

Interagency Task Force Report on
NEPA Procedures in FERC Hydroelectric Licensing

Prepared by the Work Group on the Coordination of Federal Mandates:

Federal Energy Regulatory Commission
U.S. Department of the Interior
U.S. Department of Commerce
U.S. Department of Agriculture
Environmental Protection Agency
Advisory Council on Historic Preservation

Introduction

Assessing the environmental impacts of a proposed FERC hydroelectric relicensing project and its alternatives can involve numerous complex and controversial issues. This report seeks to identify opportunities for improving the NEPA piece of the *traditional* hydroelectric relicensing process as it relates to *federal* agencies. Non-federal stakeholders may also find parts of this document useful in providing tips on how to improve their own role in the NEPA process.

The report focuses on the following aspects of the hydroelectric licensing-related NEPA process: defining purpose and need of the proposed action, developing an appropriate range of alternatives, describing the environmental consequences, assessing cumulative impacts, formulating appropriate mitigation measures, responding to agency comments, and identifying ways to expedite the process. Because the issue of baseline environmental conditions pervades the aforementioned topics, the Work Group spent some time at the outset of the discussion trying to better understand the positions and concerns of the various agencies. Ultimately, however, the goal of these preliminary discussions was to frame subsequent discussions on other NEPA issues without the expectation that any “solutions” regarding baseline would be developed. 1 /

Finally, several of the “solutions” do not represent a change in the status quo and therefore should not be construed as having “solved” the given issue but rather as an attempt to clarify existing agency roles and responsibilities.

Purpose and Need

Issue: Under CEQ regulations, agencies should follow the standard format for an EIS, which includes a statement that briefly specifies the underlying purpose and need to which the agency is responding in proposing the alternatives, including the proposed action. An issue of concern is the extent to which FERC's statement of purpose and need sometimes appears to focus primarily on the "need for power," to the exclusion of other purposes and need for the proposed action, such as water supply, irrigation, fish and wildlife, or recreation. To some extent, this appears to result from the practice of covering these topics in separate sections of the environmental document entitled "Purpose of Action" and "Need for Power," respectively.

Proposed Solution:

1/ Given their respective legal positions on the “baseline issue,” FERC and the resource agencies were unable to reach full agreement regarding how to deal with the inclusion and treatment of the no-action and decommissioning alternatives in a NEPA document (for explanation, see section on Range of Alternatives). However, despite those differences, FERC and the resource agencies did succeed in developing a number of mechanisms to improve the NEPA document which they have agreed to implement without waiving their respective legal positions.

In the "Purpose of Action and Need for Power" section of the EA/EIS, FERC will explain that the proposed federal action is the Commission's decision whether to issue a license for the proposed project and, if so, what conditions should be placed in the license. FERC will also state that the purpose of the proposed action is to determine whether to grant an application for the construction and operation, or continued operation, of hydroelectric and related facilities in compliance with FPA requirements and other laws. Additionally, FERC will include the following language in this section of the EA/EIS: "In deciding whether to issue a license for a hydroelectric project, FERC must determine that the project will be best adapted to a comprehensive plan for improving or developing a waterway. In addition to the power and developmental purposes for which licenses are issued (e.g., flood control, irrigation and water supply), FERC must give equal consideration to the purposes of energy conservation, the protection, mitigation of damage to, and enhancement of fish and wildlife (including related spawning grounds and habitat), the protection of recreational opportunities, and the preservation of other aspects of environmental quality." In addition to this general description, FERC staff will include a brief description of the project-specific issues that will be addressed in the EA/EIS.

Range of Alternatives

Issues: Developing a reasonable range of alternatives to be explored and evaluated is critical to ensuring that a NEPA document fully discloses the options before the decision maker and the affected public. One issue is whether certain types of alternatives need to be included in the NEPA document and to what extent such alternatives should be analyzed. For example, FERC and the resource agencies disagree as to whether a detailed analysis of the decommissioning alternative should be routinely included in the NEPA document. Another issue is how the "no-action" and resource agency alternatives are developed and defined, and to what extent resource agency scoping comments, recommendations, and mandatory conditions are used in the development of alternatives.

Proposed Solutions:

1. In addition to the applicant's proposal and the no-action alternative, a reasonable range of alternatives could also include, depending on the circumstances, a Commission staff alternative, an agency alternative, and a decommissioning alternative (with or without dam removal), among others.

