

**GUIDELINES TO CONSIDER FOR PARTICIPATING IN  
THE ALTERNATIVE LICENSING PROCESS**

Prepared by

The Interagency Task Force On  
Improving Hydroelectric Licensing Processes

December 2000

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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);<sup>1</sup> (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<sup>2</sup> 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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<sup>1</sup>National Environmental Policy Act of 1969, 42 U.S.C. 4321 *et seq.*

<sup>2</sup>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.

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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,<sup>3</sup> 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<sup>4</sup> 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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<sup>3</sup>See 18 CFR 4.35(f).

<sup>4</sup> 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.

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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



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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).<sup>5</sup> 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

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<sup>5</sup>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.

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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.<sup>6</sup> 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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<sup>6</sup>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).

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- 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 <sup>7</sup> 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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<sup>7</sup>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>.

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- 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

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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.

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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.<sup>8</sup>

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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<sup>8</sup>For further suggested reading, see Administrative Conference of the United States, "Mediation: A Primer for Federal Agencies", undated.

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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.<sup>9</sup> 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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<sup>9</sup>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.

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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*



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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.

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

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- C 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.
  
- C 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.

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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.<sup>10</sup> 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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<sup>10</sup> 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.

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### **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.<sup>11</sup> 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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<sup>11</sup> 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.

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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)<sup>12</sup> 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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<sup>12</sup>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.

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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.<sup>13</sup>

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<sup>13</sup> [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].

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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.

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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)*

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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).

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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,

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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.<sup>14</sup>

*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,<sup>15</sup> 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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<sup>14</sup> 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.

<sup>15</sup> 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.

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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;

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- 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)



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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

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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](mailto: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](http://www.usbr.gov/power/who/pro_dir.htm)

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i. Forest Service

[http://www.fs.fed.us/other\\_fs\\_sites.htm](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.

**Interagency Task Force Report on**  
**Improving Coordination of**  
**ESA Section 7 Consultation with the FERC Licensing Process**

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**

Under Section 7(a)(2) of the Endangered Species Act (ESA), federal agencies are required to consult with the U.S. Fish and Wildlife Service (FWS) and/or the National Marine Fisheries Service (NMFS), as appropriate, to ensure that any federal action is not likely to jeopardize the continued existence of any threatened or endangered species, or adversely modify critical habitat designated for those species. For hydroelectric licensing proceedings under the Federal Power Act (FPA), ESA consultation is often required in connection with the issuance of original and new licenses. ESA consultation may also be required, in some cases, after a license is issued. Throughout this document, the term "Service" refers generically to FWS and/or NMFS.

This document describes procedures to coordinate and integrate the ESA consultation process with the FPA licensing process, and provides a means of addressing post-licensing consideration of ESA issues. These procedures are intended as general guidance for applicants, FERC staff, and resource agency staff who are engaged in either the traditional or alternative licensing process, subject to any modifications that may be required to address the particular circumstances of each proceeding. This document also addresses issues related to the adequacy of information, off-the record communications, economic feasibility, settlement agreements, information from the Service, and scope of effects of the proposed action. The solutions developed to address these issues are contained both in the main body of the document and in the accompanying appendices. In order to provide the reader with an overview of the new procedures, flow charts are also included with the appendices to this Report. This document is not intended as a modification or restatement of the applicable procedural regulations under the FPA and ESA section 7, respectively, and it is assumed that the reader has basic familiarity with these regulations. Therefore, the reader should refer to the applicable regulations for more detail regarding the procedures addressed in this document. This document does not address substantive issues related to FERC's and the Service's or other resource agencies' responsibilities under Sections 4(e), 10(j), and 18 of the FPA; these issues are considered in a later report.

## **Coordinating the ESA Section 7 and FPA Licensing Processes**

*Issues:* If a proposed agency action may affect a listed species or critical habitat, consultation with the Service is required under Section 7 of the ESA. If formal consultation is required, this process culminates with the Service's issuance of a Biological Opinion (BO). In formulating its BO, the Service must use the best scientific and commercial information available. The ESA Section 7 regulations and FPA licensing regulations establish processes which require certain actions to be completed within specific time frames before a BO or new license can be issued. While the licensing process may take several years, Section 7 consultations typically do not require this amount of time. Often, however, the same issues are raised in

both processes and require the same or similar information for resolution. There is a common concern that, at times, the ESA Section 7 consultation and FPA licensing processes have not been well integrated, resulting in inefficiencies, inconsistencies, and delays in the application process. Examples of issues raised include:

- When should informal consultation be initiated?
- When should the Biological Assessment (BA) be prepared? (A BA, prepared by the action agency, or the applicant as FERC's designated non-federal representative, aids the action agency in determining if formal consultation is needed.)
- At what point in the licensing process should the formal consultation process begin and end to ensure the BO: Considers an accurate formulation of the proposed action; is based on the best information available; and, is coordinated with a licensing decision?
- How should the ESA Section 7 process be coordinated and integrated with the FERC NEPA process?
- To what extent can FERC's draft EA or draft EIS be used as a BA to initiate formal consultation?
- Where consultations with both NMFS and FWS are required, to what extent should a joint BO be prepared?
- How should the ESA Section 7 process be coordinated and integrated with the FPA Section 10(j) process?
- What is the role of FERC, and/or the applicant as its designated non-federal representative, in this process?

*Proposed Solutions:*

In Appendix I to this document, FERC and the Service have outlined a means of integrating and coordinating the procedural steps of the FPA licensing process and the ESA Section 7 consultation process. The coordination of the two processes is largely keyed to FERC's traditional licensing process, but Appendix I may be applied to the alternative licensing process as well. In order to expedite both ESA consultation and the overall licensing process, the streamlined process set out in the Appendix aims to ensure that ESA issues are considered early in the process and evaluated alongside other issues.

Specific solutions to the issues posed can be found throughout Appendix I. In summary, they include:

- FERC will designate the license applicant, whenever possible, to act as a non-federal representative for purposes of informal ESA consultation during the FPA pre-application consultation process. FERC will furnish guidance and supervision as needed and will independently review the biological assessment. FERC retains the ultimate responsibility for section 7 compliance during the licensing process.
- Parties are strongly encouraged to discuss, and resolve where possible, ESA issues before a license application is filed.
- Applicants are strongly encouraged to prepare and file a draft biological assessment with the license

application.

- In requesting studies and additional information, resource agencies will consider ESA issues and draft their requests accordingly.
- FERC will make sure that ESA issues are integrated into the scoping process.
- If the effort to consider and integrate ESA issues early in the process is successful, FERC will integrate and coordinate ESA formal consultation with the NEPA and Section 10(j) processes, at least for routine cases. If applied flexibly, this approach may also provide useful guidance for more complex cases. (This approach assumes that the Service and FERC agree that the information base is sufficient to initiate consultation.)
- In such cases, FERC will request initiation of formal consultation when the draft NEPA document is issued. If the Service agrees that the information is sufficient, consultation will proceed expeditiously, and can be completed simultaneously with completion of the Section 10(j) process. The Service will then issue its BO which FERC will include in its final NEPA analysis document.

### **FERC's Rules Regarding Off-the-Record Communications**

*Issues:* FERC's rules prohibit off-the-record communications between FERC and persons outside FERC in contested on-the-record proceedings (those in which there is an opportunity to intervene and an intervenor disputes any material issue). 18 CFR 2201. As a result, FERC has required that, when consultation under Section 7 of the ESA occurs in a contested case, it must be conducted on-the-record. Generally, only FERC and the Service are consulting parties, with the license applicant usually invited to participate. In some cases, an applicant may be designated to act as a non-federal representative for purposes of informal ESA consultation. If informal ESA consultation occurs early, before a license application is filed, the rule prohibiting off-the-record communications does not apply. However, if ESA consultation (whether informal or formal) occurs post-filing and involves FERC staff in the context of a contested proceeding, FERC requires that other parties be given notice of meetings or other substantive discussions of the matters at issue, as well as an opportunity to be present and observe the consultation. Section 7 consultations are usually most effective when done informally, early, and openly with the action agency and applicant, which allows for early resolution of ESA-related problems. Therefore, FERC's need for on-the-record communications may have the effect of deterring informal discussion of ESA issues.

#### *Proposed Solutions:*

FERC recently issued a final rule that would allow for certain limited exceptions to the rule prohibiting off-the-record communications, coupled with a disclosure requirement (64 Federal Register 51222, September 22, 1999). On November 21, 2000, FERC issued its decision on rehearing of the final rule. 93 FERC ¶ 61,181. On rehearing, the Commission declined to include a specific exemption for ESA consultation, and determined that the NEPA exemption regarding off-the-record communications should not be used for ESA consultation that occurs as part of the NEPA process. As a result, post-filing ESA consultation

in contested cases will continue to be conducted on the record. We note, however, that the rule includes an exemption permitting off-the-record consultations in certain circumstances with non-party agencies under the ESA and other statutes.

The Work Group addressed this issue in the previous section on coordination by providing for early, informal consultation before a license application is filed, when an on-the-record proceeding has not yet begun and the rule prohibiting off-the-record communications does not apply.

### **Adequacy of Information**

*Issues:* The ESA requires the Service to base its biological opinion on the best scientific and commercial data available. In the consultation context, the following issues may arise:

- What happens if the Service and FERC disagree about what constitutes the best available data for: (a) the purposes of initiating consultation or (b) providing the basis upon which the Service issues a BO?
- What constitutes the "best scientific and commercial data available" and to what lengths must the action agency go to obtain it?
- If the Service believes that additional data would provide a better information base upon which to formulate its biological opinion, how should the consultation proceed?
- When consultation is completed without additional data, to what extent is there a continuing responsibility to obtain that data?
- How should the consultation time line be coordinated with FERC's time line for the project in the event there is a need to obtain additional data?

### *Proposed Solutions:*

1. If FERC and the Service are able to agree on what information is needed for the purpose of initiating consultation, FERC will provide the necessary information or request it from the license applicant.
2. If the Service and FERC disagree about what constitutes the best scientific and commercial data available for the purpose of initiating consultation, FERC, the Service, and the applicant will schedule a meeting (or teleconference)<sup>1</sup> to discuss what information is available and needed to initiate consultation, and what additional information can be obtained during the consultation to ensure that the Service's biological

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<sup>1</sup> This should be discussed at the NEPA clarification meeting, if held.

opinion is based upon the best scientific and commercial data available.

3. If, after meeting, FERC and the Service still cannot agree on whether the information provided by FERC for the purpose of initiating consultation is adequate, the Service will identify, in writing, the specific information needed to initiate consultation. The Service also may specify what, if any, information can be obtained during the consultation to ensure that the Service's biological opinion is based upon the best scientific and commercial data available. FERC will provide this information or demonstrate in writing why some or all of the information requested is unavailable or is not appropriate. In the latter case, the Service will take a hard look at the information provided to determine whether it is adequate to initiate formal consultation. The Service will inform FERC in writing of its determination and the reasons for it. If FERC and the Service are unable to agree, they will seek to resolve the issue at a higher level within their respective agencies. If the Service still determines that the information is not adequate to initiate consultation, FERC will decide what course of action may be appropriate with respect to the request and the pending license application, and if possible, notify the Service of its decision prior to taking action.

4. If the Service determines that sufficient information has been presented to initiate consultation, but additional data would provide a better information base upon which to formulate a biological opinion, the Service may request an extension of formal consultation and request that FERC obtain the additional data. The Service will provide FERC and the applicant with its reasons for concluding that additional data are needed.

5. If FERC and the Service agree that the additional data are needed, FERC will agree to the extension and obtain, to the extent practicable, the data that can be developed during the extension. An extension greater than 60 days shall require the consent of the applicant. (See 50 CFR 402.14(e))

6. If FERC and the Service are unable to agree on the need for additional information, the Service will proceed with consultation based on the data already provided and otherwise available to the Service. The Service will prepare a biological opinion that: (a) documents what information was not provided and why such information would have been helpful in improving the information base for consultation; and (b) resolves uncertainties in favor of the conservative protection of the listed species – including any uncertainties that arise from differences between the Service's and FERC's views of what constitutes the best scientific and commercial data available.

## **Economic Feasibility**

Issues: To be considered a reasonable and prudent alternative (RPA), ESA regulations require that an action be both economically feasible and capable of avoiding jeopardy and destruction or adverse modification of critical habitat. To assess economic feasibility, information regarding how the proposed modifications will affect costs is needed. FERC provides information on the cost of environmental measures in its environmental documents and compares the cost of project power to the cost of replacement power.

However, FERC's policy is to allow the license applicant to determine whether to accept the license, including conditions requiring any reasonable and prudent alternatives, and all costs associated with such conditions. This approach can make it difficult for the Service to determine whether RPAs are economically feasible.

*Proposed Solutions:*

1. The Service, the Commission, and the applicant will develop information on economic feasibility during informal consultation. If this information is not provided, the Service will inform FERC. If FERC agrees that such information is available or can be obtained during consultation, FERC will request the license applicant to provide this information, and will be responsible for ensuring that the applicant supplies such information to the Service, as appropriate.
2. FERC will include information on the cost of environmental measures to protect listed species and their habitat in its draft NEPA document, consistent with FERC's guidelines for conducting its economic analysis.
3. If the Service prepares a draft biological opinion with reasonable and prudent alternatives that differ from the environmental measures for threatened and endangered species included in FERC's draft NEPA document, FERC will provide the Service with a revised economic analysis of those measures upon request.

## **Settlement Agreements**

*Issues:* Under both the traditional and the alternative licensing process, the Service may be involved in resource issues work groups and subsequent settlement negotiations. The Service may also be involved in settlements after license applications have been filed or after a license has been issued. Often these settlements address endangered species issues or include measures that could affect endangered species (e.g., minimum flow releases). Section 7 consultation, if needed, typically follows development of the settlement.

When parties reach a settlement agreement in a case that includes ESA issues, concerns may arise about how best to accommodate both the settlement process and the need for consultation under Section 7 of the ESA. If the Service participates in settlement negotiations and agrees to a settlement, parties may be concerned about the possibility of Section 7 consultation yielding results that are inconsistent with the settlement agreement. Parties may also be uncertain about the need for consultation on the provisions of the settlement. If a settlement is reached after consultation has been completed, the applicability of that consultation may be in question. These issues are related to the general issue of coordinating ESA consultation and the licensing process, and include both the timing and the substance of consultation in relation to settlement agreements.

*Proposed Solution:*

1. Service T&E staff, as well as Service hydropower staff, will participate in settlement discussions and anticipate the consequences of the settlement on listed or proposed species, on the applicability of any completed consultations, and on the future need for Section 7 consultation. This will help ensure that, to the degree practicable, the protective measures recommended in the settlement process will encompass those measures found necessary during the Section 7 process. However, the Service will reserve its right to develop additional or different measures necessary to meet its responsibilities under Section 7.

### **Post-licensing & ESA Section 7 Consultation**

*Issues:* After a license is issued, FERC and the Service agree that ESA consultation may be triggered by a license amendment or other action requiring FERC approval. However, new species may be listed or new information may become available indicating a potential project effect on listed species or critical habitat. FERC and the resource agencies differ regarding FERC's Section 7 responsibility absent a license amendment or other federal action requiring Commission approval after a license is issued. In FERC's view, a definitive federal action, such as Commission approval of a license amendment, is needed to trigger consultation. In the Service's view, either new listings or new information, together with FERC's continued oversight and discretionary authority over licenses, are sufficient to trigger Section 7 consultation for an ongoing license. In addition, the Service believes that the transfer of a license is a federal process meeting the definition of an "action" in 50 CFR 402.02, whereas FERC regards a license transfer as not meeting this definition, because it involves merely a substitution of licensees without any substantive changes in the license.

*Proposed Solution:*

In Appendix II to this document, FERC and the Service have outlined a means of addressing ESA issues in the post-licensing context. The Appendix provides a procedural framework for identifying issues; consulting among FERC, the applicant and the Service; and determining the need for measures to protect listed species and critical habitat.

### **Information from the Service**

*Issues:* In both licensing and post-licensing proceedings, FERC and licensees often consult with resource agencies with respect to environmental issues. In some cases, the agencies have separate technical staffs that consult exclusively on either hydropower or ESA issues. In addition, there are cases in which ESA and hydropower staffs from both Services are participants. Given the various types of agency staff which might be involved, there is potential for conflicting agency guidance, processes, and understandings to develop.

*Proposed Solution:*

1. As outlined in Appendix I to this document, Service ESA staff, as well as Service hydropower staff, will become involved early in the process (i.e., during pre-filing consultation with prospective license applicants) to ensure that ESA issues are considered together with other issues. During licensing proceedings, Service ESA staff and Service hydropower staff will continue to consult and coordinate with one another to assure a consistent approach to licensing issues. Service participation in post-licensing proceedings and settlement negotiations will be similarly coordinated.

**"Scope of Effects" of Proposed Action**

*Issues:* The regulations on Section 7 consultation list examples of "action" as actions directly or indirectly causing modifications to the land, water, or air. Indirect effects are delayed effects caused by the proposed action which are reasonably certain to occur. The Service and FERC sometimes differ on the "scope of effects" of a proposed action. These differences concern whether the effects in question are reasonably related to the proposed action, and whether there is a "reasonable" likelihood that indirect effects may result from the proposed action.

*Proposed Solutions:*

1. Participants are encouraged to identify the scope of effects early in the FPA process thereby allowing sufficient time to adequately resolve concerns while avoiding delays that may otherwise result.
2. In its cover letter transmitting its NEPA document or Biological Assessment, FERC will explain how it considered direct and indirect effects of the proposed action, any cumulative effects, and the effects of any interrelated or interdependent actions, as well as the basis for its findings.
3. In assessing the adequacy of information provided, the Service will be as specific as possible about what effects or actions it believes FERC should have considered, or did not consider in sufficient detail.



**APPENDIX I**  
**COORDINATING ENDANGERED SPECIES ACT CONSULTATION**  
**WITH THE FERC HYDROPOWER LICENSING PROCESS**

This Appendix outlines a means of streamlining the hydropower licensing process by coordinating and integrating Endangered Species Act (ESA) consultation with the Federal Power Act (FPA) licensing process. Coordination of the two processes is largely keyed to FERC's traditional licensing process, but it may be applied to the alternative process as well. The Appendix is keyed to the existing steps of the FERC licensing process, both before and after the application is filed, and explains how consideration of ESA issues can be integrated and coordinated at various stages of the process.

If a proposed FERC action, such as granting a license, may affect a listed species or designated critical habitat, ESA section 7 consultation is required. This consultation can have two phases: "informal consultation" and "formal consultation." The following streamlined process is specifically designed to use the informal consultation process to identify and avoid potential conflicts with the needs of federally listed species early in the licensing process, as well as to provide an opportunity for early coordination among involved parties. The goal is either to reduce potential effects to listed species and designated critical habitat to the point where adverse effects are not likely, thus eliminating the need to complete formal consultation, or to develop a project design and effects analysis that can undergo formal consultation more efficiently.

For this process to be fully effective, a prospective applicant should engage the Fish and Wildlife Service and/or the National Marine Fisheries Service (henceforth collectively referred to as the "Service"), as appropriate, early in the pre-filing stage, as the project design is developed. At the time an applicant chooses to use this streamlined process, the first step is to request that FERC designate it as a non-Federal representative for purposes of beginning informal consultation with the Service, with FERC retaining the ultimate responsibility for completing formal consultation during the licensing process. If, however, early involvement is not achieved, the following document may still be used in guiding all parties through the ESA consultation process in FPA proceedings.

**Pre-filing Consultation** (i.e., before a license application is filed)

The steps described below are intended to occur at the stages represented by each box on the attached flow chart, labeled "Figure 1, Coordination of FERC Pre-Filing Consultation Process and Endangered Species Consultation."

**BOX 1**

Upon request of the applicant, and if the Federal Energy Regulatory Commission (FERC) determines that the following process is appropriate, FERC will provide the Service and the applicant with a letter

designating the applicant as a non-Federal representative to respond to ESA Section 7 consultation matters on behalf of FERC. This letter will describe the roles and responsibilities of the non-Federal representative, which include conducting studies, developing and supplying information, attending meetings, ensuring that pertinent ESA information is maintained in a project file, developing a draft Biological Assessment (BA), participating in informal consultation with the Service, and keeping FERC apprised of its actions. Additionally, the letter will establish a point of contact within FERC who will guide the non-Federal representative and review and evaluate information prepared by the non-Federal representative, as appropriate.

If appropriate, the Service should establish a FERC Team – including staff who work on the FERC hydropower project and staff who address endangered and threatened species and ESA compliance – to coordinate activities throughout the pre-filing and post-filing licensing process.

The non-Federal representative should contact the Service to schedule a coordination meeting to identify the expectations of each party and coordinate the information needed for the hydro licensing and ESA consultation processes. At this stage (or earlier), the non-Federal representative should request from the Service a list of any listed or proposed species, or designated or proposed critical habitat that may be in the area affected by the proposed project, as well as any candidate species that are likely to become listed during the licensing process. Modifications to this list (delisting/added species, etc.) may be made, as needed, throughout the licensing proceedings.

