-6176 or mark.kalpin@wilmerhale.com.

Hydro Power Committee

Over the last six months, the Hydro Power Committee has contributed three articles to the consolidated Energy Committees Newsletter. It helped arrange an "Energy Update" panel at the 12th Section Fall Meeting in San Antonio in October 2004. Currently it is working with the Water Resources Committee to form a hydropower panel at the 23rd Water Law Conference in San Diego on Feb. 24-25, 2005 and it is polling its membership by telephone to determine the members' interests.

The committee welcomes new members and new ideas for committee undertakings including topics for a potential series of teleconferences. See <http://www.abanet.org/environ/committee/hydropower/home.html>.

Renewable Energy Resources Committee

The Renewable Energy Resources Committee has arranged the following three teleconference calls:

- Jan. 19, 2005: "Wind Project Permitting: The Major Challenges and Potential Resolutions" Seminar 12:00am-2:00pm Pacific Time (teleconference 12:30pm-1:30pm Pacific Time). Major federal and state siting and environmental issues will be discussed;
- Feb. 16, 2005: "Getting to Market: Transmission Concerns in Renewable Power Generation." Seminar 12:00pm-2:00pm Central Time (teleconference 12:30pm-1:30pm Central Time). Among the issues addressed will be transmission capacity, constraints on generator interconnections, and FERC and Texas regulatory developments.
- March 16, 2005: "Meeting the Green Finance Challenge" Seminar 12:00pm-2:00pm Eastern Time (teleconference 12:00pm-1:30pm Eastern Time). Innovative

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Vol. 2, No. 1, December 2004**

On behalf of the energy committees, James E. Hickey, Jr. was editor of this issue and Gregory J. Copeland, Frank J. Devlin, Donald S. McCauley, Jr., Peter D. Mostow, Richard Roos-Collins and Joseph A. Siegel contributed to the preparation of this newsletter.

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This newsletter is a publication of the ABA Section of Environment, Energy, and Resources, and reports on the activities of the committee. All persons interested in joining the Section or one of its committees should contact the Section of Environment, Energy, and Resources, American Bar Association, 321 N. Clark St., Chicago, IL 60610.



investment and funding opportunities and mechanisms will be discussed.

For more information contact Committee Vice Chairs Edna Sussman at esussman@hnrlaw.com or Robert Faron at rsfaron@verizon.net.

Special Committee on Restructuring of the Electric Industry

The Special Committee on Restructuring of the Electric Industry will continue to monitor progress of comprehensive energy policy legislation in the 109th Congress, as well as rules and orders of FERC, and be prepared to report to members at appropriate times concerning new developments in electricity markets and regulation.

The Special Committee is contributing to the Section's 2004 *Year in Review* publication by addressing such electric industry subjects as transmission network reliability, RTO/ISO developments and FERC activities in the areas of market-based rate authorization, market power screens and market behavior rules.

The Special Committee will propose to sponsor or co-sponsor speakers on electric industry issues at the 13th Section Fall Meeting in Nashville, Tennessee, on Sept. 21-25, 2005. And, of course, the Special Committee is a contributor to newsletters such as this one.

The Special Committee strongly encourages all of its members to contribute to any of these ongoing activities by expressing an interest and contacting the Special Committee leadership, Robert M. Fillmore at bfillmore@hunton.com.

**U.S. DEPARTMENT OF THE INTERIOR'S
PROCESS FOR REVIEW AND APPEAL
OF ITS LICENSE CONDITIONS
FOR NON-FEDERAL
HYDROPOWER PROJECTS**

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The U.S. Department of the Interior (DOI) has proposed a new process for administrative review and appeal of the mitigation conditions it adopts for incorporation into the licenses for non-federal hydropower projects. DOI, Notice of Proposed Rulemaking (NPR), "Procedures for Review of Mandatory Conditions and Prescriptions in FERC Hydropower Licenses," 69 Fed. Reg. 54602 (Sept. 9, 2004). This NPR, if finalized, would result in significant change in the administration of the Federal Power Act (FPA) Part I, 16 U.S.C. §§ 791 – 821.

Since enactment of the FPA in 1935, DOI has not permitted administrative appeal of its mandatory conditions. As a result, the U.S. Court of Appeals is the first and only venue for challenging such conditions, after a given license incorporating these conditions has issued. 16 U.S.C. § 825/(b). A laudable intent of the recent proposal is to reduce the frequency or scope of cases filed for such judicial review. However, the proposed process is controversial – largely supported by the hydropower industry, and opposed by many states and non-governmental organizations – because of its treatment of appeal standing. While any party in a licensing proceeding may file comments on the mandatory conditions (or seek judicial review thereafter), only the license applicant would have standing to file an administrative appeal before DOI.

The public comment period on this NPR closed Nov. 8, 2004. DOI's next step is expected in early 2005.

Hydropower Regulation

DOI's proposed appeal process must be understood in the context of the regulatory system for non-federal hydropower projects. While the Federal Energy Regulatory Commission (FERC) largely administers this system, other agencies have reserved authorities to prescribe mitigation conditions for incorporation into the licenses for individual projects.

Under FPA Part I, FERC licenses every dam, powerhouse and associated facility that: is used to generate electricity with water, is owned or operated by a non-federal entity, does not have a valid right-of-way issued before 1920, and is located on a navigable water or otherwise affects interstate commerce. 16 U.S.C. § 817. A total of 1,010 projects are under such licenses today in 44 states.

