GUIDELINES TO CONSIDER FOR PARTICIPATING IN THE ALTERNATIVE LICENSING PROCESS

Prepared by

The Interagency Task Force On
Improving Hydroelectric Licensing Processes

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ACRONYMS AND ABBREVIATIONS

ACHP	Advisory Council on Historic Preservation
APEA	Applicant-Prepared Environmental Assessment
BLM	Bureau of Land Management
CIPS	Commission Issuance Posting System
Commerce	Department of Commerce
Commission, the	Federal Energy Regulatory Commission
Councils, the	Fishery Management Councils
CMP	Coastal Management Plan
CP	Communications Protocol
CWA	Clean Water Act
CZMA	Coastal Zone Management Act
EA	Environmental Assessment
EFH	Essential Fish Habitat
EIS	Environmental Impact Statement
ESA	Endangered Species Act
FONSI	Finding of No Significant Impact
Forest Service	U.S. Forest Service
FPA	Federal Power Act
FWS	U.S. Fish and Wildlife Service
Interior	U.S. Department of the Interior
Magnuson-Stevens Act	Magnuson-Stevens Fishery Conservation & Management Act
MOA	Memorandum of Agreement
National Register	National Register of Historic Places
NPS	National Park Service
NEPA	National Environmental Policy Act of 1969
NGO	nongovernmental organization
NHPA	National Historic Preservation Act
NMFS	National Marine Fisheries Service
PA	Programmatic Agreement
RIMS	Records and Information Management System
SHPO	State Historic Preservation Officer
THPO	Tribal Historic Preservation Officer
TPC	Third-Party Contractor

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BACKGROUND

An increasing number of hydropower applicants have elected to pursue licensing and relicensing with early involvement of participants, such as Federal and State agencies, nongovernmental organizations, Indian Tribes, local communities, and members of the public in a collaborative setting. The purposes of this early involvement include expanding the consultation opportunities provided in the Commission's standard pre-filing process and allowing an applicant to submit a draft environmental document with its license application, either through an Applicant-Prepared Environmental Assessment (APEA) or an Environmental Impact Statement prepared by a Third Party Contractor (TPC). The Commission issued regulations, on October 29, 1997, offering an alternative pre-filing process to license applicants using collaborative procedures.

To improve participation in the overall hydropower licensing process, representatives from the Commission, Council on Environmental Quality, Department of Commerce, Department of the Interior, Department of Agriculture, and the Environmental Protection Agency have created an Interagency Task Force. The Interagency Task Force is designed to address many issues surrounding licensing and relicensing, including those related to using the collaborative process.

The *Guidelines To Consider For Participating In The Alternative Licensing Process* were developed by the Interagency Task Force to help participants in the process. Use of the pre-filing process may improve the quality of hydropower applications filed with the Commission, accelerate the environmental review process, assist the participants in addressing resource impacts of the applicant's proposal and reasonable alternatives pursuant to the National Environmental Policy Act, and allow participants to reach a negotiated settlement on all issues raised by a hydropower license application. Resolving issues can provide for earlier implementation of recommended environmental measures and allow the Licensee to plan for anticipated license conditions. Early resolution of issues can result in less time and expense for the participants than the longer traditional process. These guidelines recognize the legitimate and important role of all the stakeholders in relicensing.

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INTRODUCTION

For applicants for hydropower licenses, the Federal Energy Regulatory Commission (Commission) has developed an alternative pre-filing consultation process (referred to as the Alternative Licensing Process (ALP)) that utilizes a more collaborative approach than required in the standard pre-filing consultation process. *Compare* 18 CFR 4.34(i) with 18 CFR 4.38 and 16.8. The ALP was designed by the Commission to: involve a wider range of participants at an earlier stage in the licensing process; improve and accelerate the environmental review process; coordinate the exercise of legal authorities by State and Federal resource agencies; and expedite the resolution of disputed issues.

Specifically, the ALP attempts to combine four processes into one collaborative process: (1) the pre-filing consultation process required by the Commission (an applicant is required to undertake consultations with a variety of entities before preparing and filing an application with the Commission); (2) the evaluation of project impacts pursuant to the National Environmental Policy Act (NEPA); [1] (3) other Federal and State regulatory reviews, pursuant to such authorities as, among others, Sections 4(e), 10(j), and 18 of the Federal Power Act (FPA), Section 401 of the Clean Water Act (CWA), Section 7 of the Endangered Species Act (ESA) and Section 106 of the National Historic Preservation Act (NHPA) (see Appendix A for a complete list); and (4) where desired, a negotiation process, looking toward the filing of an agreement or an Offer of Settlement with the Commission. Although not expressly provided in the Commission's rules, interested participants may utilize similar collaborative procedures at any phase of a standard licensing process to assist in resolving issues.

Applicants and interested persons, such as State and Federal resource agencies, Indian tribes, nongovernmental organizations (NGOs), and citizen groups, that are evaluating whether to support the use of an ALP by a license applicant, are encouraged to consider the following guidelines. The guidelines were developed by a Federal workgroup [2] and are directed at the Commission's ALP. Additionally, the guidelines may also be helpful in considering different collaborative approaches to the standard pre-filing consultation process, licensing proceedings after the filing of a license application, and appropriate post-licensing proceedings with the Commission. The guidelines are suggestions only. A Collaborative Group (See Section I) need not use every suggestion. Participants may wish to use the checklist of the suggestions, if desired (see Appendix B). Although the collaborative process is a part of the ALP, the terms "collaborative process" and "ALP" are not synonymous. Participants are

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[1] National Environmental Policy Act of 1969, 42 U.S.C. 4321 *et seq*.

[2] Department of Agriculture (Forest Service), Department of Commerce (National Oceanic and Atmospheric Administration, National Marine Fisheries Service), Department of the Interior (National Park Service, U.S. Fish and Wildlife Service), the Environmental Protection Agency, and the Federal Energy Regulatory Commission.

encouraged to utilize collaborative approaches to resolve issues even if the ALP is not used.

Existing Statutory Responsibilities

The commitment by Collaborative Group members to work together to try to achieve agreement in the ALP does not in any way limit exercise of the relevant statutory authorities and regulatory obligations of the Commission, the States, or the Federal resource agencies under the FPA and other mandates. However, the Commission, State, and Federal resource agencies can exercise their authorities and obligations through a collaborative process, so long as any agreement is consistent with those authorities, and is supported by sufficient information.

A collaborative process affords all participants an opportunity to reconcile different interests and concerns. This process encourages participants to be flexible and creative in attaining their objectives.

I. CONSIDERING AND INITIATING THE PROCESS

Although only an applicant can request permission to use the ALP for the preparation of a license or amendment application,[3] any entity interested in a prospective hydropower licensing or amendment process can take the initiative to convene a group to determine whether it would be helpful to use the ALP prior to the filing of a license or amendment application with the Commission. The purpose of convening the group is to address certain considerations, including whether a consensus [4] can be developed among
interested persons in favor of using a collaborative approach. This group, sometimes referred to as a Collaborative Group, includes the applicant and typically State and Federal resource agencies, Indian tribes, NGOs, and local communities, and citizen groups. In the licensing process, State and Federal resource agencies have authority to condition hydropower licenses pursuant to applicable sections of the FPA, Sections 4(e), 10(j), and 18, and other authorities referenced in Appendix A.

A. Outreach Program

The prospective applicant for a hydropower license or amendment should conduct a

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[3] *See* 18 CFR 4.35(f).

[4] The Commission's rule on the alternative pre-filing consultation process requires that a "consensus" exist to support the use of the ALP, 18 CFR 4.34(i). The Commission stated that in the context of the participants deciding whether to use the ALP, the term "consensus" means "general agreement" or collective opinion: the judgment arrived at by most of those concerned.

comprehensive outreach program to identify those interested in a collaborative process for licensing. The purpose of putting a significant effort in an effective outreach program is to form a representative Collaborative Group, to avoid last-minute entries by necessary participants, and to ensure that the broadest possible range of interests are identified as soon as possible. In this manner all interest groups may become involved in the process from the outset and all points of view on environmental and related issues may be addressed in the ALP prior to the applicant filing a license or amendment application with the Commission.