If a coordination meeting is warranted it should be held as early as possible. During this meeting, participants also will begin identifying information that will be needed for Section 7 consultation which may include, among other things: (a) a description of the project, including location maps and project drawings; (b) a description of listed species that may be affected in the project's action area; (c) information related to the ESA baseline; (d) a list of existing scientific information/studies; (e) identification of needed scientific information/studies; (f) identification of activities that may be interrelated or interdependent with the proposed project; (g) identification of effects of the project on listed and proposed species, including direct and indirect effects of the project, any interrelated or interdependent actions, as well as any cumulative effects; (h) potential conservation actions and operational criteria that can be incorporated into the project to avoid or minimize effects on listed and proposed species; and (i) information on the legal, economic, and technical feasibility of such actions and criteria. Because there are sometimes disagreements about what information is needed, parties are encouraged to initiate a dialogue on these issues early in the consultation process.

## **BOX 1A**

In its FPA initial consultation package [18 CFR 4.38(b)(1) or 16.8(b)(1)], a prospective license applicant (hereafter referred to as the “non-federal representative”) should include, as appropriate, information on threatened, endangered, proposed, and candidate species and any designated, or proposed critical habitat (“T&E species”), potential effects of the project on T&E species, and proposed resource measures for

T&E species. Although not required, applicants are encouraged to include consideration of proposed species and proposed critical habitat, as well as any candidate species that are likely to become listed during the licensing process, together with listed species and designated critical habitat.

### **BOX 1B**

At the joint meeting during the first stage of pre-filing FPA consultation, the non-Federal representative should request the Service, tribes, non-governmental organizations, and others to identify any concerns about studies, project effects, and proposed resource measures related to T&E species.

In addition, applicants are encouraged to coordinate with agencies and other stakeholders involved in other federal and non-federal activities – including FERC licensing activities – within the same watershed.

### **BOX 1C**

After reviewing the non-Federal representative's initial consultation package and after the joint meeting, the Service should provide the non-federal representative with any pertinent information it has on T&E species in the action area, or where to get it. The Service also shall: (a) discuss its understanding of the resource issues related to T&E species; (b) identify potential project effects, including direct, indirect or cumulative effects; (c) recommend studies necessary to comply with the ESA; (d) provide technical assistance on needed study plans, checkpoints, and appropriate methodologies; and (e) provide guidance on ways to improve treatment of those issues in the package as appropriate.

### **BOX 1D**

If the non-Federal representative elects not to conduct studies that were recommended by the Service, it should meet with the Service to attempt to resolve any dispute.

### **BOX 1E**

As the studies are completed, the non-Federal representative should provide and discuss the information obtained by the studies with the Service. FERC also should be supplied with this information and provided the opportunity to participate in any discussions.

### **BOX 1F**

When the non-Federal representative submits its draft license application to the resource agencies and FERC, the non-Federal representative may include its draft Biological Assessment prepared during informal consultation. All study results gathered to date should be included in the draft application and/or draft BA, along with any proposed conservation, protection, or enhancement measures.

## **BOX 1G**

If a draft BA is included with the draft license application, the Service will provide its comments on whether the draft BA satisfies requirements of the ESA and ESA regulations. FERC will provide comments as appropriate. The non-Federal representative is encouraged to consider the Service's and FERC's comments when revising the draft BA.

## **BOX 1H**

If the non-Federal representative holds a meeting to discuss the draft license application, the non-Federal representative will include discussion of ESA issues, as appropriate. If needed, the Service will offer additional informal ESA consultation assistance at this time.

**Post-filing Process** (i.e., after a license application is filed) - see Figure 2, "Coordination of FERC Post-Filing Process and Endangered Species Consultation."

If a draft BA is filed with the license application and FERC and the Service conclude that the draft BA is satisfactory, it ordinarily should not be necessary to address ESA issues in Boxes 2 through 13 below although they will be addressed in subsequent stages of FPA and NEPA analysis. However, if the pre-filing ESA consultation process is not used, or if additional information is needed, Boxes 2 through 13 should be used.

## **BOX 2: APPLICANT FILES APPLICATION WITH FERC**

The license application filed with FERC and served on the agencies may be accompanied by a revised draft Biological Assessment of the preferred alternative, including all relevant components of the applicant's proposal and any associated settlement agreement. This revised draft Biological Assessment will include the results of studies and information gathered during the pre-filing process.

## **BOX 3: TENDERING NOTICE ISSUED (ADDITIONAL STUDIES REQUESTED)**

In response to FERC's tendering notice, the Service may provide FERC formal written comments on the studies completed and may request any additional studies they believe are needed for Section 7 consultation, including an explanation of why the information is presently needed, why the available information does not satisfy that need, and why any additional studies were not requested earlier.

## **BOX 4: ADEQUACY REVIEW COMPLETED**

## **BOX 5: ACCEPTANCE LETTER AND NOTICE ISSUED (Interventions due)**

## **BOX 6: NOTICE OF SCOPING AND SCOPING DOCUMENT 1 ISSUED**

In NEPA Scoping Document 1, FERC will identify what T&E species may be present and what the issues are regarding those species.

**BOX 7: ADDITIONAL INFORMATION REQUEST (AIR) AND RESPONSE TO ADDITIONAL STUDY REQUESTS ISSUED**

In response to any additional information or studies requested by the Service, FERC will review such requests and solicit additional information from the non-federal representative, as appropriate. (See Adequacy of Information section of this Report.) FERC response may be deferred to BOX 10, as appropriate.

**BOX 8: SCOPING MEETING HELD**

At the agency scoping meeting, FERC and the Service will discuss whether the species list is accurate and whether there is sufficient information to analyze project effects on T&E species. FERC and the Service will also discuss any additional information that may be needed and any recommended measures for T&E species. To assist FERC in meeting its ESA responsibilities, the Service will bring to FERC's attention any information it has regarding the scope of effects of the proposed action, including any direct, indirect, and cumulative effects that it believes should be analyzed, as well as any interrelated or interdependent actions that it believes should be considered. (See Adequacy of Information section of this Report.)

**BOX 9: SCOPING COMMENTS DUE**

In response to the FERC scoping notice, the Service will provide comments on, among other topics: (a) information gathered to date and any remaining information and/or additional studies that still may be required to satisfy Section 7 consultation requirements; (b) alternatives to be considered in the biological assessment/evaluation; (c) impacts to be evaluated; (d) any conservation measures to be evaluated, and, (e) the accuracy of species list. In providing these comments, the Service will be as specific as possible, particularly when identifying potential impacts (i.e., direct, indirect or cumulative effects).

**BOX 10: SCOPING DOCUMENT 2 AND ADDITIONAL INFORMATION REQUEST (IF NEEDED)**

FERC will review Service comments and obtain information requested by the Service, as appropriate. (See Adequacy of Information section of this Report.)

In Scoping Document 2, FERC will update the issues section of the document, as appropriate, to reflect any comments on T&E species. If the second Scoping Document and/or the draft BA (if prepared) do not satisfy the Service's concerns regarding Section 7 consultation or information gathering, the Service will provide FERC with a letter clearly, and as specifically as possible, explaining its ESA-related concerns and recommending ways to address these concerns.

## **BOX 11: ADDITIONAL INFORMATION FILED**

The applicant will provide the Service with copies of any additional information filed with FERC pertaining to listed species, as required by 18 C.F.R. Section 4.34(b).

## **BOX 12: READY FOR ENVIRONMENTAL ANALYSIS NOTICE ISSUED**

## **BOX 13: COMMENTS, TERMS, AND CONDITIONS DUE**

In response to FERC's Ready for Environmental Analysis Notice, the Service will provide its recommendations, comments, prescriptions, and terms and conditions pursuant to sections 4(e), 10(a), 10(j), and 18 of the FPA. Section 7 consultation may result in additional or different measures.

## **BOX 13a: NEPA CLARIFICATION MEETING**

If a NEPA clarification meeting is held (as described in the Interagency Task Force NEPA Report), FERC and the Service will use this meeting to discuss the information needed to initiate consultation and the appropriateness of initiating formal ESA consultation at that time. Among other things, FERC and the Service will discuss whether there are any outstanding issues regarding the specific geographic area that may be affected or the scope of effects of the proposed action on listed species and their critical habitat. Such issues could also include, where applicable, direct and indirect effects of the proposed action, cumulative effects, and the effects of any interrelated or independent actions.

## **BOX 14: DEA/DEIS AND NOTICE OF AVAILABILITY OF DEA/DEIS ISSUED; 10(J) LETTER ISSUED (IF NEEDED)**

If formal consultation is appropriate, FERC will request initiation of formal consultation with the Service at the time it issues its notice of availability of the draft EA/EIS. In most cases, FERC will use the draft EA/EIS as its BA, as specified below. If the draft EA/EIS does not include a discussion of ESA issues (e.g., because of a new ESA listing), FERC will prepare a separate Biological Assessment.

Section 7 regulations distinguish the information required to initiate formal consultation under 50 CFR Section 402.14(c) (the "initiation package") from the Biological Assessment. FERC prefers to combine these two items in its draft EA/EIS. Therefore, to assist the Service in evaluating the completeness of FERC's initiation package, FERC will provide a cover letter summarizing its findings and providing specific page references to the chapters, sections, or pages of the draft EA/EIS that contain the information required to initiate formal consultation. The intent of this letter is to streamline the section 7 formal consultation by providing Service staff with the exact location and precise page numbers within the NEPA documents where the specific information required for consultation may be found. It is important that these references provide the Service an accurate location of elements relevant to ESA compliance to help ensure that the Service and Commission can complete formal consultation within the time frames provided by the ESA

regulations. With this in mind, the cover letter should cite pages that contain information regarding the following: (1) the action to be considered (generally, this will be the preferred alternative); (2) the specific area that may be affected by the action; (3) any listed species or critical habitat that may be affected by the action; (4) the manner in which the action may affect listed species or critical habitat, including any direct, indirect, or cumulative effects; (5) relevant reports, including any EA, EIS, or biological assessment (generally, this will be a list, because the reports will either be publicly available or will already be part of the administrative record of the proceeding); and (6) any other relevant available information on the action, affected species, or critical habitat.

If a draft EIS is prepared, FERC will include a separate section on ESA issues in Chapter 3 (“Affected Environment”) and Chapter 4 (“Environmental Consequences”), so that a discrete analysis of ESA issues can be found in those sections. If a draft EA is prepared, FERC will include a separate ESA section in the draft EA.

The Service will review FERC's initiation package and will inform FERC, within 30 days, whether it contains sufficient information to initiate consultation. If the Service determines that sufficient information is available or can be obtained during consultation, FERC and the Service will use the ESA/10(j) integration process (see next section below) for consideration of ESA issues concurrently with the FPA Section 10(j) process. (See attached ESA/Section 10(j) flow chart.) If the Service determines that the Section 7 initiation package is not sufficient to initiate consultation, it will provide FERC with a written explanation, including a description of the specific information lacking and make recommendations regarding the manner by which such information might be obtained and presented. Upon mutual agreement of the adequacy of the initiation package, the Service shall confirm immediate initiation of formal consultation. If FERC and the Service are unable to agree, they will seek to resolve the issue at a higher level within their respective agencies.

BOXES 14 THROUGH 16: “The ESA/10(j) Integration Process” - see Figure 3.

If use of the ESA/10(j) integration process is appropriate, FERC and the Service will coordinate the Section 10(j) process with the ESA formal consultation process. If a Section 10(j) meeting is held, FERC and the Service will discuss ESA issues together with Section 10(j) issues and FERC staff will issue a summary of the meeting. If a Section 10(j) meeting is not held, FERC and the Service will determine whether to hold an ESA consultation meeting. If an extension of time to complete formal ESA consultation is needed, the Service will request an extension as provided by ESA regulations.

The ESA/10(j) integration process is intended for simple cases not requiring the Service to develop a draft Biological Opinion (BO). If FERC's initiation package contains sufficient information to initiate consultation using the ESA/10(j) integration process, but after initiation the Service preliminarily determines that the proposed action is likely to jeopardize listed species or adversely modify critical habitat, the Service will inform FERC (and the applicant and other parties) that it intends to issue a draft jeopardy BO. The draft BO will include proposed reasonable and prudent alternatives, if available, and proposed reasonable and

prudent measures to minimize the impact of any incidental take. The Service will coordinate with FERC and the applicant in developing these RPAs.

If an extension of time to complete formal ESA consultation is needed to develop a draft BO, the Service will request an extension as provided by ESA regulations.

#### **BOX 16**

##### FEA/FEIS AND NOTICE OF AVAILABILITY OF FEA/FEIS ISSUED

FERC will include its analysis of the results of the Service's Biological Opinion in its final EA/EIS.

#### **BOX 17**

##### ORDER ISSUED

FERC will include its analysis and discussion of ESA issues and any necessary license conditions for the protection of listed species and their critical habitat in its license order. Concern has been raised that, at times, changes are made to projects after the license has been issued without sufficient notice to the Service. (Although the Work Group intended to address this issue, together with other issues related to post-licensing, it was unable to do so because of time constraints.)

#### **BOX 18**

(For Post-licensing consideration of ESA issues, see APPENDIX II)



**APPENDIX II**  
**COORDINATING ENDANGERED SPECIES ACT CONSULTATION**  
**WITH POST-LICENSING**

(Boxes Correlate with *Post-Licensing Flow Chart* – see Figure 4)

**POST LICENSING NOTICES (IF NECESSARY)**

**BOX 1**

After a license is issued, new information may surface regarding project effects on listed species or critical habitat. In other instances, new species may be listed or critical habitat may be designated after a project is licensed and operational. FERC may receive information from licensees, non-governmental organizations, or the Service raising concerns about the effects of specific projects on the listed species or critical habitat.

**BOX 2**

FERC, the licensee, and the Service will consult to identify the information that would be needed to determine potential project effects. This consultation could include, among other things, compilation of existing scientific information/studies and/or identification of needed scientific information/studies. FERC and the licensee, with Service input as appropriate, will use this information to prepare a Biological Evaluation (BE) on the effects of the project on the listed species. FERC, the licensee, and the Service will attempt to reach agreement on a time frame for completing consultation, taking into account the potential effects that may be occurring while consultation proceeds.

**BOX 2a**

If the BE indicates that protective measures are not needed because project operations have no effect or are not likely to adversely affect the listed species, then FERC will send a letter and the BE to the Service explaining its reasons for the finding. FERC could also determine that, while there may be changes to existing project operations needed to protect listed species, no changes to the license would be needed to facilitate those changes.<sup>2</sup> The Service will respond to FERC's letter indicating whether or not they agreed with FERC's determination. If FERC and the Service are unable to agree, they will seek to resolve the issue at a higher level within their respective agencies.

**BOX 3**

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<sup>2</sup> In this case, the licensee, with FERC oversight, could continue its collaboration with the Service to facilitate the necessary changes to project operations.

Based on the information developed in BOX 2 , FERC, the licensee, and the Service will continue consultation to develop conservation actions and operational criteria that could be incorporated into the project to avoid and minimize impacts to the listed species.

### **BOX 3a**

If the results of the-consultation indicate that changes in existing project operations or facilities and license conditions are needed to protect listed species, and the licensee agrees with those changes, the licensee would file a non-capacity amendment application with FERC. The application, among other things, should include the licensee's proposed changes to project operations or facilities, as well as-the comments of the Service, any state fish and wildlife agencies, and any Indian Tribes that may be affected by the proposed change.

### **BOX 3b**

If the results of the consultation indicate that changes in existing project operations or facilities and license conditions are needed to protect listed species, but the licensee does not agree with those changes, FERC would initiate a license reopener proceeding based on a specific or standard license reopener article.<sup>3</sup> FERC would issue a public notice of the reopener proceeding, indicating the reason for the reopener, inviting comments from the resource agencies and interveners, and providing notice and opportunity for hearing to the licensee.

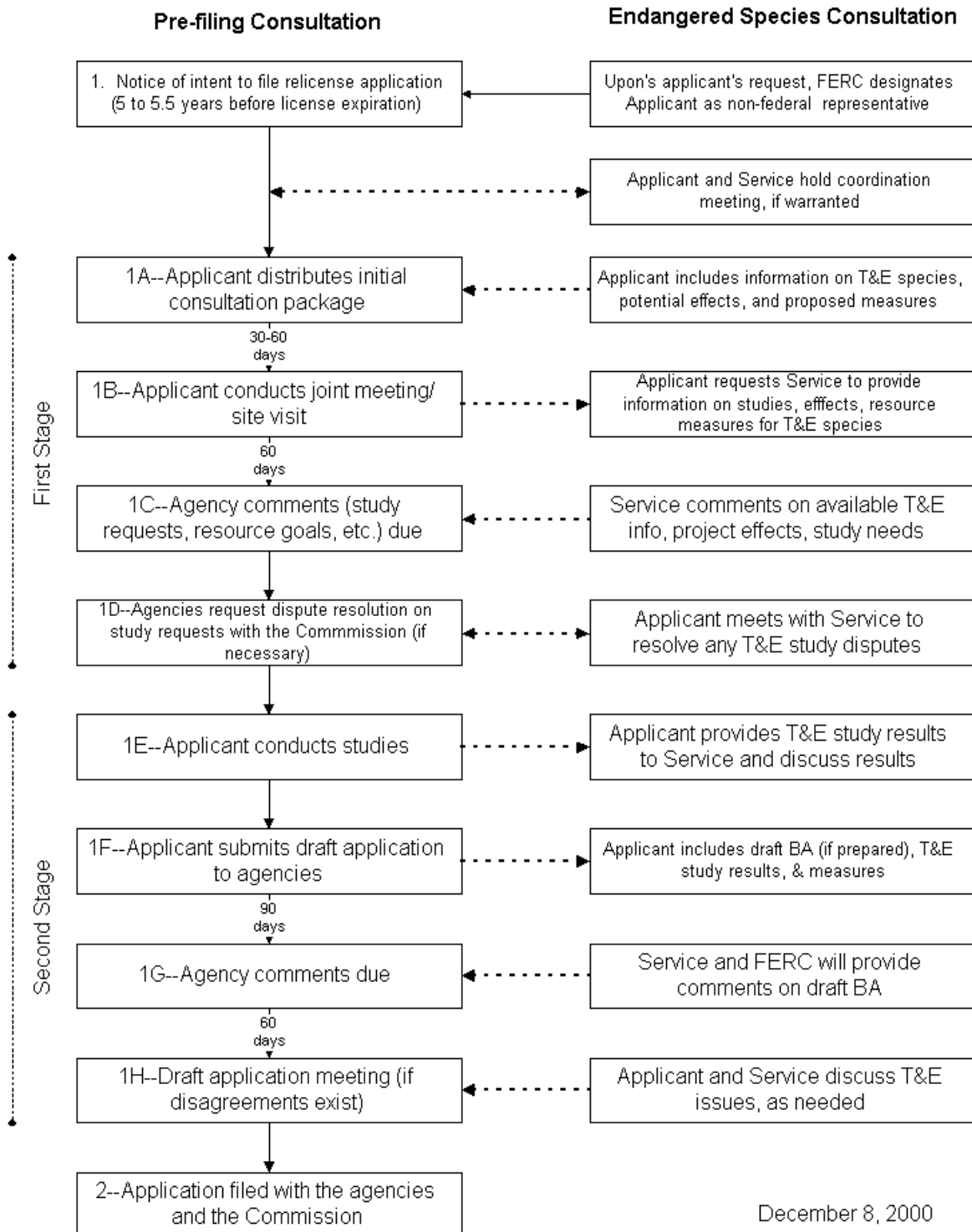
### **BOXES 4 THROUGH 6**

The activities identified in BOX 3a and BOX 3b will require formal consultation under Section 7 of the ESA, unless FERC and the Service agree that the actions are not likely to adversely affect listed species. FERC may designate the licensee to act as its non-federal representative for purposes of informal consultation. FERC will initiate formal consultation under the ESA and, with the exception of the FPA 10(j) process, follow procedures as outlined in Boxes 13a - 17 in the post-filing licensing process.

