REPORT ON HYDROELECTRIC LICENSING

POLICIES, PROCEDURES, AND REGULATIONS

COMPREHENSIVE REVIEW AND RECOMMENDATIONS

PURSUANT TO SECTION 603 OF THE ENERGY ACT OF 2000

Prepared by the Staff of
The Federal Energy Regulatory Commission

May 2001

REPORT

Submitted to the

United States Congress

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The Federal Energy Regulatory Commission

Hydroelectric Licensing Policies, Procedures, and Regulations Comprehensive Review and Recommendations

May 8, 2001

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Executive Summary

This report was prepared by the Staff of the Federal Energy Regulatory Commission (Commission) pursuant to Section 603 of the Energy Act of 2000.[1] Section 603 requires the Commission, in consultation with other appropriate agencies, to undertake a comprehensive review of policies, procedures and regulations for the licensing of hydroelectric projects to determine how to reduce the cost and time of obtaining a license under the Federal Power Act (FPA). The report is to include any recommendations for legislative changes. The recommendations herein reflect the views only of the Commission Staff; they have not been considered by the full Commission.

The report focuses on relicensing of existing hydropower projects, as relicenses comprise the great majority of licensing proceedings currently and for the foreseeable future. To ensure a comprehensive review, the Commission solicited, in addition to the views of federal and state agencies with responsibilities related to the regulation of hydropower projects, the views of Indian tribes, licensees, non-governmental organizations, and interested individuals.

The median time from the filing a license application to its conclusion for recent applications is 43 months. Many proceedings, however, take substantially longer. Many specific factors contribute to delays, but the underlying source of most delays is a statutory scheme that disperses decision-making among federal and state agencies acting independently of the Commission's proceedings. The most common cause of long-delayed proceedings is untimely receipt of state water quality certification under the Clean Water Act.

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[1] Pub. L. No. 106-489, 114 Stat. 2207 (November 9, 2000). H.R. 2884 (10/19/2000). Section 603 states, as pertinent to this report, that the Commission shall:

> . . . , in consultation with other appropriate agencies, immediately undertake a comprehensive review of policies, procedures and regulations for the licensing of hydroelectric projects to determine how to reduce the cost and time of obtaining a license. The Commission shall report its findings within six months of the date of enactment to the Congress, including any recommendations for legislative changes.

The same statutory scheme also ensures that the Commission has scant control over the costs of preparing a license application or of the costs of environmental mitigation and enhancement. These expenditures are frequently mandated in state water quality certification or mandatory federal agency conditions required pursuant to FPA Sections 4(e) and 18, and override the Commission's balancing of all relevant factors affecting the public interest.

The Commission has made a determined effort historically to make the licensing process more efficient and effective, and to achieve outcomes satisfactory to all participants. The most successful reform effort has been the introduction of the Alternative Licensing Process (ALP), a cooperative process that combines pre- and post-application activities. The ALP and other reform efforts continue, but they cannot overcome the problems with the legislative scheme. The most effective way to reduce the cost and time of obtaining a hydropower license would be for Congress to make legislative changes necessary to restore the Commission's position as the sole federal decisional authority for licensing conditions and processes. Alternatively, consideration should be given to requiring other federal agencies with mandatory conditioning authority to better support their conditions. Focusing state water quality certification by limiting certification to physical and chemical water quality parameters related to operation of the hydropower facility would be very helpful in reducing the time and cost of licensing. If Congress does not restore the Commission's authority to determine license conditions based on a balanced consideration of all public interest factors, Staff recommends that it clarify and limit authority for other federal agencies to prescribe fishways. Staff also recommends that annual charges paid by licensees to reimburse the United States for the costs of other federal agencies in administering hydropower licensing be remitted directly to those agencies with a Congressional directive to expend the funds for that purpose.

Changes in Commission regulations and policies may also assist in reducing the time and cost of licensing, although they are not an adequate substitute for legislative reform. These include: requiring license applicants to report to the Commission during prefiling consultation disputes with agencies concerning the need for studies and data, so that the Commission can determine whether to become involved in prefiling consultation; fully including the public in prefiling consultation, limiting the ability of agencies with conditioning authority to revise their conditions; issuing draft NEPA documents only when necessary, and increasing the standard term for new licenses to 50 years.

I. HYDROPOWER PROGRAM DESCRIPTION AND FUNCTIONS

The Commission currently regulates over 1,600 hydropower projects at over 2,000 dams pursuant to Part I of the Federal Power Act (FPA). [2] Those projects represent more than half of the Nation's approximately 100 gigawatts of hydroelectric capacity and over five percent of all electric power generated in the United States. As of January 1, 2001, the Commission was regulating 1,033 licensed projects.

The Commission's hydropower work generally falls into three categories of activities. First, the Commission licenses and relicenses projects.[3] Relicensing is of

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[2]16 U.S.C. §§ 796-823b. A project is all lands, water, and facilities needed to carry out project purposes, which, besides electric generation, can include any other public interest purposes the Commission designates. A typical project will consist of a dam, the reservoir it impounds, a penstock diverting water from the impoundment to the turbines, the powerhouse containing the turbines and generators, a channel or pipe returning diverted water downstream, a transmission line connecting the project power to a grid, the lands or interests in lands encompassing the above facilities, and the necessary water rights to operate the project as authorized. However, there is a great diversity in project size and operating regimes, and in the resources affected.

[3]The Commission also issues exemptions from licensing. An exemption is not deregulation; rather, it is a less comprehensive form of regulation, intended for projects which should, by their size and location, have minimal environmental impacts. The Commission may exempt from some or all licensing requirements two types of projects where new capacity is being added: (1) Conduit exemptions are for projects on manmade conduits, generally irrigation works. The size of these exemptions is limited to under 15 MW for nonmunicipalities and under 40 MW for municipalities. (2) 5 MW Exemptions are for projects proposing additional capacity (for a total of 5 MW or less) and using an existing dam or natural water feature. Exemptions have no statutory maximum term, and the Commission issues exemptions in perpetuity. Both types of exemptions are subject to mandatory fish and wildlife conditions by federal and state fish and wildlife agencies. Unlike a license, an exemption does not confer federal power of eminent domain, so exemptees must already own the necessary land or, for a project on federal lands, must get a use permit from the land managing agency. The extent of information required in an exemption application is generally much less than that required in a license application; however, most of the same procedural steps apply to both types of development applications.

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particular significance because it involves projects that originally were licensed from 30 to 50 years ago. In the intervening years, enactment of numerous environmental, land use, and other laws, and judicial interpretation of those laws, have significantly affected the Commission's ability to control the timing of licensing and the conditions of the licensing process. The Commission's second role is to continue regulatory oversight of licensed projects during their license term. This post-licensing workload involves ensuring compliance with the license requirements and acting on applications to amend the license by modifying project facilities and operations. This workload has grown in significance as new licenses are issued for projects originally licensed with few or no environmental requirements, and as development activity on or adjacent to project reservoirs increases.[4] Finally, the Commission oversees the safety of licensed hydropower dams. The Commission's dam safety program is widely recognized as a leader in the field.

The Commission's licensing processes have also evolved over the years in response to changes in applicable laws, heightened interest by resource agencies and other stakeholders, and increased competition for resources affected by the project. The licensing process and its evolution are discussed in detail below.

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The Commission's exemption authority was enacted in 1978 and expanded in 1980. Exemption applications peaked in the early 1980s; fewer than 15 applications were filed from 1996-2000. As of December 2000, the Commission was regulating 600 exempted projects.

[4]New licenses typically include instream flow and flow monitoring requirements, and often require management plans for such project-affected resources as wildlife, recreation, and cultural resources. These requirements are often finalized only after the issuance of the new license, in consultation with resource agencies or stakeholders.