A variety of communications media should be considered for outreach, including letters, newspaper notices, advertisements, postings on Web sites, e-mail, radio, and open houses. Information packets should be made available by the applicant identifying project information and the affected environment to anyone expressing an interest as a result of the outreach efforts.

Help in planning and conducting an effective outreach program is available from the Commission and resource agency staffs. The participants should be familiar with the Commission and resource agency policies and procedures pertinent to the ALP, the project, and project-related resource issues. In addition, guidance can be obtained by contacting other entities involved in a collaborative process around the country.

B. Commission Review and Approval Process

Pursuant to the Commission regulations at 18 CFR 4.34(i)(3)(i), an applicant is required to prepare and submit a request to the Commission for permission to use the ALP.

The applicant must, in the request for use of the ALP, show that it has made an effective and sufficient outreach to interested entities although the applicant need not show that everyone concerned supports the use of these procedures. The applicant need only show that the weight of opinions expressed make it reasonable to conclude that under the circumstances it appears that use of the ALP will be productive. The applicant is not required to make a formal showing, such as a signed agreement or use of a particular voting procedure, to memorialize the consensus on use of the procedures. No single interested entity has a veto power over the applicant's use of the ALP.

In order to make the showings discussed above, the Commission expects the applicant to show a series of interactions between itself and participants that goes beyond an exchange of letters. Such interactions could include conferences and meetings involving the Commission staff to explore the alternative procedures. In some cases, the applicant's showing in support of the process may rely on a lack of objections to the ALP raised in such meetings. This situation may arise at the outset of the ALP, when interested entities are unsure of how the alternative procedures may compare to those otherwise required under Commission regulations and are unaware of the relative benefits of the

alternative. In these situations, the Commission may allow the applicant and participants to try the ALP rather than foreclosing this option. However, the applicant should not treat the absence of a response from a participant, such as a resource agency, as concurrence.

In all cases, the Commission will give public notice in the **Federal Register** of the filing by an applicant of a request to use the ALP. The reasons for this are to protect the rights of all interested entities to be advised of the request to use the ALP and to file comments on the request in order to make their views known. The Commission will take the comments into account in deciding whether or not to grant the request. The decision on the request will be final and not subject to interlocutory rehearing or appeal. *See* 18 CFR 4.34(i)(5). [5] However, a denial of a request does not rule out the use of collaborative techniques by the participants in a standard licensing process.

A Note Regarding Non-Participation

In some cases, a key potential participant, such as an agency with statutory conditioning authority, may decline to participate in the ALP, in whole or in part, either because that entity believes that an ALP is not appropriate in the proceeding, or because of other constraints, such as a lack of personnel or financial resources. This will leave the participants with some important issues to resolve. Where funding is an issue, the applicant should consider means of streamlining the process to reduce costs to participants. Where appropriate, entities with budgetary constraints might consider pooling resources and/or designating a "lead participant" or third party consultant to participate in the process and notify less active participants when issues relevant to each arise.

If a key participant is unable to participate, the remaining participants will need to consider whether it is worth continuing with the ALP. The participants may want to consider alternatives, such as using the standard licensing process or using a "hybrid" of the standard licensing process, which would involve a collaborative approach, where appropriate. In considering the alternatives, the participants should bear in mind that agencies with statutory conditioning authority, for example, will retain that authority, regardless of which licensing process is used, and that those agencies' concerns ultimately will need to be addressed. Moreover, should the participants decide to request the Commission's permission to proceed with the ALP without a key potential participant, the Commission will make its own determination on the matter.

Should the remaining participants decide to proceed with the ALP, it would be to their advantage to discuss with the "non-participating" entity the extent to which it is willing and able to be

[5]The Commission has stated that it will place a copy of the decision (on the request to use the ALP) on the Commission Issuance Posting System (CIPS), so that it can readily be found by anyone interested.

involved. For example, the participants might agree to seek the views of the non-participating entity on significant subjects, such as the preparation of studies, to brief the non-participating entity at agreed-upon intervals, and to circulate group documents for comment to the non-participating entity. This could help ensure that the interests of all entities are represented, and, ideally, minimize the potential for disruptions of a Collaborative Group's efforts at later stages of the licensing process.

C. Communications Protocol

Once convened, the Collaborative Group should establish a Communications Protocol (CP). The Commission's regulations on alternative procedures require that a potential hydropower applicant requesting the use of the ALP "submit a Communications Protocol, supported by interested entities, governing how the applicant and other participants in the pre-filing consultation process, including the Commission staff, may communicate with each other regarding the merits of the applicant's proposal and proposals and recommendations of interested entities." *See* 18 CFR 4.34(i)(3)(ii). Communications Protocols can vary in length. At a minimum, the CP should document how and which oral, written, and electronic communications on non-procedural issues will or will not be recorded.[6] Many CPs address the following additional communications issues:

- What will be the primary means of communication between and among the participants, i.e., will information be transmitted primarily on paper, via e-mail, by other electronic means (such as distribution of CD ROMS or diskettes for use in personal computers), or through posting on an interactive Internet web page maintained by the prospective license applicant?

- Where will the required public reference file be located, and what will be the procedure for accessing those files and making copies if needed? Consideration should also be given to which materials will be filed with the Commission as a part of the formal record after the license or amendment application is filed.

- What will be the procedures for noticing and documenting meetings? Who will take meeting notes, and how will the notes be prepared (verbatim transcript, a discussion of the main points, or a summary)? How and when will the notes be dispersed, and how will corrections or differences of opinion be resolved, if needed?

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[6]Examples of a Communications Protocol can be found at: Lake Chelan Project (P-637) http://www.chelanpud.org/relicense; St. Lawrence-FDR Power Project (P-2000-010): http://rimsweb1.ferc.fed.us/rims (click on Document ID and enter Document ID No. 117018).

- What will be the key periods for providing comments during the process?

D. Operating Plan or Standard Operating Procedures

The Collaborative Group may also establish an Operating Plan or Standard Operating Procedures for conduct of the group's work, sometimes also referred to as Ground Rules. Although an Operating Plan is not required by Commission regulation, an Operating Plan can be helpful in ensuring a common understanding among all participants of what to expect if they choose to become actively involved in the ALP. Some participants may require such protocols in order to participate in the ALP. The Collaborative Group should work together to define the terms of an acceptable Operating Plan. An operating plan [7] could address the following:

- The scope and timing of developing an Operating Plan, should the Collaborative Group decide to address elements of the plan in a phased approach.
- What is the purpose of the collaborative process for this project?
- What will be the organizational structure of the Collaborative Group or team? Will there be subgroups or subcommittees, how will they be structured and what will be their roles?
- How will decisions be made? How will agreement be defined?
- How will disputes be resolved?
- How will participants proceed if agreement on a particular issue no longer exists?
- What will be the responsibilities of Collaborative Group/subgroup team members in terms of attendance, decision-making ability, etc.? How will Federal and State agencies that do not fully participate in the ALP be kept informed so that they can provide their input as needed?
- What will be the general rules for conduct of participants and for running meetings?

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[7]Examples of an Operating Plan can be found at: Abenaki and Anson Project Nos. 2365 and 2364, http://rimsweb1.ferc.fed.us/rims (click on Document ID and enter Document ID No. 1963214); Cabinet Gorge Project(P-2058) & Noxon Rapids Project (P-2075) http://rimsweb1.ferc.fed.us/rims.

- How will contact with the media be handled?
- Who will facilitate meetings?
- Is a mediator needed?
- Should training in negotiation and the licensing process be offered to the participants?
- What is the anticipated schedule for the process (i.e., what is the process time line?)

E. Identification of Commitment and Resources Available

The Collaborative Group should look for ways of sharing resources and coordinating or combining related processes. Are there other existing hydropower projects or dams in the same river basin whose environmental review may be on a similar track that could be coordinated or combined with the environmental review of the project in question? Can participants with similar interests share staff or assist each other with representation at all meetings and dissemination of related information? Time, costs, authority of participants, and Collaborative Group support are often topics of discussion for the Collaborative Group.

1. Time

How much time will be expected of the group members? What are the time frames for meeting licensing obligations? As soon as possible, the Collaborative Group should establish a general schedule for its work, blocking out time, setting regular meetings, and project milestones, so that the commitments made by participants are based upon a general understanding of the resources necessary to fully participate in the process. Consideration should be given to building flexibility into time lines.