Under FPA section 10(a)(1), a license assures that each project is "...best adapted to a comprehensive plan of development..." of the affected waters, including "...adequate protection, mitigation, and enhancement of fish and wildlife..., and for other beneficial uses...." 16 U.S.C. § 803(a)(1); *Udall v. Federal Power Commission*, 387 U.S. 428 (1967); *First Iowa Hydro-Electric Cooperative v. Federal Power Commission*, 328 U.S. 152, 180 (1946). In addition to energy generation, FPA section 10(a)(1) recognizes flood control, water supply, fish and wildlife protection, and recreation, as beneficial uses of the project. A given license specifies conditions (in the form of numbered articles) for construction, operation and maintenance of the project. A license has a term of 30 to 50 years, subject to renewal through a relicensing proceeding. 16 U.S.C. § 808(e). Since very few new projects have been built since 1990, this article focuses on how DOI's proposal would affect relicensing.

FERC has exclusive authority to issue or deny a license for a hydropower project. As a check-

and-balance, FPA Part I also provides that other agencies have non-preempted authorities to prescribe mitigation conditions for certain impacts. Two such authorities are relevant to this article. Under FPA section 18, the U.S. Department of the Interior or of Commerce may prescribe a fishway, a facility for upstream or downstream passage of fish. 16 U.S.C. § 811. Since Commerce regulates commercial fisheries (such as salmon or steelhead), DOI protects all others (such as riverine trout, bass or mussels) whose passage may be affected by a project. Second, under FPA section 4(e), if a project occupies lands or waters of a federal reservation, a license must include those conditions that the administering agency (which is DOI, for a Tribal reservation or a National Wildlife Refuge) determines are necessary for the protection and use of that reservation. 16 U.S.C. § 797(e). In addition, under Clean Water Act (CWA) section 401(a), the state where the project discharge occurs may issue a certification that prescribes conditions necessary to assure compliance with water quality standards. 33 U.S.C. § 1341(a); see *Jefferson County PUD no. 1 v. Washington Department of Ecology*, 511 U.S. 700 (1994). Federal and other resource agencies may recommend conditions to assure that a project is best adapted to a comprehensive plan of development of the affected waters. See 16 U.S.C. § 803(a), (j).

FPA Part I establishes an orderly process for a relicensing proceeding. See 16 U.S.C. § 808. A licensee submits a Notice of Intent to seek a new license not less than five years before the expiration of the current license. The licensee will consult with federal and state resource agencies and other stakeholders to develop and implement a study plan to characterize baseline conditions of resources affected by the project, identify corresponding management objectives, and propose field studies or other analytical methods to determine the nature and scope of the project's existing impacts and alternatives to mitigate such impacts. The

licensee will finalize and file a new license application with FERC not less than two years before expiration of the current license. Once it determines that the application is complete, FERC will solicit final prescriptions or recommendations for license conditions. All mandatory conditions, including DOI's under FPA sections 4(e) and 18, must be timely submitted in response to this notice. Under the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321 *et seq.*, FERC will then prepare and publish an environmental document intended to provide the factual and legal basis for the respective decisions of all agencies with regulatory jurisdiction. FPA Part I encourages, but does not require, a final decision on a new license application before expiration of the original license. That decision is subject to rehearing (a form of administrative appeal) before FERC. Judicial review occurs before the U.S. Court of Appeals for the D.C. Circuit or the Circuit where the project is located. 16 U.S.C. § 825/(a)-(b). A license will be upheld if supported by substantial evidence in the record and not arbitrary and capricious. *Id.*, § 825/(b).

In July 2003, FERC adopted an Integrated Licensing Process (ILP) to improve the timeliness and efficiency of hydropower regulation. 104 FERC ¶ 61,109 (July 23, 2003). After a one-year transition (see 18 CFR § 5.3(a), (e)), the ILP will effectively replace the Traditional Licensing Process (18 CFR §§ 4.34 – 4.38 and Part 16) and the Alternative Licensing Process (18 CFR § 4.34(i)), which had often resulted in untimely licensing decisions or high transaction costs for the licensees. See FERC, *Report on Hydroelectric Licensing Policies, Procedures, and Regulations: Comprehensive Review and Recommendations Pursuant to Section 603 of the Energy Policy Act of 2000* (May 2001). The ILP provides for parallel-track development of the license application and NEPA review, and for affirmative coordination between FERC and other jurisdictional agencies in the adoption of their respective conditions that, together, will constitute the license for a given project.

DOI's Proposed Review and Appeal Process

In its rehearing of a licensing decision for a given project, FERC will not hear any claims challenging mandatory conditions adopted by DOI or other prescribing agency. FERC does not have authority to delete or change those conditions. If FERC objects to such conditions, it may either: deny license or issue license subject to such conditions. See *Escondido Mutual Water Commission v. La Jolla Band of Mission Indians*, 466 U.S. 765, 772 (1984); *American Rivers v. Federal Energy Regulatory Commission*, 187 F.3d 1007, 1030 (9th Cir. 1999). Thus, the prescribing agency, not FERC, has the duty to assure that its mandatory conditions have adequate support in the record and are otherwise lawful. See *Bangor Hydro v. FERC*, 78 F.3d 659 (D.C. Cir. 1996). As a result, FERC has encouraged the U.S. Departments of the Interior, Commerce and Agriculture (each of which has authority to issue such conditions) to adopt and administer their own processes for administrative review and appeal, preparatory to any judicial review.