II. STATUTORY FRAMEWORK OF THE HYDROELECTRIC LICENSING PROGRAM

In the Federal Water Power Act of 1920 (FWPA),[5] Congress ended several decades of piecemeal development of hydroelectric power on federal lands and on waters subject to federal jurisdiction by vesting in the Commission exclusive authority to license non-federal projects determined by the Commission to be "best adapted to a comprehensive scheme for improvement and utilization" of a river basin for navigation, water power development, and other beneficial public uses. The FWPA was re-enacted in 1935 as Part I of the FPA.

a. Jurisdiction

The Commission's authority to license hydropower projects is found in Part I of the FPA. Section 4(e) of the FPA[6] empowers the Commission to issue licenses for projects that:

- o are located on navigable waters;
- o located on nonnavigable waters over which Congress has Commerce Clause jurisdiction, were constructed after 1935, and affect the interests of interstate or foreign commerce (e.g., are connected to the interstate grid);
- o located on public lands or reservations of the U.S. (excluding national parks); or
- o using surplus water or water power from a federal dam (usually a Corps of Engineers or Bureau of Reclamation dam). The licensed project will not include the federal facilities. The Commission has Memoranda of Understanding with the Corps and Reclamation to coordinate the exercise of their respective authorities.

Jurisdiction applies regardless of project size.

b. Comprehensive Development Standard

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[5] 41 Stat. 1063 (1920).

[6] 16 U.S.C. § 797(e).

Section 10(a)(1)[7] establishes the comprehensive development standard which each project must meet to be licensed. A licensed project shall be:

> ...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 or other purposes....

Pursuant to this standard, the Commission must explore all issues relevant to the public interest. Typical (and sometimes competing) uses for a waterway include power generation, irrigation, flood control, navigation, fish and wildlife, municipal water supply, and recreation.[8] In the Electric Consumers Protection Act of 1986 (ECPA),[9] Congress amended Section 4(e) to require the Commission to give equal consideration to (but not necessarily equal treatment of) developmental and nondevelopmental values.

Considerations relevant to the Commission's public interest balancing include, among others:

- o whether the project power is needed, and the cost of project power relative to other potential sources of electricity;

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[7]16 U.S.C. § 803(a)(1).

[8]FPA Section 15(a)(2), 16 U.S.C. § 808(a)(2), provides with respect to new license applications that the Commission must consider, in addition to the requirements of FPA Section 10, various other factors, including the applicant's ability to comply with the license terms; plans to manage, operate, and maintain the project safely; ability to operate the project to provide efficient and reliable electric service; and existing and planned transmission services. An existing licensee's compliance record must also be considered.

[9]P.L. 99-495, 100 Stat. 1243 (Oct. 16, 1986) (codified at 16 U.S.C. § § 71a, et seq.).

- o whether licensing the project would result in the contravention of any policies expressed in the antitrust laws;[10]

- o the project proposal's consistency with any state or federal plan which addresses one or more beneficial use of a waterway;[11]

- o fish and wildlife-protective conditions submitted by federal and state fish and wildlife agencies; and

- o the Commission's assessment of the proposed project's environmental impacts.

The Commission is authorized to issue original licenses for terms of up to 50 years.[12] New licenses, that is, those licenses issued following the expiration of an original license, may be issued for terms from 30 to 50 years.[13]

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[10]FPA Section 10(h), 16 U.S.C. § 803(h).

[11]FPA Section 10(a)(2)(A), 16 U.S.C. § 803(a)(2)(A). However, such plans are not binding on the Commission.

[12]FPA Section 10(a)(1), 16 U.S.C. § 803(a)(1). Not all original licenses are for undeveloped projects. Historically, many projects were constructed without Commission authorization that were later determined to be subject to the Commission's jurisdiction by reason of judicial decisions clarifying the ambit of the Commission's authority, or because facts establishing jurisdiction were subsequently developed.

[13]16 U.S.C. § 808(e). Issuance of a new license is only one of the Commission's options upon the expiration of a project's original license term. Other options provided by the FPA, either explicitly or by necessary implication, are: (1) the United States can take over a non-municipal project, upon payment of the licensee's net investment (this has never happened); (2) issue a new license to a third party applicant (this has never happened where the incumbent licensee applied to keep the project); (3) issue a non-power license, which is a temporary license under which generating facilities are removed and there is an orderly transfer of regulatory supervision over the project lands and non-power facilities to the appropriate federal, state, or municipal agency (this has happened once); (4) accept surrender of the license if the project is no longer in the public interest or no one wants to operate it (this has only rarely happened); (5) deny any relicense application; or (6) if the project is not required to be licensed (voluntary

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c. Dispersion of Commission Authority

FPA Section 4(e) authorizes federal land-administering agencies, typically the Department of Agriculture and the Department of the Interior, to impose mandatory conditions on projects located on Federal reservations they supervise.

The Commission's role in licensing non-federal hydropower, once nearly exclusive, has been steadily eroded since the FWPA first established a federal licensing regime in 1920. When the FWPA was reenacted as Part I of the FPA in 1935, the only significant role played by other agencies was provided in Section 4(e). When issuing a license for a project on a federal reservation, [14] the Commission must:

(a) find that the proposed project will not be inconsistent or interfere with the purposes for which the reservation was created or acquired;

(b) include any conditions that the land managing agency deems necessary for the protection and use of the reservation. For example, the Secretary of the Interior prescribes mandatory conditions for projects on Indian reservations, and the Secretary of Agriculture does so for projects in national forests. [15]

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[13](...continued)
license), the licensee can decline to apply for relicensing, and can continue to operate the project if he so chooses. The project will however be subject to other parties' applications. (No third-party applicant has ever received a voluntary license for such a project.). If none of these alternatives has been carried out before the original license expires, the status quo is preserved by statutorily mandated annual licenses subject to the same conditions as the original license.

[14]Federal "reservations" are a subset of federal lands. Reservations are defined in Section 3(2) of the FPA as "national forest, tribal lands embraced within Indian reservations, military reservations, and other lands and interests in lands owned by the United States, and withdrawn, reserved, or withheld from private appropriation and disposal under the public land laws; also lands and interests in lands acquired and held for any public purposes; but shall not include national monuments or national parks."

[15]Section 4(e) conditioning applies to new as well as original licensing. See Southern California Edison Company v. FERC, 116 F.3d 507 (D.C. Cir. 1997).

For many years, the Commission interpreted Section 4(e)'s conditioning language as precatory. However, in 1984, the Supreme Court held in the Escondido decision that 4(e) conditions are mandatory. The Commission must either include these conditions in the license without modification or, if it believes the license as conditioned would not satisfy the Section 10(a)(1) standard, it may decline to issue a license.[16] The Commission may issue the license and explain why it believes the conditions should be deleted or modified. A party to the license proceeding may then seek judicial review of the license order in a Circuit Court of Appeals. The 4(e) conditions are subject to the same substantial evidence standard of review by the courts as other provisions of the license. In addition, the Escondido case holds that 4(e) conditions may not be used to frustrate the Commission's licensing process.[17] However, agencies with 4(e) authority have no statutory obligation to adhere to the balanced development standard of Section 10(a)(1). The more narrow focus and interests of agencies with 4(e) authority, and similar authorities discussed below, sometimes results in conflicts between the Commission and an agency that cannot be resolved, with the license applicant caught in the middle of the process. Also, agencies with 4(e) authority may perform an environmental analysis pursuant to the National Environmental Policy Act of 1969 (NEPA)[18] independent of the Commission's NEPA analysis.

The 1935 reenactment also contained, in Section 18,[19] authority for the Secretary of Commerce to "prescribe" fishways. In 1970, Section 18 was amended to also give such authority to the Secretary of the Interior. The authority to prescribe fishways applies to new licenses as well as original licenses,[20] and fishway prescriptions pursuant to Section 18 are mandatory. As fishways can have a dramatic effect on the capital cost and revenue potential of a project, this prescriptive authority has taken on increased significance. In American Rivers v. FERC, 187 F.3d 1007 (9th Cir. 1999) (American Rivers II), the Court ruled that the Commission lacked authority in individual cases to

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[16] See Escondido Mutual Water Company v. LaJolla Band of Mission Indians, 466 U.S. 765 (1984).

[17] 466 U.S. at 777.