2. Costs

Do the participants have the resources (time and money) to participate in all meetings, field trips, and review processes? What adjustments can or should be made to include all interested participants, including those with resource deficits? Who will bear the costs of supporting the Collaborative Group, in regard to travel, copying, mailing, and any outside facilitators or mediators? Creative procedures, including conference calls and use of local staff, cooperative representation by a "lead" entity, e-mail procedures, use of web-sites and video conferences, may be opportunities for effective participation at minimal cost.

3. Authority of Participants

Participants should send representatives who can speak for the participant. Does each representative have the authority, on behalf of the participant, to resolve relevant issues? If not, will the representative commit to keep its management informed so that any approvals can be obtained in a timely manner? If a participant's authority is limited, the specific limitations should be explained to the Collaborative Group. Where a participant is an entity, such as a State or Federal resource agency, NGO, Indian tribe, or company with more than one representative involved in the ALP, the entity should identify to the Collaborative Group their statutory authority and the authority of each representative. A distinction may be made between policy, legal, and technical representatives. The participant's representative, who has the authority to commit the participant to a decision in regard to the collaborative process, should be clearly identified to the Collaborative Group. In some cases, the participant's representative on the Collaborative Group may not have the authority to bind the participant to a final decision in the collaborative process, at least not without additional review. This is almost always the case with governmental organizations. As a result, the participant's representative should clearly explain the decisionmaking process of the participant and should commit to keep relevant decision makers informed so as to limit the potential for reversal later in the process.

4. Collaborative Group Support

a. Facilitator

Generally, all collaborative processes may benefit from a facilitator to organize and conduct meetings. A facilitator may also assist a group in discussing constructively a number of complex issues. Beyond that, there is a wide range of options for additional assistance and support for the Collaborative Group. The facilitator should be someone that all participants perceive as trusted/neutral, as agreed to by the Collaborative Group. If an outside contract facilitator is used, the group should consider who bears the costs. Will the facilitator also be responsible for conducting the group's meetings and keeping minutes or will those responsibilities be separately assigned? What other duties will the facilitator have? It may be appropriate that facilitation be conducted by more than one person.

b. Mediator

A mediator may be the same entity or person as the facilitator, but mediation is a separate function. A mediator is a person or entity designated to help a group resolve problems using the process agreed to by the group members. The mediator may consist of more than one person or, on a specific issue, a panel of experts. If a mediator is desirable, the Collaborative Group should determine whether to select one at the beginning of the process, or only as disputes arise.

The mediator should try to develop an atmosphere of comity and encourage the participants' trust in the mediator and their ability to work and reason together. While the mediator may suggest ground rules for participation and behavior, the participants must agree to any such ground rules. These ground rules may range from matters of etiquette (e.g. who may speak) to, in some cases, protocols about such matters as scope, agenda, order of collaboration, the use and timing of caucuses, and the way in which the Collaborative Group will respond to the media or other inquiries. [8]

c. Mini-training or Orientation

It could be helpful, at the outset of the ALP, for participants to develop skills in negotiations, collaboration, mediation, and the licensing process. Furthermore, the training and qualification(s) of the participants in the Collaborative Group should be addressed. This could be crucial in successfully negotiating a particular resource study or relating the study results to appropriate mitigation and enhancement measures. Opportunities that are available for training representatives serving on the Collaborative Group should be discussed. If a mini-training session is offered to participants in an ALP, they should be encouraged to attend (see Appendix C).

F. Achieving and Maintaining Agreement

Achieving and maintaining agreement is key to a successful ALP. Success is more likely if all participants in the Collaborative Group have a clear understanding of their own expectations, as well as those of the other participants. It would be helpful if the participants can agree upon the process the Collaborative Group will utilize for making the many decisions required over the course of the process.

The group should agree on how it will make decisions in order to move forward on the difficult or complex issues that will arise during the course of the ALP, such as study needs and designs or mitigation or enhancement measures that the group may develop. The ability of the Collaborative Group to jointly make decisions that ensure movement towards group objectives is important to the ultimate success of the effort. These objectives could include progress in assessing the environmental impacts of the project, and developing reasonable alternatives, and may also include reaching an agreement or an Offer of Settlement on mitigation, enhancement, or other measures that should be adopted.

The Collaborative Group should consider establishing a mechanism for identifying when agreement on a particular issue is threatened, and, in such cases, how to proceed. Referring an issue to an internal settlement group before referring it to a third party may be helpful given their knowledge on

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[8]For further suggested reading, see Administrative Conference of the United States, "Mediation: A Primer for Federal Agencies", undated.

all the issues and may advance the process when there is disagreement on a technical issue. This and other approaches to resolving disputes internally are suggested as a predicate to the use of a third party or declaring an impasse.

Dispute Resolution

If the Collaborative Group reaches a point of impasse on a particular issue, it should follow any previously agreed-upon measures, including dispute resolution. The group might consider the following steps in trying to resolve the dispute.

Before considering outside assistance with dispute resolution, the group should first consider alternative approaches for resolving the dispute internally. For instance, the group might consider forming a technical or other subgroup of those participants with a clear stake in the dispute or who possess relevant expertise regarding the disputed issue. The subgroup should attempt to reach agreement on the issue and then present that to the whole group. Alternatively, the group could separate into caucus groups with like-minded participants to explore compromise solutions crafted by discussing the disputed issue. Such subgroups or caucuses should attempt to reach agreement on the issue and then present that to the whole group.

If it becomes evident that an outside or independent party is needed to get the group moving again, then consistent with any agreements made in the CP or an Operating Plan, the group may choose to initiate a dispute resolution process. Effective dispute resolution may provide a way to prevent disagreement on one issue from derailing previous agreements on other issues and thereby, move the ALP forward. There are a variety of options for getting outside help to resolve a dispute, including use of a professional mediator or an independent panel of experts.[9] The important thing is that everyone is comfortable with the chosen dispute resolution process, and any mediator or panel selected be bound by any applicable provisions of the group's CP or Operating Plan.

As another alternative, consistent with applicable provisions of the Collaborative Group's CP or Operations Plan, the Group or a participant may request, in writing, that the Director of the Office of Energy Projects resolve the dispute pursuant to the regulations set forth at 18 CFR 4.34(i)(6)(vii). Participants are encouraged to try to resolve the issue internally according to any agreed-upon process before seeking the Office of Energy Projects assistance. A resource agency may object to formal dispute resolution by the Office of Energy Projects regarding the subject matter of its statutory obligations.

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[9]There are several Federal agencies that offer alternative dispute resolution services, including the Commission, Bureau of Land Management, the Federal Mediation and Conciliation Service, and the U.S. Institute for Environmental Conflict Resolution.

If the participant believes that the failure to resolve the issue means that the necessary consensus to support continuation of the ALP no longer exists and continued use of the ALP will not be productive, the participant may petition the Commission to direct what steps should be taken to complete the pre-filing consultation process. If, despite the best efforts of a participant in the ALP, the participant feels compelled to withdraw from the process, in whole or in part, the Commission will assess the value of allowing the ALP to continue without the participation of the withdrawing entity. The Commission has not established standards as to how it will consider such requests and has been reviewing them on a case-by-case basis. Based on that assessment, the Commission will decide what action should be taken to complete the pre-filing consultation process in a manner that is consistent with the Commission's policies and procedures and other Federal mandates.

II. ISSUE/INTEREST IDENTIFICATION, INFORMATION GATHERING, AND ADMINISTRATIVE RECORD

The purposes of this section are to provide suggestions for identifying issues and associated information that may contribute to defining the scope of environmental analysis for the proposed action and reasonable alternatives, and for identifying information that should be submitted to the Commission as part of the administrative record associated with the license application.