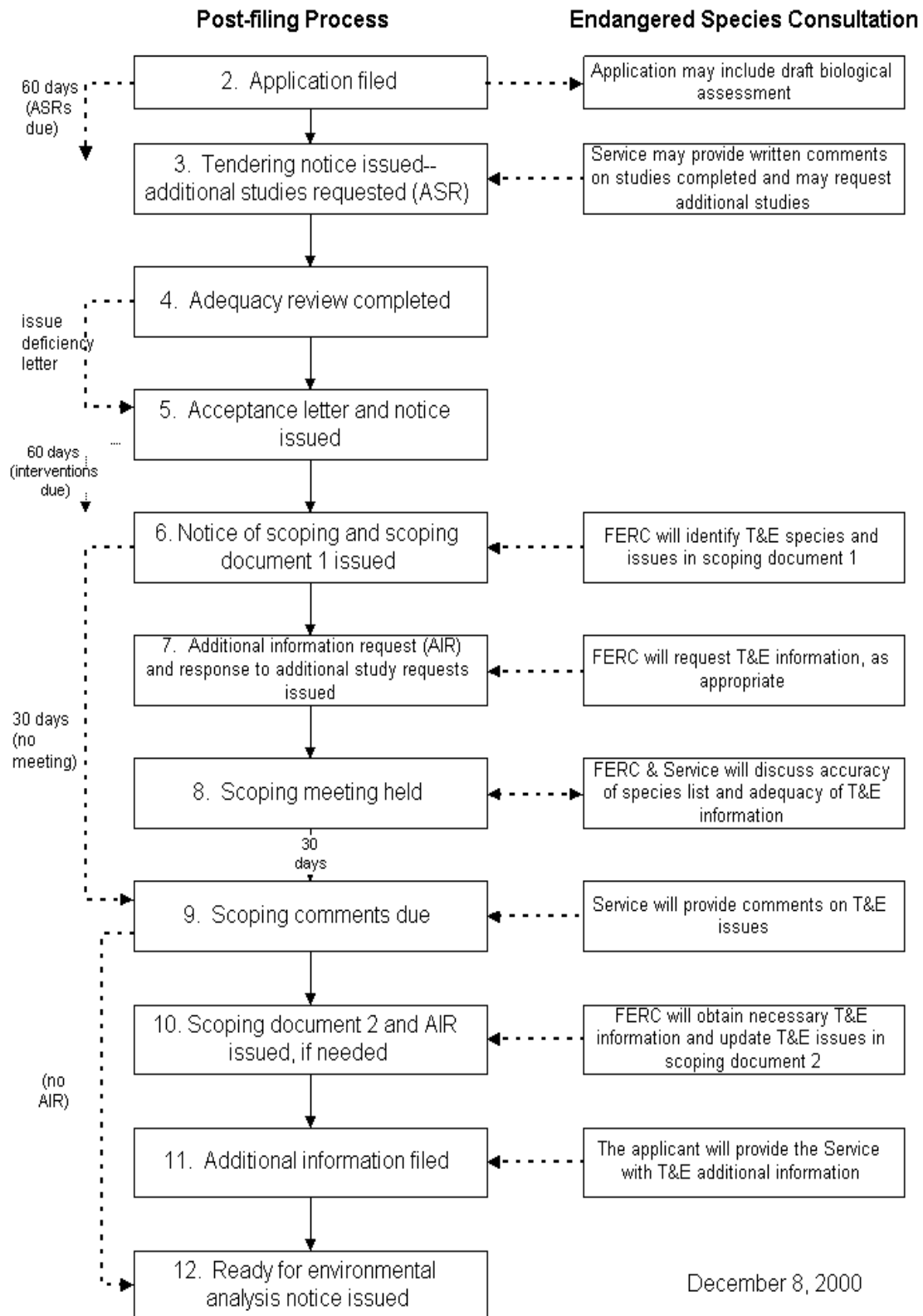
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<sup>3</sup> All licenses issued since October 31, 1975 contain standard reopener articles for fish and wildlife that can be used to address ESA issues. Some older licenses do not contain provisions to reopen the license for the protection of fish and wildlife. In those cases, FERC and the Service should continue consultation with the licensee to facilitate the necessary changes to project operations or facilities.

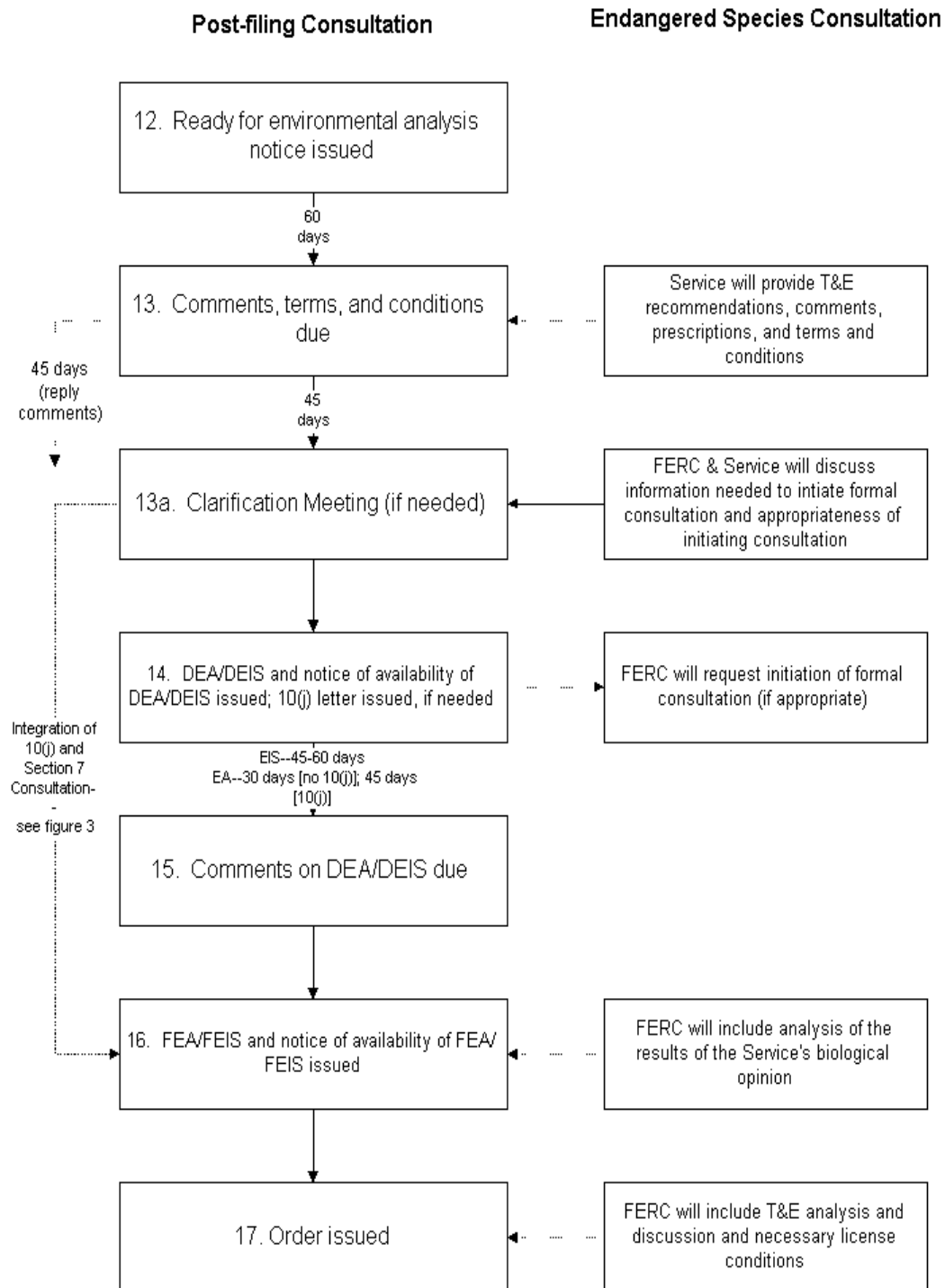
**FIGURE 1. COORDINATION OF FERC PRE-FILING CONSULTATION PROCESS AND ENDANGERED SPECIES CONSULTATION**



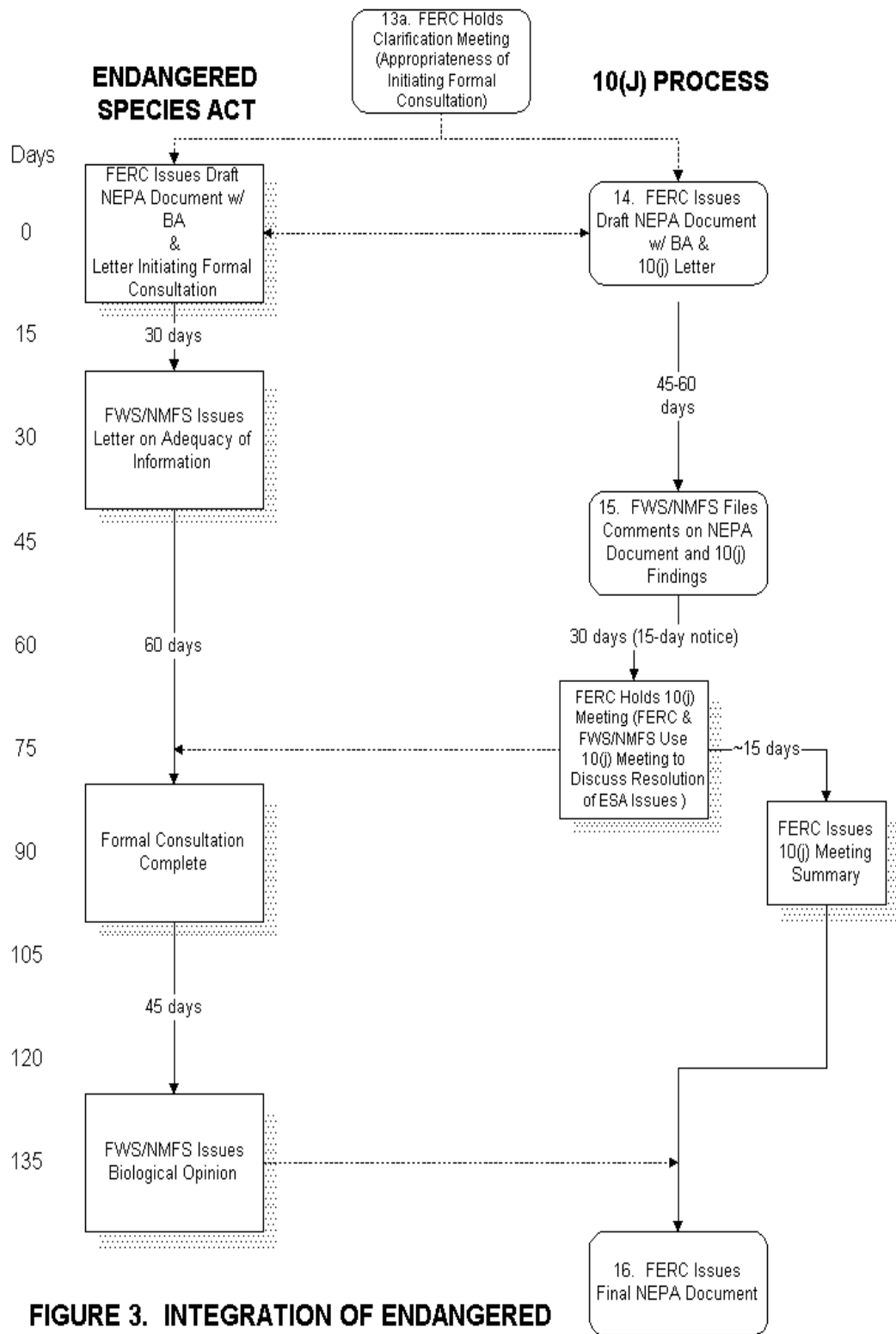
**FIGURE 2. COORDINATION OF FERC POST-FILING PROCESS AND ENDANGERED SPECIES CONSULTATION (PAGE 1 OF 2)**



**FIGURE 2 (cont.). COORDINATION OF FERC POST-FILING PROCESS AND ENDANGERED SPECIES CONSULTATION (PAGE 2 OF 2)**



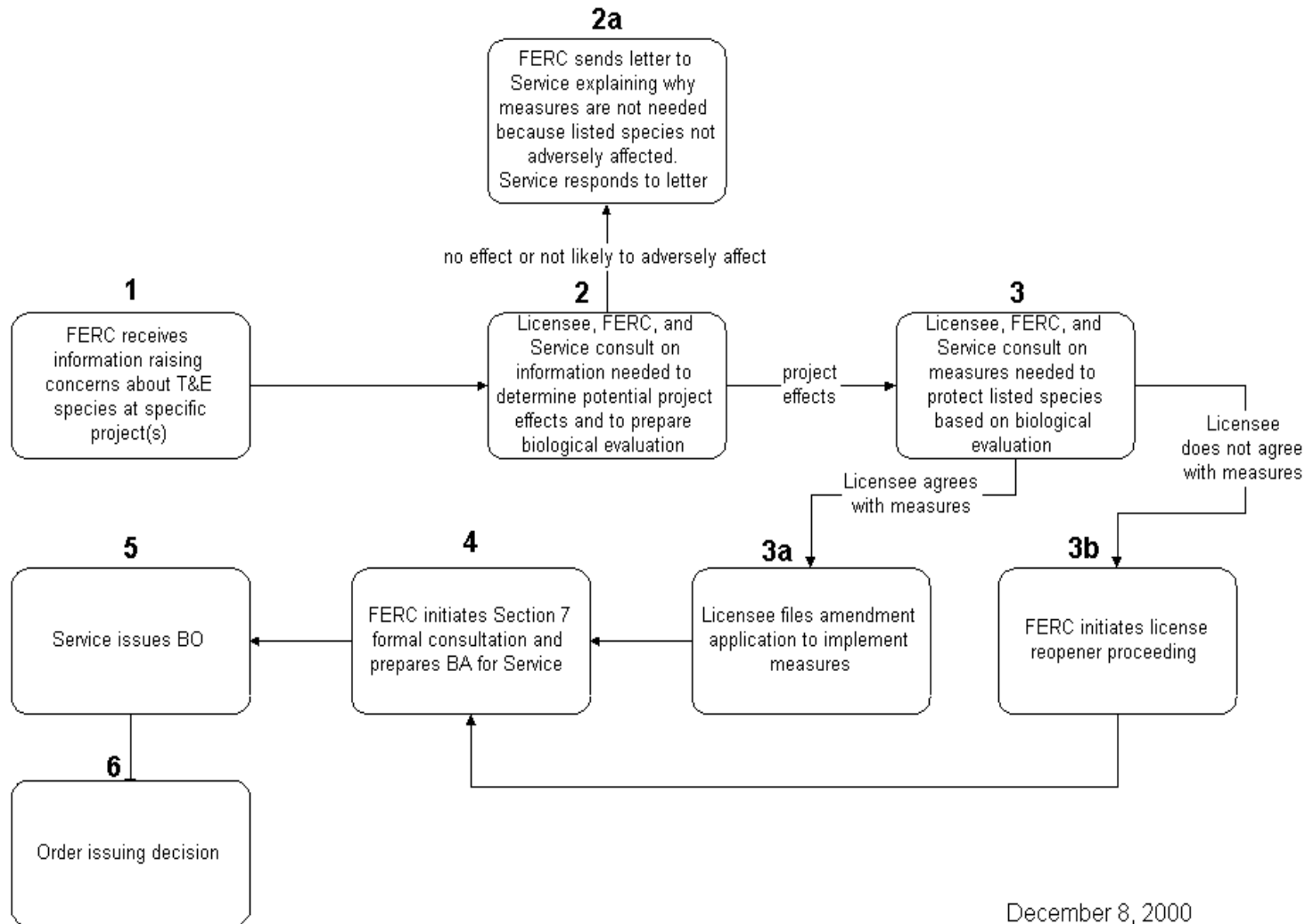
December 8, 2000



**FIGURE 3. INTEGRATION OF ENDANGERED SPECIES CONSULTATION AND THE 10(J) PROCESS (ROUTINE CASE)**

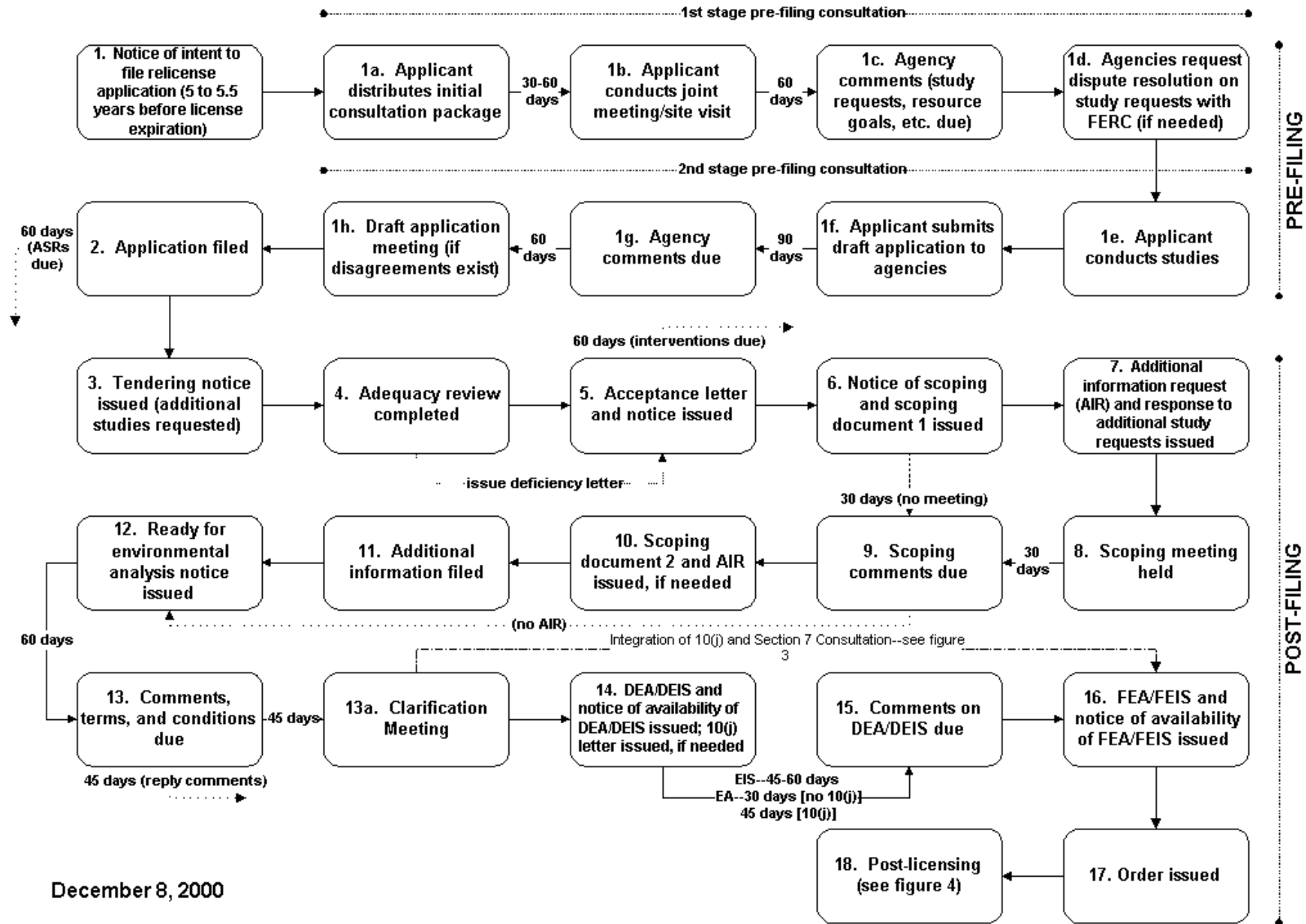
December 8, 2000

**FIGURE 4. POST-LICENSING PROCESS AND ENDANGERED SPECIES CONSULTATION**



December 8, 2000

**FIGURE 5. FERC TRADITIONAL LICENSING PROCESS**





**Interagency Task Force Report on**  
**FERC Noticing Procedures in 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**

This report addresses FERC noticing procedures, the first topic taken up by the Federal Mandates Work Group. FERC issues notices at various points in the licensing proceeding, informing parties and the public of certain filings or FERC actions and inviting responses by specified deadline dates. Consequently, FERC's issuance of notices acts as a trigger point for establishing time frames for public and agency participation in the licensing process. The Work Group has addressed, and sought solutions for issues related to: (1) notice content, (2) timing of notice receipt, and (3) timing of agency response to notices.

The work group has taken up each of these issues in turn and proposes initial solutions that address the issues without lengthening the licensing process. We also sought to avoid recommending solutions that would require FERC to issue new rulemakings. However, we did agree that such rulemaking changes could be considered at a later date if any of the procedural remedies proposed below prove ineffective.

## **Notice Content**

*Issues:* FERC notices sometimes do not indicate whether a project is on federal lands or distinguish between existing and proposed project facilities. Identification of affected federal lands in FERC notices would improve the chances for early involvement in the relicensing process by the land management agencies. In addition, notice headings do not always clearly indicate the nature of the notice. Agency participation would be further facilitated if the notice heading more clearly indicated the type of notice and response expected and if the project description identified which facilities are existing and which are proposed to be constructed.

### *Proposed Solutions:*

1. Notices will be clearly titled to indicate the type of notice being issued and the response expected (e.g., Notice of Application Accepted For Filing and Soliciting Motions to Intervene and Protests).
2. Resource agencies will identify which projects are located on federal lands, including Indian reservations, in FERC's project list of upcoming relicenses.<sup>1</sup>
3. FERC will specify in its notices any federal lands, including Indian reservations, occupied by project works or located within the project boundary.
4. FERC will distinguish between existing and proposed facilities in its notices.

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<sup>1</sup> The Department of the Interior, with help from FERC, has developed a GIS-based mapping system which includes boundary information on FERC projects and federal lands. The Department hopes to make the web-based system available for public use in the future.

## **Timing of Notice Receipt and General Agency Coordination**

*Issue:* One concern with the current noticing procedures is that the resource agency field offices may not receive notices of FERC actions in a timely manner. Delays in receiving notices can serve as an impediment to agency efforts to submit timely responses and to attend meetings. Both FERC's mailing procedures and the resource agencies' internal distribution systems may contribute to the noticing delays. While the majority of applicants provide resource agencies with pre-filing materials in a timely manner, some agencies note that they do not always receive copies of pre-filing materials and applications.