DOI has proposed a two-part process. Under the Mandatory Conditions Review Process (MCRP), DOI would solicit, consider and respond to any public comments on preliminary conditions, before adoption of the final conditions that FERC will incorporate into a license. Proposed 43 CFR § 25.6. It would compile a formal record for its conditions for submittal to FERC. *Id.*, § 25.7. The bureau which exercises the mandatory authority – e.g., the Fish and Wildlife Service (FWS) for a fishway prescription – would administer this review process. The MCRP has been in effect as policy since 2001 (see 65 Fed. Reg. 77889 (Dec. 13, 2000)) and is largely uncontroversial. It acknowledges and implements DOI's responsibility to provide a public hearing for mandatory conditions, and to state the basis for its decision, before any judicial review of a license.

The Mandatory Conditions Appeal Process (MCAP), which was not included in the 2001 policy, would permit the licensee to appeal any final conditions to the DOI assistant secretary who oversees the prescribing bureau. An appeal, which would be due 30 days after the submittal of such conditions to FERC, would state the factual and legal basis for the appeal and propose an alternative which the licensee supports. See 43 CFR § 25.56 (*proposed*). Within 21 days thereafter, other parties in the relicensing proceeding may comment on the appeal but not file their own. *Id.*, § 25.52, 25.57. With support of a review team not previously involved in the relicensing proceeding, the assistant secretary would decide the appeal on a *de novo* basis, without deference to the prescribing agency. *Id.*, § 25.59(a). The appeal may be granted if the assistant secretary finds that the licensee's alternative is supported by substantial evidence and equally protective of the protected resources. *Id.*, § 25.59(c)-(d). The appeal decision would ordinarily be made within 60 days of appeal, in order to conform to the ILP's overall schedule for the licensing proceeding. *Id.*, § 25.59(e).

Comments on the NOPR

Many stakeholders filed public comments on the NOPR. Commenters include: National Hydropower Association, individual licensees such as Pacific Gas and Electric Company, the States of Washington, Oregon, California and non-governmental organizations such as the Hydropower Reform Coalition and The Nature Conservancy. The comments consistently raised several issues that DOI will presumably address in its next step in this rulemaking proceeding.

First, did the 2001 policy have the intended effects of reducing the frequency or scope of litigation of mandatory conditions? How does the NOPR build on the results achieved by that policy?

Second, what is the legal basis and practical purpose of limiting appeal standing to licensees? Any person interested in the outcome of a licensing proceeding may intervene as a party before FERC (16 U.S.C. § 825g), seek rehearing of a final licensing decision (*id.*, § 825(a)), and thereafter seek judicial review (*id.*, § 825(b)). News reports have suggested (although the NOPR does not state) that the limited standing provision was driven by DOI's concern that the process otherwise would result in multiple conflicting appeals which could not be resolved on the ILP's schedule. See Opinion Editorial, "Due Process on Dams," *Washington Post* (Nov. 15, 2004).


Third, how will the appeal process be administered to add value to the record that would otherwise exist in any judicial review? As stated, the process will ordinarily be completed in 60 days by the assistant secretary and other senior officials, previously unfamiliar with the project, who have multiple responsibilities.

Fourth, will an *ex parte* rule apply to the appeal process? The NOPR is silent on this issue.

Fifth, what is the practical effect on judicial review if Interior, Commerce and Agriculture, each of which may issue mandatory conditions for certain hydropower projects, provide different forms of exhaustion of administrative remedy? Commerce recently proposed to have only a review process for its mandatory conditions (69 Fed. Reg. 54,615 (Sept. 9, 2004)), and Agriculture does not currently have any such process. How will judicial review of a license (including the degree of deference to each prescribing agency) be affected if DOI's mandatory conditions have been subject to administrative review and appeal (*i.e.*, Commerce's only review, and Agriculture's neither)?

Energy Bill

The pending Energy Bill includes a hydropower title that addresses administrative review and appeal of such mandatory conditions. Any successor bill in the next Congress will likely follow suit.



LIKE TO WRITE?

The Energy Committees welcome the participation of members who are interested in writing articles for this Newsletter.

Interested members are asked to submit one paragraph proposals for articles for future Newsletter issues. Article proposals for the next edition are due by Jan. 31, 2005.

Proposals should be e-mailed to Richard Roos-Collins at rrcollins@n-h-i.org (phone: (510) 644-2900).

The inaugural issue of this Newsletter and other Committee Newsletters can be found at <http://www.abanet.org/environ/pubs/newslettershome.html>.

Information regarding the Energy Committees can be found at <http://www.abanet.org/environ/committees/descriptions.html>.

**CURRENT LITIGATION AFFECTING
OPERATION OF FEDERAL
HYDROELECTRIC PROJECTS IN THE
COLUMBIA RIVER BASIN TO MEET
RESPONSIBILITIES UNDER THE
ENDANGERED SPECIES ACT:
FALL 2004 UPDATE**

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The statements in this article are the author's and do not necessarily reflect the views of BPA or the federal government.

