



Mike Swiger <MAS@vnf.com>  
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*This is also  
Van Ness Feldman*

Record Type: Record

To: Edward A. Boling Energy Task Force/CEQ/EOP@EOP

cc:

Subject: Final corrected version of comments

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Earlier I emailed you what I believed to be a corrected version of our comments filed yesterday. It has come to my attention that that document was, in fact, an unedited prior version. Here is our final corrected version. I apologize for the confusion. If you have any questions, please feel free to email me or call at 202/298-1891. Thank you.



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October 31, 2001

James Connaughton, Chair  
Council on Environmental Quality  
Executive Office of the President  
17<sup>th</sup> and G Streets, N.W.  
Washington, D.C. 20503  
Attention: Task Force

Re: Comments to the Energy Task Force

Dear Chairman Connaughton:

On May 18, the President issued Executive Order 131212, which established an interagency task force to ensure that federal agencies coordinate their efforts on permitting of energy projects. You have requested specific suggestions regarding how permitting and other regulatory decision making processes may be improved or streamlined.<sup>1</sup> The Sacramento Municipal Utility District ("SMUD"),<sup>2</sup> New York Power Authority ("NYPA"),<sup>3</sup> Public Utility District No. 1 of Douglas County, Washington

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<sup>2</sup> SMUD owns and operates the Upper American River Project ("UARP"), FERC No. 2101, originally licensed in 1957. This almost 700-megawatt hydroelectric development, consisting of several cascading reservoirs and powerhouses on the western slope of the Sierra Nevada known as the "Stairway of Power," is a critical component of SMUD-owned generation used to serve the needs of its 1.2 million customers. The project provides economical power generation, operational flexibility and important electric transmission system reliability benefits. The project also provides abundant and varied lake recreational facilities in an area known as the Crystal Basin, and produces enhanced summertime stream flows for fisheries and whitewater recreation downstream of the project dams. SMUD's relicensing efforts under FERC's cooperative Alternative Licensing Process for the UARP are currently underway.

<sup>3</sup> NYPA, a corporate municipal instrumentality of the State of New York, operates 10 generating facilities and provides about a quarter of New York State's electricity. NYPA's hydroelectric facilities include the international St. Lawrence-Franklin D. Roosevelt Power Project, which produces more than 900 megawatts of power; the Robert Moses Niagara Power Plant, which produces 2,400 megawatts of power; the Blenheim-Gilboa Pumped Storage Power Project, which produces 1,040 megawatts of power; and five other smaller hydro projects, which together produce about 37 megawatts of power. The license for the St. Lawrence Project expires in 2001, and the license for the Niagara Project expires in 2007.

("Douglas PUD"),<sup>4</sup> and American Public Power Association ("APPA"),<sup>5</sup> appreciate the President's initiative and the opportunity to comment about the potential impacts of this important effort.

The National Energy Policy Development Group observed in its White House report that regulatory uncertainty in the hydroelectric licensing process is "the most significant challenge confronting hydropower." The issue is timely and significant. Over the next 15 years, about half of all non-federally owned hydroelectric capacity – more than 29,000 megawatts of power – must go through a relicensing process in order to continue in operation. Although the process is supervised by the Federal Energy Regulatory Commission ("FERC"), which has central licensing authority under the Federal Power Act ("FPA"), it involves a host of other federal and state resource agencies with overlapping and sometimes conflicting interests and responsibilities. The process is lengthy and complicated, and does not always produce results that balance environmental benefits with the interests of consumers and the public in domestic, renewable, emission-free electric generation resources. As a result, thousands of megawatts of existing clean, low-cost, domestic energy supplies are at risk, at a time of heightened concern for energy security and self-sufficiency, if improvements to the relicensing process are not made.

Although numerous federal agencies play a role in the relicensing process, the focus of these comments is on the role of three key agencies: the Department of the Interior, the Department of Commerce, and the Department of Agriculture (through the Forest Service) (collectively, "Departments"). Agriculture and Interior set mandatory conditions on FERC-issued licenses under Section 4(e) of the FPA for projects on federal lands. Commerce and Interior have the authority to mandate fishways under Section 18 of the FPA. FERC is required to consult with Interior and Commerce under Section 7 of the Endangered Species Act ("ESA"), and as a policy matter generally defers to them regarding license requirements for species protection. Below are ten suggestions for actions these agencies can take to improve the relicensing process.

1. Support the hydro industry's legislative proposals for reform of the licensing process. The hydroelectric industry for several years has been seeking moderate reforms of the licensing process, in particular reforms to the Departments' mandatory conditioning authority under Sections 4(e) and 18. These reforms would not overturn or impair mandatory conditioning authority in any way. Rather, they would

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<sup>4</sup> Douglas PUD is a municipal corporation of the state of Washington. Douglas PUD's chief generating resource is the Wells Hydroelectric Project. The Wells Project has ten generating units rated at a combined 840 megawatts. The Project's eleven gated spillway openings can pass a flood of over 8,800,000 gallons of water per second. The Project has the most effective juvenile fish by-pass on the Columbia River, and operation of several salmon and steelhead hatcheries is funded by the Project.