### *Proposed Solutions:*

1. Resource agencies are currently reviewing FERC mailing lists<sup>2/</sup> and providing to FERC, under agency letter, the necessary corrections, deletions, or additions.
2. To maintain accuracy of mailing lists over time and to be sure the appropriate agencies are involved up front in the licensing process, FERC will routinely attach the project mailing list to the Notice of Intent to File Application for New License issued for each project and request review and correction of the list. (The mailing list will be attached to notices mailed out but not to notices published in the Federal Register or newspaper.) Agencies, applicants, and other entities will respond to that request by providing specific additions or deletions to the list, to ensure that the appropriate entities receive notices.
3. FERC will forward any updated mailing lists to applicants.
4. If an agency does not receive pre-filing materials from an applicant in accordance with FERC regulations, the agency will first contact the applicant about the problem. If that does not remedy the situation, the agency will contact FERC. FERC will contact the applicant and inform it of the regulation to ensure that the agency receives future pre-filing materials in a timely manner.
5. In addition to the regular noticing process, FERC's web site is available to quickly obtain notices and service lists.
6. Resource agencies are currently revising their notice distribution systems to ensure that notices are delivered to relevant agency field offices as quickly as possible. Suggested improvements include use of electronic mail as well as other measures to improve their internal notice distribution systems.
7. Each year, the Department of the Interior holds a national meeting of the Department's hydropower relicensing staff to review the FERC relicensing forecast list and coordinate bureau participation in individual relicensing proceedings. Improved coordination will increase the likelihood that all Interior bureaus are aware of upcoming FERC deadlines and respond to requests for comments in a timely manner.

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<sup>2</sup> "Mailing lists" contain all entities with an interest in the project. Thus, anyone may ask to be placed on a project mailing list. By contrast, "service lists" contain those entities who have officially intervened in a project proceeding.

## Notice-specific Timing Issues

Resource agencies want to ensure that they receive notices in a timely manner so they can make use of the full amount of time allotted to respond. Beyond the general issue of receiving notices in a timely manner, there are several timing issues that concern specific notices. Each topic below addresses a different notice in the FERC license application process.

### Tendering Notice

*Issues:* The tendering notice notifies entities that an application has been filed and provides them with an opportunity to request additional studies, if needed. Agencies and others must reply within 60 days *from the date the application is filed*. Delay in distributing this notice is particularly problematic because the 60-day comment period begins with application filing, not notice issuance. Although applicants are required to file a copy of their application with all consulted agencies, not all offices within an agency may receive notice of the filing at this point, nor have the applicants been serving the applications on all interested agencies.

### *Proposed Solutions:*

The solutions below involve efforts to distribute the notice more quickly and to increase agency awareness of application filing due dates well in advance of filing.

1. FERC will issue tendering notices not more than 14 days after applications are filed.
2. Resource agencies will take steps to improve internal distribution of FERC notices.
3. FERC has provided its updated “forecast” list of license expirations through 2010 to the agencies. The list should help alert agencies to upcoming license proceedings and all the attendant deadlines they will need to meet.
4. FERC will indicate the actual deadline (due date) for additional study requests in the tendering notice.

### Scoping Notice and Meetings

*Issues:* Resource agencies and FERC believe that scoping meetings could be more productive if they were adapted to encourage face-to-face discussion of issues, alternatives, and any outstanding study needs. Currently, the scoping meetings are not well attended by resource agencies, in part because agencies do not believe the meetings provide an opportunity for interaction. There is general concern that use of stenographers at scoping meetings can sometimes inhibit an open exchange of information.

*Proposed Solutions:*<sup>3/</sup>

1. FERC and the resource agencies will emphasize to their respective staffs that scoping meetings are important and should be used to exchange information with resource agencies and applicants with the aim of clarifying or resolving issues regarding the NEPA process and study needs, if applicable.
2. Resource agencies will encourage their staffs to attend and actively participate in scoping meetings.
3. FERC will make an effort to hold agency scoping meetings at locations easily accessible to agency staff, and to the extent practicable, coordinate meeting dates.
4. As a general rule, FERC will issue notices announcing scoping meetings at least 30 days before the meeting.
5. FERC will add an "Upcoming Scoping Meetings" section to its web site.
6. Stenographers will continue to be used at scoping meetings. However, FERC will work with them to ensure that their presence is as unobtrusive as possible. At the beginning of a scoping meeting, FERC staff will explain the role of the stenographer at the meeting and answer questions regarding the use of the meeting transcript.

Ready for Environmental Analysis (REA) Notice

*Issues:* The issuance by FERC of the Ready for Environmental Analysis notice is a critical milestone. However, because the period between the filing of the application and the subsequent issuance of the REA varies in duration, due to a variety of factors, resource agencies sometimes feel caught off guard when an REA notice is issued. Also, it is sometimes the case that FERC issues intervention and REA notices concurrently, which puts a strain on agencies which then have to prepare their comments and their motion to intervene at the same time.

*Proposed Solutions:*

1. FERC will include a tentative schedule for REA notice in its initial scoping document and any necessary revisions in scoping document 2.
2. When there is a need for additional information after scoping, FERC will indicate any necessary revision to the REA notice schedule in its additional information request.
3. To the extent possible, FERC will seek to avoid issuing intervention and REA notices concurrently.
4. FERC will consider written requests by resource agencies during the scoping process to host project-specific "status teleconferences" prior to the REA notice. The purpose of the teleconferences would be for FERC, resource agencies, applicants, and other entities to exchange information on a project's schedule as well as provide an opportunity to discuss issues of interest or concern.
5. Whenever possible, resource agencies will continue making every effort to begin preparing their terms and conditions before issuance of the REA notice.

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<sup>3</sup>These recommendations apply only to the agency scoping meeting, not the public scoping meeting typically held in the evening.

## Final NEPA Notice

*Issue:* The resource agencies request that FERC not issue a license order until at least 30 days after EPA publishes notice of the Final EIS (FEIS) in the Federal Register. CEQ regulations generally require this 30-day “waiting period” but permit any agency with an internal appeal procedure, like FERC, to issue a final decision concurrently with publication of the FEIS. In such cases, the FEIS must explain the timing and the public’s right of appeal. In virtually all cases, FERC waits at least 30 days after publication of an FEIS before issuing a license. However, in a few cases, FERC has issued a licensing decision less than 30 days after publication of the FEIS. In these cases, agencies did not regard the notice of appeal procedures in the FEIS as providing sufficiently clear information about the possible timing of the pending license decision, making it difficult to coordinate their review of the FEIS with any possible requests for rehearing.

### *Proposed Solution:*

1. FERC will continue its practice of waiting at least 30 days after the FEIS notice is issued before issuing the license order. If FERC relies on the alternative procedure allowed under CEQ regulations, it will explain more clearly in the FEIS the possible timing of the order and availability of rehearing under FERC regulations.

## **Anatomy of Trackable and Enforceable License Conditions**

Prepared by Working Group 2 - Coordination of State Mandates  
December 8, 2000

### **Background**

Over the next decade about 220 hydropower project licenses are expiring. This group of projects has a combined capacity of about 22,000 megawatts, or 20 percent of the Nation's installed hydropower capacity. Collectively, these hydropower relicensing decisions will shape local communities, ecosystems and economies across the country.

The Federal Energy Regulatory Commission's (Commission) jurisdiction over these projects recognizes the requirements of a number of other participating federal agencies and their respective natural resources laws relevant to hydropower project relicensing. Certain laws impose procedural requirements on the relicensing process and others require authorizations in addition to the Commission's license.

The Interagency Task Force (ITF) to Improve Hydroelectric Relicensing Processes was created in response to this large number of relicensing applications requiring evaluation. The ITF, in turn, created five working groups to develop practical ways to improve the overall relicensing process among participating agencies. The Working Groups are charged to develop issue papers on the following tasks—

1. Coordinate Commission relicensing requirements with federal resource agency activities.
2. Coordinate Commission relicensing requirements with State agencies acting under authorities that give States the lead responsibility.
3. Understand and developing economic analysis methods and procedures for hydropower projects.
4. Facilitate constructive participation in the collaborative process.
5. Provide input into the Commission's *ex parte* rule reform.

This is the first report to be prepared by Working Group 2. This Working Group is charged

with recommending ways to better integrate Clean Water Act (CWA) Section 401 and the Coastal Zone Management Act (CZMA) into the hydropower relicensing process. The challenge of this Working Group is to find new, mutually agreeable ways to successfully achieve the goals of all applicable Federal, State and Tribal requirements.

This report details how CWA Section 401 conditions, CZMA certification, and license articles adopted under the Federal Power Act (FPA) may be drafted to achieve the desired goals. It should be noted that these suggestions are equally applicable for any condition required or recommended to become part of a license. Although beyond the scope of this paper, the Working Group also discussed other issues to better integrate State mandates into the Commission's relicensing process arising from the interaction among the CWA, CZMA, and the FPA. Addressing such issues helps to achieve consistency, improve communications, reduce duplication, and ensure that the best use is made of relevant expertise throughout the process.

### **Clean Water Act and Coastal Zone Management Act Conditions**<sup>1</sup>

Under Section 401(a)(1) of the CWA, applicants for hydropower licenses must obtain certification (or waiver from certification) that the activity will comply with applicable water quality standards from the agency administering Section 401. This agency will be either a State, Tribe, or the U.S. Environmental Protection Agency (collectively referred to in this report as "State"). Denial of certification precludes issuance of a license. A State may issue a certification with conditions necessary to meet water quality standards and other appropriate requirements of State law. These conditions must become conditions of the license; the Commission cannot delete or modify them. The majority of hydroelectric projects licensed by the Commission obtain State certifications that include such conditions.

Under Section 307(c) of the CZMA, applicants for licenses for hydropower projects affecting a State's coastal zone must provide the State and the Commission with a certification that the proposed project complies with the legally-binding policies in a State's coastal zone management program. The State must then notify the applicant and the Commission whether it concurs with or objects to the certification (concurrence being presumed if the State does not provide timely notification). The Commission cannot issue a license in the absence of State concurrence, unless upon appeal by the applicant the Secretary of Commerce overrides the objection. As a result of the certification process, a State may identify in its concurrence specific enforceable policies and management measures that are needed to ensure that the project is consistent with the State's coastal zone program.

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<sup>1</sup>The term "condition" in this document is used to refer to requirements under the CWA, FPA, and CZMA, and not as a legal term of art.



The incorporation of conditions into licenses issued by the Commission, the Commission's obligation to administer and enforce the license, and the State's on-going obligation to assure compliance with the conditions and measures designed to implement enforceable policies under the CWA and CZMA all raise the obvious need for States and the Commission to assure that conditions are drafted in a coordinated and mutually acceptable manner. It will be unnecessarily difficult and time consuming to meet resource objectives if the Commission cannot effectively administer State certification conditions.

For the purposes of this paper it is assumed that the Commission is the enforcement entity for conditions in a project license. The Commission enforces license conditions through scheduled and unscheduled on-site inspections, monitoring, self-reporting requirements, issuance of compliance orders, penalties, and in severe cases license revocation. It should be noted that state agencies are not precluded from using other available avenues of enforcement. Enforcement is critical, since state agencies need to have adequate assurance that a condition will be enforceable or they cannot certify compliance with water quality standards.

### **Desirable Characteristics of a Condition**

A condition that the Commission can effectively administer is one that is "enforceable and trackable." Below we address the characteristics that increase the likelihood that conditions achieve the desired outcome. That is, the States' authority under the CWA and the CZMA, and the Commission's authority under the FPA, are exercised in a coordinated and consistent manner in order to efficiently achieve mutual goals.

Crafting conditions<sup>2</sup> which achieve the desired outcome is a challenge. The thirty to fifty-year licensing period for which the conditions apply necessitates that States and the Commission anticipate that conditions will be interpreted by staff who have no direct knowledge of their derivation. Providing sufficient clarity to achieve the desired outcome over such a long term requires adequate background to explain the intent and provide specific information to ensure clarity. Should additional details be required that cannot be specified in the condition, a plan that is subsequently reviewed and approved by a certifying agency and becomes part of the conditions may help to provide the desired specificity.

In general, conditions should answer the following generic questions: who, what, where, when, why, and how. This requires being as explicit as possible about the goal of the condition, criteria for measuring success, and required monitoring and reporting. Conditions should also be accompanied by

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<sup>2</sup>Conditions are referred to as "articles" by the Commission.

supporting information that explains the need for the condition. Section 313(a) of the FPA requires that conditions of a license issued by the Commission be supported by substantial evidence contained in the record.

### Identify Goals

Conditions and statements regarding consistency with a State's CZMA enforceable policies should clearly state the resource goal being pursued and, when possible, reference a statute or regulation. For example, a condition designed to support water quality characteristics for the propagation of cold water fish should state just that. Similarly, a goal may be to maintain water quality conditions similar to those upstream of the project reservoir. Other goals might relate to recreational boating, swimming, industrial use, and so forth. It also is important to differentiate between construction-related conditions and enforceable policies, such as turbidity monitoring, versus operational conditions and enforceable policies, such as flows for boating.

### Success Criteria

Each condition component should define the criteria by which its successful implementation will be judged. For example, with the goal of cold water fish propagation, a condition could further specify that to maintain conditions conducive to the propagation of cold water fish, a dissolved oxygen (DO) concentration of 7.0 milligrams/liter (mg/l) must be maintained. In this example, maintenance of the 7.0 mg/l DO concentration is the criterion by which the Commission and resource agencies will determine if the condition achieves the resource goal of cold water fish propagation.

In other words, the criteria are the objective measure by which achievement of the resource goal is determined. The condition should reflect whether a criterion is an instantaneous measure (i.e., must be maintained at all times), a daily mean, a minimum or maximum value, or some other statistical measure. If the criterion is a reference to a narrative measure, without numerical component, it is important to identify the method and standard for judging the success of the licensee to meeting the condition. And, it is important to identify when, where, and how compliance will be determined, and which parties are legally authorized to enforce such compliance.

### Monitoring Requirements

For some conditions, it may be appropriate to specify the type of monitoring needed to measure the criterion by which achievement of the goal can be judged. When determining the type of monitoring necessary, care needs to be taken to select the appropriate time and location of monitoring. This may be particularly true if multiple facilities or other actions in the watershed, including operation of the hydropower facility, have a bearing on whether the objective criteria can be met. In such a case, monitoring requirements should be crafted in a manner so as to distinguish between effects associated

with the operation of the hydropower project and effects associated with other actions in the watershed. Conditions should reflect the realities of the existing project. For example, does it make sense to monitor DO concentrations in the project tailrace if the project tailrace is not habitat for cold water fish? Similarly, does it make sense to monitor DO concentrations during the cold weather period when DO concentrations generally are well above the 7.0 mg/l criterion?

Other considerations may include the data collection method (grab samples vs. continuous data sampling), equipment calibration methods, sampling intervals, etc. A condition should also specify what type of monitoring records need to be maintained, and by whom. Furthermore, one may wish to consider a public benefit aspect of installing measuring devices, such as a staff gauge. Such devices may be able to be configured to provide both the public and regulatory agencies with visual information regarding the condition of the water body.

### Reporting Requirements

Conditions also should detail the reporting (filing) requirements, and procedures that are necessary to follow if the goals are not being met. Consideration of reporting requirements should include who should receive the data report(s), what form the data report(s) should take, and when the report(s) should be filed. Further, the condition should explain what actions, including reporting requirements and mitigation, are to be taken if it is determined that the resource goal criterion is not met.

### Checklist

Below is a checklist to help determine if a condition includes the language necessary to enable the Commission to track and enforce the objective(s) of a condition. Note that a condition may require a plan to help further define the objective.

#### Resource Goals

- Does the condition clearly identify the resource goal?
- Does the condition reference the supporting authority?
- Does the condition specify that it relates to construction, operation, or both aspects of the project?

#### Success Criteria

- Does the condition include a criterion by which to judge the implementation, success and/or effectiveness of the condition?

#### Monitoring Requirements

- Is monitoring needed? Will the monitoring provide the information necessary to

- determine the implementation, success, and/or effectiveness of the condition?
- Have the timing, location, data collection methods, equipment calibration methods, and sampling interval been considered?
- Are there public benefit aspects to the monitoring requirements?

#### Reporting Requirements

- Are reporting requirements detailed in the condition? (Who, what, when, where, and how?)
- Does the condition explain actions, including monitoring requirements and mitigation measures, to be taken if resource goal criteria are not met?

### **Examples of Certification Conditions with Desirable Characteristics**

Conditions can be developed in a number of contexts: by States under CWA Section 401 and CZMA Section 307(c)(3), and by the Commission under the FPA. In each case, an effective condition will be one that is written clearly and reflects the characteristics and principles discussed above.

The following are examples of conditions that are, from the Commission's perspective, "enforceable and trackable" while, from the States' perspective, assuring that water quality and coastal resources will be protected against present and future unknowns. These examples address some, but certainly not all, potential certification conditions. The examples do, however, range from the standard condition necessary to protect DO to conditions addressing circumstances where there is insufficient information to determine the best water quality protection measures, or as may be authorized by law when the subject waters are reclassified or applicable water quality requirements are revised. The merits of any condition must, of course, be viewed in the full context of a license or certification proceeding. Therefore, the Working Group has not attempted to reach any conclusions regarding the merits of the conditions.

The examples are provided in the following order: two conditions with an analysis of how they might be made more easily trackable and enforceable, followed by a series of example conditions categorized by type. For each type of condition, a brief explanation is given regarding its usage.

**Example #1a:** Dissolved oxygen and temperature conditions shall be monitored from June through October at three locations: 1) the river channel directly below ABC Dam; 2) the powerhouse penstock and 3) the powerhouse tailrace. Sampling shall be done at no less than weekly intervals. The two samples at the penstock and powerhouse shall be concurrent. Annual data reports shall be filed no later than the end of the

sampling year. A quality assurance/quality control plan shall be filed with the Department<sup>3</sup> within 60 days of issuance of the federal license. The sampling at the dam is deferred until the initiation of bypass minimum flows. The Department may suspend the data collection when there is an adequate data base to determine whether or not mitigatory action is necessary.

Examination of Example #1a reveals that this condition may be subject to differing interpretations, leading to enforcement difficulties. In addition, tracking this condition may be difficult. Thus this condition may not yield the State's desired outcome. First, the condition doesn't identify the resource goal. Second, the condition doesn't identify objective criteria to judge whether future actions are to be taken. Third, while the condition does identify monitoring locations, the description of the locations is vague, as is the reporting requirement. Finally, the condition fails to identify a specific date when monitoring will commence.

The following example, incorporating the desirable characteristics identified, is provided for comparison to the above condition.

**Example #1b:** For the purposes of maintaining a dissolved oxygen (DO) concentration of 7.0 milligrams per liter and temperature conditions consistent with Section 231.23 of the State water quality regulations.<sup>4</sup> DO and temperature shall be monitored from June 1 through October 31 at three locations: 1) the river channel 100 hundred feet downstream of ABC Dam; 2) within the powerhouse penstock and 3) the powerhouse tailrace no more than 10 feet from the turbine draft tube. Sampling shall be done at no less than weekly intervals between 4:00 and 6:00 am. The samples within the penstock and the powerhouse tailrace shall be concurrent. Annual data reports shall be filed with the Department and Commission no later than the end of the sampling year (December 31). A quality assurance/quality control plan shall be filed with the Department and the Commission within 60 days of issuance of the federal license. The sampling at location 3 is deferred until the initiation of bypass minimum flows. The Department will suspend the data collection when there is an adequate data base to determine whether or not future action is necessary, or 5 years after issuance of the Federal license whichever is first.

The condition author may give consideration to incorporate the minimum elements of the quality assurance and quality control plan. In addition, any future action contemplated should be defined.

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<sup>3</sup>Use of "Department" is in the generic. In real life application the specific name of the water quality department with jurisdiction should be identified

<sup>4</sup>The applicable section of a State's water quality regulations should be incorporated into the certification either in the condition itself or in the preamble as assumed here.

**Example #2a:** Within 90 days of the issuance of this certification, the applicant shall submit a plan for proper disposal of debris associated with project operation, including trashrack debris, for written approval by the Department. The plan shall include information on the design and materials used for flashboard construction at ABC Dam and the potential for the discharge of flashboards downstream.

This example requires the project applicant to file a plan with the State within 90 days of the issuance of the water quality certification. While such a requirement may be enforceable through other State means, the Commission cannot enforce this condition until it becomes part of a license. Therefore the condition author should tie the condition to issuance of a Commission license for the project. Other problems include: no indication of the type of debris covered by the condition; no indication of the type of information on the design or materials for the flashboards; no indication of the resource goal to be achieved; and, the criteria by which such achievement can be assessed.

Below Example #2b has been rewritten to address some of these shortcomings.

**Example #2B:** Within 90 days of the issuance of a license, the applicant shall file a plan for proper disposal of debris associated with project operation, including trashrack debris, litter, and trash for written approval by the Department. The department approved plan shall be filed with the Commission. The purpose of the plan is to protect downstream navigation and aesthetic quality. Proper disposal is defined as disposal in accordance with (State statute or regulation) § 548.1 through 548.9 of the State waste disposal regulations, as described in this certification. The plan shall include information on the design and materials (including flashboard composition, failure characteristics, and attachment method) used for flashboard construction at ABC Dam and the potential for the discharge of flashboards downstream, including the stage at which failure is expected to occur and the downstream fate of the failed flashboards. Upon approval of the plan by the Department and the Commission the licensee shall implement the approved plan.