2. Clarification Meeting

FERC will schedule a clarification meeting or teleconference if requested by the resource agencies in their comments on the Ready-for-Environmental Analysis (REA) notice or if determined necessary by FERC (see 18 CFR 4.34(e)(2)). This meeting and the meeting agenda will be noticed so that all parties have an opportunity to participate. At the meeting, resource agencies and FERC may:

- * Provide/Seek clarification of resource agency comments, mandatory conditions, and

- recommended protection, mitigation, and enhancement measures;
- * Discuss the full range of alternatives that will be analyzed and the associated issues or concerns with each;
 - * Discuss possible settlement options with the applicant;
 - * Discuss the extent to which agency recommendations and mandatory conditions can be included and analyzed as the basis for a complete NEPA alternative.

3. Agency Alternative

a. To the extent possible, resource agencies will coordinate their recommendations and endeavor to minimize/eliminate inconsistencies to facilitate analysis. When possible, the agencies will submit to FERC a consistent set of recommendations, with a request that they be analyzed as an alternative. As long as FERC determines the set of recommendations to be the basis for a reasonable alternative, 2/ it will analyze the recommendations as part of a complete NEPA alternative. If only one agency submits recommendations, then, upon that agency's request, FERC will analyze those recommendations and, if FERC determines that they provide the basis for a reasonable alternative, FERC will include them in the NEPA document as part of a complete NEPA alternative.

b. If resource agency recommendations are not analyzed as a NEPA alternative, FERC will ensure that all impacts of the recommendations are disclosed in all appropriate resource sections.

4. Decommissioning

FERC and the resources agencies have identified factors (listed below in item 'a') to be considered in determining whether, in certain cases, a more thorough analysis of decommissioning is warranted. Using these factors, FERC will either examine decommissioning as a reasonable alternative or briefly discuss the reasons for eliminating it from detailed study.

a. The consideration of whether to include a detailed analysis of a decommissioning alternative in a NEPA document should begin early in the process, that is, in the scoping stage. In addressing this issue, FERC will consider, where applicable, and where information is available, the beneficial or adverse effects of the projects on a variety of resources or interests, including but not limited to: (1) listed threatened or endangered species; (2) economic viability of a project, including costs of resource protection measures; (3) river targeted for fish recovery; (4) feasibility of fish passage; (5) consistency with comprehensive plan(s); (6) protected river status (e.g., scenic river, wilderness area); (7) effectiveness of past mitigation measures and availability of future measures; (8) support by applicant or other party for decommissioning; (9) Tribal lands, resources, or interests; (10) water quality issues, including presence of toxic sediments; (11) potential opportunities for recreation; (12) physical condition of project; (13) presence of existing

2/ The term "reasonable alternative" is used as it pertains to the CEQ regulations, 40 CFR 1502.14.

project-dependent development (e.g., houses abutting reservoir); (14) other non-power project-related benefits (e.g., municipal water supply, flood control, irrigation); (15) project-dependent resource values (e.g., recreation, wetlands, wildlife, habitat); (16) need for power and ancillary services; and (17) historic properties.

b. In comments on Scoping Document 1 or as early in the process as possible, resource agencies will provide FERC with information relating to these factors in their areas of expertise.

Environmental Consequences

Issues: In describing the environmental consequences of licensing, resource agencies and FERC sometimes differ in their assessment of the degree to which an action will cause adverse impacts. These disagreements may be a result of differences over how to characterize the “baseline” used to measure environmental conditions, an issue this group was unable to resolve. Other issues include consideration of information on past and present (or continuing) effects, consultation with tribes over identification of impacts to tribal lands, and the consistency of proposed actions with tribal treaties and rights.^{3/}

Proposed Solutions:

1. As explained in the preamble to its relicensing regulations, FERC does not require relicense applicants to gather information or conduct studies regarding the condition of resources in the project area that existed prior to the initial licensing and construction of the project. However, FERC uses information on past effects in two ways. First, in deciding whether or under what conditions to relicense a project, FERC can consider both past and present (or continuing) effects, including those attributable to the project since its construction, in determining what conditions may be appropriate for the new license term. FERC also considers past and present (or continuing) effects, as well as reasonably foreseeable future effects, in its cumulative effects analysis.
2. Where applicable, FERC will consider past and present (or continuing) effects as part of its environmental effects analysis and in the formulation and evaluation of the alternatives.
3. Resource agencies will help FERC to identify continuing effects early in the process (particularly in scoping).
4. Resource agencies will share with applicants during prefiling consultation, and with FERC after the application has been filed, their views on project impacts to stated resource objectives. FERC will consider this information in its environmental consequences discussion.