The Army Corps of Engineers (Corps), Bureau of Reclamation and Bonneville Power Administration (BPA) (action agencies) operate and manage certain federal hydroelectric projects in the Columbia River Basin to meet multiple purposes, including flood control, navigation, irrigation, power generation, recreation and fish and wildlife protection and enhancement. To avoid jeopardy to salmonid species listed as threatened or endangered under the Endangered Species Act (ESA) and the destruction or adverse modification of the species' designated critical habitat, these agencies have operated hydroelectric projects consistent with constraints under a biological opinion issued by the National Marine Fisheries Service (NMFS), also called NOAA (National Oceanographic and Atmospheric Administration) Fisheries, in December 2000 (2000 BiOp).

As described in the author's article in the August 2004 issue of the Energy Committees Newsletter (vol.1, no.1, at 5), *National Wildlife Federation v. National Marine Fisheries Service (NMFS)*, 254 F. Supp. 2d 1196 (D. Or. 2003), found fault with the 2000 BiOp and remanded it to NOAA Fisheries for further consideration. This Fall 2004 Update summarizes subsequent developments: (1) the court's injunction against the action agencies'

decision to reduce water used for summer spill in August 2004 and to use that water instead to generate additional electric power; and (2) responding to the court's concerns, NOAA Fisheries' issuance of a draft new BiOp in September 2004 and expected final BiOp at the end of November 2004. The ruling on summer spill, the new BiOp and expected challenges to that BiOp show how this case can have significant impact on the operation of federal projects in the Columbia River Basin to meet their multiple purposes, including the generation of power.

Summer Spill

During the remand period preceding issuance of a new BiOp, the court kept the existing BiOp, issued in December 2000 (2000 BiOp), in place as a guide for meeting ESA responsibilities during the remand period. The 2000 BiOp provided performance standards and an initial set of actions for progressing toward these standards. It also provided an implementation planning process by which the action agencies would develop annual plans for implementation of the BiOp. The BiOp allowed for revision to the initial set of actions, as long as the revised set of actions provided comparable or better benefits to the listed salmonid species.

Biologists generally view spill of water over dams' spillways as a primary means for passing migrating juvenile fish by dams. The 2000 BiOp, which Judge Redden allowed to remain in effect during the remand period, calls for summer spill at Bonneville, the Dalles, John Day and Ice Harbor dams through Aug. 31. However, spill also entails a substantial cost because water used for spill is passed over spillways and not through turbines to generate power. Consequently, some have raised concerns that, while some level spill is certainly desirable, additional spill provides smaller incremental benefits while the incremental costs, in terms of foregone revenues, are high.

The Northwest Power and Conservation Council's (NPCC) has responsibility to develop a Fish and Wildlife Program for the protection, mitigation and enhancement of fish and wildlife while also providing an adequate, efficient, economical and reliable power supply. Responding to concerns about the benefits and costs of spill, the Council's April 2003 Mainstem Amendments to the Columbia River Basin Fish and Wildlife Program, Council Document 2003-11, called for an evaluation of the effectiveness of spill to benefit fish and a consideration of alternative approaches to achieve the same or better benefits at less cost. The Council made the following statement:

[T]he Council will work with the federal operating fish and wild-life agencies, in consultation with the state fish and wildlife agencies and tribes and the Independent Scientific Advisory Board in a rigorous evaluation of the biological effectiveness and costs of spillway passage at each project and bring that information to bear in a systematic way in decisions on when, and how much, to spill. The goal of this evaluation should be to determine if it is possible to achieve the same, or greater, levels of survival and biological benefit to migrating fish as currently achieved while reducing the amount of water spilled, thus decreasing the adverse impact on the region's power supply. At the conclusion of this evaluation, the Council will conduct a public review process with the goal of providing recommendations to the federal agencies for the most biologically effective spill actions at the lowest cost possible.

The federal action agencies considered proposed changes in 2003 but, principally due to only a short amount of time to evaluate proposals and a lack of consensus, they chose not to make changes in 2003 and instead urged the region to develop a better operating plan for future years. Their conclusion follows:

The agency heads stated their goal is to have a method in place by next year to help ensure that biological benefits are met in the most cost effective manner available. The agency heads concluded that they have a responsibility to the region to devise an approach that is less costly while maintaining the ability to achieve the biological objectives for salmon and steelhead, and will work with all interested parties in the region to accomplish this objective.

To consider changes in spill for the next fish migration period in 2004, the Corps and BPA participated and engaged in extensive public processes over several months to consider revised approaches toward spill and offsets for adverse impacts that might result from reduced spill. They primarily used the implementation planning process under the 2000 BiOp. The 2000 BiOp allowed implementation plans to revise the BiOp's initial set of recommended measures, such as the spill measures, if the revisions provided comparable or better benefits to listed species. 2000 BiOp at § 9.1.4, p. 9-3. Consistent with this process, the Corps and BPA considered possible reductions in spill and alternative beneficial measures to offset any adverse effects associated with the spill reductions.