[18] 42 U.S.C. § § 4321, et seq.

[19] 16 U.S.C. § 811.

[20] See Order No. 513 (1989), 54 Fed. Reg. 23756 (June 2, 1989), FERC Stats. & Regs. 1986-1990, Regulations Preambles ¶ 30,854 at 31,375); Order 513-A (1989), 55 Fed. Reg. 4 (January 2, 1990), Regulations Preambles ¶ 30,869.

determine whether prescriptions submitted under color of Section 18 of the FPA were in fact fishways.[21] The court held that disputes relating to whether a condition was authorized by FPA Section 18 were to be resolved by the courts, not the Commission.

As a result of these judicial rulings and others discussed below, the Commission's only discretion with respect to mandatory conditions it might otherwise conclude are not in the public interest is simply to deny the license application. In most relicense proceedings, this is not a feasible alternative.

On December 22, 2000, the Departments of Interior and Commerce issued a joint Notice of Proposed Interagency Policy on the Prescription of Fishways.[22] The Commission staff filed comments on the proposed policy, which are attached to this report as Appendix D. In brief, staff's review found that the proposed policy purports to define the term "fishway" in an over broad manner inconsistent with the definition of that term enacted by Congress EPACT and without consultation with the Commission as contemplated by that Act. Staff also concluded that the proposed policy's definition of "fish" appears to overreach, and its statement of "Need for Fishways" may be inconsistent with judicial precedent on that issue. Staff's comments also note that the Departments appear to misapprehend some Commission policies and regulations and to overstate the Departments' authority. Overall, staff concluded that the various problems with the proposed policy risk adding delay, expense, inefficiency, and uncertainty to the licensing process, and recommended that the Departments work with the Commission to develop a mutually agreeable definition.

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[21] In Order No. 533 (1991), 56 Fed. Reg. 23,108 (May 20, 1991), FERC Stats. & Regs., Regulations Preambles 1991-1996 ¶ 30,921; Order No. 533-A (1991), 56 Fed. Reg. 61,137 (December 2, 1991), FERC Stats. & Regs., Regulations Preambles 1991-1996 ¶ 30,932, the Commission promulgated a definition of fishway. Subsequently, in Section 1701(b) of the National Energy Policy Act of 1992 (EPACT), Pub. L. No. 102-486 (Oct. 24, 1992), 106 Stat. 3096, Congress vacated the Commission's definition of fishway and provided that the items that can be considered fishways under Section 18 are limited to physical structures, facilities, or devices necessary to maintain all life stages of such fish, and project operations and measures necessary to ensure the effectiveness of such structures, facilities, or devices. Congress further provided that the Commission may not issue a rulemaking defining fishway without the concurrence of the Secretaries of Interior and Commerce.

[22] 65 Fed. Reg. 80898.

In addition, Section 10(j) of the FPA,[23] added by ECPA, requires generally that the Commission base fish and wildlife conditions in licenses on recommendations received from federal and state fish and wildlife agencies. Whenever the Commission believes that any recommendation of a fish and wildlife agency may be inconsistent with the FPA or other applicable law, it must attempt to resolve the inconsistency, giving due weight to the expertise and statutory responsibilities of such agencies. If the Commission fails, in any respect, to adopt an agency's recommendation, it must explain not merely why its disagrees with the agency, but why the agency's recommendation is inconsistent with the law, and how the measures included in the license provide adequate protection for fish and wildlife resources.[24] The Government Accounting Office has found the Commission in practice rejects only five percent of these recommendations.[25]

More recently, other legislation has been enacted which gives certain federal and state agencies de jure or de facto veto authority over license applications. The principal legislation in this regard is the Clean Water Act (CWA).[26]

Section 401(a)(1)[27] of the CWA precludes the Commission from licensing a hydroelectric project unless the project has first obtained State water quality certification or the state has waived certification. In PUD No. 1 of Jefferson County v. Washington Department of Ecology, 511 U.S. 700 (1994) (Jefferson County), the Supreme Court in 1994 held that a State acting under the CWA could regulate not only water quality (such as the physical and chemical composition of the water), but water quantity (that is, the amount of water released by a project), as well as State-designated water uses (fishing, boating, etc.).[28] It is important to note that the court specifically acknowledged that its

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[23]16 U.S.C. §803(j). Regulations implementing Section 10(j) are at 18 CFR 4.34(e). See also Order No. 533 and 533-A.

[24]American Rivers II holds that the Commission is authorized to decide whether a condition recommended under FPA Section 10(j) is properly within the scope of that section.

[25]Electric Deregulation: Electric Consumers Protection Act's Effects on Licensing Hydroelectric Dams. GAO/RCED-92-246, p. 19 (1992).

[26]33 U.S.C. §§ 1251-1376.

[27]33 U.S.C. § 1341(a)(1).

[28]EPA has encouraged states to treat water quality certification as a basis for

(continued...)

decision did not address the interaction of the CWA and the FPA, since no license had been issued for the project in question. Its decision therefore did not discuss which regulatory scheme would prevail in the event of a direct and critical conflict.

In American Rivers v. FERC, 129 F.3d 99 (2nd Cir. 1997) (American Rivers I), the Court held that the Commission lacked authority to determine whether conditions submitted by state agencies pursuant to Section 401 of the Clean Water Act were beyond the scope of that section. The court held that disputes concerning whether conditions submitted under Section 401 were lawful were to be resolved instead by the courts.

State water quality certifications now impose a wide array of requirements on projects, without any obligation to take into account the benefits of hydropower or other competing interests, or to concern themselves with whether their requirements duplicate or conflict with those imposed by the Commission or other agencies. Most troublesome are the conditions controlling minimum instream flows, as these flows have a direct impact on a project's power generation and economic viability.

Moreover, the section 401 certification process is often very time-consuming, despite the intent of the CWA that a State should act on a certification request in a year or less. In years past, many state water quality agencies avoided the one-year requirement by counting the year beginning when the agency determined that the certification application was complete. The Commission sought to curb this practice by issuing a rule holding that the one-year waiver period for state action on 401 water quality certifications begins running when the request for certification is filed.[29] This has not proved to be effective, as it now common for licensees to repeatedly restart the clock by withdrawing and refiling their requests for certification, in order that the State will have more time to act. Until the State does act, the Commission cannot grant the license application. Appeals of water quality certification are also common, rendering

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[28](...continued)
imposing conditions applicable to aquatic ecosystem as a whole. See, e.g., EPA's November 30, 1999 comments in response to Commission's notice of the application for a new license for the Falls Village and Housatonic River Project Nos. 2597 and 2576. There, EPA states that it encourages states to look beyond water chemistry is developing water quality standards to include standards for the protection of "aquatic systems including the adquatic life, wildlife, wetlands and other aquatic vegetation, and hydrology required to maintain the aquatic system." (Detailed Comments, p. 1).

[29]Order No. 464, III FERC Stats. & Regs. ¶ 30, 730, reh. denied, 39 FERC ¶ 61,201 (1987), reconsideration denied, 41 FERC ¶ 61,206 (1987).

problematic Commission issuance of a license based on certification conditions that could significantly change.

d. Other Statutes Affecting the Licensing Process

Endangered Species Act[30]

Under this act, the Commission must ensure that its actions do not jeopardize protected species or their habitat and must consult with the U.S. Fish and Wildlife Service or the National Marine Fisheries Service (NMFS) when determining what protection measures to take. A project that would pose such jeopardy could not be authorized. In one recent case, NMFS issued a jeopardy opinion with respect to a project the Commission had previously licensed (but was not yet constructed). The Commission disagreed that the project would pose such jeopardy, but was compelled to rescind the license.[31]

Coastal Zone Management Act[32]

Under this act, the Commission cannot authorize development of a hydropower project within or affecting a state's coastal zone, unless the state concurs with the applicant's certification of consistency with the state's Coastal Zone Management Act program (which has been approved by the Secretary of Commerce). The state's concurrence is conclusively presumed if it fails to act within 180 days of its receipt of the applicant's completed certification. The phenomenon of repeated denials without prejudice or withdrawal and refiling that is commonplace for water quality certification applications is also becoming common with respect to CZMA consistency certifications.