### **Commission License Articles/CZMA and CWA Certification Conditions**

The Commission and States include many types of environmental resource conditions in licenses and certifications, respectively, to address the changing environment or other unknowns. Below is a brief discussion of the types of conditions used.<sup>5</sup>

#### **Standard Articles/Conditions:**

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<sup>5</sup> The application of adaptive management and some examples which require future review and approval may not be applicable or legally allowed under the CZMA.

All hydropower licenses issued by the Federal Energy Regulatory Commission contain standard articles which have been written by Commission staff.<sup>6</sup> The standard articles provide generic requirements that may be applied based on effects known to occur in association with particular types of projects or project attributes. A given standard article does not change from license to license.

The ordering paragraphs of the license identify which set of standard articles, also known as "L" form articles, are applicable to that license. There are 18 different sets of standard articles with anywhere from 15 to 37 individual articles in each set based on project size and location, and whether the project is constructed or un-constructed.

Certifications generally contain standard conditions addressing issues such as:

*Construction and Operation:* This type of condition requires the project to be constructed and operated as described in the water quality certification. Usually such a description comes from the license applicant and is designed to ensure that the project is constructed and operated as described in the application. Additional language may be added to ensure that if changes must be made after license issuance the certifying agency is given opportunity to review and approve such changes prior to their implementation.

*Maintenance and Repair:* This type of condition ensures that the licensee submit to the certifying agency for review any plans which may require alteration of normal reservoir pool levels or stream flow, or maintenance or repair that requires earth disturbing activities and may include dredging or silt removal operations, the licensee shall consult with the Department for review and approval. Consideration should also be made for the licensee take actions in emergency situations, such as flooding, which may affect public safety or the safe operation of the project.

*Reservation of Authority:* Provision such as this indicates that, when authorized by law, the terms and conditions of certification may be amended and additional terms or conditions added after notice and opportunity for hearing.

*Compliance Inspection by Department:* This type of condition allows the certifying agency to inspect the project in order to monitor the terms of the certification.

*Posting of Certification:* Such a condition requires that a copy of the certification be prominently posted within specific project facilities.

*Approval of Project Changes:* This type of condition notifies the licensee that any change

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<sup>6</sup>18 CFR Part 2, General Policy and Interpretations, Section 2.9.

to the project that would have a significant or material effect on the findings, conclusions, or conditions of the certification must be submitted to the certifying agency for written approval prior to implementation.

*Public Access:* This type of condition requires the licensee to allow public access to the project area for utilization of public resources, subject to reasonable safety and liability limitations, and may address issues such as posting of access points. Consideration should be made to allow the licensee to deny access to project areas that would jeopardize public safety or the safe operation of the project.

### Project-Specific or Special License Articles and Conditions

The Commission always includes project-specific requirements in a license, which are considered necessary to ensure the project is best adapted for the basin where it is located. These special articles are based on the record developed during the relicensing process, recommendations and mandatory conditions from resource agencies, the licensee's proposed measures, and Commission staff's independent evaluation. The articles normally require the licensee to take specific actions including: water quality monitoring, providing minimum flows, installation of special project facilities, and adjusting the mode of operation. CWA and CZMA certifications also commonly include project-specific conditions. These articles/conditions typically describe the objective to be achieved and a general approach for achieving that objective.

#### Example 1: Project Operation

The project shall be managed as a run-of-river operation. A "run of river operation" is defined as a hydroelectric project that operates without the use of reservoir storage. Such an operation maintains flows below the tailrace equivalent to the total inflow to the project on an instantaneous basis. Normally, the headpond elevation is stable.

### Plan Articles

There are many situations that call for articles/conditions specific to a particular project, and which require review and approval after the license or water quality certification has been issued. Examples of each type of condition are provided below. Plans may be helpful when it is not always possible to determine precisely how to implement resource goals, compliance criteria, and reporting requirements. For example, it may be established that a particular flow rate in a project bypass is required to meet a particular resource goal. However, the most feasible method of flow release (such as through a gate, minimum flow turbine, or valve) has not been determined. In such a case, the licensee may be required to develop a flow release plan to achieve the desired flow rate that supports the resource goal.



A desirable plan should include a schedule which allows sufficient time for consultation with appropriate parties. A plan may also include a requirement for addressing how comments and recommendations received during the development of the plan are incorporated into the final plan, which will be submitted to the Commission and/or the state certification agency. And, of course, it is important to include a requirement that the approved plan be implemented and made subject to a reasonable monitoring program.

To be effective, a plan should include many elements: (1) the specific objective(s) of the plan, (2) general guidance on how the plan's objectives are to be achieved, (3) detailed schedule for specific actions, (4) provisions for adequate time for consulted entities to review and comment on the draft plan, (5) requirements that comments received should be included with the plan, along with a description of how the plan was modified (if any) to incorporate comments, (6) names of individuals, if any, who may approve extensions of time for filing the plan or implementing the required measures, (7) names of individuals who may approve, or modify and approve, the proposed plan, and (8) requirements that the licensee implement the measures proposed in the plan according to the approved schedule.

The details for achieving the objectives of special articles or conditions are often defined by several types of plans which the licensee may be required to file for approval as follows.

**Single Plans:** Often the project-specific article or condition requires the licensee to develop, in consultation with resource agencies, a detailed plan that provides site-specific details and a schedule for implementing the actions required to achieve the objectives described in the special article or condition. The detailed plan and the schedule for its implementation is approved, or modified and approved, by the Commission and/or certifying agency and becomes part of the license.

#### Example 1. Water Quality Monitoring Plan.

At least 90 days before the start of project operation, the licensee shall file with the [FERC and/or Department] for approval, a plan to monitor DO levels, in the [River], downstream of the project reservoir.

The licensee shall prepare the plan after consulting with the [identify appropriate agencies and interested entities that need to be consulted]. The licensee shall include with the plan documentation of consultation and copies of comments and recommendations on the completed plan after it has been prepared and provided to the agencies, and specific descriptions of how the agencies' comments are accommodated by the plan. The licensee shall allow a minimum of 30 days for the agencies to comment and to make recommendations prior to filing the plan with the Department and FERC. If the licensee does not adopt a recommendation, the filing shall include the licensee's reasons, based on project-specific information.

The plan shall include a schedule for submitting the monitoring results to the Department and FERC and the other consulted agencies and recommendations on needed measures to ensure maintenance of the State DO standard as measured at [location] located 0.25 mile downstream from the of the project reservoir. The Department reserves the right to require changes to the plan. Project operation shall not begin until the licensee and FERC are notified by the Department that the plan is approved. Upon Department approval, the licensee shall implement the plan, including any changes required by the Department.

If the results of monitoring indicate that changes in project structures or operation are necessary to ensure maintenance of State DO standards, the Department may direct the licensee to modify project structures or operation. The licensee shall, if necessary, obtain timely approval from other agencies to comply with the Department's directive.

#### Example 2. Downstream Fish Passage.

In order to prevent the entrainment of downstream migrating fish, the licensee shall, within 180 days of license issuance, submit a plan for the design and construction of downstream fish passage facilities at [project], including estimated design flows necessary for proper operation, to the Department of Fish and Wildlife for review. Any design submitted shall exclude fish with a minimum total length of 8 inches and shall include sufficient flow to provide a minimum depth of 12 inches in depth in any necessary conveyance structure and a minimum depth of 5 feet in any associated plunge pool. The design shall be capable of operating 24 hours per day between April 1 and May.

The plan shall include an implementation/construction schedule. The U.S. Fish and Wildlife Service and the Department of Fish and Wildlife shall be consulted during plan development. The plan shall include an erosion control and water management plan designed to assure compliance with water quality standards during construction.

The Department of Fish and Wildlife may suspend the operation of downstream passage facilities at any time based on its fishery management needs by sending written notice to the applicant and to FERC for its approval.

#### Example 3. Upstream Fish Passage.

In order provide for the passage of [fish species], the licensee shall, within 180 days of license issuance, submit a plan for the construction and operation of a Denil fishway at [project], including estimated design flows necessary for the passage of 20,000 fish between March 15 and May 15, and the passage of 15,000 fish between October 1 and November 15. Upstream fish passage facilities shall be installed so as to be operational within 18 months of final approval.

The plan shall include an implementation/construction schedule. The U.S. Fish and Wildlife Service and the Department of Fish and Wildlife shall be consulted during plan development. The plan shall include an erosion control and water management plan designed to assure compliance with water quality standards during construction.

The Department of Fish and Wildlife may suspend the operation of downstream passage facilities at any time based on its fishery management needs by sending written notice to the applicant and to FERC for its approval.

#### Example 4. Monitoring Plan for Reservoir and Flow Management.

The applicant shall file with the Department, for review and approval, within one year of the issuance of the federal license, whichever is sooner, a plan for monitoring instantaneous flow releases at the project, both below dams and below tailraces, and reservoir levels and inflows. Following approval of the monitoring plan by the Department, the licensee shall file the approved plan with the FERC for its approval. Upon Department and FERC approval the licensee shall then measure instantaneous flows and reservoir levels in accordance with the approved plan and provide records of such measurements on a regular basis as per specifications of the Department and the FERC. Upon receiving a written request from the licensee, the Department may waive this requirement, all or in part, for monitoring at this project provided the applicant satisfactorily demonstrates that the project will at all times be managed consistent with the requirements other requirements of this certification. If this requirement is waived, or waived in part, the licensee shall file the revised requirement with FERC for its approval.

Management Plan for [Project name] Gate Operation. The applicant shall develop a management plan to govern operation of the gates at [project name] to meet the goals of the water level management requirements set forth in Condition [#], and shall file that plan with the Department within 120 days of the issuance of the Federal license.

Implementation shall begin no later than the first loon nesting season following the approval of the Department and the FERC. The gates shall be automated as soon as practicable, but no later than 12 months following the approval of the plan by the Department and the FERC. In addition to the final automated operation, the plan shall address manual operation during the period prior to approval of the plan. The management plan shall include performance expectations for the equipment to be used and operating method proposed, both for interim and final operation; the plan shall include a calculation brief to support the projected performance. At its discretion, the applicant may elect to file the long-term plan separate from the interim plan, in which case the long-term plan will be due on or before January 1 following issuance of the license.

The stage data recorder at [project name] shall transmit real-time data to [location] to enable the operators to monitor water levels and perform gate adjustments as necessary for the protection of loon nesting, consistent with the provisions of Condition [#] above. Within 10 days of each two-week period during the month of April and May, the applicant shall file reports of [project's] hourly stages and outflows with the Department. Where the reservoir conditions are inconsistent with the goals of Condition [#], the report shall indicate the reason. Condition [#] allows the 100 cfs up-ramping requirements to be suspended as necessary to lower the reservoir to the loon nesting target elevation by May 1. As this is undesirable from a downstream resources perspective, the management plan shall be designed to minimize or eliminate the need to exceed the up-ramping requirement while achieving a high probability of attaining the target elevation.

Example 5: Rare, sensitive, protected species mitigation plans.

**Tubercled Orchid.** The applicant shall file with the Department for prior review and approval within 90 days of issuance of the license, a plan of mitigation (three copies) for the detrimental effect of increased flows in [project] bypass on the state threatened tubercled orchid (*Platanthera flava*). The applicant shall consult with the Department of Fish and Wildlife during the development and implementation of this plan, which shall commence with the first summer following final approval and shall include, but not be limited to the following steps:

**FIRST SUMMER**

1. Inventory the [project] bypass above [state] Route 9 in between June 15 and July 15 and during peak flowering periods when it is most visible.
2. Locate the tubercled orchid plants throughout the [project] and [project] bypass reaches in July when it is flowering and flag, if necessary, to facilitate re-identification in the fall.

**FIRST AUTUMN**

3. Conduct flow releases at the [project] bypass (70 cfs) and the [project] bypass (35 cfs) after September 15 and locate and mark all inundated individuals of the tubercled orchid. At the same time potential new habitat, based on the habitat characteristics where existing individuals were found during the first summer period identified above, will be identified and marked along the new edge of bank.
4. Create favorable habitat for the orchid in the areas previously identified along the new edge of bank by removing alders and any other reasonable means as required.
5. Collect seeds from the inundated orchids and sow along the new edge of bank using the best means available to insure germination.
6. Attempt to move all the orchids that will be inundated or harmed by whatever reasonable means available such as moving entire tussocks if all the plants it contains will be inundated. If individual plants are moved, as much soil as possible should be included, and the transplants should be covered with staked chicken wire to inhibit predation.

**FIRST SPRING**

10. Prior to mid-May and in coordination with the certifying agency, raise water levels up to the required minimum flows in the two bypasses.
11. Monitor the orchid populations on a yearly basis between June 15 and July 15 for the next five years and report the results to the certifying agency by October 1 of each.

### Example 6. Recreation Plan.

The Licensee shall implement the Recreation Plan included on pages E-32 through E-64 of its license application filed with the Commission on January 1, 1999. The Licensee shall file with the Commission, for approval, at least 60 days prior to the start of any recreational facility construction, final design plans and details, which include the following:

- (1) final design drawings of all recreation enhancements;
- (2) a description of signs to be used to identify the public access areas;
- (3) drawings and specifications for each recreational enhancement;
- (4) an erosion control plan to address existing erosion at the project and measures to reduce erosion during recreation facility improvements.

The Licensee shall prepare the final design plans and details after consultation with the Department of Forests and Parks, Recreation Section, the Department of Environmental Resources, the Natural Resources Conservation Service, the National Park Service, and the U.S. Fish and Wildlife Service. The Licensee shall include with the plans documentation of consultation, copies of comments and recommendations on the completed plan after it has been prepared and provided to the resource agencies listed above, and specific descriptions of how the agencies' comments and recommendations are accommodated by the plan. The Licensee shall allow 30 days for the agencies to comment and make recommendations before filing the plan with the Commission. If the Licensee does not adopt a recommendation, the filing shall include the Licensee's reasons, based on project-specific information.

The Commission reserves the right to require changes to the plan. No land-disturbing activities shall begin at the project until the Licensee is notified by the Commission that the plan is approved. Upon Commission approval, the Licensee shall implement the plan, including any changes required by the Commission. Within 90 days of completion of construction of the approved recreational facilities authorized by this license, the Licensee shall file for approval, revised Exhibit G, to show those recreational facilities as-built, in relation to the project features.

**Iterative Plans:** Where conditions at the time of relicensing are changing so quickly that development of a long-term plan is infeasible, the licensee may be required by a special article to file a series of plans (every 5 or 10 years) over the course of the license, that revises the resource measure based on updated information, current resource needs, or recommendations from consulted agencies. The objectives proposed in the original license are used to determine the adequacy of the measures proposed in each plan. When each plan is filed with the Commission it is approved, or modified and approved, and becomes part of the license. A requirement for iterative review can also help meet States' need for ongoing review of certain operations or activities.

### Example 1: Erosion Control Plan.

At least 90 days prior to initiation of any land disturbing activities, the licensee shall file with the Department an erosion control plan that describes the measures to be taken to control erosion and minimize the transport of sediment during construction and operation of project facilities. The plan must fully describe how construction and operation will be conducted so as to avoid erosion-related violations of State Laws 123.45 and 678.90. The plan, and schedule for its implementation, must be approved by the Department prior to initiation of any land disturbing activities. Implementation of this plan shall be based on actual-site geological, soil, and groundwater conditions and on the project design, and shall include, at a minimum, the following.

- (1) a description of the actual geological, soil, and groundwater site conditions;
- (2) final preventive measures based on the licensee's draft erosion and sediment control plan;
- (3) detailed descriptions, functional design drawings, and specific topographic locations of all control measures, including rip-rap placement, stream set back and stabilization of spoil material, and class of rock to be used;
- (4) a revegetation plan to include a complete prescription for revegetating all disturbed areas including: (a) locations of treatment areas; (b) plant species and methods to be used; (c) planting densities; (d) fertilizer formulations; (e) seed test results; (f) application rates; and (g) locations and density of willow plantings; and
- (5) a specific implementation schedule and details for monitoring, reporting and maintenance programs.

For the term of the license, every 5 years from the anniversary date of the initial plan, the erosion control plan must be revised and filed with the Department. The revised plans shall take into account existing project conditions, describe any changed land use, and describe the measures to be taken to control erosion and minimize sediment transport during specified activities. All erosion control plans are to be prepared in consultation with the Department and must be approved by the Department and FERC.

**Adaptive Management Plans:** -This type of plan provides the licensee and the resource agencies with discretionary authority to make real-time decisions regarding resource measures. A special article or certification condition may authorize the licensee to work cooperatively with certain resource agencies to implement a pre-approved range of resource protection measures. An example of this would be when and how releases are made from a project reservoir to protect and maintain habitat for an anadromous fishery, or to provide for recreational boating activity. Under this scenario, the Commission may define the total volume of water to be released, and rely on the licensee and the resource agencies to determine how best to release that water. The licensee and resource agencies work consensually to select and implement the best timing of reservoir releases to optimize use of flows. This process is feasible when:

- (1) the resource protection objectives can be clearly defined and are generally agreed to by the participants,
- (2) the licensee and resource agencies have established a record of communication and cooperation and are agreeable to this process, and

- (3) all entities necessary to implement the pre-approved resource protection measures are willing to participate.

The licensee and resource agencies have discretionary authority to take appropriate action to meet the quickly changing resource needs. The Commission is kept informed of these actions, however, as long as the actions are consensual and within the range initially contemplated, the licensee and resource agencies have considerable latitude to best utilize the available measures.

#### License Amendment

Modification of project facilities or operations authorized by the license requires a license amendment. The licensee may request to amend the license at any time. A license amendment may be as complex as the original licensing action or a simple administrative clarification. It should be noted that, unless provided for in the license, even modifications for which the licensee has the concurrence or approval of the resource agencies must receive Commission approval prior to implementation. License amendments may have utility for States if the State and applicant can agree on desired improvements as part of the amendment. Depending on the nature of the amendment, subsequent State certification and concurrence may be required.

#### License Reopeners

Some standard articles in a license authorize the Commission, on its own initiative, or upon the request of an entity other than the licensee, to determine if changes in the project license are necessary and appropriate. If, after notice and opportunity for hearing, the Commission determines that changes in project facilities or operation are necessary, the Commission may amend the license to require the licensee to implement these changes. These standard articles are very specific about when and under what circumstances a license may be reopened. The Commission's authority to reopen a license varies from license to license and is limited by the provisions of the specific license. License reopeners also may be used in certification conditions to put the licensee on notice that one of the mechanisms available to a State to ensure compliance with state water quality standards is to ask the Commission, as a matter of its authority, to reopen the license.

#### Reservation of Authority under the CWA<sup>7</sup>

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<sup>7</sup> Workgroup members disagree on what to call the category of condition that allows for changes to project management requirements in response to revisions of water quality standards that occur after issuance of a license. Some members believe that these conditions represent another form of adaptive management, while others define them as reservations of authority, or think they are most appropriately accomplished via a license reopener.

While a water quality certification is being prepared, it may be evident that additional information and decisions will be required by the State after issuance of the certification or the license. This situation can arise for a number of reasons, including: an inability to determine the most effective, least-cost mitigation required; a pending change in the status of beneficial uses; a pending change in water quality standards; or a pending change in load allocations due to development of a Total Maximum Daily Load (TMDL) for the basin.

In the example below, a TMDL based on basin-wide temperature modeling was being developed, but its completion was scheduled for a year after the deadline for issuing a 401 decision. An adaptive management condition was needed to implement any appropriate thermal load reductions identified by the TMDL.

Example: TMDL requirements.

The applicant may be required to release bypass flows in addition to those required in [previous conditions to this certification] to meet water quality standards in accordance with the following stipulations.

When a TMDL for temperature in the portion of the [River] affected by the project is approved and adopted, the Department will determine if the required thermal reductions from the project are adequate to comply with the TMDL. If the Department determines that the thermal reductions are not adequate to comply with the TMDL, the Department may require the applicant to release additional flows in the bypass reach subject to the following limitations:

- 1) The Department may require increased flows during the period July 1 through October 15 to achieve the temperature load allocation or to meet the applicable temperature criteria.
- 2) Any required increases in bypass flows shall be made in 50 cubic foot per second (cfs) increments. Flow increases are limited to 50 cfs increments to allow for water-temperature monitoring to determine the effects of the flow increases on river temperatures.
- 3) The Department will specify monitoring and reporting requirements to be met by the applicant and specify a mechanism for agreeing on future flow increases if warranted by monitoring results.
- 4) Follow-up conditions that outline Department actions that would apply in the case where unexpected temperature responses occur.



### **Definitions for Selected Terms Used in this Paper**

Those writing conditions to protect water quality or coastal zones may wish to define terms used in the conditions, and provide the definitions along with the conditions, to ensure all parties interpret the conditions as intended. The terms below are not defined as legal “terms of art”, but are given their colloquial meanings. They are presented here because past experience shows that they are subject to differing interpretations, and warrant definition within a license. Those writing certifications should feel free to define terms as best suits the particulars of the facility under review, taking into account applicable legal limits.

