



ROLE OF WATER RIGHTS AND OTHER PERMITTING

NWHA Low Impact Hydro Workshop

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FERC Regulations

- Exemptions shall include the terms and conditions that fish and wildlife agencies may timely determine are appropriate to carry out the responsibilities specified in section 30(c) of the Federal Power Act. 18 CFR § 4.34(f)(2).
- Standard Terms and Condition: The construction, operation, and maintenance of the facility must comply with all terms and conditions placed on it by state and federal fish and wildlife agencies. 18 CFR § 4.94; 18 CFR § 4.106.

FERC Regs for in-conduit (cont.)

- Non-Standard Terms and Conditions. the Commission may prescribe terms or conditions in addition to those set forth in § 4.94 in order to:
 - (a) Protect the quality or quantity of the water supply for agricultural, municipal, or industrial consumption;
 - (b) Otherwise protect life, health, or property;
 - (c) Avoid or mitigate adverse environmental impact; or
 - (d) Conserve, develop, or utilize in the public interest the water power resources of the region.
- 18 CFR § 4.93(c).

FERC Regs for small hydro (cont.)

- Non-Standard Terms and Conditions. In approving any application for exemption from licensing, the Commission may prescribe terms or conditions in addition to those set forth in § 4.106 in order to:
 - (a) Protect the quality or quantity of the water supply;
 - (b) Otherwise protect life, health, or property;
 - (c) Avoid or mitigate adverse environmental impact; or
 - (d) Better conserve, develop, or utilize in the public interest the water power resources of the region.
- 18 CFR § 4.105(b)(2).

FERC Regulations (cont.)

- Other Mandatory and Recommended Terms and Conditions. In addition to the standard terms and conditions, a small conduit exemption will include any mandatory terms and conditions submitted by resource agencies in their initial comments as well as terms and conditions recommended by resource agencies, Indian tribes, or the public in the notice and comment hearing process.
- *Recommended terms and conditions from Fish and Wildlife agencies.* All fish and wildlife agencies and Indian tribes must recommend terms and conditions for the protection of, enhancement of, or mitigation of damages to fish and wildlife in their initial comments. 18 CFR § 4.34(b)(2).

State Water Rights

- General Premise: If you put water to beneficial use, you need a water right. State owns the water; user gets a usufruct (use right).
- Gravel pits
- Water right attributes: Authorizes use of water from a specified source, for a specified use, for a specified amount (rate and duty), at a specified place, from a specified diversion point, for a specified season, with certain conditions and requirements.
- If irrigation water being delivered from point A to point B, and during conveyance you also want to use water to produce power, need a water right (secondary authorization) for hydro use.

The Issue

- How do you get the water right, what does it authorize, and how does it relate back to the FERC exemption process?



Oregon water right statute

- In 2007, the Oregon legislature created an expedited process for securing the right to use water under existing water right certificates for certain hydroelectric projects.
- Under HB 2785, holders of existing water rights could obtain a secondary authorization to make use of water for hydro purposes where the water would have been diverted in any event for beneficial use without waste.
- Must qualify for FERC exemption, no separate priority date, no regulation or call for hydro use, no right to divert for hydro use.

Fish passage triggers

- HB 2785 includes a series of conditions that must appear in the new authorization for the secondary use of water for hydroelectric purposes. In particular, the relevant language provides:
- “At a minimum, a certificate issued under this section must contain the following conditions: (a) Fish screens, by-pass devices and fish passages as required by the State Department of Fish and Wildlife.”
*** ORS 543.765(5).
- The requirement for fish passage is triggered only where four key requirements are met. There must be (1) construction, a fundamental change in permit status, or abandonment of (2) an artificial obstruction, that (3) crosses “waters of this state” (4) where native migratory fish are or historically have been present.

Fish passage triggers

- The term “fundamental change in permit status” means “a change in regulatory approval for the operation of an artificial obstruction where the regulatory agency has discretion to impose additional conditions on the applicant, including but not limited to licensing, relicensing, reauthorization or the granting of new water rights, but not including water right transfers or routine maintenance permits.” ORS 509.580(4); OAR 635-412-0005(25).
- 3/19/07 public hearing before the House Committee on Energy and the Environment, Rep. Burley stated: “Colleagues, those of us that had the benefit of going over to Bend and seeing the fish screen and diversion for Central Oregon Irrigation District ... I mean picture this, all we’re suggesting is that that same water from that same diversion through the same fish screens going down the same canal, same pipe is now also going to be spinning a microhydro project which the Governor’s renewable energy working group thinks is a great idea .. And what we need to do is incent this, not disincent it; so anything we can do to streamline this I think makes a ton of sense.”

Policy issues and concerns

COID, SwID, and NUID settled. 40/60 split; 2017. Agree to disagree on law and policy issues.

- Time is not your friend. Artificial grant/financial incentive dates drive project developers to make concessions that they might not otherwise make. Construction schedule, etc. No time for fish passage waiver or pre-emption debate. Need a project without controversy, all packaged up with a bow.
- Need agency to air concerns and issues early, so that add-on costs can be incorporated into long-term financing.
- Step back, and hard look at whether you are really incentivizing low-impact/no-impact hydro; too many ornaments collapses the tree.
- Every state different.

Who owns/controls the water/canal?

- If you are a third-party developer, need to know who owns/controls the water and the canal for in-conduit projects
- Could be irrigation district, US Bureau of Reclamation, could be patrons, could be individuals
- Safest path is agreement with everyone, as oftentimes longstanding disputes over who has control
- Fort Vannoy Irrigation District case

Conclusion

- Do your homework on both the existing water rights you intend to utilize, the water rights you will need, and the conditions that the state will likely attach to your water right
- Take that information and incorporate it into your project economics and financing
- Thank you