A. Identify Interests, Concerns, and Goals

The ALP provides an opportunity for all participants to identify interests, concerns, statutory responsibilities, and goals regarding the proposed action and reasonable alternatives, and to explain how they are related. For example, fish protection may be a resource agency's statutory responsibility. The agency may have specific goals, such as a management plan for a sustainable fishery to protect and enhance the fishery resource, which need to be addressed in the collaborative process. The members of the Collaborative Group should explain their goals for the process, including both procedural and substantive goals. For example, if a Forest Plan says that one of the management requirements for the Forest Service in the project area is to "maintain good quality habitat for fish," the Forest Service should articulate what is meant by good quality and which fish are the focus of interest. Another example would be an applicant stating that lowest cost power production is its goal. Can the applicant specify in greater detail the specific goals? Is its power need constant or is it tied to differing demand times? Are there existing contracts for water use, separate from power generation, that should be considered? If some of these concerns cannot be described, they may be appropriately included in the list of information gaps, as discussed below.

B. Identify Available Relevant Information and Data

The applicant, assisted by the rest of the Collaborative Group, should identify, collect, review, and disseminate to the participants available relevant information for the proposed action and reasonable alternatives. The Collaborative Group should try to identify gaps in the information and seek ways to gather such information as early as possible. Participants should use the resource agencies and the Commission staff as a resource and guide in the ALP. For example, participants should learn how to use the Commission's electronic Records and Information Management System (RIMS) and CIPS systems, and should inquire of resource agencies and other sources as to other available materials concerning project impacts on resources. The Collaborative Group should identify what resources are available from resource agencies and other sources that can be used to understand project resource impacts (see Appendix D).

Information gathering should take into account all relevant legal requirements or goals, and the statutory responsibilities of the Commission, State and Federal resource agencies. In particular, information relating to existing agency planning efforts, such as fishery management or restoration plans, land management plans, water quality and river basin plans, tribal management plans, recovery plans, historic preservation plans, additional plans on the Commission's List of Comprehensive Plans, and local or county plans are critical. This information gathering could also include policy bases for an agency's goals and objectives. Some of the information may be part of the applicant's existing records, such as relevant environmental and economic information. The rest of the information might have been gathered by resource agencies for other projects or programs. The Collaborative Group should consider which of this information can be used. (See the NEPA regulations governing Tiering at 40 CFR 1502.20 and Incorporation by Reference at 40 CFR 1502.21). Also, the Collaborative Group should consider contacting universities or other institutions to see if anyone has relevant information or is conducting relevant studies. The following list describes the types of information that generally may be useful.

- Information, quantified data, or professional opinions that may contribute to defining the geographic and temporal scope of the cumulative effects analysis and identifying significant environmental issues.

- Information from any other Environmental Assessment (EA), Environmental Impact Statement, or similar document or study (previous, ongoing, or planned) relevant to the proposed action.

- Existing information and any data that would aid in describing the past and present effects of the project and other developmental activities on water quality and quantity, fish and wildlife resources, recreation or land use resources, cultural resources, flood control, or water supply.

- Federal, State, local, or Indian tribe resource plans and future project proposals that encompass the affected river basin. For example, relevant proposals to construct or operate water treatment facilities, recreation areas, and water diversions, or to implement fishery management programs.

- Cumulative effects of basin-wide activities on resources, including the proposed project. Information could include, but not be limited to: how the project would interact with other projects on the river and other developmental activities; results from studies; resource management policies; and reports from Federal, State, and local agencies, and Indian tribes.

C. Identify and Conduct Studies

The Collaborative Group may prepare a summary of interests, concerns, and goals that reflects the key points agreed upon by the Collaborative Group. This summary may lead to a recognition of studies needed to assess the proposed action and reasonable alternatives, as well as to meet anticipated information needs and analysis. Consequently, the ALP allows participants to negotiate the study scope, and to review and assess the applicant-conducted studies, review study progress, and if necessary, have the applicant conduct additional studies. The applicant should work closely with interested participants during the study process, particularly when a study is proposed to address concerns relating to statutory responsibilities (such as, the Endangered Species Act, the Clean Water Act, or the National Historic Preservation Act, among others).

The potential applicant must diligently conduct all reasonable studies and obtain all reasonable information requested by resource agencies and Indian tribes. See 18 CFR 4.38(c)(1), 16.8(c)(1). In addition, under the ALP, NGOs and interested persons may also request studies during the pre-filing stage. 18 CFR 4.34(i)(6)(v).

The expectation is that the applicant will work closely with the Collaborative Group in developing study plans, implementing studies, and analyzing results. Agreement on these study issues will facilitate the development of an acceptable information base upon which decisions can be made and help expedite the Commission's licensing process.

The Commission's regulations allow an opportunity for participants to request studies after the filing of the application. 18 CFR 4.34(i)(5(iv). However, the ALP will work best when necessary studies can be identified early in the process. When study issues are not identified and resolved early on, various difficulties may arise, such as the inability of participants to commit to settlement terms because of a concern that the information necessary to support a settlement is lacking from the record.

Furthermore, after the filing of the application, the Commission staff may request from the applicant additional information, which may include studies to be conducted.

D. Administrative Record

The administrative record forms the basis of the Commission's licensing decision, including the approval of any settlement offer. The administrative record supports the recommendations, terms and conditions, and other actions of State and Federal resource agencies. At all stages of the ALP, the Collaborative Group should be considering the development of an administrative record which is sufficient to support its recommendations.

During the ALP, the Collaborative Group should identify those particular items of information, including study reports, that should be submitted as part of the administrative record at the time the license application and preliminary draft NEPA document are filed with the Commission. [10] Submission by the Collaborative Group does not necessarily preclude the submission of information by individual participants. The Commission staff are available to discuss with the participant(s) the appropriateness of written project-related materials that should be submitted to the Commission, and therefore, made available to the general public.

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[10] At the time of filing of the license application and preliminary draft NEPA document, the participants should decide what materials have been properly filed with the Commission (e.g., 18 CFR 4.32(b)(1) requires filing an original and eight copies with the Commission's Secretary) and which additional documents, not filed in accordance with the Commission's filing regulations during the pre-filing period should be included in the official record. The Commission's regulations, 18 CFR 4.34(i), delineate what documents are required to be filed during the ALP. Other documents may be filed at the discretion of the participants.

If a participant wishes that a document be included as part of the administrative record for a license application (unless the document has already been filed with the Secretary as an original and eight copies, in paper form, during the pre-filing phase of the ALP), the applicant or other interested participant should submit to the Commission the necessary number of copies at the time of filing of the license application and draft NEPA document.

The Commission is currently investigating the use of electronic filing for proceedings before the Commission. This Electronic Filing Initiative seeks to develop a comprehensive information management system that accepts filings and disseminates information electronically. However, until the Commission's regulations are amended to reflect changes in technology, filing for record purposes requires the submission of the required number of paper copies of each document.

III. NATIONAL ENVIRONMENTAL POLICY ACT AND COMMISSION LICENSING AUTHORITY

National Environmental Policy Act (NEPA)

The licensing or amendment of the license of a hydroelectric project may trigger the environmental review process governed by NEPA. The Commission, as the agency with the authority to issue or amend a hydropower license, is responsible for ensuring compliance with NEPA in the licensing context. Other agencies with jurisdiction by law, or special expertise with respect to any environmental issue, may be a cooperating agency with the Commission staff in developing the NEPA analysis and documentation. The basic regulations governing the NEPA process can be found at 40 CFR Parts 1500 through 1506; the Commission's regulations implementing NEPA can be found at 18 CFR Part 380. The NEPA process is intended to help the Commission and other public officials make decisions that are based on an understanding of environmental consequences, and take actions that protect, restore, and enhance the environment. *See* 40 CFR 1500.1(c). For this reason, as soon as possible, the applicant, assisted by the rest of the Collaborative Group, should collect sufficient information to evaluate the environmental consequences of the proposed project. The Commission's licensing decision, whether in approving an Offer of Settlement of the Collaborative Group, or otherwise, must be supported by substantial evidence in the record before the Commission.

The Commission's regulations establish that, generally, an EA is prepared in analyzing an application for an original license, a new license (i.e, relicensing), or amendment.[11] An EA is a document providing sufficient evidence and analysis from which it can be determined whether the proposed action (i.e., licensing, relicensing, or amendment) is a major Federal action likely to significantly affect the quality of the human environment. If so, an environmental impact statement (EIS) is required. It contains, at a minimum, a discussion of the need for the project, description of the affected environment, reasonable alternatives, the environmental impacts of the proposal and alternatives, environmental enhancement or mitigation measures, and a listing of the agencies and persons consulted. Should the Commission find that a hydroelectric project will not have a significant effect on the human environment (a "Finding of No Significant Impact, or "FONSI"), then no further NEPA documentation (an EIS) is required.