^{3/} The Group was not able to reach agreement on when and how environmental justice issues are considered in FERC’s NEPA document. However, FERC will continue its practice of considering these issues, as appropriate, in NEPA documents and license orders.

5. During pre-filing, resource agencies will assist applicants in performing their responsibilities by informing applicants of Indian Tribes and tribal lands, resources, rights and interests which may be affected by the proposed action.
6. If the resource agencies or others notify FERC of an affected tribe that has not been consulted, FERC will remind the applicant of its consultation responsibilities under FERC regulations.
7. FERC will consult with Indian Tribes in order to identify project effects on the Tribe and its lands, resources and interests. Furthermore, FERC will take steps to improve consultation with Indian tribes by making greater use of direct personal contact with tribal representatives when written requests fail to elicit a sufficient response. Any post-filing consultation between FERC and a tribe will be noticed, in accordance with FERC's rules governing off-the-record communications. The type and extent of consultation will vary with the circumstances of each case.
8. FERC will analyze, where applicable, the environmental effects of each alternative on Indian Tribes and tribal lands, resources and interests. This analysis will include a discussion of how effects to specific resources (e.g., fisheries, cultural resources) will affect the Tribe.

Cumulative Impact Assessment

Issues: It is generally recognized that assessing cumulative impacts in a NEPA document is one of the more complex and difficult areas for NEPA analysts. While CEQ has recently developed a handbook that explores some of the more general issues surrounding cumulative impact assessment, there continues to be a need for methods to make cumulative impact analyses more effective and meaningful. In the relicensing context, a key question is how to consider past, present (or continuing), and future environmental effects in the evaluation of alternatives and the development of mitigation measures. In addition, there are questions concerning how future relicensing and other non-hydropower activities in the watershed should be considered and when a watershed or other large scope of analysis is appropriate.

Proposed Solutions:

1. FERC will clarify in its NEPA analysis how it incorporates cumulative effects assessment information in its analysis of the proposed project and alternatives and in the development of license conditions.
2. Past Conditions/Effects for Cumulatively Affected Resources
 - a. In accordance with the Council on Environmental Quality's regulations, FERC will include and utilize information regarding past conditions/effects, where applicable, in its cumulative effects

analyses. ^{4/} FERC will request this information and include it in its cumulative effects analysis and in its evaluation of measures appropriate to protect, mitigate damages to, and enhance resources affected by the project. The resource agencies will provide FERC with any available information regarding past conditions/effects.

b. During pre-filing consultation, resource agencies will identify, where available, existing agency and/or other pertinent information regarding past conditions/effects and will request information regarding past conditions/effects they consider necessary for the NEPA analyses.

c. If adequate information regarding past conditions/effects is not available from existing information or is not obtained during pre-filing consultation, additional information or studies may be required after the application is filed.

3. Comprehensive Plans

a. FERC will provide a list of pertinent comprehensive plans in Scoping Document 1. Resource agencies will review this list and, in their comments on SD1, inform FERC of any changes (additions/subtractions) to the list. If there are plans that should be added to the list, agencies will file the plans according to 18 CFR section 2.19.

b. As early as possible, but at least in response to the REA notice, resource agencies will identify pertinent parts of comprehensive plans that may be useful for FERC's cumulative impact assessment.

c. Comprehensive plans will be used as one means to describe reasonably foreseeable future activities and their effects. FERC will consider these activities and effects in its NEPA analysis.

4. Scope of Cumulative Assessment

Where relevant, the NEPA document will identify other watershed activities including hydropower projects and will analyze the effects of the proposed project and alternatives in combination with other projects and activities.

5. For projects within the same watershed, FERC will consider cumulative effects at original licensing or relicensing to the fullest extent possible, consistent with FERC's responsibility to avoid undue delay in relicensing and in ameliorating individual project effects. To the extent that it is not possible to explore and address all cumulative effects at relicensing, FERC will reserve authority to reopen the license, if necessary,

^{4/} The CEQ regulations define cumulative effects as the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions.

to examine and address such effects after the new license has been issued. FERC will also coordinate the expiration dates of new and original licenses to the maximum extent possible, to maximize future consideration of cumulative effects within the watershed at the next opportunity for relicensing. (See 18 CFR 2.23, Use of reserved authority in hydropower licenses to ameliorate cumulative impacts.) FERC will continue to perform cumulative impact analysis for one project which includes other projects in the watershed, even if expiration dates don't coincide.