The Corps and BPA released for public review and comment their evaluation of alternative spill arrangements and offsets for adverse impacts (January 2004), a preliminary spill proposal (March 30), an amended proposal (June 8), and a final spill proposal (June 23) as part of an amended 2004/2004-2008 implementation plan, which NOAA reviewed and approved as providing the same or greater biological benefits and consistent with the analysis and expectations of the 2000 BiOp (July 1). Consequently, on July 6, the Corps issued a Statement of Decision to reduce spill consistent with the final spill proposal. Specifically, in its Statement of Decision, the Corps expressed the

following decision to reduce summer spill and provide offsets for any adverse effects associated with reductions in spill:

The NOAA Fisheries 2000 BiOp calls for the summer spill at Bonneville, The Dalles, John Day and Ice Harbor dams through August 31. The modification in summer spill operations for 2004 is to end fish passage spill at Bonneville and The Dalles dams as of the beginning of August 1, and at Ice Harbor and John Day dams as of August 26. The modification also includes actions to offset potential adverse impacts to listed and non-listed salmonids in order to achieve similar or better biological benefits than those anticipated in the NOAA Fisheries 2000 BiOp. The offsets are as follows: 1) providing 100,000 acre feet (100 kaf) of water from Idaho Power Company's (IPC) Brownlee Reservoir to augment flows in the lower Snake River above IPC's planned flow operation during July; 2) implementing an enhanced Northern pikeminnow management program to reduce predation related mortality; 3) providing long-term anti-stranding operations in the Columbia River's Hanford reach; and, 4) implementing hatchery and habitat improvements to address estimated impacts to non-listed salmon not otherwise benefited by the Hanford reach anti-stranding or pikeminnow control efforts. The hatchery and habitat actions will accrue benefits in future years to offset the impacts occurring in 2004. Specific details of the modified summer spill operations are provided in the "Final Proposal for FCRPS Summer Juvenile Bypass Operations," dated June 22, 2004, and the *Amendment to the 2004/2004-2008 Implementation Plan for the FCRPS Biological Opinion Remand*, dated June 2004, and referenced materials to those documents.

However, this spill decision did not garner support from all parties to the *NWF v. NMFS*

litigation. Views about the benefits and costs of spill and offsets widely differed. Opposing the spill decision, environmental plaintiffs, supported by tribes and some states, filed a motion for preliminary injunction to prevent implementation of the action agencies' spill decision.

At the close of hearing oral argument on July 28, the court announced its decision to issue an injunction against the spill decision. In a written opinion, the court expressed its view that (1) the proposed offset of release of 100,000 acre-feet of water from Brownlee Reservoir was not entirely "new" or additional water and therefore could not entirely count as an offset for adverse fish effects associated with reduced spill and (2) NOAA erroneously calculated the benefits from the 100,000 acre-foot release of water from Brownlee Reservoir. *National Wildlife Federation v. National Marine Fisheries Service*, CV 01-640-RE (D. Or. July 29, 2004).

NOAA and the Corps appealed the preliminary injunction and filed an emergency motion to stay the injunction, which the court of appeals denied. *National Wildlife Federation v. National Marine Fisheries Service*, No. 04-35673 (9th Cir. Aug. 13, 2004). Because the denial of the emergency motion meant that the appellate court would not rule on the appeal until after the opportunity for reduced spill in August 2004 had passed, appellants moved for voluntary dismissal of the appeal, which the appellate court granted. *National Wildlife Federation v. National Marine Fisheries Service*, CV 01-640-RE (D. Or. Sept. 29, 2004).

2004 BiOp

In response to the court's remand of the 2000 BiOp for correction, NOAA, after much reconsideration, released for comment a new draft 2004 BiOp on Sept. 8, 2004, received public comment, and issued a new final BiOp on Nov. 30, 2004. The 2004 BiOp reviews operations and configuration changes proposed

by the action agencies in their Updated Proposed Action. The BiOp concludes that proposed operations and configuration of federal projects avoid jeopardy to listed salmonid species and the destruction or adverse modification of their critical habitat.

Because the 2004 BiOp addresses issues of much interest to many parties with different views, further litigation is almost certain. Some parties are likely to file a motion for summary judgment that the 2004 BiOp is still inadequate, and to seek a court decision on the new BiOp by the spring of 2005, when juvenile salmonid fish begin to migrate downstream. Again, resolution of issues respecting this BiOp will affect how the action agencies operate federal hydroelectric projects to meet ESA responsibilities while meeting the projects' other purposes, including the generation of electric power.

A comparison of the 2004 BiOp to the 2000 BiOp indicates how NOAA is addressing various, sometimes controversial, subjects. Three subjects follow.

Changes to Jeopardy Methodology. Analyzing whether a proposed action jeopardizes listed species, NOAA makes projections about the likelihood of survival and recovery in future years with and without the proposed action. The court's May 7, 2003, opinion determined that the 2000 BiOp improperly relied upon future federal actions that had not completed consultation and non-federal actions that were not reasonably certain to occur. In response, the draft BiOp revised its methodology so that its projections of survival and recovery with and without proposed operations did not improperly count or rely on the types of future actions by others that were the subject of the court's concerns.

Estimating Effects of Proposed Operations. Normally, to assess the effects of a proposed action and whether these effects jeopardize

listed species, NOAA will assess the difference in the likelihood of survival and recovery with the proposed action and without the proposed action (no-action alternative). However, with regard to operations of hydroelectric projects, which were previously constructed and continue in place, flows of water by dams require some form of operation of the dams, even if the particular proposed action were not implemented. A "no action" alternative, with no operations at all, does not exist. Instead, if NOAA is to compare proposed operations to the absence of proposed operations, NOAA must make some assumptions about the operations if the proposed operations were not pursued.