Emergency conditions beyond the control of the licensee - An emergency operating condition exists if a short term variance from the flow or water level management requirements appears necessary to avoid personal injury, loss of life, or significant property damage. The emergency operating condition shall persist only so long as is necessary to abate the risk, and the amount of deviation from the license requirements shall be the minimum believed necessary to address the risk. If such conditions can be anticipated, the operational reaction should be included in any flow or water level management plan.

Lag time - Lag time is the time delay before downstream flows are reestablished after generation is suspended or reduced. The delay is caused by the time necessary for the headpond to rise and provide dam spillage and for the discharge to travel through the bypassed reach to the tailrace.

Ramping rate - Ramping rate is the staging of the flow transition over a time interval in order to artificially adjust river flows between two different discharge rates, such as between generation releases and a storage-period conservation flow. Ramping rates are commonly used to reduce mortality or disruption to aquatic organisms.

Reasonable access - Reasonable access to project lands is 1) access by the public for use of facilities provided in a project recreational plan during such hours and in such a manner as is consistent with the use for which the facilities are provided or as otherwise agreed upon; 2) access by the public for the use of water resources located at the project; and 3) access by governmental agencies charged with resource management or compliance monitoring, with the access for any of these uses restricted only where necessary to provide for public safety.

Run-of-river operations - A run-of-river operation is the operation of a hydroelectric facility without the use of reservoir storage. Such operations maintain flows below the tailrace equivalent to the total inflow to the project on an instantaneous basis. Normally, the headpond elevation is stable.

JAN 10 2001

To Whom It May Concern:

We are pleased to report that the Interagency Task Force (ITF) on Improving Hydroelectric Licensing Processes, a coordinated effort by the Federal Energy Regulatory Commission, the Department of the Interior, the Department of Commerce, the Department of Agriculture, the Department of Energy, the Environmental Protection Agency, and the Council on Environmental Quality, has successfully completed its work. After extensive collaboration, the ITF has agreed on recommendations to make hydropower licensing decisions more timely and well-supported by reducing redundancy, improving communications, finding efficiencies, and streamlining the licensing process, while maintaining the balance between developmental and non-developmental values mandated by Congress.

We are proud of our accomplishments. The key documents developed by the ITF, which are summarized in an attachment to this letter, provide recommendations concerning: the National Environmental Policy Act (NEPA) process; environmental studies performed in connection with hydropower licensing; consultation under the Endangered Species Act; mandatory license conditions provided by fish and wildlife resource agencies; procedures for providing public notice of hydropower licensing actions; guidelines regarding the Commission's streamlined Alternative Licensing Procedures; and, methods for drafting enforceable and trackable license conditions. The ITF's working groups also provided input to the reform of the Commission's off-the-record communications rule, reviewed the economic techniques used by various federal agencies as they participate in the licensing process, and examined adaptive management principles. Other projects have arisen as a direct result of the ITF, including the proposal by the Departments of the Interior and Commerce to establish notice and comment procedures with respect to their preparation of mandatory license conditions, and Commission staff's work to clearly articulate policy regarding enforcement of settlement provisions. Overall, the entire ITF effort was fruitful and produced concrete reforms that can make a real difference. These reports are available on the Commission's web site, [www.ferc.fed.us](http://www.ferc.fed.us).

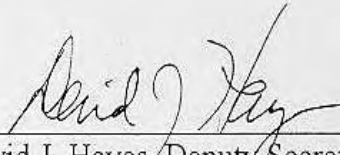
The next step is to fully implement the improvements recommended by the ITF. We are doing this already by devoting senior staff to continue the interagency dialogue with the regional offices, and we will soon be providing public education outreach on the ITF's efforts to the field offices, with ongoing monitoring of the implementation process. There were also some issues that were not addressed or resolved during the life of the ITF. An Interagency Hydropower Committee (IHC) has been created and will meet quarterly to pursue solutions to these remaining issues and address new ones that may

arise. The IHC will not only provide a forum for resolution but will help continue this constructive exchange of ideas.

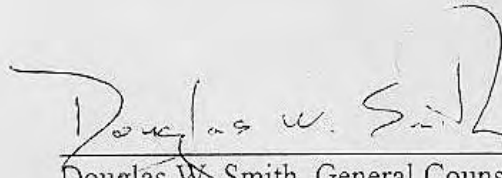
As important as the ITF's substantive achievements was the rapport, increased understanding, and spirit of collaboration it fostered among the staffs of the Federal agencies involved, as well as representatives of state agencies who participated in the ITF working groups. Moreover, representatives of licensees, Indian Tribes, state and county governments, and non-governmental organizations provided valuable input to the ITF through the ITF advisory committee. We gratefully acknowledge the invaluable contributions of these dedicated people. We suggest that the next Administration consider the benefits of using an advisory committee or other structured outreach as a mechanism for continued stakeholder input.

The ITF itself is coming to an end but its work will continue with the implementation of the recommended reforms. We are confident that this effort will continue to bear fruit, resulting in important improvements in the hydropower licensing process.

Signed,



David J. Hayes, Deputy Secretary  
Department of the Interior



Douglas W. Smith, General Counsel  
Federal Energy Regulatory Commission

December 2000

**SUMMARY OF REPORTS DEVELOPED BY**  
**THE INTERAGENCY TASK FORCE**  
**ON IMPROVING HYDROELECTRIC LICENSING PROCESSES**

***National Environmental Policy Act (NEPA) Process.*** This report identifies several methods to better assess the environmental impacts of proposed hydroelectric projects. Using this approach, the Commission will (1) provide and seek clarification of comments early in the process; (2) discuss with resource agencies the full range of alternatives, possible settlement options, and the extent to which recommendations and mandatory conditions can be included; (3) coordinate state and federal resource agency recommendations; (4) ensure identification of NEPA alternative effects during the scoping process; and, (5) encourage collaboration during pre-filing between resource agencies and license applicants of project impacts on resource objectives and tribal interests. These recommendations will facilitate better coordination among federal agencies and enable all interested parties to understand and more efficiently work within the NEPA process.

***Studies.*** This report helps to determine which environmental studies should be performed and focuses on dispute resolution and post-filing studies. With respect to pre-filing studies, the report encourages resource agencies to explain their objectives, suggest methodologies, data collection and analysis techniques for conducting such studies, and identify those which would support their conditions. For post-filing studies, it recommends that study requests be discussed during NEPA scoping meetings and progress monitored. If uncertainty exists, adaptive management may be appropriate but the report proposes that such a plan include measurable objectives, monitoring, and dual consultation between licensees and resource agencies on interim measures and final adjustments. These new procedures should help make the licensing process more efficient and eliminate or help resolve disputes early on in the process.

***Endangered Species Act (ESA) Consultation.*** This paper recommends improved coordination of ESA consultations when measures are proposed to protect threatened and endangered species. During the pre-filing stage, the report suggests early discussions between resource agencies and licensees, early consideration of ESA issues when requesting studies, and the filing by the licensee of a biological assessment along with the application. After filing of an application, discussions of ESA issues should occur when NEPA meetings are held, separate sections in the NEPA document should be devoted to ESA issues, if any, and the accompanying biological assessment, with references, and the Commission should identify and earmark ESA issues when initiating formal consultation. After licensing, when new species are listed or critical habitat designated, new information will be continuously monitored to determine project effects. A biological evaluation will be developed to identify measures needed to protect new

species. If changes to project operation are needed as a result, the licensee must apply for a license amendment with the Commission. This improved ESA coordination will facilitate timely licensing actions.

***Federal Power Act (FPA) Mandatory Conditions.*** This paper deals with (1) Section 4(e) of the FPA, which authorizes the Departments of Agriculture and the Interior to impose mandatory conditions on projects located on Federal reservations they supervise; (2) Section 18 of the FPA, which authorizes the Departments of Commerce and the Interior to impose mandatory fishway prescriptions; and, (3) Section 10(j) of the FPA, which authorizes federal and state resource agencies to propose conditions to protect fish and wildlife. It recommends that during the pre-filing stage, the resource agencies provide license applicants with their resource objectives, and encourages them to consider the least expensive response and to coordinate conditions and recommendations among agencies. Under Section 10(j), resource agencies are urged to provide specific, detailed, and timely recommendations. These recommendations can lead to better coordination, an improved exchange of information, and, consequently more timely, better-informed decision making.

***Noticing Procedures.*** This report reforms noticing procedures to facilitate accurate resource agency responses. These reforms will expedite issuance and receipt of notices and improve overall communication among federal agencies

***Alternative Licensing Procedures (ALP).*** This document proposes guidelines for use by all stakeholders involved in the Commission's ALP, or collaborative process. The guidelines supplement the Commission's ALP regulations and are designed to, among other things, assist stakeholders in identifying resource management goals early in the process, establish clear ground rules for participating in an ALP, and help resolve disputes as they arise.

***Enforceable and Trackable License Conditions.*** This paper provides guidance to state and federal agencies on how to draft clear and enforceable license conditions. The recommendations will help ensure that conditions meet the goals of the drafters, and that the Commission is able to enforce them.

**Interagency Task Force Report on**  
**Agency Recommendations, Conditions, and**  
**Prescriptions Under Part I of the Federal Power Act**

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**

Under Part I of the Federal Power Act of 1935, as amended (FPA), the Federal Energy Regulatory Commission (Commission) is responsible for determining whether, and under what conditions, to issue licenses for the construction, maintenance, and operation, or continued operation, of non-federal hydropower facilities. As part of the Commission's licensing process, federal resource agencies are responsible for providing conditions and prescriptions (collectively, conditions) and recommendations to protect natural and trust resources, including fish and wildlife and federal reservations. The federal resource agencies have both overlapping and different authorities under the FPA for conditions, prescriptions, and recommendations, as explained below.

This report examines ways to clarify and coordinate procedures for incorporating resource agency recommendations, conditions, and prescriptions in the hydroelectric licensing process. It is composed of three sections: 1) mandatory conditions pursuant to section 4(e) and prescriptions pursuant to section 18; 2) agency recommendations pursuant to section 10(j); and 3) other issues. Where possible, this report offers solutions to help resolve issues and improve the licensing process. The issues raised and corresponding solutions are administrative, rather than legal and/or policy, in nature. Consequently, issues pertinent to Indian Reservations and the federal trust responsibility to Indian Tribes are not addressed in this paper.

## **SECTION 1: MANDATORY CONDITIONS and PRESCRIPTIONS**

The Department of the Interior (DOI) and the Department of Agriculture/Forest Service (FS) share mandatory conditioning authority under section 4(e) for hydropower licenses within reservations of the United States; DOI and the Department of Commerce (DOC)<sup>1</sup> share mandatory conditioning authority under section 18 for fishways.

Under Section 4(e) of the FPA, licenses issued within reservations of the United States must contain such conditions as the Secretary of the department responsible for the supervision of the reservation deems necessary for the adequate protection and utilization of the reservation. Section 3(2) of the FPA defines reservation. Section 18 of the FPA gives the Secretaries of Commerce and Interior the authority to prescribe such fishways as deemed necessary. Section 1701(b) of the Energy Policy Act of 1992 provides guidance on the elements which are appropriate for inclusion in a fishway definition. When a resource

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<sup>1</sup> The Departments of Interior, Agriculture and Commerce are referenced collectively as the "resource agencies" or the "agencies" throughout this document.

agency submits a condition pursuant to Section 4(e) and/or a prescription pursuant to Section 18, the Commission is required to include the condition and/or prescription as a condition of any license issued, subject only to review of the Court of Appeals.<sup>2/</sup>

Participants in the Commission hydropower licensing process have expressed the desire to improve the mandatory conditioning process. The Commission, the resource agencies, and applicants have all identified specific concerns with the process. These include agency concerns over difficulties in obtaining information necessary to the formulation of mandatory conditions, Commission concerns over timing and consistency of conditions, and applicants' desire for agency review processes.

The resource agencies and the Commission are undertaking a number of initiatives to respond to these concerns and improve the mandatory conditioning process. The majority of these steps are administrative in nature. Many substantive issues arise through a resource agency's exercise of mandatory authority and are beyond the scope of this document.

## **Recommendations**

### Basis and Support for Conditions

1. The resource agencies will continue to use the Commission's pre-filing consultation process to provide information to the applicant regarding their respective resource goals and objectives in the initial phase of consultation, prior to the initiation of requested studies. The agencies will use the consultation process to help determine resource needs in view of the project effects, the agencies' identified goals, and the results of identified studies. When the resource agencies submit conditions to the Commission, the resource agencies will submit the supporting administrative record. Administrative records should include the substantial evidence in support of the condition or prescription.
2. If the Commission staff determines that the information the resource agencies need is also necessary for the Commission's decision on the license application, the Commission staff will require the applicant to provide the information in the form of an additional information request.

### Review

3. The DOI and the DOC have committed, through Federal Register Notice dated May 26, 2000, to establish a standardized mandatory conditions review process. While the content of this process is not yet determined, it will provide an opportunity to provide comments on and obtain meaningful review of agency conditions and prescriptions by the prescribing or conditioning agency. Where possible, the resource

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<sup>2</sup> The applicability of 4(e) conditions to parts of a project not located on a reservation is an area of dispute and the subject of litigation.



agencies will continue to work with applicants in the development of their mandatory conditions<sup>3</sup>/.

4. The resource agencies have committed to consider, where sufficient information is provided by the applicant, alternatives, including the least expensive alternative, that will meet agency management goals. The results of this review will be included in the administrative record.

#### Clarification and Coordination of Conditions

5. The resource agencies will continue to coordinate among themselves and to eliminate, where possible, inconsistent conditions and recommendations.

6. To assist in reconciling conflicts between conditions and/or recommendations, the Commission staff may use: (1) the National Environmental Policy Act (NEPA) clarification meeting or teleconference, if requested by the resource agencies in their comments on the Ready for Environmental Analysis (REA) notice (this meeting and the meeting agenda will be noticed so that all parties have an opportunity to participate); or (2) the 10(j) meeting when the conflicts involve recommendations provided under Section 10(j).

#### Timing and Workload

7. To assist the resource agencies in anticipating when the conditions will be due, Commission staff will include a tentative schedule for issuing its REA notice in the initial scoping document and any necessary schedule revisions in scoping document 2 (see the ITF Report on FERC Noticing Procedures in Hydroelectric Licensing). When there is a need for additional information after scoping, Commission staff will indicate any necessary revision to the REA notice schedule in its additional information request.

## **SECTION 2: AGENCY RECOMMENDATIONS UNDER SECTION 10(J)**

Under Section 10(j) of the FPA, licenses for hydroelectric projects must include conditions to protect, mitigate damages to, and enhance fish and wildlife resources, including related spawning grounds and habitat. These conditions are to be based on recommendations received from federal and state fish and wildlife agencies. The Commission is required to include such recommendations unless it finds that they are inconsistent with Part I of the FPA or other applicable law, and that alternative conditions will adequately address fish and wildlife issues. Before rejecting an agency recommendation, the Commission and the agencies must attempt to resolve the inconsistency, giving due weight to the agencies' recommendations, expertise, and statutory authority. If the Commission does not adopt a 10(j) recommendation, in whole or in part, it must publish findings that adoption of the recommendation is inconsistent with the purposes and requirements of Part I of the FPA or other applicable provisions of law, and that conditions selected by the Commission adequately and equitably protect, mitigate damages to, and

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<sup>3</sup>The Forest Service already has a public review process for its 4(e) conditions.

enhance fish and wildlife, including related spawning grounds and habitat. Resource agencies may also recommend conditions under Section 10(a)(1) of the FPA. However, the Commission may accept, modify, or reject those conditions under the comprehensive development standard of Section 10(a)(1) without attempting to resolve inconsistencies or making the findings required by Section 10(j).

Participants in the licensing process have expressed interest in clarifying and improving the Section 10(j) process. The Commission, resource agencies, and applicants have identified some specific concerns with the process. These include the need for more information or better explanation in the following general areas: (A) the Commission staff's determination of whether recommendations are within the scope of Section 10(j), including recommendations for studies; (B) procedures for clarification of agency recommendations, including the basis and support for the recommendations and the Commission staff's interpretation of them for compliance purposes; (C) the Commission staff's preliminary determination that a recommendation may be inconsistent with the FPA or other applicable law, including the role of cost considerations; and (D) response to a preliminary determination of inconsistency, including the difficulty in meeting simultaneous deadlines for responding to the Section 10(j) letter and the draft NEPA document, and the extent of information that is provided after the Section 10(j) meeting. To address these general categories of issues, the Commission and the resource agencies have identified the following suggested clarifications and improvements.

#### **A. Determination of whether recommendations are within the scope of section 10(j)**

##### Scope Determination – Recommendations

1. Consistent with Commission regulations, precedent, and staff practice, the Commission staff will consider recommendations to be within the scope of Section 10(j) when they meet all of the following criteria:

- they are timely filed; within 60 days of issuance of the notice that the application is ready for environmental analysis, or in the case of an alternative licensing process, within 60 days of issuance of the notice soliciting agency recommendations and terms and conditions (unless an extension of time has been granted);
- they are specific measures for the protection, mitigation, or enhancement of fish and wildlife resources affected by the project;
- they are made by the appropriate state or federal fish and wildlife agencies; and
- they are within the Commission's authority to implement.

The staff's decision on the scope of section 10(j) is subject to review by the Commission in the licensing order.

2. Resource agencies should provide recommendations that are as specific and detailed as possible for the project under review and are developed in light of the Commission's criteria. With the recommendations, the agencies should provide justification including information on the significance of the resource and the specific purpose, management objectives, and goals that the recommendations are designed to address.
3. Commission staff will explain in the 10(j) section of the draft environmental document and/or the 10(j) preliminary determination of inconsistency letter the reason why a recommendation was considered to be outside the scope of 10(j).
4. If resource agencies have concerns with the 10(j) scope determination, they will explain those concerns in their response to the Commission staff's preliminary determination of inconsistency letter.

#### Scope Determination – Studies

1. Consistent with its regulations and case law, the Commission staff will consider as within the scope of Section 10(j), requests for studies which cannot be completed prior to licensing. Examples are studies that can be conducted only after the project is operating or would determine the success of mitigative measures.
2. When a resource agency requests, as a 10(j) recommendation, a study that could be (or could have been) performed pre-licensing, the Commission will not consider it as a 10(j) recommendation, but rather under Section 10(a)(1).
3. Commission staff will explain in the draft environmental document the reason why a 10(j) study recommendation was considered to be outside the scope of 10(j).
4. If resource agencies have concerns with the 10(j) scope determination for studies, they will explain those concerns in their response to the preliminary determination of inconsistency letter.
5. Resource agencies are encouraged to include in study requests information regarding the significance and value of the studies, resource goals and objectives, and the role they believe the study plays in providing information necessary for the Commission's licensing decision.

#### **B. Clarification of Section 10(j) Recommendations**

##### Clarification of Basis and Support

1. The Commission staff will, when necessary, request clarification of agency recommendations. Specifically, the Commission staff will seek clarification of agency recommendations that are unclear,

appear to be generic recommendations that might not apply to a specific project, or could be accomplished more appropriately in a manner that the agency may not have considered when making its recommendation. Commission staff will explain why the clarification is needed. Clarification may be requested at several stages of the licensing process:

- a) within 45 days of the filing of any fish and wildlife recommendation, Commission staff may seek clarification [see 18 CFR 4.34(e)(2)].
  - b) if a NEPA clarification meeting is held, Commission staff may use it to clarify 10(j) recommendations. (See Range of Alternatives, Solution 2, in the ITF Report on NEPA Procedures in FERC Hydroelectric Licensing.)
  - c) Commission staff may request clarification of agency recommendations in writing as part of the 10(j) letter. If agencies believe discussion is needed, clarification may be discussed at the 10(j) meeting.
2. Resource agencies are encouraged to include supporting documentation to help clarify their recommendations.

#### Clarification for Compliance Purposes

1. The resource agencies will be as specific as possible about exactly what measures they are recommending, and for what purpose. For example, a minimum flow recommendation should contain information regarding the amount of the flow; where and how the flow should be released; where and how the flow should be measured for compliance purposes, if known at the time of the recommendation; and whether the flow is needed for fish at all times or only certain times.
2. Commission staff will seek clarification if there is uncertainty as to how a measure should be implemented.

### **C. Preliminary determination of inconsistency with the FPA**

#### Basis for Determination

1. Consistent with the statutory requirement, the Commission staff, in making its preliminary determination of inconsistency, will continue to give due weight to the recommendations, expertise, and statutory responsibilities of the resource agencies.
2. Commission staff will explain in its environmental documents and/or 10(j) letters the basis for the preliminary determination of inconsistency (i.e., this discussion will include an explanation of the specific inconsistencies with respect to: substantial evidence standard under 313(b) of the FPA; comprehensive

development/public interest standard of Sections 10(a)(1) and 4(e) of the FPA; mandatory conditions submitted under other sections of the FPA, such as Sections 4(e) and 18; or conditions imposed under other applicable law, such as the Clean Water Act or the Endangered Species Act). Where the Commission staff's environmental document and/or 10(j) letter offers an alternative recommendation, Commission staff will provide as much information as possible to allow meaningful evaluation by the resource agency.