National Historic Preservation Act[33]

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[30]16 U.S.C. §§ 1531-43.

[31]See P.U.D. No. 1 of Okanogan County, WA, 88 FERC ¶ 61,040 (1999), order rescinding license, 90 FERC ¶ 61,169 (2000).

[32]16 U.S.C. § 1451 et seq.

[33]16 U.S.C. §§ 470-470w-6.

This act requires the Commission, before authorizing a project, to consider the project's effects on any site, structure, or object included in, or eligible to be included in, the National Register of Historic Places, and to afford the Advisory Council on Historic Preservation (Advisory Council) an opportunity to comment. In practice, this is generally handled through the State Historic Preservation Officers.

Pacific Northwest Electric Power Planning and Conservation Act[34]

Under this act, the Northwest Power and Conservation Planning Council has developed a regional electric power and conservation plan, and a Columbia River Basin fish and wildlife protection program. The act imposes on the Commission three obligations: (1) provide "equitable treatment" to fish and wildlife; (2) take into account "to the fullest extent practicable" the Council's fish and wildlife program; and (3) in carrying out its responsibilities, consult with a variety of entities and, to the "greatest extent practicable," coordinate actions with other federal agencies.

Federal Land Policy and Management Act[35]

The Energy Policy Act of 1992 amended FLPMA to reverse a court decision which had excluded Commission licensed projects from FLPMA's terms. Consequently, most Commission licensees and exemptees (some are grandfathered) must obtain from the Forest Service or the Bureau of Land Management, as appropriate, the necessary rights-of-way to build and operate projects on the public lands. Any conditions on such rights-of-way are mandatory.

Wild and Scenic Rivers Act[36]

This act bars the Commission from authorizing hydropower projects on river segments congressionally designated as Wild or Scenic, or on river segments congressionally selected to be studied for possible designation.

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[34] 16 U.S.C. § 893 et seq.

[35] 43 U.S.C. § 1701 et seq.

[36] 16 U.S.C. § 1271 et seq.

III. EVOLUTION OF THE LICENSING PROCESS

License applications are processed in hearings conducted by notice and comment procedures.[37] Licensing procedures have evolved over time in response to changes in the statutory framework, in public perceptions concerning the appropriate role of hydropower in the nation's energy mix, and as a result of Commission efforts to make the process more efficient and effective.

a. The Traditional Licensing Process

Prior to 1985, at a time when most applications were for original licenses for new projects, the Commission was compelled to reject many applications as patently deficient for failure to conduct studies necessary to evaluate the project. This failure commonly resulted from inadequate consultation between license applicants and federal and state resource agencies. Applicants were required to consult further with the agencies, conduct additional studies, and resubmit their applications. This cycle of inadequate initial consultation, rejection, reconsultation, and resubmittal of an application often wasted the time, resources, and money of the applicants, the agencies, and the Commission.

To make the process more efficient, the Commission revised its consultation regulations in 1985,[38] establishing what is now referred to as the "traditional" consultation process. The substantive elements of this process are essentially the same for original and new licenses, but detailed procedural and information requirements specifically applicable to relicenses were issued in 1989 to implement the relicensing provisions of ECPA, including deadlines for applicants and agencies to complete the steps of the prefiling process so that an applicant would be able to timely file the application for a new license.[39]

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[37] See Order No. 533 and Sierra Association for the Environment v. FERC, 744 F.2d 661 (9th Cir. 1984).

[38] Order No. 413 (1985), 50 Fed. Reg. 23947 (June 7, 1985), FERC Stats. & Regs. Preambles 1982-1985 ¶ 30,632 (1985): Order No. 413-A (1991), 56 Fed. Reg. 31,327 (July 10, 1991), FERC Stats. & Regs. Preambles 1991-1996 ¶ 30,922.

[39] Order Nos. 513 and 513-A. For relicenses, incumbent licensees must give notice between five and five and one-half years before the current license expires of whether they intend to apply for a new license (FPA § 15(b)(1); 18 CFR 16.6(c)). From

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In Order Nos. 533 and 533-A the Commission adopted further revisions to its procedural regulations for all applications for hydropower licenses, implemented other provisions of ECPA, especially Section 10(j) of the FPA, and made the licensing process more efficient, fair, and understandable for all participants. In the latter regard, the Commission clarified and improved many of the regulations governing prefiling consultation and hearing practices. These improvements included adding a requirement for applicants to meet with consulted entities during the first stage to discuss potential alternatives and study requirements and for consulted entities to provide follow-up comments in writing, increasing opportunities for public and Indian tribe participation in prefiling consultation, expanding the time for agency review and comment on draft license applications, adding a process for resolving disputes over necessary scientific studies, and establishing deadlines for various prefiling activities.[40]

In 1992, the Commission further amended the license application and post-license issuance regulations to remove several outdated or unnecessary requirements.[41]

In 1993, the Commission convened a Relicensing Roundtable with stakeholders on ways to improve licensing. As a result of that event, the Commission committed to increasing the number of multi-project NEPA documents for applications for projects in the same river basin or subbasin; revised its policies on license terms to help ensure coordination of future relicense proceedings in the same river basin or subbasin, began

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[39](...continued)
the time the notice of intent is issued, the existing licensee must make various information about the project available to resource agencies and the public (FPA § 15(b)(2); 18 CFR 16.7(d)). Following the notice of intent, the Commission issues public notice and directly notifies federal and state fish and wildlife agencies (FPA § 15(b)(3); 18 CFR 16.6(d)).

[40]The rule also clarified a number of Commission practices in the conduct of licensing proceedings governing prefiling consultation related to amendment of licenses, when a water quality certification must be obtained, and how the Commission begins its review of hydropower applications.

[41]See Order No. 540 (1992), 57 Fed. Reg. 21734 (May 22, 1992), FERC Stats. & Regs., Regulations Preambles 1991-1996 ¶ 31,944 (reducing the number of copies required to be filed, eliminating a requirement for full size prints, extending the period between required filings of Form 80 (recreational development and activity), reducing reporting requirements pertaining to conveyances of project lands, and eliminating superfluous regulations pertaining to certain licensees' net investment in project works.

issuing draft environmental assessments (EAs) for comment; agreed to include license articles providing for reopening of licenses to consider cumulative environmental impact issues raised by future applications in the same basin or sub-basin; and involve Commission staff earlier in the process where possible.[42]

The process as it exists today is described below. During the stage one, applicants must consult extensively with relevant federal and state resource agencies, affected land managing agencies, Indian tribes, and state water quality agencies. The applicant must provide the consulted entities with detailed information describing the proposed project (initial consultation document). This is followed by a joint meeting with the agencies open to the public to discuss the proposed project and the data and studies that the applicant will provide as part of the consultation process. The consulted entities have an opportunity to make additional written comments and study requests following the meeting.[43]

During the second stage of consultation, the applicant must perform any reasonable studies that are necessary for the Commission to make an informed decision on the application. The applicant completes its draft application, which includes the results of the studies; proposed protection, mitigation, and enhancement (PM&E) measures based on the study results; and the applicant's responses to the consulted entities written comments and recommendations made during stage one. The applicant must then send a copy of its draft application to the consulted entities, allowing them 90 days for review and comment. If the applicant and a consulted entity are not able to agree on necessary studies, either participant may submit to the Director of the Office of Energy Projects a request for dispute resolution. Based on the disagreeing parties' submissions, the Director will issue a written resolution. An applicant who disagrees with the outcome of a dispute resolution is not required to conduct studies pursuant to the

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[42]The Commission has also entered into several memoranda of agreement (MOA) with other federal agencies over the years to improve the licensing process. These include MOAs governing joint NEPA review and coordinated application processing by the Commission and the U.S. Forest Service or the Bureau of Reclamation. The Commission also has agreements with the Federal Emergency Management Agency, the Corps of Engineers, the Department of Energy, the Nuclear Regulatory Commission, the Bureau of Reclamation, and Washington State. These agreements formalize the sharing of dam safety expertise, promote the continued development of public safety measures, and reinforce the importance of working together for the protection of life and property.