However, if the Commission cannot make such a determination, or it is clear that the project may have a significant effect on the human environment, then an EIS (including a published draft) must be prepared. The EIS is a detailed written document addressing the purpose and need for the project,

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[11] The environmental document may be prepared by a Third-Party Contractor. The participants should make sure that the Third-Party Contractor is bound by the Communications Protocol and processes of the Collaborative Group.

alternatives including the proposed action, a description of the affected environment, the environmental consequences of the proposal and reasonable alternatives, and environmental enhancement or mitigation measures. The Commission may decide to prepare an EIS for a proposed licensing or amendment of license at the outset of a process, without preparing an EA initially.

In the ALP, preliminary drafts of environmental documents may be prepared by the applicant in lieu of Exhibit E (Environmental Report) [12] in the license or amendment application. The applicant must consult with a broad range of interested entities, including State and Federal resource agencies, Indian tribes, NGOs, and citizen groups. The applicant conducts studies and subsequently prepares the preliminary draft(s) EA, commonly referred to as an Applicant-Prepared Environmental Assessment (APEA), in consultation with the Collaborative Group.

The Commission is expected to integrate, to the fullest extent possible, the NEPA analysis and documentation of the licensing or amendment proposal with other environmental review and consultation processes required under other statutes, such as the ESA and the NHPA (see Section V and Appendix A, Part 2). *See* 40 CFR 1500.5(g) and 1502.25. In addition, agencies are encouraged to reduce delay in the NEPA process by, among other things, integrating the NEPA process into early planning, emphasizing interagency cooperation before the NEPA document is prepared, and preparing NEPA documents early in the process. *See* 40 CFR 1500.5. Thus, to meet the Commission's goal of combining processes and reducing time, the APEA submitted with the application should address all statutorily-required consultation and compliance matters (such as ESA and NHPA consultations) and discuss all reasonable alternatives.

IV. RESOURCE AGENCY JURISDICTION UNDER THE FEDERAL POWER ACT

Under the FPA, State and Federal agencies other than the Commission are granted certain authorities relating to hydropower licensing to impose certain conditions and recommend other conditions. The mandatory authorities include Section 4(e) (relating to conditions for the protection and utilization of Federal reservations), Section 18 (relating to fish passage), and Section 30(c) (relating to

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[12] In the standard pre-filing consultation process, an applicant prepares an Exhibit E (Environmental Report) to the license application as required by the Commission's regulations. *See* 18 CFR 4.51(f), 4.61(d), 16.8(d), and (f). Exhibit E contains information on the expected environmental impacts from the proposed hydropower project, including a description of the locale, and measures proposed by the applicant to protect and enhance environmental resources, and to mitigate adverse impacts of the project on such resources. In the alternative pre-filing consultation process, the preliminary draft of the APEA or contractor-prepared EIS may substitute for the Exhibit E.

conditions for conduit exemptions). The recommending authority for state and Federal agencies includes Section 10(a) (recommendations to ensure a project is best adapted to a comprehensive plan for development of a waterway), and Section 10(j) (recommendations regarding fish and wildlife protection, mitigation, and enhancement measures). In addition, State authority regarding water rights is preserved by Section 27 of the FPA. Further details regarding these authorities can be found in Appendix A, Part 1.

V. LAWS RELEVANT TO THE COMMISSION'S LICENSING PROCESS

In addition to NEPA, other Federal laws are relevant to the licensing or license amendment of specific projects. The Commission and agencies with responsibilities for such laws are working together to integrate or combine their processes with the hydropower licensing process. A list of the possible statutes involved follows; general summaries of these laws and their relationship to the licensing process (and hence, the ALP) are contained in Appendix A, Part 2.

- Clean Water Act, Section 401 Water Quality Certification
- Coastal Zone Management Act, certification
- Endangered Species Act, Sections 7 and 10 consultation
- Fish and Wildlife Coordination Act
- Magnuson-Stevens Fishery Conservation and Management Act, essential fish habitat consultation
- National Historic Preservation Act, Section 106 consultation
- Wild and Scenic Rivers Act

VI. NEGOTIATING TOWARD OFFER OF SETTLEMENT

One of the common goals in a collaborative process is for the participants to develop a negotiated agreement or settlement on issues in the relicensing. For example, the Collaborative Group could seek to develop an agreement on what terms and conditions the applicant would propose in its application for the protection, mitigation, and enhancement of various resources. This agreement, or "Offer of Settlement", would be filed with the Commission for incorporation into the license.[13]

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[13] [Editor's note: The issue of how settlement agreements are or are not incorporated into the Commission's licensing Order(s) and the Commission's license(s), and how that may affect the enforcement of settlement terms and conditions, has been raised but not resolved by the interagency Federal workgroup. This section on settlement agreements should not be construed as having either addressed or resolved the issue].

The Commission's regulations are silent as to when participants may commence negotiating towards an Offer of Settlement during an ALP. As each process is different, the appropriate time to initiate discussions on all or individual issues depends upon the situation. An important factor to consider in reaching a negotiated settlement is that participants should seek to negotiate based on interests and concerns, not positions.

The Operating Plan, if it exists, may address what conditions should be present for negotiations to commence on all or individual issues. The Collaborative Group may want to wait until all information has been obtained and all relevant studies have been completed before starting to negotiate toward an Offer of Settlement. Conversely, the Collaborative Group may agree to allow a sub-committee, if subcommittees are utilized, to commence negotiations on issues within the subcommittee's agreed-upon jurisdiction when the subcommittee believes it has adequate information upon which to propose a resolution of those issues.

Additionally, an Offer of Settlement does not have to include all issues. The Settlement Agreement may cover selected issues or all issues, and participants may give their full or partial support. In the best of all worlds, an Offer of Settlement will address all issues arising in the licensing or post-licensing process and be endorsed by all members of the Collaborative Group. While there may be significant benefits in a partial Offer of Settlement, settlements which exclude particular parties or issues may be of limited value.

It is critical to recognize that certain agency participants, including the Commission, have statutory responsibilities, which are not limited by any agreement of the participants. Additionally, the applicant and certain other participants may have other constraints which impact their respective negotiating positions. The agencies' statutory responsibilities and participants' constraints should be outlined early in the ALP so that such considerations do not come as a surprise upon commencement of negotiations. Resource agencies have responsibilities to protect and manage the resources under their care. In order to meet those responsibilities, the relevant statutes provide them with opportunities in licensing proceedings to provide comments, terms, conditions, and prescriptions.

It is important for all participants in the negotiation process to identify information gaps when commencing and conducting negotiations. Also, the Collaborative Group or subcommittee should attempt to identify a range of mitigation and enhancement measures and associated costs, if possible, that may be agreed to depending upon the information generated by the planned studies. The CP and/or an Operating Plan for the ALP may also make clear that a participant will not be deemed to agree to any provision of settlement until completion of relevant scientific studies and agreement on all relevant issues. Such a protocol may also provide that positions taken in negotiations must not be used for other purposes outside the Commission licensing process.

Although resource agencies may agree to engage in negotiations prior to completion of scientific studies and their associated public review in the NEPA process, that participation cannot be construed to alter or constrain the agencies' statutory authority. The potential problems of conducting a negotiating process before completion of studies affecting an agency's statutory authority are twofold. First, when an agency presents a negotiating position based on only preliminary information available at the time, the agency may be compelled to change that position in light of any final information provided by ongoing scientific studies. This change may undermine any partial, but tentative, agreement on an issue that may have been achieved in the Collaborative Group. Second, if the participants proceed to negotiate prior to the completion of relevant studies, the agency, upon joining the negotiations after the studies are completed, may object to or otherwise identify problems with the proposed resolution of issues.

VII. CONCLUSION

These guidelines provide an overview of the ALP and issues that participants may wish to address before embarking on the use of this method and while they are participating in a Collaborative Group. Consideration of the subjects addressed in the guidelines should help the Collaborative Group operate more smoothly, resulting in the pre-application process taking less time and shortening the time for licensing proceedings through early resolution of contentious issues.