The 2004 BiOp presents an approach, but not necessarily the only approach, for estimating the effects of proposed operations. The BiOp does so by comparing survival under proposed operations to survival under a theoretical "reference operation" considered beneficial to fish migration. NOAA considers the difference in survival under proposed operations and survival under the reference operation to be an estimate of the effects of proposed operations.

Adverse Modification of Critical Habitat. In addition to determining whether proposed operations avoid jeopardy to listed species, NOAA must determine whether the proposed action avoids destruction or adverse modification of critical habitat. 16 U.S.C. § 1536(a)(2). For years, NOAA and the U.S. Fish and Wildlife Service have defined "destruction or adverse modification of critical habitat" to mean:

[A] direct or indirect alteration that appreciably diminishes the value of critical habitat for both the survival and recovery of a listed species. Such alterations include, but are not limited to, alterations adversely modifying any of those physical or biological features that were the basis for determining the habitat to be critical. 50 C.F.R. 402.02.


However, three courts of appeal, and most recently the court of appeals for the Ninth Circuit, the circuit within which the *NWF v. NMFS* litigation takes place, have questioned or criticized this definition. *N.M. Cattle Growers Ass'n v. United States Fish and Wildlife Serv.* 248 F.3d 1277, 1283 & n.2 (10th Cir. 2001); *Sierra Club v. United States Fish and Wildlife Serv.*, 245 F.3d 434, 441-43 (5th Cir. 2001); *Gifford Pinchot Task Force v. USFWS*, No. 03-35279 (9th Cir. Aug. 6, 2004). The thrust of these opinions is that the quoted definition should be revised to give increased importance to the effect of actions on the value of critical habitat for the recovery of listed species.

Currently, NOAA has designated critical habitat for Snake River Sockeye, spring/summer Chinook and fall Chinook. To assess the effect of proposed operations on these species' critical habitat, the 2004 BiOp uses two approaches. It compares the effects of the proposed operation on critical habitat with effects under the reference operation. It also compares the conditions of critical habitat under the proposed operation with conditions existing at the time NOAA listed these fish as threatened or endangered. NOAA's approach is one of the early "adverse modification" analyses following *Gifford Pinchot*.

Additional information

- The author's initial article about this litigation appears in the August 2004 issue of the Energy Committees Newsletter, at <http://www.abanet.org/environ/committees/energy/newsletter/>.
- For the ESA's statutory provisions, see <http://www4.law.cornell.edu/uscode/16/ch35.html>.
- For the regulations on consultation, see http://www.access.gpo.gov/nara/cfr/waisidx_03/50cfr402_03.html.

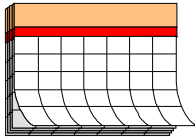
- For documents related to the federal government's response to the May 7, 2003 opinion, see <http://www.salmonrecovery.gov/remand.shtml>.
- For the 2000 BiOp and implementation of the BiOp, including NOAA's July 1, 2004 Findings Letter about summer spill, see <http://www.nwr.noaa.gov/1hydrom/hydroweb/fedrec.htm>.
- For NOAA's September 2004 draft BiOp, see http://www.salmonrecovery.gov/R_biop.shtml.
- For documents related to the process leading to proposals and decisions to modify summer spill, see <http://www.salmonrecovery.gov/implementation.shtml>.
- For the Northwest Power and Conservation Council's 2003 Mainstem Amendments to the Council's Fish and Wildlife Program, see <http://www.nwcouncil.org/library/2003/2003-11.htm>.
- For the federal agencies' updated Proposed Action, see <http://www.salmonrecovery.gov/implementation.shtml>.
- For NOAA's final 2004 BiOp issued Nov. 30, 2004, see http://www.salmonrecovery.gov/R_biop_final.shtml.



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**ONTARIO OUTLINES LEGAL AND POLICY
INITIATIVES TO MEET PROJECTED
ELECTRICITY SUPPLY SHORTAGE**

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“Ontario’s electricity system faces significant challenges over the next 10 years. The uncertainty surrounding the return to service of [certain nuclear] units, the lack of new generation investment and the commitment to shut down 7,500 MW of coal fired generation by December 31, 2007, all contribute to a potentially severe shortfall. New transmission, supply and demand side initiatives are urgently needed to address this gap and secure Ontario’s energy future.”

From: “10-Year Outlook: An Assessment of the Adequacy of Generation and Transmission Facilities to Meet Future Electricity Needs in Ontario from January 2005 to December 2014,” published by the Ontario Independent Electricity Market Operator.

