

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)⁽¹⁾ 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 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.⁽²⁾

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 agencies will continue to work with applicants in the development of their mandatory conditions⁽³⁾.
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 1 of the FPA or other applicable provisions of law, and that conditions selected by the Commission adequately and equitably protect, mitigate damages to, and 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.

- **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).

- 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).
- 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.
- 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.

- **Clarification of Section 10(j) Recommendations**

Clarification of Basis and Support

- 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.

- Resource agencies are encouraged to include supporting documentation to help clarify their recommendations.

Clarification for Compliance Purposes

- 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.
- 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

- 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.
- 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.
- 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

- Resource agencies will identify and /or provide any available information on cost that the agency considered in making its recommendations.
- 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

- 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.
- 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

- 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.
- 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.

- 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.
- 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.
- 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.
- 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.
- 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.

- 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.
- 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.

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

2. 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.
3. The Forest Service already has a public review process for its 4(e) conditions.