The ALP will encourage early, frequent, and open communication between participants, which in turn can help build an understanding of the participants' positions, flexibility, and a level of trust that can lead to mutually satisfactory resolution of the issues at hand.

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APPENDIX A: LAWS RELEVANT TO THE COMMISSION LICENSING PROCESS

Part 1. Certain Federal Power Act Provisions

Although the Commission decides whether or not to grant a license application, the Federal Power Act (FPA) provides for designated Federal agencies to submit mandatory license conditions for fishways and for the protection and utilization of Federal reservations; and provides for designated State and Federal agencies to submit recommendations regarding resources within their respective purviews, as described below.

Section 4(e)

Section 4(e), 16 U.S.C. 797(e) contains a number of provisions, but when reference is made to an agency's mandatory 4(e) authority the reference is to the provision that requires that licenses issued for a project located within any reservation "be subject to and contain such conditions as the Secretary of the department under whose supervision such reservation falls shall deem necessary for the adequate protection and utilization of such reservation." This means that when a project is licensed within a Federal reservation, which is defined as lands or interest in lands owned by the United States, such as tribal lands embraced within Indian reservations, national forests, and military reservations, then the Secretary responsible for managing those lands has the authority to establish conditions, to be incorporated in any hydropower license issued by the Commission, for the protection and utilization of the Federal reservation. This authority may be delegated by the Secretary to a subordinate agency, e.g., Secretary of Agriculture through the Forest Service, and the Secretary of Defense through the Army.

Section 10(a)

Under Section 10(a), 16 U.S.C. 803(a), the Commission must ensure that a hydropower project is "best adapted" to a comprehensive plan for improving or developing a waterway or waterways, for the use or benefit of interstate or foreign commerce, for the improvement and utilization of waterpower development, for the adequate protection, mitigation, and enhancement of fish and wildlife (including related spawning grounds and habitat), and for other beneficial public uses, including irrigation, flood control, water supply, and recreational and other purposes referred to in Section 4(e). In order to ensure a project is best adapted, under Section 10(a)(2), the Commission must consider the extent to which the project is consistent with a comprehensive plan (where one exists) for improving, developing, or conserving a waterway or waterways affected by the project, and the recommendations of State and Federal agencies exercising administration over relevant resources and recommendations of Indian tribes affected by the project.

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Section 10(j)

Under Section 10(j), 16 U.S.C. 803(j), in each hydropower license issued, the Commission must include conditions based on recommendations for the protection, mitigation and enhancement of fish and wildlife affected by the proposal. These conditions are based on recommendations for fish and wildlife protection, mitigation, and enhancement, including spawning grounds, made pursuant to the Fish and Wildlife Coordination Act (16 U.S.C. 661 *et seq*.) by the U.S. Fish and Wildlife Service (FWS), National Marine Fisheries Service (NMFS), and State fish and wildlife agencies. The Commission must base license conditions on these agency recommendations unless the Commission finds that the recommendation may be inconsistent with the purposes or requirements of the FPA or other applicable law, has attempted to resolve such an inconsistency, giving due weight to the recommendation, expertise and statutory responsibility of the State or Federal resource agency in question, and incorporate into the license conditions to adequately and equitably protect, mitigate damages to, and enhance, fish and wildlife resources affected by the proposal.

Section 18

Under Section 18, 16 U.S.C. 811, the Commission must provide for the construction, operation, and maintenance of any "fishway" prescribed by the Secretary of the Interior (delegated to the FWS) or the Secretary of Commerce (delegated to NMFS) for the safe and timely upstream and downstream passage of fish.

As with Section 4(e), the fishway conditions submitted by the relevant resource agency must be supported by substantial evidence on the record before the Commission. The Commission must include the Secretaries' prescriptions for fishways as conditions in a license, if a license is issued.

Section 27

Section 27, 16 U.S.C. 821, specifies that nothing in the FPA is to be construed as affecting or interfering with State law regarding the control, appropriation, use or distribution of water, or any vested right in water. Generally, this means that States retain the authority to require that an applicant for a hydroelectric license from the Commission comply with State laws regarding obtaining a water rights for operating projects. See also, Section 9(a)(2), 16 U.S.C. Section 802(a)(2) (requiring applicants to submit evidence of compliance with State laws regarding appropriation and diversion of water).

Section 30(c)

Section 30(c), 16 U.S.C. 823a(c), provides that in issuing exemptions for conduit facilities, the Commission shall consult with the FWS [and the NMFS] and the applicable state agencies, in the manner provided by the Fish and Wildlife Coordination Act, and shall include in exemptions such terms and conditions as the agencies determine appropriate to prevent loss of, damage to such resources and to otherwise carry out the purposes of such Act.

Part 2. Other Federal Laws

In addition to the FPA, there are a number of other Federal laws that intersect with the hydropower licensing process, and which should be integrated into a collaborative process. The following list provides the most prominent examples of these other laws, in alphabetical order. Note, however, that the Clean Water Act is particularly significant because it provides States with mandatory conditioning authority for the protection of water quality.

Clean Water Act

Under Section 401 of the Clean Water Act (CWA), 33 U.S.C. Section 1341, applicants for hydropower licenses, in order to conduct activities which may result in any discharge into the waters of the United States, must obtain a certification or waiver of certification from the State or eligible Indian tribe in whose jurisdiction the discharge originates that the activity will comply with applicable provisions of the Clean Water Act and appropriate State laws.

A State or eligible Indian tribe may condition their certification to assure that the applicant will comply with applicable provisions of the CWA and appropriate State laws, which become conditions of the license. Each State and eligible Indian tribe has its own procedures for issuing a Section 401 certification. Section 401(a)(1) provides that a license cannot be issued until a water quality certification for the project is obtained, unless certification has been waived by the State, either affirmatively or by operation of law. *See* 18 CFR 4.38(f)(7). Commission regulations require applicants for amendments to existing licenses to request a certification if the amendment would have a material adverse impact on the water quality in the discharge from the project or proposed project. *See* 18 CFR 4.38(f)(7)(iii).

Coastal Zone Management Act

Section 307 of the Coastal Zone Management Act (CZMA), 16 U.S.C. 1456, requires that each Federal agency activity within or outside the coastal zone that affects any land or water use or natural resource of the coastal zone shall be carried out in a manner which is consistent to the maximum extent practicable with the enforceable policies of approved State coastal management programs (CMP).

Non-Federal applicants for Federal licenses or permits and Federal financial assistance must comply with State CMP enforceable policies. Original and new hydroelectric licenses and certain license amendments issued by the Commission are Federal license or permit activities under the CZMA and National Oceanic and Atmospheric Administration's implementing regulations. If a State CMP has "listed" such approvals, then the applicant must certify that the activity is consistent with the CMP. The State must concur with, or object to, the certification. The Commission cannot issue its approval until the State concurs, or if the State objects, until the Secretary of the Department of Commerce (Commerce), on appeal by the applicant, overrides the State CMP's objection.

Endangered Species Act

Section 7 (a)(2) of the Endangered Species Act (ESA), 16 U.S.C. 1536(a)(2), requires the Commission, in consultation with the FWS, or the NMFS (depending on the species), to ensure that any action the Commission authorizes, funds or carries out is not likely to jeopardize the continued existence of any threatened or endangered (listed) species, or result in the destruction or adverse modification of designated critical habitat. If a proposed licensing may affect a listed species or critical habitat, the Commission is required to consult with the appropriate Service. *See* 50 CFR Part 402. The consultation process refers to one or more components- - early consultation, informal consultation, formal consultation, and further discussion.

The outcome of formal consultation is a biological opinion issued by the appropriate Service, indicating whether the proposed licensing is likely to jeopardize the continued existence of the listed species or result in the destruction or adverse modification of critical habitat. A "jeopardy" biological opinion must identify reasonable and prudent alternatives, if any, that if adopted by the Commission will avoid jeopardy to listed species or destruction or adverse modification of critical habitat, thus allowing the project to proceed in compliance with Section 7(a)(2). The final decision as to whether or not to issue a license that may affect a listed species or critical habitat must be made by the Commission in accordance with applicable law. After initiation of consultation required under the ESA, Section 7(a)(2), the Commission and the applicant are prohibited under Section 7(d) from making any irreversible or irretrievable commitment of resources with respect to the licensing which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternatives.