Introduction

Ontario, Canada’s largest province and energy consumer, is undertaking legal and policy initiatives to meet projected energy shortages in the medium and long term. In the face of growing electricity demand and a government commitment to replace coal-fired generation with new, cleaner generation capacity or demand-side management initiatives by 2007, the Ontario Government has projected that by 2020, approximately 25,000 MW of Ontario’s existing 30,500 MW of electricity generating capacity will need to be refurbished, replaced or

conserved. The Ontario Government estimates that investments of C\$25 billion to C\$40 billion from public and private sources will be necessary to rebuild or replace 80 percent of Ontario's existing generating capacity. Among other initiatives to meet the projected supply shortage, the Ontario Government has (i) passed legislation to restructure the electricity sector in Ontario, (ii) issued requests for proposals (RFPs) for the construction of 300 megawatts (MW) of generating capacity from renewable energy sources and the creation of 2,500 MW of generating capacity from new "clean" generation facilities and demand-management projects and (iii) proposed the installation of "smart meters" in Ontario to incent consumers to shift electricity consumption to off-peak periods. Each of these initiatives is discussed briefly in this paper.

Market De-regulation and Re-regulation

By way of background, the wholesale and retail electricity markets in Ontario were opened to competition in May 2002 and these markets have faced many challenges since that time. Following open access, to deal with these challenges, the Ontario government re-regulated aspects of the electricity markets. For example, in the wake of higher than expected spot prices for electricity during the summer of 2002, the Ontario Government passed legislation in December 2002 that capped the commodity price of electricity for low-volume consumers (residential and small businesses) and certain designated consumers (universities, hospitals and charitable institutions) to 4.3 cents per kilowatt-hour (kWh). This price cap was retroactive to the date of market opening, regardless of whether such consumers were paying the electricity spot price through their local distribution companies (LDCs) or had signed a fixed-price contract with an electricity retailer. Subsequent legislation has increased the commodity price of electricity for low-volume and designated consumers to 4.7 cents per kWh for the first 750 kWh consumed in a month, and 5.5 cents per kWh thereafter. Under

Bill 100, the *Electricity Restructuring Act, 2004*, which was passed into law on Dec. 9, 2004, the Ontario Government has proposed a number of structural changes to the electricity sector in Ontario to meet the projected gap between supply and demand. It has also given the Ontario Energy Board (OEB), the energy regulator in Ontario, the responsibility of developing a commodity price of electricity for certain classes of consumers that, over time, is to approximate the true cost of electricity.

Highlights of Electricity Restructuring Act, 2004

The following are some of the highlights of *Electricity Restructuring Act, 2004*:

- A new Ontario Power Authority (OPA) will be created with a mandate to ensure an adequate, long-term supply of electricity.
- Incentives will be provided for more private sector investment in new generation facilities.
- The creation of a new Conservation Bureau.
- A redefinition of the role of the Ontario Independent Electricity Market Operator (IMO), which administers the wholesale electricity markets in Ontario and directs the operation of its main transmission grid. Its new name would be the Independent Electricity System Operator (IESO). Some responsibilities of the IMO, including market surveillance, would be transferred to the OEB and the newly proposed OPA.

The regulation of electricity prices in parts of the electricity sector would be adjusted and approved periodically by the OEB to ensure price stability for consumers. This would include a new standard rate plan for certain classes of consumers (presumably low volume) that would be adjusted periodically, as well as a mixed pricing scheme allowing some rates to be set by a combination of market competition and

regulation by the OEB. The minister of Energy has stated that medium and large users will continue to have the flexibility to pay the market price for electricity or could use retailers or hedging instruments to manage energy costs.

The Ontario Power Authority

The *Electricity Restructuring Act, 2004* creates the OPA which, among other things, has the responsibility of (i) forecasting electricity demand and the adequacy and reliability of electricity resources for the medium and long term, (ii) engaging in activities in support of the goal of ensuring adequate, reliable and secure electricity supply and resources, and (iii) promoting diversification of electricity sources and promoting cleaner sources and technologies and establishing goals in that regard.

The legislation also confers upon the OPA specific powers to enable it to develop and implement integrated power system plans and procurement processes as approved by the OEB to achieve goals relating to the adequacy and reliability of electricity supply. These powers include the ability to enter into contracts for the procurement of electricity supply or capacity and the management of electricity demand. See the discussion below of the Request for Proposal (RFP) for clean energy supply and the contracts with energy suppliers that the OPA is expected to support.

New Responsibilities of the Ontario Energy Board

Under the *Electricity Restructuring Act, 2004*, the OEB is given broadened regulatory and rate-setting powers. For example, the OEB is given the power to review and revoke any amendment made by the IMO/IESO to the market rules, if the amendment is inconsistent with the purposes of the original legislation that opened the electricity markets or unjustly discriminates against or in favour of a market participant or class of market participants. In

addition, the OEB will now have responsibility for market surveillance of the IESO-administered markets (formerly an IMO responsibility), to monitor for any market abuse by market participants or structural market inefficiencies.

Further, the OEB is given the responsibility of forecasting or developing a formula for the cost of electricity for various classes of consumers, taking into consideration the “true cost” of electricity. Based on these forecasts, the OEB is charged with approving or fixing separate rates every year for various classes of consumers (low-volume or residential and certain designated institutional consumers), with the objective of matching the rates to the “true cost” of electricity, over time. The OEB issued a draft pricing plan for public comment on Dec. 7, 2004.

Thus, in the restructured electricity sector, there will be a regulated commodity price of electricity for certain consumers fixed by the OEB as well as a spot market or floating commodity price of electricity on the wholesale markets administered by the IMO/IESO.