<sup>5</sup> APPA is the national service organization that represents the interests of over 2,000 locally owned, locally controlled, not-for-profit electric utility entities of government—counties, public utility districts, an occasional state, but in the great majority, owned by individual local communities. Public power systems own approximately 13.7% of the total installed electric utility generating capacity in the U.S. Hydroelectric projects comprise nearly 22% of public power's total generating capacity. There are 150 public power utilities with hydroelectric capacity. By the year 2010, 16,000 MW of publicly-owned hydro capacity will be up for license renewal. This represents 50% of all hydro capacity subject to the renewal process.

make various improvements in the Departments' administering of that authority to require greater consideration of impacts of mandatory conditions on electric generation and reliability, and to require consideration of cost-effective alternatives to achieving agency resource objectives. The proposals would also promote a streamlined and cooperative environmental review by FERC and the Departments under the National Environmental Policy Act ("NEPA"). The previous Administration opposed any legislative changes to improve the licensing process. This Administration should support such moderate changes.

2. Base mandatory conditions on sound science and consider the economic impacts of conditions. Even without legislative reform, we believe the Departments have considerable discretion, if not an obligation, to take into account impacts on electric generation and reliability and other economic values when setting mandatory conditions. Decisions also should be based on the best available data and scientific analysis, to ensure that licensee and ratepayer resources are spent in achieving meaningful environmental benefits. The Departments should adopt express policies and rules for consideration of economic impacts and for basing decisions on sound science.

3. Establish a meaningful administrative appeals process for mandatory conditions and rescind the Joint Policy for Review of Mandatory Conditions issued on January 19, 2001. In the waning hours of the Clinton Administration, Interior and Commerce issued a joint policy on administrative review of mandatory conditions under Sections 4(e) and 18. The joint policy rejected suggestions that Interior and Commerce utilize "equal consideration and public interest standards" in developing mandatory conditions. The joint policy also rejected proposals for an administrative appeals process to develop an adequate record for mandatory conditions, and to help avoid the need for costly and protracted court appeals, which is the only recourse currently available to licensees and other parties unhappy with mandatory conditions. Although a small step in the right direction, the Joint Policy essentially was "window dressing" to divert attention from the hydro industry's legislative reform efforts. Interior and Commerce should develop proposed regulations for public comment that set both substantive standards for mandatory conditions (see No. 2, above) and establish a meaningful opportunity for administrative appeal. The Forest Service should revise its administrative appeals process to conform to the new Interior and Commerce process.

4. Withdraw the Proposed Interagency Policy on the Prescription of Fishways Under Section 18 of the Federal Power Act issued December 22, 2000. Also in the last hours of the Clinton Administration, Interior and Commerce issued a joint proposed policy on fishway prescriptions under Section 18 of the FPA. Despite extensive hydro industry criticism and adverse national press (see 3/13/01 *Washington Post*, p. E1), Interior and Commerce have not yet withdrawn this proposed policy. Among many other problems, the proposed policy would greatly overreach the agencies' prescriptive authority under Section 18 by defining "fish" to include virtually every form of water-related animal life (insects, mollusks, amphibians, etc.) other than mammals and birds, and by defining "fishway" to include all aspects of a hydro dam and its operations. Interior and Commerce should cooperate and consult with FERC, in the event FERC

initiates a rulemaking pursuant to Section 1701(b) of the Energy Policy Act of 1992 to clarify the Section 18 fishways authority.

5. Comply with the Commission's regulations for timing of mandatory conditions. The Commission's regulations (18 C.F.R. 4.34) currently provide for the filing of agency mandatory conditions within a certain time, which is more than adequate, after a license application is complete and all environmental studies are done. If the agency nonetheless believes it has insufficient information to set its conditions at that time, it can provide preliminary conditions. Within a fixed time period after the Commission staff has issued its draft NEPA document, the agencies must file their final conditions, which can depart from the preliminary conditions to the extent there is new information in the draft NEPA document. Failure to meet these deadlines can result in waiver of the agencies' mandatory conditioning authority under the rules. However, the Departments frequently ignore the deadlines and have questioned the Commission's statutory authority to impose them. There are good reasons for the deadlines. First, failure to comply with the deadlines results in unnecessary delay of the relicensing process. Second, the Commission staff needs to have the agency final conditions in order to perform its public interest balancing of all terms and conditions in the recommendations it makes to the Commission. When the Departments withhold their conditions, Commission staff must make its recommendations based on incomplete information. Further, it is not unusual for the Departments to "ratchet up" their environmental requirements in the final conditions, which often are not submitted until the eleventh hour, after Commission staff has completed its final NEPA document. This results in a "piling on" effect of costly environmental conditions. Commission staff does not have or take the opportunity to revisit the balance it originally struck. The Departments could solve this problem by agreeing as a matter of rule or policy to comply with the Commission's regulations on timing and deadlines. (The Commission also could help alleviate this problem by directing its staff to revisit and rebalance its license recommendations based on late-filed mandatory conditions.)

