Establishing a state regulatory program for qualifying water-power development projects

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History of Water-Power Statute
AS 42.45.350
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3/13/01 – Senators Torgerson, Taylor, Austerman, and Cowdery introduced SB 140 entitled “An Act relating to regulation and licensing of certain water-power development projects; and providing for an effective date”.

1/31/03 – AS 42.45.350 became effective.

- States that the RCA shall adopt regulations to establish a regulatory program for qualifying water-power development projects.
What could AS 42.45.350 mean to the State?

- State may be required to have provisions similar to 16 U.S.C. 797 (e) [Section 4(e)], 803 (j) [Section 10(j)], and 811 [Section 18].
- DNR and RCA estimated the combined cost of $280,000 per year for implementation of a program.
  - The total cost of the program can not be determined until the program is designed.
- Will increase the work load of DEC, DF&G, DNR, and RCA.
- Existing State Statutes may not be equal to United States Codes [U.S.C.] which FERC operates under.
  - There are two attorneys from the Department of Law assisting.
  - To see if others agree, the questions found in the NOI was developed to assist us with theses issues.
Information on Alaska Hydropower

- FERC – 3 exemptions, 26 licenses [2 pending] and 5 preliminary permits.
- Alaska has 1/3 of the untapped hydropower potential of the US.
  - From the Alaska Rural Electric Cooperative Association at 3.21.01 SB 140 hearing.
- 1,144 potential hydro sites in Alaska; 602 sites <5 MW.
  - From the Locher Interests, 1997 Report for Alaska Energy Authority
- 131 sites are considered most viable.
Criteria for the 131 Most Viable Sites

- Adequate flow and head.
- Projects do not exist and site not being actively developed.
  - FERC has not received or issued NOI, preliminary permits, or license applications.
- Construction cost data developed.
- Project correct size for “current” market.
- No obvious land or environmental constraints.
  - National Park, Wildlife Refuge, or “Major” Salmon Stream
Qualifying Water-Power Development Projects


- Projects for which the preliminary permit, a license application, or an application for an exemption from licensing has not been accepted for filing by FERC before November 9, 2000, unless the application is withdrawn at the election of the applicant.
Qualifying Water-Power Development Projects

- Projects that are part of a project that has a power capacity of 5,000 kilowatts (5 megawatts [MW]) or less.
- Projects that are located entirely within the boundaries of the state of Alaska.
- Projects that are not located in whole or part on an Alaskan Indian reservation, a conservation system unit as defined in 16 U.S.C. 3102 (sec. 102, Alaska National Interest Lands Conservation Act), or on a segment of a river designated for study for addition to the National Wild and Scenic Rivers Systems.
In the case of nonqualifying project work that would be qualifying project work but for the fact that the project has been licensed or exempted from licensing by FERC before November 9, 2000, the licensee of the project may elect to make the project subject to licensing and regulations by the state.
FERC Licensing Process

COMMISSION

Natural Gas  Oil  Electricity  Hydroelectric
Conduit Exemptions Categorically Excluded from NEPA
Issues covered by FERC during development of latest licensing process
Issues found in the Notice of Proposed Rulemaking

- Advance Notification of License Expiration
- Integrated Pre-Filing consultation with NEPA Scoping
- Study Plan Development
- Study Dispute Resolution Process
- Timing of Water Quality Certification Application
- Consultation with Indian Tribes
- Cooperating Agencies Policy
- Non-Decisional NEPA Documents
- Draft License Articles
- Endangered Species Act Consultation
Issues found in the Notice of Proposed Rulemaking

- Fish and Wildlife Agency Recommendations
- National Historic Preservation Act Consultation
- Public Participation
- Processing Schedules and Deadlines
- Settlement Agreements
- Flexibility in Processing Schedules
- Timing and Conduct of Settlement Negotiations
- Guidance on the Content of Settlement Agreements
- New and Original Licenses
- Competition for New Licenses
Issues found in the Notice of Proposed Rulemaking

- NOI, Process Schedule, Study Plan Development
- Conduct of Studies
- Draft Application to License Order
- Intervention by Federal and State Agencies
- Information Technology
Issues found in the Final Rule
FERC Order # 2002

- Background
- Number of Processes
- Pre-NoI Activity
- Filing Date for NOI and PAD
- Advance Notice
- Pre-Application Document [PAD]
- PAD Contents, Format, and Distribution
- NEPA Scoping and Study Plan Development
- Study Criteria
Issues found in the Final Rule  
FERC Order # 2002