Revised Responsibilities of the Independent Market Operator /Independent Electricity System Operator

In addition to renaming the IMO the “Independent Electricity System Operator”, the *Electricity Restructuring Act* among other things, (i) requires the IESO to make adjustments, over time, through its billing and settlement systems, to ensure that market participants will pay amounts that reflect the true cost of electricity, having regard to both the regulated and market prices of electricity that will be in effect after the new legislation comes into force; (ii) limits the IESO’s duties relating to forecasting electricity demand to the short-term, with the OPA taking on the responsibility for forecasting demand and the adequacy and reliability of electricity resources for the medium and long term; and (iii) transfers the IMO’s

responsibility for market surveillance to the OEB.

In addition, since the rates initially fixed by the OEB for certain consumers will likely be lower than the true cost of electricity, the legislation requires the IESO to keep track of the difference between the regulated price and the actual cost of electricity in variance accounts. In re-setting rates for certain classes of consumers from year to year, the OEB is required to consider the true cost of electricity with a view to eliminating, over time, these variance accounts.

Conservation and Clean Energy

While the existing electricity legislation has a stated objective of promoting energy conservation and energy efficiency and the use of cleaner energy sources, the *Electricity Restructuring Act, 2004* places a greater emphasis on conservation and clean energy. One of the responsibilities of the OPA is to establish a Conservation Bureau to provide leadership in planning and co-ordination of measures for electricity conservation and load management in Ontario. Another responsibility of the OPA is to establish system-wide goals for the amount of electricity to be produced from alternative and renewable energy sources and the OPA has the power to procure and enter into contracts for the supply of energy from such sources. The legislation permits transmitters, distributors and the OPA to provide services that promote energy conservation and the use of cleaner energy sources.

RFPs for New Generating Capacity from Renewable Resources, Clean Energy Sources and Demand-Side Projects

On a parallel course with the introduction of the *Electricity Restructuring Act, 2004*, the Ontario Government has issued RFPs for new generation and demand-side projects. If successful, it is anticipated that the Ontario Government will issue additional RFPs of this

nature to secure additional generating capacity for the province.

In April 2004, the Ontario Government issued an RFP for 300 MW of new generating capacity from renewable energy sources, such as wind energy, hydroelectric facilities and landfill-gas projects. To support such projects, the Ontario Government has agreed to enter into long-term power purchase agreements with selected proponents. The proposals were due in August 2004 and the list of selected proponents and projects is expected to be issued shortly.

In September 2004, the Ontario Government issued an RFP for up to 2,500 MW of new generating capacity from “clean” energy generating facilities and demand-side projects. Clean energy generating facilities include co-generation facilities utilizing gas and other fuels (but not coal or municipal solid waste) as a primary fuel source. Support for the clean energy projects would come in the form of a financial contract, called a Clean Energy Supply Contract (CES Contract) between the Ontario Electricity Financial Corporation (OEFC) (a Crown or government agent) and the supplier. Under the CES Contract, the OEFC essentially guarantees the payment to the electricity supplier of a revenue stream sufficient to meet its minimum net revenue required to amortize the capital costs of the new generating facility, while the electricity supplier also agrees to share essentially all of the “upside” net revenue with the OEFC (*i.e.*, the deemed revenue of the facility in excess of the minimum guaranteed revenue and deemed operating costs). The Ontario government has proposed similar financial contracts for demand-side projects. The proposals for clean energy supply and demand-side projects are due in mid-December 2004.

The CES Contracts and the other contracts proposed under the RFPs are contemplated to be transferred to the OPA if and when it is created. Although the OEFC, the currently

proposed counterparty, is a Crown or Ontario Government agent, the *Electricity Restructuring Act, 2004* provides that the OPA will not be. Accordingly, although the OPA has been given provisional credit ratings of A(high) by Dominion Bond Rating Service and (P)Aa3 by Moody's, a number of potential proponents of the RFP are unsure of the OPA's financial wherewithal and whether the Ontario Government will ultimately support the OPA's financial obligations under the CES Contracts and other contracts.

Smart Meters

The Government of Ontario has also announced an initiative to manage electricity demand by installation of smart meters to measure electricity usage by customers during each hour of each day (as opposed to total electricity usage for the month). This will allow LDCs or retailers to charge their customers an electricity price that varies depending on the time of day that the electricity is consumed, with higher prices charged during the peak consumption hours during the day, thereby providing customers an incentive to control their electricity costs by shifting energy usage to off-peak periods or lowering energy usage during peak demand periods. The government's plan is to have 800,000 smart meters installed by the end of 2007 (approximately 12 percent of all meters) and installation of smart meters for all Ontario customers by the end of 2010, according to a draft smart meter implementation plan published by the OEB on Nov. 9, 2004 for comment by stakeholders and the public.

Pro-Active Market Management Ahead

The *Electricity Restructuring Act, 2004* contains a general framework for discussion. However, the implementation of the various initiatives for conservation and new power generation, including the RFPs for new generating capacity from renewable energy sources, clean energy sources and demand-side projects, the formula from the OEB for regulated prices of electricity

for certain consumers and the smart meter initiatives, among others, all will be needed before the impact of the legislation is fully known. What is clear, though, is that the government intends to be more involved in the market, to promote demand management initiatives and to seek more private investment in generation capacity to ensure that there is an adequate supply of electricity in the province. It will not rely solely on market forces to manage the market.

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