3. Commission staff will issue 10(j) letters that, as appropriate, use the following format:
  - include an introductory statement identifying those agency recommendations that Commission staff believes may be inconsistent with the FPA and those that the staff believes need clarification.
  - explain in the letter, or provide a specific citation to the appropriate section in the draft environmental document which explains, the basis for the preliminary determination of inconsistency for each recommendation identified.
  - explain in the letter, or provide a specific citation to the appropriate section in the draft environmental document which explains, why the recommendation appears to be inconsistent with applicable law(s), including, where appropriate, information on the effect of the recommendation on factors such as project generation, overall project economics, and other project purposes, as well as information on the cost of the measure and benefits to the resource.
  - describe clearly any request for clarification of an agency recommendation.
  - for the preliminary determination of inconsistency, include any pertinent questions to the recommending agency regarding the basis for its recommendation and whether it could support specified alternative recommendations.
  - describe the regulatory time frames for completing the 10(j) process and ask the agency whether it would like to discuss the preliminary determinations of inconsistency, clarifications, or any other issues at a meeting or teleconference.
  - send a copy of the letter to the agency making the recommendations, the applicant, and the other entities on the Commission's service list.

#### Role of Cost

1. Resource agencies will identify and /or provide any available information on cost that the agency considered in making its recommendations.
2. Commission staff will inform the resource agencies if the preliminary determination of inconsistency is based upon a balancing of the costs and benefits of the recommendation and will provide supporting analysis.

#### **D. Response to preliminary determination of inconsistency**

### Timing and Workload

1. To assist the Commission staff in its review, resource agencies will strive to meet the simultaneous deadlines for their 10(j) response letter and comments on the draft EA. The Commission staff will consider requests for extensions of time to respond to 10(j) letters and/or draft NEPA documents.
2. To assist resource agencies in anticipating when their 10(j) response letter and comments on the draft NEPA document will be due, the Commission staff will include a tentative schedule for issuance of the draft NEPA document in scoping document 1 and will include any necessary schedule revisions in scoping document 2, and in any subsequent additional information requests.

### Communication following 10(j) meeting

1. Following the section 10(j) meeting, the Commission staff will continue to provide a summary, which will identify issues resolved at the meeting, and those issues that remain unresolved.
2. The agencies may provide comments to the Commission staff on the summary of the section 10(j) meeting, including the draft 10(j) recommendations.

## **SECTION 3: OTHER ISSUES**

### **Economics of Recommendations and Conditions**

Some applicants may assert that a given mandatory condition or recommendation would render a project uneconomic. While all parties understand applicants' interest in maintaining project economic viability, the FPA mandates equal consideration of not only power and development purposes but also for fish and wildlife, recreation, and environmental quality. The resource agencies and the Commission agree that appropriate environmental measures are a cost of doing business; however, they may disagree as to which measures may be required to achieve appropriate environmental protection, mitigation, and enhancement.

1. When relevant economic information is part of the Commission's administrative record, resource agencies currently do and will continue to take cost into account in developing conditions, whenever alternative, less expensive measures can provide protection that will meet the agencies' resource objectives.
2. Applicants are encouraged to provide to the resource agencies as early as possible alternative conditions that achieve commensurate resource protection at lower cost, and should provide sufficient information to support the conclusion that the alternative would meet resource agencies' stated management goals.

## **Coordination of FPA Conditions with the ESA/Section 7 Process**

Agency recommendations, conditions, and prescriptions under Sections 4(e), 10(a)(1), 10(j), and 18 are sometimes submitted without consideration of possible issues that may arise under the Endangered Species Act (ESA). As a result, formal consultation under Section 7 of the ESA may result in conditions that are inconsistent with, or different from, previously submitted agency recommendations, conditions, and prescriptions.

1. As described in the Interagency Task Force Report on Improving Coordination of ESA Section 7 Consultation with the Commission Licensing Process, resource agency ESA staff, as well as hydropower staff of the National Marine Fisheries Service and the Fish and Wildlife Service (Service), as appropriate, will become involved early in the FPA pre-filing consultation process, to ensure that ESA issues are considered together with other issues.
2. In preparing their recommendations, conditions, and prescriptions, Service staff involved in the hydropower licensing process will coordinate, to the fullest extent practicable, both early in the FPA pre-filing stage and throughout the licensing process, with Service staff involved in ESA issues, to ensure that the FPA conditions will be consistent with the protective measures likely to be found necessary during ESA consultation. However, the Commission and the agencies recognize that additional or different measures may be necessary as a result of ESA consultation.

## **Enforceability of Settlement Agreements**

Settlement agreements are an increasingly popular tool for resolving issues in hydropower relicensing proceedings in a timely and consensus-based manner. Settlements may provide benefits by: 1) allowing parties to consider non-traditional protection, mitigation, and enhancement measures; 2) providing opportunities for more immediate, on-the-ground action; and 3) expediting issuance of a new license.

Recent Commission decisions remind the parties that, although the Commission may approve or accept a settlement agreement, the Commission may not have the authority to enforce all the terms of settlement agreements, notably terms involving procedural rules for dispute resolution and other interactions among signatory parties (such as provisions that involve changes to future project operation and resource management measures by stakeholder management groups, as in some forms of adaptive management or mitigation funding). Additionally, only the Commission has the jurisdiction to enforce license provisions related to project operations or actions within project boundaries. For the federal resource agencies, therefore, the Commission is the only available forum for enforcement of license provisions in settlement agreements affecting project operations and within project boundaries. For settlement provisions which are not enforceable by the Commission, there are difficulties for federal resource agencies that may prevent them from seeking enforcement elsewhere. For the resource agencies, this may raise questions about not

only the viability of certain types of settlement provisions, but also the ultimate desirability of agency participation in pursuit of settlement agreements.

1. As indicated in the ITF Joint Statement of Commitment (May 22, 2000), the Commission staff will work to clarify the Commission's jurisdiction over, and enforcement policy regarding, settlements, so that participants in hydropower licensing settlements will have a clear understanding of what matters are within the Commission's jurisdiction.
2. To the extent possible, the Commission will designate members of its legal and technical staff to assist participants in determining what types of settlement provisions are likely to be acceptable to the Commission or to be included in the license as conditions that the Commission can enforce. In some instances, this staff will need to be separate from those members of the staff serving as advisors to the Commission. Participants in settlement agreements should be aware that the recommendations of Commission staff as to what is enforceable are not binding on the Commission.
3. If a settlement agreement is included as a mandatory license condition, the Commission will be unable to delete from the license those provisions of the settlement that are beyond the Commission's jurisdiction, in whole or in part, to enforce. However, as a general matter, participants contemplating settlement agreements should be aware that the Commission has discretion to accept, modify, or reject the terms of the settlement agreement. The Commission may issue a decision approving a settlement agreement, but will include as enforceable license conditions only those measures that are within the scope of the Commission's FPA authority.
4. In developing settlement agreements, the Commission and the resource agencies will encourage the settlement parties to include in any settlement agreement to be filed with the Commission provisions that are enforceable by the Commission. Parties are encouraged to delineate separately those provisions assumed to be enforceable by the Commission from those that are not.
5. The resource agencies encourage the Commission, through its licensing orders, to clearly identify any settlement provisions that are beyond its jurisdiction.

Rule 602 requires that an offer of settlement filed in a proceeding be served on all parties to the service list, and that they be provided with notification of the date comments on the settlement agreement are due (see 18 CFR 385.602). This time period is 20 days after the date of filing of the settlement agreement. In addition to this opportunity to comment, the Commission may publish notice of the settlement offer and invite additional public comment. This additional public comment period may add an element of uncertainty to the settlement because new issues may be raised, and the Commission may make changes to the conditions proposed for the license in the settlement agreement based on these comments.

1. Consistent with its regulations and basic due process principles, the Commission will likely publish



notice and seek public comments on such agreements, because of the possibility that persons not involved in negotiating the agreement might have an interest that may be affected by the proposed settlement. The Commission will strive to provide this notice within 20 days of the settlement agreement filing.

2. The Commission considers the proposed action and alternatives in its NEPA documents. If a settlement is reached after the Commission has published its final NEPA document, the Commission may determine that there is a need to issue a supplement to its NEPA document if the proposed settlement includes measures that are not within the range of measures or alternatives already considered in the NEPA analysis.

**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:*

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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

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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.<sup>3/</sup>

### *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.

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<sup>3/</sup> 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. <sup>4</sup>/ 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,

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<sup>4</sup>/ 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 pre-filing 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 pre-filing. 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.

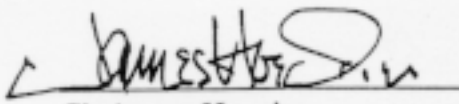
2. DOI will increase coordination of responses from various bureaus. In addition, and where appropriate, resource agencies will coordinate responses and comments.
3. Each of the key resource agencies will hold periodic internal meetings to coordinate relicensing efforts.
4. Resource agencies will collaborate 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.


To Whom It May Concern:

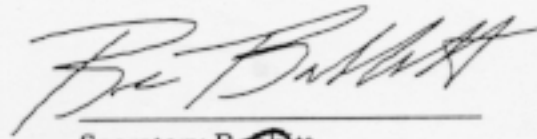
In the Winter of 1998, the Federal Energy Regulatory Commission, the Departments of the Interior, Commerce, Agriculture, and Energy, the Council on Environmental Quality, and the Environmental Protection Agency formed the Interagency Task Force to Improve Hydroelectric Licensing Processes. Through the deliberations of agency staff, and with regular input from key non-federal stakeholders, the task force has made significant progress in developing administrative reforms that will make the hydropower licensing process more efficient and effective.

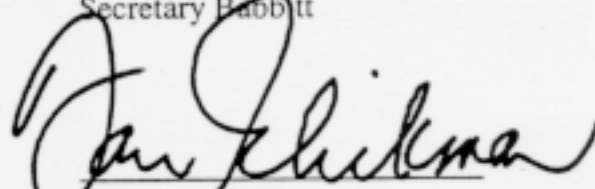
The attached documents provide a summary of the commitments that our respective agencies have made through the Interagency Task Force and as individual agencies dedicated to reform. We are committed to ensuring that our collective efforts result in a greatly improved hydropower licensing program that well serves the public interest.

Signed,

  
Chairman Hoecker

  
Secretary Daley

  
Secretary Babbitt

  
Secretary Glickman

May 22, 2000

000531-0400-3

**JOINT STATEMENT OF COMMITMENT  
FOR AN  
IMPROVED HYDROPOWER LICENSING PROCESS**

Hydropower projects regulated by the Federal Energy Regulatory Commission produce over five percent of all electric power generated in the United States and thus are an important part of the nation's power mix. Streamlining the licensing process – while continuing to find public interest solutions that balance power generation, natural and cultural resource protection, recreation, irrigation, flood control, and other public purposes served by hydroelectric projects – is essential to ensuring the viability of this energy source.

In the Winter of 1998, the Federal Energy Regulatory Commission, the Departments of the Interior, Commerce, Agriculture, and Energy, the Council on Environmental Quality, and the Environmental Protection Agency formed the Interagency Task Force to Improve Hydroelectric Licensing Processes (ITF). Through the deliberations of agency staff, and with regular input from key non-federal stakeholders, the task force has made significant progress in making the hydropower licensing process one that is more efficient and effective, and results in sensible and more timely licensing decisions.

In pursuing these important reforms, the task force has actively sought input from the public. In August of 1999, the task force took formal steps to seek such input by forming an advisory committee comprised of representatives from licensees, non-governmental organizations, tribes, states, and counties. The advisory committee has proven to be a useful vehicle for providing non-federal stakeholders with an opportunity to weigh in on the deliberations and reform efforts of the task force as well as for the task force to better understand, and try to address, the concerns of outside stakeholders. The advisory committee has met three times in the last seven months and will continue to collaborate with the task force until the end of this year when the work of the task force is scheduled to be completed.

The task force has made significant progress in its reform effort. The various attachments to this statement set forth some of the accomplishments of the ITF in more specific detail. In addition to producing concrete policy changes, the ITF also has been a catalyst for notably improved communications and relationships among ITF participants and other non-federal stakeholders with an interest in hydropower licensing. While the task force intends to bring its work to completion in the Fall, the agencies represented on the task force are committed to continuing to work together to ensure that the solutions developed by the task force are institutionalized in the policies and procedures of each participating agency. This post-ITF implementation phase will include an outreach component designed to ensure that all staff involved in hydroelectric licensing – at headquarters and regional levels – understand the benefits of adopting task force solutions.

Agencies are also taking noteworthy steps to improve their hydropower licensing practices in ways that go beyond the scope of what is being done through the task force itself. Most recently, the Departments of the Interior and Commerce have committed to establishing a public review process for their mandatory conditioning authorities. Attachment A summarizes the accomplishments of the ITF while attachments B, C, D, and E describe other improvements or commitments made by individual agencies.

## Attachment A

### Interagency Task Force to Improve Hydroelectric Licensing Processes Summary of Accomplishments

Representatives of the Federal Energy Regulatory Commission, the Department of Agriculture, the Department of Commerce, the Department of Energy, the Department of the Interior, the Environmental Protection Agency, and the Council on Environmental Quality comprise the Interagency Task Force to Improve Hydroelectric Licensing Processes (ITF). ITF working groups, which also include representatives from the Advisory Committee on Historic Preservation and State agencies, have been reviewing the process by which the Commission, with the input of the listed federal agencies and other participants, issues licenses for non-federal hydropower projects. To date, the task force has accomplished the following:

- ***Noticing procedures*** The ITF has completed a report which reviews the manner in which the Commission alerts the public and other agencies of proposed hydropower licensing actions. The report proposes changes in Commission and resource agency procedures which expedite issuance and receipt of notices and improve overall communication among federal agencies. The Commission has implemented these changes.
- ***NEPA process*** The ITF has completed a report which examines the manner in which the environmental impacts of hydropower licensing actions are studied and alternative actions are proposed and evaluated. The report recommends changes that will facilitate better coordination among federal agencies and enable all interested parties to understand and more efficiently work within the NEPA process.
- ***Studies*** The ITF has completed a draft report which provides basic guidelines on how to identify resource issues, identify and conduct necessary studies during the pre-filing stage, resolve disputes over studies, and address issues related to post-filing studies. These new procedures should help make the licensing process more efficient and eliminate or help resolve disputes early on in the process.
- ***Endangered Species Act consultation*** The ITF currently is developing an integrated and streamlined process by which the Commission and the resource agencies coordinate Section 7 consultation under the Endangered Species Act with the Commission's traditional licensing process, to facilitate timely licensing actions.
- ***Enforceable license conditions*** The ITF has completed a draft report which provides guidance to state and federal agencies on how to draft clear and enforceable license conditions, particularly those pertaining to the Coastal Zone Management Act and Section 401 (water quality certification) under the Clean Water Act.

- ***Alternative Licensing Procedures*** The ITF has completed draft guidelines for use by all stakeholders involved in FERC's alternative licensing procedures (ALP, or "collaborative process"). The guidelines supplement FERC's ALP regulations and are designed to, among other things, assist stakeholders in identifying resource management goals early in the process, establish clear ground rules for participating in an ALP, and help resolve disputes as they arise.
- ***Off-the-record communications*** The ITF provided useful input to the process whereby the Commission revised its regulations governing off-the-record (i.e., *ex parte*) communications. The new regulations – which were issued in final form on September 15, 1999 – facilitate communications among the participants in hydropower licensing proceedings.
- ***Economics*** The ITF completed a draft report on how the Commission and the other federal resource agencies use economic information in the Commission's licensing process and in other regulatory fora related to resource protection. This report examines the different types of economic analyses used by different federal agencies and outlines the types of economic data and methodologies that are available.

In addition to the report on endangered species coordination, the ITF will be issuing draft reports in the coming months on issues relating to Sections 4(e), 10(j), and 18 of the Federal Power Act as well as on issues related to the post-licensing phase of hydropower operations.



## Attachment B

### Actions or Commitments by the Federal Energy Regulatory Commission

The Commission has the responsibility under the Federal Power Act to license non-federal hydropower projects. Over the last several years, Commission staff has been engaged in a major effort to improve the hydroelectric licensing process. As part of that effort, Commission staff has undertaken or commits to the following actions:

- ***Supporting collaborative procedures*** The Commission has promulgated regulations to encourage use of more collaborative alternative licensing procedures. The Commission has also made a significant commitment of its staff resources to support alternative licensing processes, and all collaborative efforts with the applicant and stakeholders. Such processes have led to better understanding of the issues, and often to settlement of some or all of the issues in licensing proceedings. This, in turn, leads to more timely processing of applications and less litigation.
- ***Supporting settlements*** The Commission has committed significant resources to participation in settlement discussions, when requested by the stakeholders.
- ***Clarifying settlement policy*** Commission staff will work to clarify the Commission's policy on jurisdiction over, and enforcement of, settlements, so that participants in hydropower licensing settlements will have a clear understanding on what matters the Commission considers to be within its jurisdiction versus those for which the settlement parties may need to seek alternative enforcement procedures.
- ***Continuing staff efforts to meaningfully involve Tribes in the licensing process*** Commission staff is committed to increase direct consultation with the Tribes, in order to ensure an understanding of Tribal issues and concerns.
- ***Implementing ex parte reforms*** The Commission recently reformed its rules on *ex parte* communications which aim to improve communication during licensing proceedings consistent with maintaining a fair process.
- ***Active outreach*** Commission staff has conducted, and will continue to conduct, outreach meetings throughout the country to educate stakeholders about licensing and alternative licensing approaches available to them, and to assist stakeholder understanding of past Commission actions and regulation.
- ***Implementing progressive environmental policies*** Commission staff will continue to conduct scoping for all license and relicense applications and to issue draft environmental assessments for public comment. (While regulations require the issuance of draft environmental impact

statements, there is no such requirement for draft environmental assessments.) This approach provides a greater opportunity for timely agency, tribe, applicant, and public input.

- ***Quick turnaround in dispute resolution regarding studies*** Commission staff commits to provide a quick response to parties who request staff guidance regarding disputes over what studies should be performed to support the licensing process.
- ***Using ad hoc groups to address specific issues*** Where issues arise that appear common to a number of licensing proceedings, such as cultural resources and Forest Service issues, Commission staff commits to supporting interagency groups to discuss such matters.
- ***Updating FERC relicensing handbook*** Commission staff commits to updating its relicensing handbook which provides guidance about the relicensing process. The new handbook will cover both licensing and relicensing in one volume and will include a section on alternative licensing procedures.
- ***Supporting the Interagency Hydropower Licensing Workshop*** Commission staff continues its commitment to working with staff from other agencies to teach the Hydropower Licensing Workshop, which provides detailed information about licensing processes and issues in an interactive forum with representatives from all sectors involved in hydro licensing.
- ***Improving noticing procedures*** Commission staff is implementing recommendations in the task force's report on noticing, in order to give other agencies and the public more information regarding the scope of licensing proceedings, as well as opportunities for intervention and comment.

## Attachment C

### Actions or Commitments by the Department of the Interior

The Department of the Interior is comprised of a number of bureaus which play a key role in the hydropower licensing process. They include: US Fish and Wildlife Service, Bureau of Indian Affairs, Bureau of Land Management, Bureau of Reclamation, National Park Service, and a host of departmental support offices and bureaus (e.g., Solicitor's Office, Office of Environmental Policy and Compliance, Office of Policy Analysis, and US Geological Survey).

In the fall of 1998, concurrent with the initiation of the interagency reform effort, the Department of the Interior initiated its own internal review of its practices, policies and procedures with regard to hydropower licensing. As a result of that review and subsequent reforms, the Department has committed to making the following improvements:

- ***Mandatory conditioning review process*** The Department of the Interior, together with the Department of Commerce, is committed to establishing a public review process for its mandatory conditioning authorities. The Departments have convened a joint drafting committee and are exploring a variety of approaches. The Departments have issued a Federal Register notice to get early input from the public as to how such a review process might work.
- ***Alternative Licensing Process*** The Department strongly endorses the good faith use of the alternative, or "collaborative," licensing process. The Department will support such use of, and participate in, the alternative process when a consensus to use the process exists among key agencies and stakeholders and when staff resources allow for the Department's full and effective participation.
- ***Anticipation of upcoming licenses*** By streamlining various administrative practices (e.g., early circulation of FERC notices, use of intervention templates), the Department's bureaus are now better able to anticipate and get involved early in upcoming relicensing projects.
- ***Coordination*** By convening Department staff on a periodic basis (e.g., through annual regional and national meetings) and creating a comprehensive GIS/web-based project data and tracking system, there is better opportunity to identify bureau interests, coordinate bureau responses to FERC actions, and share the workload required to constructively participate in concurrent relicensing projects.
- ***Consistency*** While recognizing the important differences among individual projects, especially from region to region, the Department has taken a number of steps to ensure that its approach to hydropower licensing is as consistent as possible among bureaus and across regions. These steps include: development of a hydropower licensing handbook; revision of internal procedural

memoranda; increased legal review of bureau comments; and annual Department-wide meetings which provide opportunity for training and coordination.