- Progress Reports and Initial and Updated Study Reports
- Modified Study Requests
- New Study Requests
- Comments on Study Reports
- Study Dispute Resolution
- Compliance with Study Plan
- Draft License Application
- Need for Draft Application
- Contents of Draft Application
- License Application
Issues found in the Final Rule
FERC Order # 2002

- Post-Application Study Requests
- Consultation and Coordination with States
- Timing of Water Quality Certification Application
- Coastal Zone Management Act
- Tribal Issues
- Environmental Document Preparation
- Settlement Agreements
- Time Outs
- Original License Applications
- Competition for New License
Issues found in the Final Rule
FERC Order # 2002

- Intervention by Federal and State Agencies
- Electronic Filing
- Additional Information Normally Requested
- Number of Paper Copies Per Filing
- Delegation of Authority
- Critical Energy Infrastructure Information
Important Issues that should be covered by a Potential State Program
Issues to be Discussed during the Development of a State Program

- Notice of Intent [NOI]
- Pre-NOI Activity
- Pre-Application Document [PAD]
  - PAD Contents, Format, and Distribution
  - Additional Information Normally Requested
- Advance Notification of License Expiration
- Environmental Assessment Procedure [EAP]
  - Development of a State EAP
  - Integrated Pre-Filing Consultation
Issues to be Discussed during the Development of a State Program

- Study Plan Development
  - Study Criteria
  - Modified Study Requests
  - New Study Requests
  - Progress Reports and Initial and Updated Study Reports
  - Compliance with Study Plans
  - Use of RCA for Study Dispute Resolution

- Public Participation

- Consultation with resident Alaska Natives
Issues to be Discussed during the Development of a State Program

- Cooperating State Agencies Policy / Coordination
  - Fish and Game – Fish and Wildlife Coordination Act
  - Water Rights
  - Dam Safety Construction and Operation Approvals
  - Coastal Zone Management Act / ACMP
  - DNR, Fish Passage and Habitat Permits – Title 41
  - Office of History & Archaeology Alaska Historical Commission
  - State Land Use Issues
  - Division of Parks and Recreation
  - Water Quality Certification
  - Storm Water Issues
  - Wastewater Discharge Permits
Issues to be Discussed during the Development of a State Program

- Settlement Agreements
  - Timing and Conduct of Settlement Negotiations
  - Guidance on the Content of Settlement Agreements
  - Enforcement of Settlement Agreements

- Applications
  - Draft License Application
  - Final License Application
  - Additional Information Normally Requested
Issues to be Discussed during the Development of a State Program

- **Licenses**
  - New and Original Licenses
  - Competition for New Licenses
  - License Renewals
  - Transfer of Licenses – Owner to Owner
  - Transfer of Licenses – Federal to State
  - Additional Information Normally Requested

- **Terms and Conditions found in a License**
  - Federal Agencies Recommendations
  - State Agencies Recommendations
  - Standard
Issues to be Discussed during the Development of a State Program

- Filing Requirements
  - Electronic Filing
  - Number of Paper Copies per Filing
  - Who receives a copy of a Filing
- Intervention by Federal Agencies
- Consultation and Coordination with Federal Agencies
  - Endangered Species Act
  - National Historic Preservation Act
  - Fish and Wildlife Coordination Act
  - National Environmental Policy Act
  - Forest Service Special-Use Authorization
Issues to be Discussed during the Development of a State Program

- State Licensing Process
  - Time frame
  - Processing Schedule
  - Flexibility in Processing Schedules
  - Delegation of Authority
  - Critical Energy Infrastructure Information

- Third Party Contractors / Consultants
Potential State Program
Questions in Docket R-03-5, Order No. 1

- We intend to conduct interactive and structural workshops to make a record to develop the regulations. Can you and/or your organization attend a workshop, and are you willing to provide written comments?

- What are the institutional, regulatory, financial, and legal factors at the federal and state levels that either encourage or impair the development of a state licensing program?
We offered the following information to assist in providing comments on the previous question:

- **Institutional** – Intergovernmental, cultural, procedural, or relationship issues that either enhance or impair the ability of the state to develop a regulatory program for qualifying water-power development facilities.

- **Regulatory** – Federal, state, or local rules, ordinances, regulations, statutes, and codes that could affect the transfer of the program to the state.

- **Financial** – Financial practices, policies, or conditions that affect the transfer of the program to the state.