A biological opinion that concludes with a finding that the action is not likely to jeopardize a listed species or result in the destruction or adverse modification of critical habitat will include a statement specifying the amount or extent of anticipated incidental take, and any reasonable and prudent measures (including terms and conditions) necessary to minimize the impact of the take. Generally, incidental take will be addressed by means of consultation under Section 7(a)(2); however,

under certain circumstances, it may be appropriate to authorize such incidental take via an incidental take permit issued by the Service(s) pursuant to Section 10 of the ESA. [14]

Fish and Wildlife Coordination Act

The Fish and Wildlife Coordination Act provides that whenever an activity is planned to modify waters by a department or agency of the United States, that entity shall first consult with the FWS, NMFS, [15] and with the State agency exercising administration over the fish and wildlife resources (16 U.S.C. 661-667e). This Act's purposes are to recognize the vital contribution of our wildlife resources to the Nation, and their increasing public interest and significance. In addition, the Act provides that wildlife conservation receive equal consideration with other features of water resource development through planning, development, maintenance, and coordination. The Secretary of the Interior is authorized to provide assistance to, and cooperate with, Federal, State and public or private agencies and organizations in developing, protecting, rearing, and stocking all wildlife and their habitat, controlling losses from disease; minimizing damages from overabundant species; and carrying out other necessary measures.

Magnuson-Stevens Fishery Conservation and Management Act

The Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act) (16 U.S.C. 1801 *et seq*.) was amended in 1996 to include a requirement that the Fishery Management Councils (Councils) include a provision in their fishery management plans to describe essential fish habitat (EFH), including adverse impacts and conservation measures. Federal agencies must consult with the Secretary of Commerce, acting through NMFS, if their activities may adversely affect EFH. If the activity would adversely affect EFH, NMFS must respond to the Federal action agency with recommendations to conserve this habitat. Within 30 days of receiving NMFS's EFH recommendations, the Federal action agency must respond in writing with a description of measures the agency will take to avoid, mitigate or offset the impact of the activity on EFH, and in the case of a response that is inconsistent with the recommendations, the Federal agency shall explain its reasons for not following the recommendations.

Commerce issued an interim final rule, 50 CFR 600 Subpart K, with procedures for conducting EFH consultations. The rule emphasizes that EFH consultations should be combined with consultation

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[14] Section 10 of the ESA provides for the exemption of certain activities from the take prohibitions of the ESA where the take will be incidental to an otherwise lawful activity.

[15] While NMFS is not specifically mentioned in the Statute, it is given a role comparable to the FWS, pursuant to Reorganization No. 4 of 1970.

or review procedures whenever possible, provided the existing procedures meet certain criteria. The FPA licensing process provides an existing framework for EFH consultation. The Commission and NMFS staff are in the process of working out the details of how to dovetail EFH consultation with the Commission's licensing procedures.

National Historic Preservation Act

Section 106 of the National Historic Preservation Act (NHPA), 16 U.S.C. 470f, requires the Commission to take into account the effect of its actions (such as issuance of a license for a hydroelectric project) on historic properties, and to provide the Advisory Council on Historic Preservation (ACHP) with a reasonable opportunity to comment. Historic properties are those that are included in, or determined eligible for, the National Register of Historic Places (National Register). The Commission, as the responsible Federal agency in the context of the NHPA, must, in consultation with the State Historic Preservation Officer (SHPO), or, where applicable a Tribal Historic Preservation Officer (THPO), identify historic properties and apply the criteria of adverse effect to determine if the proposed license and operation of the project may adversely affect any historic properties (sites, districts, buildings, structures, or objects listed in or eligible for listing in the National Register). Consultation should include other consulting parties, such as the applicant, Indian tribes, the National Park Service (NPS) and nongovernmental organizations.

NHPA and its implementing regulations also require consultation with any Indian tribe or Native Hawaiian organization that ascribes traditional cultural and religious value to historic properties that may be affected by the project.

An adverse effect usually results in a Memorandum of Agreement (MOA) or Programmatic Agreement (PA) among the Commission, the SHPO, THPO, and in many cases, the ACHP, that includes stipulations on ways to avoid or mitigate adverse effects, which the Commission must include as a condition of the license. The applicant and the Collaborative Group (or cultural resources subgroup) should be encouraged to participate in developing the MOA or the PA and, where appropriate, sign the MOA or PA as invited signatories or concurring parties. For projects affecting Indian lands and resources, tribes (and the Department of the Interior) may become consulting parties to the Section 106 process and sign the MOA or PA as invited signatories.

In order to facilitate coordination of Section 106 of the NHPA and the Council's regulations (36 CFR Part 800) with the collaborative process, the applicant should:

- Invite the SHPO or THPO to participate in the Collaborative Group during outreach and provide the SHPO or THPO with an opportunity to participate in all meetings and decision making;

- If the SHPO or THPO declines to participate, request the SHPO's or THPO's views on definition of the study area (area of potential effects), plans for cultural resource studies, and the results of cultural resource studies; and

- Provide the SHPO or THPO with an opportunity to participate in decision-making regarding mitigation and enhancement, especially where the resolution could have an effect on historic properties.

The Section 106 process is concluded by the Commission with an executed MOA or PA, or SHPO or THPO concurrence in the Commission's finding that no historic properties will be adversely affected by the project license. If there is no agreement, the ACHP must be provided an opportunity to submit its comments to the Commission. The Commission shall take into account the comments submitted by the Council in reaching a final decision on the undertaking.

Wild and Scenic Rivers Act

Section 7 of the Wild and Scenic Rivers Act (16 U.S.C. 1278) provides that no license may issue for the construction of any hydroelectric project on or directly affecting any river in the Wild and Scenic River system. The law does not preclude, however, licensing developments below or above a wild and scenic, or recreational river or on any stream tributary of the river so long as the project will not invade the area or unreasonably diminish the values for which the river was designated, as determined by the Secretary charged with its administration.

The Forest Service, Bureau of Land Management, FWS, and NPS are the agencies charged with carrying out the administration and management of rivers within the Wild and Scenic River system. In carrying out these duties, these agencies must make Section 7(a) determinations in hydroelectric licensing proceedings where a project would have an effect on a designated river.

The above provisions also apply (with somewhat different standards) to rivers that have been designated by Congress for potential addition to the Wild and Scenic Rivers system (study rivers).

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APPENDIX B: CHECKLIST

A checklist can help the Collaborative Group utilize the alternative licensing process in a concise manner. While the checklist below is patterned after the information contained in the *Guidelines To Consider For Participating In The Alternative Licensing Process* and is not exhaustive, it can be tailored to meet the specific needs of individual projects.

_____CONDUCT OUTREACH PROGRAM TO ATTRACT PARTICIPANTS
- __Federal agencies
- __State agencies
- __Local governments
- __Tribal governments
- __Landowners
- __Nongovernmental organizations
- __Citizen groups

_____DEVELOP COMMUNICATIONS PROTOCOL

_____DEVELOP OPERATING PROTOCOL (optional)

_____COMMISSION APPROVAL FOR USE OF THE ALTERNATIVE LICENSING PROCESS

_____CONDUCT PUBLIC SCOPING MEETING(S) AND SITE VISIT(S)
- __Identify proposed action, alternatives, scope of environmental analysis, issues

_____IDENTIFY ISSUES/INTERESTS, GATHER INFORMATION
- __Identify existing relevant information
- __Identify required information
- __Conduct necessary study(ies)
- __Request for additional study(ies), if necessary

_____CONSIDER OTHER RELEVANT SUBSTANTIVE LAWS
- __Clean Water Act, Section 401 Water Quality Certification
- __Coastal Zone Management Act
- __Endangered Species Act
- __Federal Power Act
  - Provisions such as:
  - __Section 4(e)

__Section 10(a)
__Section 10(j)
__Section 18
__Section 30(c)

__Fish and Wildlife Coordination Act

__Magnuson-Stevens Fishery Conservation and Management Act

__National Historic Preservation Act

__Wild and Scenic Rivers Act

_____PREPARATION OF ENVIRONMENTAL DOCUMENT

_____ITEMS TO ENTER INTO THE COMMISSION'S ADMINISTRATIVE RECORD

_____OFFER OF SETTLEMENT
__Coordination and Implementation of Any Commission-Approved Offer of Settlement

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APPENDIX C: TRAINING IN COLLABORATION AND MEDIATION

In investigating the use of the ALP, it is important to remember that every hydropower licensing proceeding involves a unique combination of issues and interested participants. For example, a multi-dam project located on several tributaries within a National Forest is likely to generate a different mix of players and concerns than a single dam project located on applicant-owned lands near a major metropolitan area. As a result, a "one size fits all" model of effective collaboration is neither attainable nor desirable. Beyond the initial decision to embark on the ALP, participants should discuss how to utilize their combined resources to make the process work efficiently, fairly, and in a manner that serves the varied interests of those involved.

