Reinvigorating Hydropower

Hydropower Licensing

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NWHA Fall Regional Workshop 2019

October 10, 2019
America’s Water Infrastructure Act of 2018: Enactment and Implementation
AWIA Enactment and Implementation

America’s Water Infrastructure Act of 2018 (Public Law No. 115-270)

• § 3001 – Extends preliminary permit term and deadline for starting construction

• § 3002 – Expands conduit facilities that do not require FERC approval

• § 3003 – Promotes prompt licensing of hydro at existing nonpowered dams

• § 3004 – Promotes prompt licensing of closed-loop pumped storage projects

• § 3005 – Requires FERC to consider “early action” investments when establishing length of license
AWIA § 3001: Preliminary Permits

- 4-year permit term (16 U.S.C. § 798(a))
  - Previously 3-year term
- 4-year extension (16 U.S.C. § 798(b)(1))
  - Previously 2-year extension
- New permit under “extraordinary circumstances”
  - Refines FERC precedent.
- Site banking concern
AWIA § 3001: Commencement of Construction Deadline

- Maintains 2-year deadline (16 U.S.C. § 806)
- Authorizes FERC to grant extensions for 8 additional years (16 U.S.C. § 806)
  - Previously only a single 2-year extension
- Eliminates need for extension by an act of Congress
- Approximately 25 extensions granted to date
- FERC appears to be granting extensions in 2-year increments
- Reversed FERC’s rule that required annual charges payments to begin no later than 2 years after license order; payments now begin upon start of construction (non-municipalities) or upon commercial operation (municipalities)
AWIA § 3002: Qualifying Conduit Hydropower Facilities

• 30-day FERC determination of jurisdiction (16 U.S.C. § 823a(a)(2)(C))
  – Previously 45 days

• Installed capacity limit of 40 MW (16 U.S.C. § 823a(a)(3)(C)(ii))
  – Previously 5 MW

• Since passage of AWIA on October 23, 2018:
  – 11 notices of intent filed; FERC determined that all meet criteria of qualifying conduit facility
  – Installed capacity range from 300 W to 1,100 kW—i.e., none benefit from AWIA’s capacity increase

• Did the 2013 Hydropower Regulatory Efficiency Act effectively terminate the conduit exemption program?
AWIA § 3003: Promoting Development at Nonpowered Dams (16 U.S.C. § 823e)

- Requires FERC to “seek to ensure” that decisions on qualifying hydropower projects at nonpowered dams are issued within 2 years of receipt of a completed license application
- Qualifying criteria
- FERC’s implementing regulations (Order No. 858; 18 C.F.R. Part 7)
  - No change in the pre-filing consultation procedures—i.e., Traditional, Alternative, or Integrated processes
  - Request for expedited process must include documentation of compliance with ESA, NHPA, CWA, and other requirements
  - If FERC grants request, FERC issues notice that the application is ready for environmental analysis, and which establishes an expedited process schedule
AWIA § 3004: Closed-Loop Pumped Storage Projects (16 U.S.C. § 823f)

- Same general requirement (licensing decision within 2 years of complete application) and expedited process as non-powered dams
- What is a “closed-loop” pumped storage project? (16 U.S.C. § 823f(g); 18 C.F.R. § 7.1(c)(3))
  - Cause little to no change to existing surface and groundwater flows and uses
  - Is unlikely to adversely affect species listed as a threatened or endangered, or designated critical habitat of such species, under the ESA
  - Utilize only reservoirs situated at locations other than natural waterways, lakes, wetlands, and other natural surface water features
  - Rely only on temporary withdrawals from surface waters or groundwater for the sole purposes of initial fill and periodic recharge needed for project operation
AWIA § 3005: License Term “Credit” for Early-Action Investments

- AWIA § 3005 significantly expands early-action investments that FERC must consider when setting new license term
  - Redevelopment, new construction, new capacity, efficiency, and modernization
  - Rehabilitation or replacement of major equipment
  - Safety improvements
  - Environmental
  - Recreation
  - Other protection, mitigation or enhancement measures

- FERC must give “equal weight” to early-action investments and new license obligations
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AWIA § 3005: License Term “Credit” for Early-Action Investments

- For projects meeting one of the broad categories of investments, the only other criterion is that FERC must not have considered the investment when previously settling the license term

- Upon request of the licensee, FERC must determine whether an investment qualifies as an “early action” investment
  - Adds regulatory certainty to a proposed or completed investment
  - Relicensing considerations
  - Importance of maximizing license term on relicensing
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AWIA § 3005: License Term “Credit” for Early-Action Investments

  - $50 million investments in project qualified for an additional 10-year license term

- Chelan County Public Utility District, 168 FERC ¶ 61,083 (2019)
  - First-ever FERC order determining—well in advance of relicensing—that certain measures qualify as “early action” investments
  - Included turbine/generator rehabilitation, environmental measures, and dam safety upgrades
  - Importance of documenting qualification criteria

- Pending request by South Carolina Public Service Authority for Santee Cooper Project No. 199
Potential Policy Proposals to Improve Hydropower Licensing
Challenges for Hydro Project Relicensings