[43]See 18 CFR 4.38(a) and (b) (original licenses) and 16.8(a) and (b) (relicenses).

resolution but, if it elects not to, must include with its application an explanation of the basis for that decision.[44]

The third stage of consultation is initiated with the filing of the license application, accompanied by certification that it simultaneously is being mailed to the consulted and other specified entities.[45] Applicants are required to include, among other things, a summary of the consultation process and any written comments and recommended terms and conditions from resource agencies, Indian tribes, and the public, notice or remaining disagreements concerning study requirements, and a discussion of the basis for the applicant's disagreement with recommendations of the resource agencies or tribes.[46]

In the case of existing projects, an application for a new license must be filed at least two years before the existing license expires.[47] If no application is filed by the incumbent licensee, the Commission issues a notice seeking applications. If no other applications are received, the licensee is required to file an application to surrender the license.[48]

When the application is filed, the Commission reviews it for deficiencies. If an application lacks all required information but does not have major deficiencies, the Commission keeps the application on file and sends the applicant a list of the deficiencies and establishes a schedule for the missing information to be supplied.[49]

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[44] See 18 CFR 4.38(c) and 16.8(c).

[45] See 18 CFR 4.38(d) and 16.8(d). Basic application content requirements are specific to the kind of project in question. See, e.g., 18 CFR 4.41 (major unconstructed project or major modified project); 4.51 (major project at existing dam).

[46] See 18 CFR 4.38(f) and 16.8(f). The application must be reasonably accessible to the public for inspection and reproduction, including at a public library in the county where the project is located. See 18 CFR 4.32(b)(3)(i) and 4.32(b)(4)(ii-iv).

[47] FPA 15(c)(1); 18 CFR 16.9(b).

[48] 18 CFR 16.25.

[49] An application with major deficiencies which cannot be quickly cured is considered to be patently deficient and is rejected. For practical reasons, findings of patent deficiency are limited to applications for original licenses, because if a relicense

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When an applicant has cured any deficiencies, the Commission issues notice accepting the application for filing and setting deadlines for comments, interventions and protests.[50]

Within 60 days after the application filing deadline, the Commission issues public notice of certain processing deadlines[51] and the date for final amendments.[52]

License applicants sometimes file amendments that materially modify their application. Such amendments require prefiling consultation, with the agencies having an opportunity to comment on the proposed amendment to the application. The applicant must respond to any comments in its amendment application.[53]

In many cases, scoping meetings are held in the vicinity of the project to help better determine the scope of environmental issues requiring analysis in the NEPA document and to narrow the scope of analysis to the extent feasible. In some cases, staff are able to conduct NEPA scoping via written submissions.

When additional information is no longer required, the Commission issues notice that the project is ready for environmental analysis (REA notice). The REA notice triggers a deadline for comments, recommendations, and mandatory conditions or

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[49](...continued)
application is rejected the applicant is prohibited from refiling, and the Commission is obliged to solicit other license applications for the project.

[50]The notice accepting the filing is published in the Federal Register and local newspapers and is mailed to federal and state agencies. 18 CFR 16.9(d)(1).

[51]Processing deadlines include a requirement for the applicant to issue public notice in appropriate newspapers providing general information and identifying the date to request additional information or studies and a deadline for the applicant's response to requests for additional information. See 18 CFR 4.32.

[52]In addition to the Federal Register notice, notice is mailed to resource agencies, Indian tribes, and all parties to the proceeding. 18 CFR 16.9(d)(2). In rare instances, the Commission will extend the date for final amendments, such as when the project is sold and the license is transferred while a relicense application is pending.

[53]18 CFR 16.8(b)(3). Such amendments can occur any time during the license proceeding, and may require additional actions in compliance with NEPA or other legislation.

prescriptions, and for replies to such filings.[54] When these filings are complete the Commission has all the information needed to prepare the NEPA document. If agencies are not ready to make their mandatory conditions and prescriptions known, they must file preliminary conditions and a schedule for filing final conditions.[55] A draft NEPA document will be prepared using the preliminary conditions.

Following the issuance of a draft NEPA document,[56] participants have an opportunity to modify their recommendations and prescriptions in light of the Commission staff's analysis and draft recommendations.[57] Also, if the Commission staff proposes not to adopt any of the recommendations of the federal or state fish and wildlife agencies, a meeting is held pursuant to FPA Section 10(j) for the purpose of attempting to resolve those differences.

The Commission's policy is that untimely filed mandatory fishway prescriptions filed pursuant to FPA Section 18 and terms and conditions pursuant to Section 4(e) may be treated as non-mandatory recommendations pursuant to FPA Section 10(a).[58] As discussed below in Section IV.a., this authority has been exercised infrequently.

b. The Alternative Licensing Process

In one important respect, the Commission took no action in the rulemakings discussed above in response to comments made by some resource agencies and citizens' groups. These commenters believed that in the revised regulations the Commission should have integrated the environmental review process pursuant to the NEPA with the

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[54]18 CFR 4.34(b).

[55]18 CFR 4.34(b)(1).

[56]Notice of draft NEPA documents is published in the Federal Register and copies are mailed to the parties to the proceeding and governmental entities that may be interested, regardless of party status.

[57]18 CFR 4.34(b)(4).

[58]18 CFR 4.34(b). See also South Carolina Electric & Gas Co., 76 FERC ¶ 61,308, order on reh'g, 78 FERC ¶ 61,039 (1997) (preliminary 4(e) conditions filed one year after REA notice, final conditions submitted after issuance of final EA; treated as recommendations); Wisconsin Power & Light Co., 79 FERC ¶ 61,181 (1997) (draft conditions filed two years late, final conditions never filed; draft conditions treated as recommendations).

prefiling consultation process required of hydropower applicants. The Commission stated that this was not its historical practice, and that the results of the prefiling consultation process and the comments, recommendations, conditions, and prescriptions of concerned parties were a necessary predicate to a successful NEPA review by the Commission of a hydropower application.[59]

In Section 2403 of the EPACT,[60] Congress authorized the Commission, in preparing a NEPA document in hydropower licensing proceedings, subject to certain conditions, to permit the applicant or its contractor or consultant to prepare an Environmental Assessment (Applicant Prepared Environmental Assessment, or APEA) or a contractor or consultant chosen and directed by the Commission and funded by the applicant to prepare an Environmental Impact Statement (EIS) (third party EIS). The provision left untouched the Commission's own responsibilities under NEPA.

The Commission initially implemented this provision of the Act by permitting hydropower applicants to explore alternative licensing procedures which would integrate the application preparation process under the FPA with the environmental review process under NEPA. The Commission's staff responded to such requests on a case-by-case basis. Staff advised potential applicants that staff could not participate unless entities that might reasonably have an interest in the contemplated hydropower application are invited to participate in the prefiling process. Such entities included all resource agencies, Indian tribes, local governments, citizens groups, and members of the general public affected by the proposed project. In order to receive the necessary waivers of prefiling consultation and application requirements, applicants were required to demonstrate the interest and commitment of substantially all agencies and key non-governmental entities and to develop a communications protocol governing how the participants, including Commission staff, may communicate with each other during the prefiling process. The process also included public and Federal Register notice requirements at various stages during the prefiling process.[61] The resulting license

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[59]Commission staff explored with stakeholders the feasibility of developing an integrated process, then called the "Consolidated Application Process," in the early 1990s. Many of the ideas developed in that effort were later incorporated into the alternative licensing process discussed herein.

[60]Pub. L. No. 102-486, 106 Stat. 3097.