While an initial focus on organizational structure and operating procedure is necessary to establish a basic framework for collaboration, overall success will most likely turn on the skills and commitment of the participants involved. However, as is the case in any group effort, a lack of knowledge of the licensing process and/or attention to the skills required to make the process work inevitably will impede progress toward resolving the important substantive issues. The participants in the ALP may possess varying degrees of training and experience in basic collaborative skills.

Training opportunities, therefore, should be explored to enhance basic knowledge of the licensing process and collaboration skills of participants that will enable them to more effectively represent their substantive interests, and allow them to work constructively with others towards mutually satisfactory solutions. Further, training at the earliest stages of the ALP will give the participants a basic mutual understanding of the range of alternatives available--from facilitation to mediation--to allow the participants to choose the process best suited to their particular situation.

Training should combine generic skills in areas such as the licensing process, facilitation, mediation, advocacy and negotiation with examples and experience gained from the use of the collaborative process in previous licensing contexts. Participants from various perspectives (e.g. State and Federal agencies, nongovernmental organizations, citizen groups, industry, Indian tribes) who have had previous experience with the ALP should take an active role in the development of such training opportunities. For example, a participant with prior experience in the ALP might work with an in-house or hired consultant to develop a training session for participants on a specific project, under a format that combines generic training on facilitation and negotiation skills with examples derived from hands-on experience.

By building on the lessons of experience, participants will have an opportunity to familiarize themselves with the types of challenges they are likely to face at various stages in the process, from early scoping of environmental issues and development of study plans, to evaluation of study data and identification of alternatives, to the negotiation of an Offer of Settlement, including mitigation and

enhancement measures. Each stage provides a different context for discussion and consensus building and thus requires participants to employ a different combination of interpersonal skills.

In addition, the involvement of participants with various roles and disciplines (e.g. facilitators, scientific and technical staff, lawyers, policy-makers) and the role that each plays will evolve with each new stage of the process. For this reason, transitioning from one stage to the next presents particular challenges for those who have invested considerable time and effort in the collaborative process. Training that is targeted to these important transitional steps may provide an important vehicle for reorienting and refocusing the overall group effort and improve the chance for success.

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APPENDIX D: FEDERAL ENERGY REGULATORY COMMISSION INFORMATION ACCESS

INTERNET

Federal Energy Regulatory Commission
(Commission or FERC) Home Page
An Introduction
The Office of Energy Projects

1. **Commission Issuance Posting System**

Commission Issuance Posting System (CIPS) on the Web provides timely access to issuances of the Commission, such as Orders, Notices, and Rulemakings, and to many other types of information. CIPS contains FERC issuances dating back to November 14, 1994. The documents can be read or downloaded in either ASCII or WordPerfect. Other types of information on CIPS on the Web include: the news releases; the Commission Agenda and Action Agenda; the Daily Filing List; the Formal Documents Issued List with the FERC Reports Citations; and the Daily Calendars of Hearings and Meetings.

Types of Searches

Users can search by Library/Topic, Type/Prefix, Company, Docket Number, or by Text String by selecting the appropriate command button found in the blue CIPS Search box in the upper left hand portion of the page.

In both CIPS and Records and Information Management System (discussed below), an easy way to retrieve documents relating to projects, if you know the FERC Project number, is to use the "docket" selection on the relevant menu, and type in "P-XXXX" where "XXXX" corresponds with the FERC Project number (without any sub-dockets). The "P" is used to identify it as a hydroelectric project, as opposed to some other type of project or category within the Commission's database.

Contacting CIPS Staff

On the bottom of the CIPS Web main page, you can select a link that will e-mail either the Web Master or the Content Master. Direct questions or problems with content or files to the Content Master and any errors or problems with the Web pages to the Web Master. For a quicker response to any content problems, you can contact the CIPS staff via the phone number noted on the main page.

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Printing

When you print the document from your browser the pagination may be different from that of the original document. If you need to retain the format, you should download the file first, then open it in your preferred word processing program.

2. **Records and Information Management System**

The Records and Information Management System (RIMS) is a database containing the indexes and images of documents submitted to and issued by the Commission since November 16, 1981.

Documents from 1981 until approximately 1994 are available on microform. Starting in July 1994, the Commission began to enhance the system by scanning (rather than filming) images of selected documents, gradually phasing in additional documents. Since November 13, 1995, the Commission has been scanning all RIMS documents (11" X 17" and smaller). These scanned images are available for viewing and printing.

Records and Information Management System (RIMS) on the Web
http://rimsweb1.ferc.fed.us/rims

RIMSWeb – Access to Documents with More Than 1,600 Pages

No document that is more than 1,600 pages in total length can be viewed, printed, or downloaded at this time through RIMSWeb. However, the indexes of the documents remain available. In addition, all of these documents are still available for viewing and printing from RIMS at the Commission's facilities. If copies of (or further information about) these documents are needed, please contact the Commission's Public Reference Room by telephone at 202-208-1371 or by e-mail at Public.ReferenceRoom@FERC.Fed.US.

3. **CCH CD-ROM**

Complete FERC reports. FERC Reports Parts I & II is a two-disc CD-ROM product that contains selected precedential issuances of the Commission from October 1, 1977 through the present. Part I contains FERC Reports Archive Vols. 1-75. Part II contains the current volume of FERC Reports plus Archive Vols. 76-xx (the last archive volume). When a new quarterly volume of FERC Reports is issued, the current volume is added to Part II as the last archive volume.

4. **LEXIS-NEXIS**

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Complete FERC reports. Use Energy library.

LEXIS-NEXIS is a fee-based full-text, online legal citation and news retrieval service that covers a variety of information resources. It allows you to retrieve the full text of Federal and State case law, codes and regulations, and law review journal articles. It also allows the use of Shepardizing, Lexsee, and other legal research functions.

LEXIS-NEXIS is the world's leading provider of enhanced information services and management tools in online, Internet, CD-ROM and hard copy formats for a variety of professionals. The company is a division of Reed Elsevier Inc., part of the Reed Elsevier plc group of London.

5. **Internet Sites**
(not complete, examples for illustrative purposes only)

a. Commission
http://www.ferc.fed.us/intro/keycontact.htm

b. NMFS -- Northwest Regional Office
http://www.nwr.noaa.gov/home.htm

c. BLM
http://www.blm.gov/nhp/directory.htm

d. California BLM Office
http://www.ca.blm.gov/caso/Addresses.htm

e. FWS
http://www.fws.gov/who/phone.htm

f. Department of the Interior
http://www.doi.gov/bureau.htm

g. Bureau of Reclamation
http://www.usbr.gov/main/aboutus/addresses.htm

h. Bureau of Reclamation -- Power Resources Office
http://www.usbr.gov/power/who/pro_dir.htm

i. Forest Service
http://www.fs.fed.us/other_fs_sites.htm

j. Region 6 Forest Service
http://www.fs.fed/intro/directory/rg-6.htm

k. Northwest Power Planning Council
http://www.nwppc.org/people.htm

l. National Park Service
http://www.nps.gov/legacy/index.htm#offices

Other Information Sites:

a. FWS Endangered Species Page (includes listed species, State lists)
http://www.fws.gov/r9endspp/endspp.htm

b. American Rivers (includes list of settlements)
http://www.amrivers.org/index.htm
American Rivers Home Page has a section on hydroelectric relicensing settlement agreements.