- **Legal** – Federal, state, or local statutes, codes, interpretations of laws, policy decisions, and court decisions that affect the transfer of the program to the state.
In the protection of the public interest and the environment, the RCA is required to give equal consideration to energy conservation; the protection of, mitigation of damage to, and enhancement of, fish and wildlife, including related spawning grounds and habitat; the protection of recreational opportunities; the preservation of other aspects of environmental quality; the interests of resident Alaska Natives; other beneficial public uses, including irrigation, flood control, water supply, navigation; and the interest of Alaska residents and landowners. Should we give equal consideration to additional issues? Are there any of the above issues that in your opinion be given a higher priority than others? How can we fairly consider these factors in a licensing process at the state level efficiently?
Questions in Docket R-03-5, Order No. 1

- Should any proposed state licensing program be patterned after the existing federal licensing processes?

- Currently FERC is classifying water-power development facilities as either exempt, minor, and major projects. Should the state program follow, modify, or develop its own classification of facilities?
Applicant files a Notice of Interest (NOI) with RCA.

RCA issues project number based on data NOI was received and public notices NOI.

Pre-application meeting with State Resource Agencies (SRA) is scheduled by the applicant.

Applicant files State License Application (SLA) with draft Study Plans with the RCA.

If SLA is not complete, RCA returns it to the applicant.

If SLA is complete, RCA sends complete SLA and Draft Study Plans to local, state, and federal agencies, Tribes and Native American Organizations, non-governmental organizations (NGO), and public for review and comments. RCA schedules a site meeting for agency staff, and then the SLA and Draft Study Plans.

Local, state, and federal agencies, tribes, NGO, and public reviews SLA and Draft Study Plans.

1st season studies:
1) Applicant files interim reports;
2) Meeting is conducted to discuss results.

RCA issues order regarding SLA and Study Plans:
- Order approves SLA and Study Plans
- Order requests additional information
- Order denies SLA and Study
- Order modifies license process

RCA holds hearing on SLA and Draft Study Plans.

Final comments on SLA and Draft Study Plans are due from agencies [federal and state], tribes, NGO, and others.

RCA staff holds site meeting and discussion of SLA and Draft Study Plans.

Based on the results of 1st season study results, one or more parties requests that one or more of the study plans be modified:
- if modifications can not be agreed upon, a hearing date is set. Go back to Step 9.
- if modifications are agreed upon, information/documentation is provided to the RCA along with a request to modify the order issued in Step 10.

2nd season studies:
1) Applicant files final reports on all study plans; 2) Meeting is conducted to discuss final results.

Applicant files Project Verification Document (PVD) with RCA. This includes all the final study plan results and agency comments. If determined and documented by applicant and SRA in Step 3, the applicant files both the SLA and PVD at this time.

a) If PVD is incomplete, RCA returns it to the applicant.
b) If PVD is complete, RCA sends the PVD out for comments to local, state, and federal agencies, Tribes and Native American Organizations, NGO, and others for review and comments.
c) If PVD is complete but there will be changes, RCA notifies the SRA of the changes. The applicant is notified of the determination, the project is transferred back to Step 3.

Monitoring the terms and conditions of the license starts.

RCA issues order regarding Draft License:
- Order includes license
- Order requests additional information
- Order denies license

RCA holds hearing on draft license including the terms and conditions set by other agencies.

RCA issues draft license for public comments. Draft license includes environmental documents, terms, and conditions set by other agencies. A date on the draft license hearing is set.

Comments on PVD are due from agencies (federal and state), Tribes and Native American Organizations, NGO, and others.

Revised June 11, 2003
Scheduling Workshops
Workshops

- Should the RCA schedule more workshops?
- Should the RCA continue to use a court reporter?
- Are you interested in using the State Videoconferencing services for some workshops?
- Would 10 to 14 days before a workshop is scheduled be sufficient time to review information that will be discussed at the workshop?
Committee Formation

- **Request for Participation**
  - We also seek to identify persons or organizations willing to participate in a committee to be formed after the three workshops and to meet several times during the next several months to provide verbal and/or written comments to use on the development of the proposed regulations.

- **Formation of the Committee**
  - Are you willing to become a member?
  - Recommendations on the makeup of the committee?
  - Should committee meetings be tied to workshops?
  - Are you interested in using the State’s videoconferencing services?
Questions?
Who to Contact?

- Would you like to be placed on the mailing list?
- If you have a question, who to contact?
- Keven Kleweno, P.E.
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