Protection, Mitigation, and Enhancement Measures

Issues: In preparing NEPA documents, FERC is required to consider measures to protect, mitigate damages to, and enhance resources affected by the project. Issues relating to mitigation measures include: (1) clarifying the distinction between "protection", "enhancement", and "mitigation" measures, and the relevance of those distinctions to the NEPA analysis of mitigation measures; (2) whether the need for mitigation is adequately explained; and (3) the nexus between project effects and mitigation measures.

Proposed Solutions:

1. The resource agencies and FERC differ in their assessment of protection, mitigation, and enhancement, stemming from each agencies' interpretation of environmental baseline. Therefore, to promote a greater understanding of the use of the terms "protection", "mitigation", and "enhancement", FERC and the resource agencies provide the following statements to clarify their respective analyses.
 - a. FERC analyzes all protection, mitigation, and, enhancement measures under the comprehensive development standard of section 10(a)(1) of the Federal Power Act, regardless of classification.
 - b. The resource agencies use the terms protection, mitigation, and enhancement to characterize their recommendations submitted pursuant to section 10(j) of the Federal Power Act, as well as other recommendations and mandatory conditions, where applicable. The resource agencies consider all of these recommendations important in addressing impacts of the proposed project.
2. Resource agencies will provide an explanation of the need for protection, mitigation, and enhancement measures – including the relationship to resource management goals and objectives – and the nexus between project effects and those measures.
3. If FERC believes it would benefit from a fuller explanation of the need for protection, mitigation, and enhancement measures and or the nexus between these measures and project effects, it will make use of the clarification meeting to discuss these issues with the resource agencies.

Response to Comments

Issues: An essential component of a Final EIS is for the preparing agency to assess and consider comments received on the Draft EIS and make a clear statement of its response to these comments in the Final EIS. Concerns have been raised that in some cases resource agency comments on NEPA documents and FERC responses to agency and other comments may have been too cursory or generic.

Proposed Solutions:

1. Resource agencies, to the extent possible, will clearly identify and explain their concerns in their comment letters to FERC.
2. In its NEPA documents, FERC will indicate that it has considered all comments on the draft document. However, FERC will provide responses to substantive issues raised and avoid the use of phrases such as “comment noted” or “no response needed” in the NEPA document.
3. When offering a legal or policy citation as part of a response to comments, FERC will include a brief description of the authority cited and explain how the authority applies to the facts involved.
4. FERC and the resource agencies will improve the tone of their comments and responses, endeavoring to make communication more "positive."

Other Ways to Expedite the Process

Issues: The hydropower licensing process has been criticized because of its lengthy nature. Implementation of the NEPA process, a major part of licensing, may contribute to this problem. If agencies do not get involved until late in the process, or information is not developed early on, action on the license application may be delayed. Similarly, when settlement discussions are begun late in the process, further NEPA analysis may be required and final action on the project may be extended.

Proposed solutions:

1. FERC will consider the prefiling consultation process as satisfying the scoping process for those license or amendment applications that do not normally require the preparation of an Environmental Impact Statement, and for which no person or organization has identified concerns during prefiling. Furthermore, FERC will issue one Environmental Assessment (EA) rather than issuing draft and final EAs, and will continue to notify the public of the EAs availability. In these circumstances, FERC will propose, and request comments on, this alternative procedure in the Tendering Notice. If any person or organization objects to FERC's proposal to forego the scoping and draft EA procedures, they can write a letter to FERC briefly explaining the basis for their objection. Upon receipt of any such objection, FERC will proceed with the scoping process and preparation of both a draft and final EA.

2. DOI will increase coordination of responses from various bureaus. In addition, and where appropriate, resource agencies will coordinate responses and comments.
3. Each of the key resource agencies will hold periodic internal meetings to coordinate relicensing efforts.
4. Resource agencies will collaborate with each other and with FERC in developing national data bases – such as FWS's web-based GIS mapping system – that agencies and the public can use to identify projects scheduled for licensing action.
5. FERC and the resource agencies will compile and exchange a contact/phone list (for headquarters and regional offices).
6. DOI will inform FERC of lands under its jurisdiction which are occupied by hydroelectric projects. FERC will include in its various Notices information concerning federal lands within project boundaries.