[61]In order to assist applicants in this regard, the Commission's Office of Hydropower Licensing developed "Guidelines for the Applicant Prepared Environmental

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application would include a cooperatively developed record and an APEA. The first license application accompanied by an APEA prepared under an alternative process was filed in August 1995. The license was issued seven months later in March 1996.[62]

In 1995, the National Hydropower Association (NHA) filed a petition for rulemaking. Like the cooperative alternative proceedings being fostered by staff, the goal was to shorten and simplify relicensing by eliminating repetitious steps in the pre-filing and post-filing stages by integrating the application preparation process under the FPA with the environmental review process under NEPA. The NHA proposal would also have involved Commission staff prior to the filing of the application, and afforded resource agencies and the public greater opportunities to participate in the prefiling process. NHA also sought to promote settlements and to allow greater communication among parties and Commission staff by relaxing restrictions on ex parte communications.[63] NHA's proposed revisions, including a "collaborative option" wherein participants could agree to an alternative process for preparing and evaluating an application for a new license, would have applied to all relicensing proceedings, regardless of whether there was a supporting consensus.

NHA's petition was opposed by most federal and state agency commenters that are active in licensing proceedings, and received only mixed support from the hydropower industry. It was uniformly opposed by nongovernmental organizations (NGOs). The proposal would, in effect, have eliminated the prefiling consultation process, and required the Commission's staff to be involved in developing every application for a new license and to render decisions on the details of the steps required in that development. The Commission observed that it did not have the resources to

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[61](...continued)
Assessment (APEA) Process."

[62]See Georgia Power Company, 74 FERC ¶ 62,146.

[63]NHA recommended amending the ex parte rule, 18 CFR 385.2001, to provide that it does not apply until after the filing of the license application. The Commission comprehensively revised its ex parte rules in 1999. The revised rule, among other things, adopted NHA's proposal. See Order No. 607 (1999), 64 Fed. Reg. 51,222) (September 15, 1999), FERC Stats. & Regs. Preambles ¶ 31,097; Order No. 607-A (2000), 65 Fed. Reg. 71247 (November 30, 2000), FERC Stats. & Regs. Preambles ¶ 31,112. This and other changes to the rule will benefit the licensing process by enhancing the flow of information, permitting a more productive, less adversarial dialogue, and supporting greater use of consensus-seeking processes.

carry out such an open-ended mandate and that if staff assumed the role of decision maker during prefiling consultation for all proceedings, concerned parties (including applicants) might be discouraged from trying to form a consensus on how to study and resolve critical issues in a mutually satisfactory manner. The Commission was also concerned that NHA's proposal would have shortened the applicable time frames for responses and decisions in an inflexible manner, thus jeopardizing the development of a cooperative approach to resolving licensing issues.

These difficulties with NHA's proposal and the promising results of the voluntary prefiling collaborative process initiated by the Commission staff led the Commission to instead propose refinement and codification of the latter process (Alternative Licensing Process, or ALP), and to leave intact the existing prefiling and hearing procedures (traditional process) for use in proceedings where there is neither a consensus on suitable alternative procedures nor any reasonable prospect for their success in expediting the proceeding.[64]

The goals of the ALP include integrating the prefiling consultation process and the environmental review process, and the administrative processes associated with Section 401(a)(1) of the Clean Water Act, by facilitating greater participation by Commission staff and the public in the prefiling consultation process, allowing the applicant to prepare an EA or a contractor to prepare an EIS, encouraging the applicant and interested persons to narrow any areas of disagreement, and promoting settlement of the issues raised by the applicant's proposal. Commenters almost uniformly supported the proposed ALP, and suggested various modifications. The final rule adopting the ALP included several revisions based on the comments, including notice, filing and service requirements, and provision for dispute resolution.[65]

The fundamental differences between an ALP and the traditional process are; (1) in an ALP, the NEPA process begins early in the application preparation process. In the traditional process, the NEPA process does not begin until after the application has been filed and accepted, and all necessary studies are complete. (2) A license application prepared under an ALP contains a preliminary draft NEPA document which is largely the product of stakeholder collaboration instead of an exhibit containing the results of

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[64]Regulations Governing Off-the-Record Communications, 63 FR 51312 (September 25, 1998); FERC Stats. & Regs. [Proposed Regulations 1988-1998] ¶ 32,534 (September 16, 1998).

[65]Order No. 596 (1997), 62 Fed. Reg. 59,802 (November 5, 1997), III FERC Stats. & Regs ¶ 31,057.

environmental studies prepared solely by the applicant. (3) Commission staff are involved in advising the collaborative team throughout the ALP prefiling activities. In the traditional process, Commission staff are very rarely involved in prefiling consultation.

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Under the alternative procedures, if the participants can agree on what information must be developed for the record and on deadlines for steps such as the completion of studies and the filing of comments and proposed conditions, the pre-filing consultation and environmental review processes can be integrated and proceed concurrently. In such cases, the processing time for an application can be dramatically shortened. Moreover, if the participants begin building consensus early in the relicensing process, there is a much greater chance that they can reach agreement on substantive issues, and perhaps settle the entire matter. While the Commission strongly supports use of the alternative approach and has made its technical and legal staff available to assist in the process, it is ultimately for the participants to determine whether the approach is appropriate in any given proceeding.[66]

As of January 2001, 20 licenses had been issued through the ALP, applications based on ALPs had been filed for ten licenses, 33 more were in various stages of prefiling consultation, and approval was pending for four more.

[66]In one recent case, the Commission declined to approve a licensee's request to use the ALP where it did not appear that there is sufficient support for the process from critical participants. In that case, the Commission is providing limited support by assigning separated technical and legal staff to assist stakeholders, but who are not active participants in the prefiling consultation.

IV. TIMELINESS AND COST ANALYSIS

Many factors affect the timeliness and cost of hydropower licensing. The Commission staff has reviewed its records to provide, where possible, specific information about the time required to complete the licensing process overall and various steps in the process, and the costs of obtaining a license. The results of these analyses are presented below.

a. Timeliness

1. Average Processing Times

As discussed above, the traditional licensing process has two major phases; prefiling consultation and application development, and the post-application review by the Commission. The following analysis focuses on relicense proceedings, although much of the discussion applies as well to original license application.[67]

Incumbent licensees are required to notify the Commission of whether they intend to seek a new license between five and five and one-half years before the original license expires,[68] and to file an application no later than two years before the license expires.[69] Nothing prevents a licensee from beginning prefiling consultation before the notice of intent, and some licensees evidently do. We consider the ICP date to be a better date to mark the beginning of the relicensing process, since it is the first required communication

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[67]Prefiling consultation officially begins when a potential applicant provides to consulted entities the Initial Consultation Package (ICP). By design, there is no link under the regulations between this event and the filing of an application, because the attrition rate between ICPs and original license applications is very substantial. The contents of the ICP are prescribed in Rule 4.38(b)(1) for original licenses and in 16.8 for relicenses.

[68]FPA Section 15(b)(1); 18 CFR 16.6(b). The Commission thereafter notifies other interested entities by Federal Register and local newspaper notice and direct mail notice to appropriate agencies and tribes.

[69]18 CFR 16.9(b).

between the applicant and interested parties. We use the date of license issuance or other merits disposition of the application to mark the end of the process.[70]

In order to determine whether progress is being made with respect to the time required to process license applications, Staff compared processing times for applications filed in the 1980s, to those filed from the early 1990s to present. The analysis indicates that average processing times have increased substantially.

A. 1980s Applications

A General Accounting Office (GAO) report prepared in 1992 determined that the median processing time[71] for the 111 relicense applications filed between January 1982 and May 1992 was 30 months.[72]

Factors affecting the timeliness of the licensing process during the period of the GAO study include: (1) the need, in some instances, to process several applications for projects on the same waterway or in the same watershed together to address cumulative environmental or other impacts; (2) required consultation with the U.S. Fish and Wildlife Service or National Marine Fisheries Service (NMFS) under the ESA and attendant studies in cases where such species are present, or may be present, in the project area; (3) requests by resource agencies or intervenors for additional applicant-funded environmental studies in addition to those the applicant performed in preparing its

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[70]Rehearing of license orders and judicial review is not part of the licensing process. Absent rare circumstances in which a full or partial stay of the license is issued, licenses become effective on the first day of the month in which they are issued. The licensee is required to comply with its requirements from the date of issuance, although extensions of time to complete specific requirements may be issued for good cause. The Commission, moreover, cannot control the timing of judicial review. For purposes of completeness, however, we include information on the average time required to process requests for rehearing of license orders.