- ***Study requests*** In making study requests, the Department will provide the applicant with an explanation of resource management goals, study objectives, suggested methodologies, data collection and analysis techniques, and a clear nexus between project operations and effects on the resources being studied. The Department will work with other resource agencies and participants to develop joint study recommendations, thereby increasing the efficiency of the licensing process. The Department will also make available any information it has on resources within the project area.
- ***Coordinating recommendations and conditions*** In cases where the Department shares overlapping statutory authorities with another resource agency, it will seek to work with that agency to try to develop consistent and compatible recommendations and conditions. Where possible, the agencies will try to develop and submit to FERC a coordinated set of recommendations and conditions for proposed inclusion as a stand-alone “alternative” in FERC’s NEPA document.
- ***Coordinating resource agency participation*** In cases where there may be insufficient Interior bureau staff to fully participate in a given relicensing, the Department will seek opportunities to coordinate its efforts with other similar federal agencies, where appropriate (e.g., NMFS in the case of insufficient FWS staffing, or Forest Service in the case of insufficient BLM staffing).
- ***Staff training*** The Fish and Wildlife Service, with input and participation by the Department and other bureaus, is developing a pilot hydro licensing training program. The program is designed to give less experienced staff an opportunity to learn from veteran staff as well as to ensure that all bureau hydro staff are working in a way that is consistent with Department policy and with the other bureaus and regions. To that end, a module on legal issues and the importance of preparing a strong administrative record to support agency conditions will also be included in the training program. The Department is also developing a Hydropower Licensing Handbook that will also serve to improve consistency by creating a standard set of guidelines for all hydro staff to follow.
- ***Post-licensing*** Despite limited resources, the Department will try to continue its active role in the post-licensing arena, especially with regard to adaptive management and implementation of license conditions.

## Attachment D

### Actions or Commitments by the Department of Commerce

The Department of Commerce, through the National Oceanic and Atmospheric Administration (NOAA)/National Marine Fisheries Service (NMFS), engages in a wide variety of activities designed to protect, mitigate damages to, and restore living marine and anadromous resources and the habitats upon which they depend. We pursue these objectives under various statutes including the Magnuson-Stevens Fishery Conservation and Management Act, Fish and Wildlife Coordination Act (FWCA), Endangered Species Act (ESA), and the Federal Power Act. NMFS plays a key role in the hydropower licensing process.

The Department has committed to making the following improvements:

- ***Mandatory conditioning review process*** The Department of Commerce, together with the Department of Interior, is committed to establishing a public review process for its mandatory conditioning authorities. The Departments have convened a joint drafting committee and are exploring a variety of approaches. The Departments have issued a Federal Register notice to get early input from the public as to how such a review process might work.
- ***Alternative Licensing Process*** The Department strongly endorses the good faith use of the alternative, or “collaborative,” licensing process. The Department will support such use of, and participate in, the alternative process when a consensus to use the process exists among key agencies and stakeholders and when staff resources allow for the Department’s full and effective participation.
- ***Training*** NMFS Headquarters staff provides hydro licensing training to regional staff as needed. NMFS regional staff have contributed to the development of the Hydropower Licensing Class sponsored by the US Fish and Wildlife Service National Conservation Training Center (NCTC).
- ***Internal Guidance*** NMFS is developing a Hydropower Licensing Handbook that will also serve to improve consistency by creating a standard set of guidelines for all hydro staff to follow.
- ***Interagency Coordination*** Headquarters and regional staff work with other resource agencies to coordinate our positions on hydropower issues, as well as coordinate with other interested entities.
- ***Intra-agency Coordination*** NMFS Headquarters staff serves as coordinators for NMFS's positions on hydropower issues around the country, and helps ensure consistency.

- **Interagency Task Force** Headquarters and regional staff are actively involved in the "Interagency Task Force to Improve Hydroelectric Licensing Processes" effort to develop administrative measures to streamline the hydropower licensing process.

## Attachment E

### Actions or Commitments by the Department of Agriculture

The U.S. Forest Service of the Department of Agriculture is responsible for protecting National Forest System (NFS) lands and natural resources that may be affected by FERC-licensed hydropower projects. As a result, the Forest Service plays a key role in the licensing process for projects situated on NFS lands.

In recent years the Forest Service and Department of Agriculture have increased their focus on hydropower licensing with the commitment of additional funding, personnel and internal programs designed to improve consistency, coordination and accountability. A brief description of these reforms is included below:

- **National Hydropower Initiative** Since 1998, the Forest Service has budgeted \$10 million annually to address the increased workload in hydropower relicensing. The additional funding has helped establish a National Hydropower Assistance Team (NHAT) comprised of experts in aquatics, terrestrial resources, recreation, wild and scenic rivers, and economics. The NHAT regularly meets with hydropower staff across the country to discuss hydropower issues and assist with specific licensing projects. This initiative has helped improve the Forest Service's quality control and consistency.
- **In-stream flow policy** The Forest Service is in the process of developing an in-stream flow policy to ensure a consistent approach to conditioning bypass flows for hydropower projects.
- **Internal review process for all 4(e) conditions** Before submitting preliminary 4(e) conditions to FERC, the local Forest Service office will submit draft conditions to the NHAT team for review and approval. This process, which is currently being developed, will help ensure that Forest Service 4(e) conditions are adequate to protect NFS resources, are consistent with Agency policy and federal law, and do not conflict with conditions submitted to FERC by other resource agencies.
- **Use of NEPA process for public review of mandatory conditions** Since the 1980s, the Forest Service has used the NEPA process in the formulation of mandatory 4(e) conditions, thereby ensuring the public an opportunity to review and comment prior to the Forest Service decision. The Forest Service is exploring ways of streamlining its NEPA process with that of FERC.
- **Anticipation and tracking of upcoming projects** The Forest Service has set up a National Hydropower Database to help hydro staff identify future licensing projects. Like its sister federal resource agencies, the Forest Service has revised its administrative practices to anticipate upcoming projects and allow it to participate early in the relicensing process.

- **Coordination and Consistency** To enhance nationwide consistency within the Agency, the Forest Service will publish a Hydropower Manual to serve as a compendium of its hydropower policies. Additionally, the Forest Service will publish a companion Handbook to provide general guidelines and assistance. These documents will prescribe procedures to ensure study requests reflect the nexus between project operations and natural resource effects. Moreover, the guidance will encourage the coordination of Forest Service licensing activities with other federal agencies. The Forest Service has been an active participant in the Fish and Wildlife Service-sponsored Hydropower Licensing Training Course.
- **Alternative Licensing Process** The Forest Service endorses the concept of the alternative, or “collaborative,” licensing process. The alternative licensing process is particularly attractive to the Agency where there is a real possibility of settlement and adequate staffing allows for consistent participation.
- **Study requests** In making study requests, the Forest Service will provide the applicant with an explanation of management goals, study objectives, suggested methodologies, and the nexus between project operations and natural resource effects. Where possible, the Agency will work with other resource agencies and participants to develop joint study recommendations, thereby increasing the efficiency of the licensing process.
- **Sharing information** To ensure that all participants in licensing proceedings have information about affected resources early in the process, the Forest Service will seek to timely provide whatever resource information it has to the interested parties (e.g., fishery studies).
- **Post-licensing** The Forest Service is reviewing its past involvement in the post-licensing arena and seeking ways of strengthening its role during this period.



**Hydropower Projects  
Roles and Responsibilities**

**National Conservation Training Center**

**SUMMARY OF REPORTS DEVELOPED BY  
THE INTERAGENCY TASK FORCE**

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**Approved May 22, 2000**

ITF work products and recommendations are available at <http://www.doi.gov/hydro/>

**I.     *National Environmental Policy Act (NEPA) Process.***

methods to better assess the environmental impacts of proposed hydroelectric projects. Using process; (2) discuss with resource agencies the full range of alternatives, possible settlement coordinate state and federal resource agency recommendations; (4) ensure identification of pre-filing between resource agencies and license applicants of project impacts on resource federal agencies and enable all interested parties to understand and more efficiently work within

**II.**           This report helps to determine which environmental studies should be studies, the report encourages resource agencies to explain their objectives, suggest those which would support their conditions. For post-filing studies, it recommends that study exists, adaptive management may be appropriate but the report proposes that such a plan include agencies on interim measures and final adjustments. These new procedures should help make the

**III.**   This paper recommends improved endangered species. During the pre-filing stage, the report suggests early discussions between the filing by the licensee of a biological assessment along with the application. After filing of an sections in the NEPA document should be devoted to ESA issues, if any, and the accompanying

issues when initiating formal consultation. After licensing, when new species are listed or critical habitat designated, new information will be continuously monitored to determine project effects. A biological evaluation will be developed to identify measures needed to protect new species. If changes to project operation are needed as a result, the licensee must apply for a license amendment with the Commission. This improved ESA coordination will facilitate timely licensing actions.

**IV. *Federal Power Act (FPA) Mandatory Conditions.*** This guidance paper deals with (1) Section 4(e) of the FPA, which authorizes the Departments of Agriculture and the Interior to impose mandatory conditions on projects located on Federal reservations they supervise; (2) Section 18 of the FPA, which authorizes the Departments of Commerce and the Interior to impose mandatory fishway prescriptions; and, (3) Section 10(j) of the FPA, which authorizes federal and state resource agencies to propose conditions to protect fish and wildlife. It recommends that during the pre-filing stage, the resource agencies provide license applicants with their resource objectives, and encourages them to consider the least expensive response and to coordinate conditions and recommendations among agencies. Under Section 10(j), resource agencies are urged to provide specific, detailed, and timely recommendations. These recommendations can lead to better coordination, an improved exchange of information, and, consequently more timely, better-informed decision making.

**V. *Noticing Procedures.*** This report reforms noticing procedures to facilitate accurate resource agency responses. These reforms will expedite issuance and receipt of notices and improve overall communication among federal agencies

**VI. *Alternative Licensing Procedures (ALP).*** This document proposes guidelines for use by all stakeholders involved in the Commission's ALP, or collaborative process. The guidelines supplement the Commission's ALP regulations and are designed to, among other things, assist stakeholders in identifying resource management goals early in the process, establish clear ground rules for participating in an ALP, and help resolve disputes as they arise.

**VII. *Enforceable and Trackable License Conditions.*** This paper provides guidance to state and federal agencies on how to draft clear and enforceable license conditions. The recommendations will help ensure that conditions meet the goals of the drafters, and that the Commission is able to enforce them.

**Interagency Task Force Report on**  
**Improving the**  
**Studies Process in FERC 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**

Before FERC can make an informed decision as to whether to issue a new hydropower license, it must obtain adequate information on all aspects of the project, including effects on fish and wildlife and natural, cultural, recreational and tribal resources. In order to obtain this information, it is typically necessary for the applicant to conduct studies to assess those environmental effects and to determine the resource protection, mitigation and enhancement measures needed at the project.

These studies constitute a critical element of the licensing process in a number of ways. Studies, and the resulting information, provide the foundation for analyzing the proposed project and alternatives, assessing effects, and determining appropriate protection, mitigation and enhancement measures. Studies also provide much of the basis for resource agencies to develop proposed license conditions to protect resources for which they have statutory responsibilities. The Bangor decision, which requires that conditions be supported by substantial evidence, highlights the importance of the information resulting from studies.<sup>1</sup> Finally, FERC needs the information generated by studies to perform its NEPA environmental analysis and other regulatory responsibilities, to make an informed decision as to the appropriate level and type of resource measures to attach to licenses, and to ensure that its decisions are supported by substantial evidence.

Because of differing views over studies, including those regarding their adequacy, relevance and quality, studies are often a source of disagreement among participants, which can result in increased expense and delay in the licensing process. Some contend that resolving key problems associated with studies would make a substantial contribution toward avoiding disputes and litigation and significantly speeding up the overall licensing process.

The purpose of this document is to identify some of the salient issues associated with identifying and conducting studies in the traditional licensing process and to recommend some specific steps to address these issues. While this report assumes the traditional licensing process, many of the solutions could also be useful in an Alternative Licensing Process. With the exception of dispute resolution, FERC normally has a limited role in the pre-filing phase of the traditional licensing process. Therefore, while this document provides some basic guidelines on how to identify resource issues and conduct studies during the pre-filing stage, it is primarily focused on dispute resolution and post-filing studies.

## **Pre-filing Studies**

*Issues:* There are a number of issues that come up during pre-filing with respect to selecting and

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<sup>1</sup>Bangor Hydro-Electric Company v. FERC, 78 F.3d 659 (D.C. Cir. 1996).

implementing studies. Any one of these issues, if unresolved, can lengthen the time before studies are completed, thus lengthening the overall licensing application process. If FERC determines, after reviewing the license application and additional study requests, that information related to resource effects is needed for its licensing decision, it will request the applicant to submit additional information before proceeding with the application process. Such additional information requests may lead to delays in the overall licensing process.

Significant issues associated with pre-filing studies that were identified by the working group are listed below.

1. During initial stages of consultation, license applicants must identify the affected environment, significant resources affected by the project, and their proposed studies and study methodologies. License applicants may not always provide sufficient information in these areas to enable resource agencies to identify necessary studies, comment on proposed studies, or recommend additional studies.
2. Conflicts can occur if study requests made by resource agencies are not sufficiently clear about their resource management goals and the nexus between the project and potential resource effects.
3. Disagreements may arise as to which resource issues require studies and what kind of studies are necessary.
4. Differences over the necessity of conducting studies sometimes occur because there is a lack of recognition that agencies need study information to develop their recommendations and conditions.
5. Once the general studies are agreed upon, problems can arise in trying to agree on study goals, methodologies, and data collection.
6. Even when the study plan is acceptable to all participants, there may be problems with the timing of study initiation and completion as well as the quality of the studies performed.
7. Even if the quality of the completed studies is adequate, disagreements can arise over the interpretation of the results.
8. Completed studies or proposed changes to project design can reveal new issues that require further study which complicates the licensing schedule.
9. During the overall studies process, there may not be sufficient communication between applicants and agencies with regard to sharing information on the study plan, design, and methodologies and the monitoring of study execution and progress.
10. Participants may disagree about the need for studies when they have agreed on mitigation measures

and are working toward settlement.

*Proposed Solutions:*

The following are suggestions for applicants, resource agencies, and other participants on how to improve the process by which studies are selected, designed, and implemented and thereby ensure a more expeditious overall licensing process:

1. To gain insight into the type of information necessary for a complete application, applicants should consult FERC's "Hydroelectric Project Licensing Handbook" (December 1991) or "Hydroelectric Relicensing Project Handbook" (April 1990). FERC is in the process of consolidating these two documents into one revised and updated handbook that will cover both licensing and relicensing. In addition, applicants may also consult agencies for relevant guidance and publications.
2. Applicants should initiate the process for conducting studies sufficiently early so as to ensure that all necessary studies are completed before the application is filed. In identifying necessary studies, it would be helpful for the resource agencies to have specific information regarding the project description, resources, operations and effects.
3. As early in the process as possible, resource agencies should provide the applicant with an explanation of resource management goals, study objectives, suggested methodologies, data collection and analysis techniques. The resource agencies should also demonstrate a clear nexus between project operations and the resources being studied as well as between information needs and statutory responsibilities.
4. In making study requests, the resource agencies should identify studies needed to assess project effects for the purpose of developing recommendations and conditions. The information generated by the studies may be part of the administrative record used to support recommendations or conditions.
5. When possible, participants will provide and make use of existing studies and other applicable information.
6. Starting early in the consultation process, participants should cooperate in developing study objectives, time lines and methodologies. In addition, consulting resource agencies on the selection of contractors to conduct studies may help avoid surprises and delays.
7. All participants should consider cost and practicality when developing the study plan.
8. Participants should also establish protocols for sharing information on all aspects of the study plan and its execution (e.g., evaluation of study plan, monitoring of study implementation, review and discussion of interim and final results and possible need for modified or additional studies).

9. Participants involved in settlement agreements should acknowledge the need for basic information to meet the substantial evidence standard which, in some cases, might require the execution of studies.

10. Various dispute resolution processes are available should disagreements over study issues persist.

## **Options for Resolving Disputes**

*Issue:* Study issues can sometimes be the source of disagreements among the various participants involved in a given licensing. Participants can often avoid such disagreements by working together early in the licensing process to identify their resource goals and develop a study plan. Yet, in those cases where study disputes cannot be avoided, there are a variety of ways that participants can seek resolution.

### *Proposed Solutions:*

1. Early in the pre-filing licensing process, resource agencies should identify their resource management goals. In addition, this is a good opportunity for other participants to identify their resource goals. With resource goals identified, participants should work together to develop a study plan appropriate to the range, impact and scope of resource issues affected by the project. If disagreements arise between participants as to the study plan, participants are encouraged to attempt to resolve these disagreements early.

2. If early attempts to resolve disagreements regarding studies fail, participants have a variety of options available to them to help resolve the dispute:

a) Participants may use alternative means of dispute resolution, including but not limited to settlement negotiations, conciliation, facilitation, mediation, fact finding, mini trials and panels, or any combination thereof. If alternative dispute resolution is considered, participants must agree to a process appropriate and acceptable to the group.<sup>2</sup>

b) FERC regulations provide that if a dispute arises between a potential applicant and a resource agency or Indian Tribe regarding the need to conduct a study or gather information, or regarding any other matter arising during the first stage of consultation, any of these participants may refer the dispute, in writing,

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<sup>2</sup> See 18 C.F.R. Section 385.604. Note that FERC regulations allow for the use of these alternative processes, though there are certain instances where that use may be limited. In addition, FERC's Office of Dispute Resolution Services can provide advice and information to participants regarding the use of alternative means of dispute resolution.

to the Director of the Office of Energy Projects (Director) for resolution.<sup>3</sup> In addition, the resource agencies may have alternative dispute resolution processes which may be used by applicants. The determination of the appropriate forum for dispute resolution should be made by the participants to the dispute and be based upon the subject matter of the dispute.

If resource agencies choose to use FERC's dispute resolution procedure and believe that further discussion would be useful, they may request, either in the referral or the response, that FERC also hold a technical conference. In appropriate cases, FERC will schedule a technical conference to clarify and attempt to resolve the issue before the Director issues a decision. Whenever possible, FERC will issue its letter resolving the dispute within 30 days of the technical conference.

### **Post-filing Studies**

*Issues:* After an application is filed, FERC staff reviews the application for completeness, including whether there is adequate information about environmental effects of the project. FERC may require, on its own accord, or on recommendation of a resource agency, that the applicant perform certain post-filing studies necessary to provide any missing information.

As with pre-filing studies, agencies may request post-filing studies be performed to provide information to assist in the development of recommendations and conditions to protect resources under their jurisdiction; similarly, agencies may view some study results as failing to provide such necessary information. However, disagreements may arise as to the need for these studies, or as to who has responsibility for providing certain information.

The time needed for post-filing studies may delay FERC's final action on an application. Therefore, to keep this delay to a minimum, it is important that the status and progress of these post-filing studies be monitored. During study execution, circumstances may arise that require modification of study design and scheduling to obtain desired study conditions and useful results. Current procedures do not promote or easily allow for the review of study progress or study execution. In addition, resource agencies, applicants, and FERC may disagree on how to interpret study results. Even when studies (both pre-filing and post-filing) are well executed, new issues may emerge, which may necessitate additional studies. Finally, studies may not present a clear picture as to what resource measures may be needed or how effective they may be.

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<sup>3</sup> See 18 C.F.R Sections 4.38(b)(5) and 16.8(b)(5) for more detail. Note: Normally, applicants, agencies, and tribes have made limited use of the process. There is some concern that FERC may not be prepared to resolve the dispute because they haven't been involved in the pre-filing consultation process. In addition, resource agencies are concerned that their participation in FERC's dispute resolution process to resolve study issues could undermine their ability to obtain the information needed to develop mandatory conditions.



*Proposed Solutions:*

1. When making requests for post-filing studies, resource agencies should identify which studies are being proposed for the purpose of providing information needed to develop recommendations and conditions.
2. Use the scoping meeting to discuss the study requests and review and document the progress of post-filing studies.
3. FERC and the resource agencies should encourage applicants to institute check points in study plans as a way to update FERC and the agencies on the status of studies.
4. Full agreement on study results is not always possible, but it is important that the resource agencies, FERC and other participants fully understand their respective views. Possible forums for discussion include scoping meetings, and status teleconferences before and clarification meetings after FERC issues a notice that an application is ready for environmental analysis.
5. Even in cases where the most comprehensive and cooperative studies have been conducted, some information may be unattainable at the time of licensing. When uncertainty prevents appropriate environmental measures from being identified for the term of the license, adaptive management may be appropriate. An adaptive management plan proposed for inclusion in a new license may allow FERC to expedite license issuance as long as the plan includes provisions for completing adaptive management studies or monitoring in the post-licensing period. A license which adopts an agreed upon adaptive management plan should include: (1) measurable objectives; (2) interim resource measures; (3) an effective monitoring program or studies designed to evaluate whether objectives are being met; (4) procedures for revising interim resource measures to incorporate new measures in light of new information; (5) provision for licensees to consult with resource agencies (and other participants, as appropriate) in developing, implementing and adjusting the plan; and (6) a structure that takes into consideration enforceability by FERC.

Adaptive management may not be appropriate in all situations and should not be considered a substitute for studies needed prior to license issuance. In developing adaptive management plans, participants should be aware that FERC's enforcement authority under the FPA extends only to licensees.