6. Consult and cooperate with FERC in setting mandatory conditions. The Commission consults with the Departments under Section 10(j) of the FPA, the Fish and Wildlife Coordination Act, the Endangered Species Act, and numerous other statutes. The Departments, however, have not typically sought or considered the Commission's views when setting their mandatory conditions. As the agency with overall licensing responsibility and the mandate to balance environmental and economic factors in the public interest, the Commission's views should be important in informing the Departments' decisions. The Departments should adopt rules or policies providing for consultation with the Commission.

7. Establish a consistent policy or rule on internal delegation and oversight of mandatory conditioning authority. The Secretaries of the Departments typically delegate their mandatory conditioning authority to lower level department officials. The Departments are not consistent on how those authorities are delegated and whether and to what extent there is higher level Departmental oversight of the conditions. The Departments should provide clearer policy direction from the Secretarial level to career

personnel, and be willing to step in when necessary to help resolve important mandatory condition disputes. Establishing an administrative appeals process (see No. 3, above) would provide further oversight and consistency in the exercise of mandatory conditioning.

8. Recognize the Departments' cooperative and co-decision making status with FERC rather than act as adverse parties in licensing proceedings. The Departments in exercising their mandatory conditioning authority essentially exercise co-decision making power with FERC. Outside of their mandatory authority, FERC extensively consults with them and seeks their license recommendations. However, the Departments have typically declined to accept cooperating agency status with the Commission under NEPA. They have insisted on their right to intervene in license proceedings, potentially as Commission and license opponents, and to ultimately seek rehearing and judicial review of Commission license decisions. For the Departments to take an adversarial role is inconsistent with the spirit if not the letter of the FPA. It is not appropriate or seemly for the Departments to act as decision makers on the one hand, and as project adversaries on the other hand. The Departments can protect their interests through Sections 4(e) and 18 conditions; the Commission has no ability to reject or modify those conditions. Alternatively, the Departments could limit their interventions and appeals to jurisdictional questions concerning the scope of their mandatory conditioning authority, and exercise discretion not to litigate matters within the Commission's discretion under Sections 10 and 15 of the FPA.

9. Establish joint rules with FERC for better integration of the Endangered Species Act Section 7 consultation process and hydro licensing. Currently, neither Interior and Commerce rules nor FERC's rules specifically address how the ESA Section 7 process is to be integrated into the FERC licensing process. FERC's rules do not have deadlines for submission of agency Biological Opinions, for example, as they do for conditions under Sections 4(e) and 18. The Departments generally conduct their formal Section 7 reviews in the last stages of the licensing process. This disrupts and delays licensing, sometimes for years. In addition, the Departments are able to use their ESA authority to take a "second bite" at imposing more stringent environmental conditions on licenses. Further adding to the confusion and delay, some U.S. Fish and Wildlife Service offices (e.g., in California) are now asserting that Section 7 consultation must be done before pre-filing studies are carried out, in addition to the post-filing Section 7 reviews. Interior and Commerce and FERC should cooperate in developing joint rules on integration of the ESA Section 7 process with the licensing process. The Interagency Task Force on hydro licensing from the previous Administration attempted to address these coordination problems with limited success. This is a critically important issue that would be well worth addressing by the new interagency task force.

10. The Departments should also develop special rules, policies and procedures for projects on international waterways subject to joint international regulation. NYPA's St. Lawrence and Niagara Projects are located on international boundary waters subject to joint regulation by the United States and Canada. The International Joint Commission ("IJC") was established by treaty to govern operation of

such projects. International boundary projects are thus subject to duplicative regulation by the IJC and FERC. This imposes additional costs and uncertainties, and the potential for conflict between mandatory conditions imposed under FPA Sections 18 and 4(e), and operating conditions established by the IJC. Interior, Commerce and FERC should develop special rules, policies and procedures to govern relicensing of these international boundary projects and eliminate unnecessary and duplicative regulation.

We again appreciate the opportunity to comment on these important issues. We would be pleased to meet with you and answer any questions you may have or provide further information.

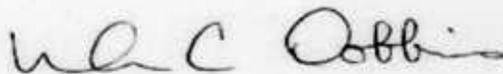
Sincerely,



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Jan Schori  
General Manager  
Sacramento Municipal Utility District

//s// by Gary D. Bachman on behalf of  
Eugene W. Zeltmann  
President and Chief Operating Officer  
New York Power Authority



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William C. Dobbins  
CEO/Manager  
Public Utility District No. 1 of  
Douglas County



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Alan H. Richardson  
President & CEO  
The American Public Power Association

October 31, 2001

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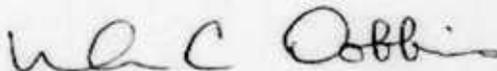


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Jan Schori  
General Manager  
Sacramento Municipal Utility District

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