[71]The median is the midpoint in a ranked series of values; e.g., the median of the series 1, 2, 3, 6, and 7 is 3; that is, there are two data points above and below this value..

[72]GAO/RCED-92-246. Although the GAO report included applications filed through May 1992, 157 of these applications were filed nearly simultaneously in December 1991 for licenses expiring December 31, 1993. None of these "Class of 93" applications was completed during the term of the GAO study. For analysis, they are included instead in the early 1990s to present category of applications.

application, (4) requests by applicants, resource agencies, or intervenors for extensions of time; (5) untimely action by federal agencies in providing mandatory conditions pursuant to FPA Section 4(e) and by Interior or Commerce in providing fishway prescriptions; and untimely receipt of state water quality certification. Some or all of these factors may be present in any license proceeding.

B. Early 1990s to Present

The Class of 93 applications were prepared under the traditional licensing process, but prior to the improvements of Order No. 533. The median processing time for Class of 93 cases which have been completed is approximately 42 months.[73] Staff also reviewed a larger class of licenses, those issued from January 1, 1993 through December 31, 2000. For this group, the median time from application to issuance is 43 months, and the average time is 52 months.[74] This is a substantial increase from the 30-month median time required to conclude a license application in 1982-1992 time period.[75]

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[73]Of the 157 applications for license, 14 are still pending. Nine of the pending applications have not yet received water quality certification and therefore the Commission cannot issue a license. Two others received water quality certification in 2000 following the successful conclusion of settlement negotiations. Commission consideration of the settlement agreement is pending. In two other cases, the licensee ultimately elected to surrender the project license, and applications for surrender are pending.

A report prepared for the Idaho National Engineering Laboratory in 1997 (DOE/ID-10603, September 1997) (IRNL Report) found that major licenses (i.e., larger than 1.5 MW capacity) issued during the period 1994-1996, which includes original licenses and non-Class of 93 relicenses, required an average of more than 60 months to process. No underlying data were provided, so the Commission cannot determine whether the sample was representative.

[74]Interior separately analyzed license processing times. The results of its analysis are in its supplemental comments, included in Attachment A. Using a somewhat different sample (all licenses and exemptions issued during 1994-2000), Interior calculated a median processing time from application to issuance of 3.99 years and an average time of 4.66 years, similar to the results of Staff's analysis.

[75]For traditional processes alone, the average and median licensing period was 55 months and 47 months, respectively.

The increased processing time is attributable to many factors. These include:

- The great volume of the Class of 93 cases;
- The persistence of post-application disputes over the scope of necessary studies and the failure of resource agencies and license applicants to seek dispute resolution during prefiling consultation;[76]
- Commission efforts to promote settlements;[77]
- The establishment in 1993 of a policy in licensing cases to issue draft environmental analyses (EAs) for comment. This added about six months to the process;[78]
- Starting in 1994, in an attempt to better obtain the views of all stakeholders, additional scoping procedures were added, extending processing time a few months;
- An increase in the number of joint NEPA documents with other federal agencies, requiring additional time for coordinated preparation and joint review;
- Increased issuance of state water quality certification (as opposed to waiver of certification), and untimely receipt of water quality certification.

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[76]Requests for dispute resolution were made in fewer than ten Class of 93 cases. Post-application disputes over necessary studies occurred in the great majority of cases.

[77]For instance, Niagara Mohawk Power Corporation filed simultaneous relicense applications for 11 projects with 32 developments. Following a long period of disputes over studies and multiple appeals water quality certification denials, the parties agreed to undertake comprehensive settlement negotiations on all of the projects. Because the parties lacked the resources to simultaneously negotiate on all of the projects, they agreed to a schedule of sequential negotiations on a river basin by river basin basis. The Commission staff has provided assistance to the parties throughout. The parties have settled eight of the 11 proceedings and have scheduled negotiations for the remaining three.

[78]This commitment was made following a "Relicensing Roundtable" in June 1993 initiated by then-Chair Elizabeth Moler.

Nineteen ALP-based applications were completed during this time period. The median time required to process these applications was 16 months.[79]

2. Times Between Major Milestones

To determine the effect, if any, that reforms since the early 1990s have had on processing times, staff examined all applications filed from January 1, 1994 to January 1, 2001. Figure 1 shows the median number of months between major milestones [80] in these proceedings for the traditional process and for ALPs.[81]

[79] ALPs also increased the likelihood of settlements. During the early 1990s to present period 24 percent of traditional licensing proceedings had whole or partial settlements, while 74 percent of ALPs included settlements. The Commission's policy of encouraging settlements and the benefits thereof are more fully discussed in Section V.

[80]"SD1" refers to the first issued scoping document in the NEPA process. The "REA notice" is notice to the parties that data collection is complete and the Commission is ready to begin preparing the NEPA document; it triggers the requirement for agencies to submit their recommendations and conditions.

[81]Interior calculated average times from filing to acceptance of the application (1.03 years), acceptance to REA notice (.9 years), and REA notice to license issuance (2.67 years). Comparable figures cannot be derived from Figure 1 and Table 1because the Staff's table provide median times rather than averages, and Staff broke out the processing times between traditional and ALP processes, while Interior evidently combined them. Staff did not calculate the period from acceptance to REA notice.

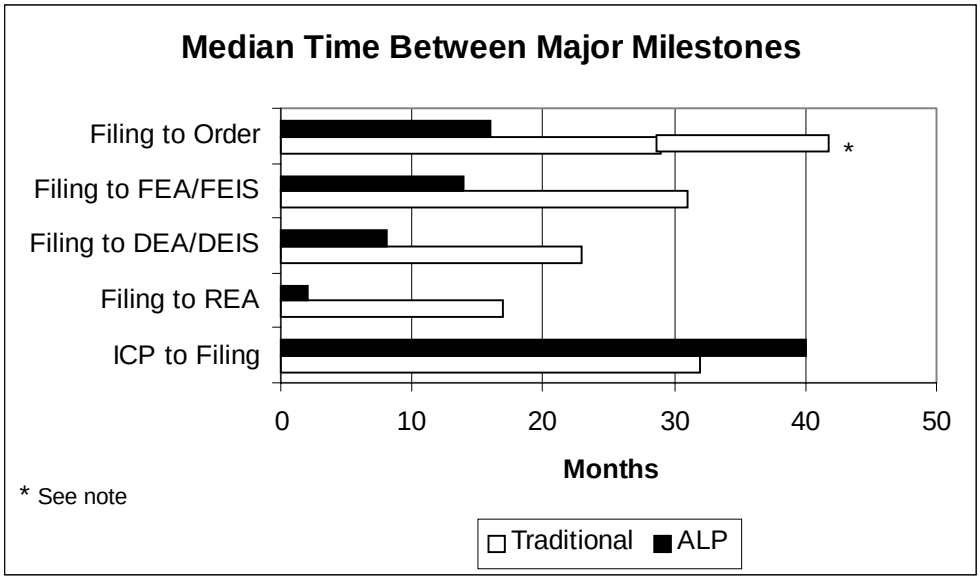

Figure 1 Median time between Major Milestones. Note: Staff used two different populations to determine the median time to process an application, resulting in processing times of 29 months and 43 months. Many applications in the smaller sample (median 29 months) have not been completed; as the pending applications in this group are completed, the median number of months to issue a license would be larger. We believe 43 months is a realistic estimate of median time to process an application as it is based on a large data set, i.e. (all projects with licenses issued since 1993).

The figure shows clearly that the ALP results in a much faster overall process. The time spent during the prefiling period (ICP to Filing) is slightly greater for ALPs than for traditional applications (40 and 32 months, respectively); substantially more effort is required during the prefiling period for an ALP. The time required to complete all post-application milestones is substantially lower for the ALP than for the traditional process (16 and 29 months to license issuance, respectively). The two periods considered together yield a total time from ICP issuance to license order for ALP and traditional applications of 56 and 61 months, respectively.[82]

[82]The figure may skew the average time for traditional application processing because only 31 of the applications filed since January 1, 1994 have been processed to completion. As the remaining pending applications from this groups are completed, the average number of months for all the milestones following the application will likely increase for this group.