Challenges

• Older projects may require additional capital improvements to continue operation
• Operating requirements (e.g., run-of-river) limit operational flexibility to increase economic return
• Prevailing market conditions do not recognize all products provided by hydropower
• High relicensing costs can place projects at further risk
  – Process costs (e.g., consultation, environmental studies, document preparation)
  – New license obligations that may result in more restrictive operations, impose capital costs and increase operational costs
Challenges

• Federal agencies with mandatory conditioning authority (FPA sections 4(e) and 18) do not give “equal consideration” to development and non-developmental values
  – Undermines FPA requirement and policy that project licenses are balanced in the public interest
• Lack of coordination in permitting process, resulting in conflicting or inconsistent license requirements
• Lack of flexibility for adaptive management plans and offsite mitigation
Solution 1: Clarify Requirement for “Equal Consideration”

Require Mandatory Conditioning Agencies to Demonstrate “Equal Consideration”

• Under FPA section 4(e), FERC is directed to give “equal consideration” to developmental and non-developmental values when setting license conditions
• Courts have held that “equal consideration” is not “equal treatment”
• Demonstration that FERC understands the multi-faceted effects of its conditions
• Requiring federal mandatory conditioning agencies with the same obligation has multiple benefits:
  – Demonstration of climate, market, and other effects of license conditions
  – Achieves licenses that are better balanced in the public interest
• Arguably this is already a requirement under the Energy Policy Act of 2005 (FPA § 33)
What is the Electric Consumers Protection Act of 1986 (ECPA)?

• Viewed as a major modernization of the environmental protections required directly under the Federal Power Act:
  – FPA section 10(a)(1): Added among the numerous public interest considerations “for the adequate protection, mitigation, and enhancement of fish and wildlife (including related spawning grounds and habitat)”
  – FPA section 10(a)(2): Added a new paragraph requiring FERC to consider comprehensive plans developed and submitted by other agencies
  – FPA section 10(a)(3): Added a new paragraph expressly requiring FERC to solicit license recommendations from Indian tribes
What is the Electric Consumers Protection Act of 1986 (ECPA)?

- Viewed as a major modernization of the environmental protections required directly under the Federal Power Act:
  - FPA section 4(e): Imposed new requirement for FERC to give “equal consideration” to developmental and non-developmental values in its licensing decisions
  - FPA section 10(j): Added new subsection authorizing federal and state fish and wildlife agencies to submit protection, mitigation, and enhancement measures for fish and wildlife resources. FERC must accept these conditions unless doing so would be inconsistent with the purposes and requirements of the Federal Power Act, after consultation with the submitting agencies
Solution 2: Leveraging the Electric Consumers Protection Act of 1986

ECPA: Regulatory Solutions

• The Pre-Application Document (PAD) should indicate the environmental benefits gained from implementing the existing license, post-ECPA (e.g., existing FPA 10(j) conditions)

• The PAD should include data collection results from post-ECPA relicensing requirements, together with “adaptive management” PM&Es

• Environmental studies should focus on incremental data needs and changed circumstances since prior relicensing

• Opportunity to advocate that resource agencies and FERC should treat the relicensing as more of a “check-in” on new environmental issues identified since the prior post-ECPA licensing
Solution 2: Leveraging the Electric Consumers Protection Act of 1986

ECPA: Potential Legislative Solution

- Congress could create special relicensing requirements for projects that already have been relicensed once post-ECPA. These procedures could include:
  - Refocus FERC and agency objectives on continuing status quo except in limited instances (e.g., licensee request for change operations, new ESA-listed species, or other changed circumstances)
  - Streamlined consultation and environmental study requirements
  - Streamlined NEPA review
  - Higher threshold for new conditions that would disrupt the existing status quo
Solution 3: Simplify Conversions from Licenses to Exemptions

Challenges with Current Regulatory Conversion to Exemption

- **Limited Availability**: Project must be located at an existing non-federal dam or existing natural water feature and utilize for electric power generation the water power potential of the dam or natural feature
- **Capital Costs**: Must add capacity to existing project, but remain at 10 MW or less for total installed capacity
- **Regulatory Procedures**: Same basic requirements for FERC licensing apply (e.g., NEPA, ESA, NHPA, CZMA, and possibly CWA)
- **Regulatory Risk**: Open-ended “mandatory” conditions can be imposed by federal and state fish and wildlife agencies, with no protections of FPA section 6
Solution 3: Simplify Conversions from Licenses to Exemptions

One Proposed Legislative Solution (S. 1029, 115th Congress)

• Would authorize FERC to convert a license to an exemption for any small hydroelectric power project meeting the following criteria:
  – Installed capacity of 15 MW or less
  – Operating under a license issued after June 19, 1991
  – Is not located in an area that is not critical to species listed as endangered or threatened

• Would be subject to the same mandatory conditions imposed by federal and state fish and wildlife agencies as other exemptions

• Exemption would not take effect until license expiration

• Did not address NEPA/consultation requirements for conversion to exemption
Solution 3: Simplify Conversions from Licenses to Exemptions

Possible Improvements to S. 1029 in the 116th Congress:

• Increase installed capacity to expand projects that may be eligible for a license-to-exemption conversion
• Require expedited process for conversion to exemption, recognizing broad conditioning authority that applies to exemptions
• Require categorical exclusion from NEPA review
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