The 16-month figure from application filing to license issuance for ALP applications reflects a blend of five applications for original licenses for unconstructed projects and 15 for new licenses. ALP applications for original licenses averaged about 22 months from filing to license order, compared to only 15 months for new licenses.[83]

3. Use of Prefiling Dispute Resolution

An important contributing factor to the time between the filing of a traditional application and issuance of the REA notice is that applicants are typically required by the Commission to supply additional information. Of the 157 Class of 93 applications, 148 required additional information.[84] In many instances the applicant was required to obtain the data by conducting additional scientific studies over periods of time ranging as long as two years. These requirements stemmed in large measure from unresolved disputes between applicants and resource agencies over the need for and scope of such studies.

As discussed previously, the Commission's regulations provide a mechanism to resolve these disputes during prefiling consultation. Very little advantage has been taken of this opportunity. Instead, applicants and resource agencies have let their differences go unresolved until after the application is filed, at which point resource agencies often request that the Commission require the applicants to conduct additional studies or revise and redo studies already completed. Only 19 requests for dispute resolution were made between 1989 and 2000, and only one request was been made between 1997 and 2000.

The time required for resolution does not appear to be undue, as the median time between submission of the request and the Director's letter of resolution, which includes an opportunity for parties to respond to the request, is 80 days.[85] Fifteen of the 19 requests were made by applicants, three by Interior, and one by two state resource agencies.

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[83]There was no material difference between the time required from application filing to license issuance for constructed and unconstructed projects where a traditional application was used.

[84]See Barnes, M., FERC's "Class of 93": A Status Report. Hydro Review (October 1996).

[85]One atypical case required 308 days to resolve. If that outlier is included, the resolution time required increases to 94 days.

None of the consulting federal agencies or commenters addressed the matter of why so little use is made of the prefiling dispute resolution regulations. This is unexpected, as many commenters requested that the Commission staff become much more actively involved during prefiling consultation, particularly for the purpose of resolving disputes. It is possible that a more active staff presence in prefiling consultation would help to reduce the incidence of post-application study requests. The Commission's experience with ALP applications is that they result in many fewer requests for post-application additional studies, as indicated by the short time between filing and the REA notice (two months, compared to 21 months for the traditional process). This may be explained, in addition to the fact that ALPs are premised on collaborative action, by the fact that Commission staff is on hand to assist in informally resolving study disputes that may arise. These matters are further addressed in Section VIII.

4. Time to Receive Terms and Conditions

Sixty days is the standard time provided to parties following the REA notice to submit recommendations, terms and conditions, and fishway prescriptions, absent extensions of time. Responses to these filings are due 105 days from the REA notice. The Commission has historically been reluctant to use its authority to treat late-filed terms and conditions or fishways as recommendations made pursuant to FPA Section 10(a). Owing to an overriding desire to maintain comity among federal agencies participating in the process, this has generally only occurred in aggravated circumstances.[86] As a result, the Commission customarily grants requests for extensions of time by agencies with Section 4(e) and 18 authority to provide conditions and prescriptions. Also, as noted previously, agencies that are not ready to make their conditions and prescriptions known must explain why, file preliminary conditions, and provide a schedule for providing final conditions. As long as the agency provides the final conditions within the time frame of its schedule, they are deemed not to be late. It is not uncommon for the Forest Service to file its final conditions following the issuance of the Commission's final NEPA document.

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[86] See, e.g., Lower Valley Energy, Inc., 92 FERC ¶ 62,222 at 64,307-311 (2000); Southern California Edison Co., 86 FERC ¶ 61,230 (1999); Bangor Hydro-Electric Co., 83 FERC ¶ 61,040 (1998); PUD No. 1 of Okanogan County, 76 FERC ¶ 61,271 (1996), order on reh'g, 88 FERC ¶ 61,040 (1999); South Carolina Electric & Gas Co., 76 FERC ¶ 61,308 (1997), order on reh'g, 78 FERC ¶ 61,039 (1997); Wisconsin Power & Light Co., 79 FERC ¶ 61,181 (1997).

Many commenters contend that delays in receiving these submissions is a major source of delay in the process. In order to determine the actual time required for these submissions staff evaluated all 245 relicense applications granted or denied between October 1986 when ECPA was enacted and January 30, 2001. Table 1 shows the results of the analysis.

Table 1
Months from REA Notice to Receipt of
Recommendations and Conditions

	No. of Projects		Average Months		Median Months[87]	
Type of Filing	Initial Filing	Final Filing	Initial Filing	Final Filing	Initial Filing	Final Filing
S. 4(e) conditions	40	42	7.9	18.8[88]	3	14
S. 18 prescription or reservation	159	160	3.9	4.7[89]	3	3
10(j) recommendations		224		2.9		2

As shown on the table, in a typical (median) case the conditions were received one month beyond the 60 day filing deadline. However, extensive delays occurred in enough cases to significantly increase the average time for all three types of filings.

In some cases, agencies submitted final conditions after the Commission prepared its draft EA. This occurred in 31 out of 48 cases with 4(e) conditions, with an average

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[87]Outliers are not included in these numbers.

[88]This number does not include outliers. In six of the 42 cases, 4(e) conditions were filed 8 years or more after the REA notice. If these outliers are included in the data, the average number of months to file final 4(e) conditions increases to from 18.8 to 20.8 months and the median does not change.

[89]This number does not include outliers. In five of the 160 cases, 4(e) section 18 prescription or reservation were filed 3 years or more after the REA notice. If these outliers are included in the data, the average number of months to file section 18 increases to from 4.7 months to 6.3 months and the median does not change.

delay of 13.5 months, and in 28 out of 168 fishway prescriptions or reservations of authority, with an average delay of 12.1 months. The Commission's rules permit submission of final conditions after the draft EA if preliminary conditions are filed with a schedule for filing final conditions, but makes it more difficult to timely complete the analysis of all alternatives in a timely manner.

Staff also compared the time to process applications (from filing to order) for cases with Section 4(e) conditions and/or Section 18 prescriptions versus those with neither.[90] The analysis considered all traditionally licensed projects with license orders issued from January 1993 to January 2001. The average time is about the same for both sets of licenses.[91] Thus late filing of Section 4(e) and 18 conditions contribute does not appear to affect the total time frames as much as such factors as delayed water quality certification and post-application completion of additional information requests.

5. Time to Receive Water Quality Certification

To determine if untimely receipt of water quality certification (WQC) is a factor in delays, Staff reviewed 167 applications for water quality certifications filed between 1994 and February 2000.[92] Sixty-one percent of these (102) were completed within one year. These comprise 71 cases where certification was issued or waived by the state within one year of the first request for certification, 21 cases where certification was deemed waived because the state did not act within one year following the filing of the first request, and 10 cases in which the application is no longer active and in which there were no WQC related delays.

Sixty-five of the 167 cases (39 percent) experienced WQC-related delays. In 19 of these, certification was eventually issued following a period exceeding one year from the first request. In five cases applications were rejected or dismissed due in part to certification-related issues. Forty-one of the cases have pending applications. Among these pending applications, the median time from the first WQC request is 27 months.

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[90]For this purpose, a reservation of authority to prescribe a fishway is not treated as a prescription.

[91]Interior reached the same conclusion in its study.

[92]This end date was chosen so as to ensure that the data set includes only cases where at least one year has passed since the first certification request was filed.

Of the 14 Class of 93 cases still pending, 11 (78 percent) have not received water quality certification. A review of 75 long-delayed cases (pending over five years as of October 1, 1997) shows that in 21 of those cases the primary reason for delay was lack of certification.[93] Moreover, although the vast majority of the 75 cases have been resolved, 18 (86 percent) of the 21 cases delayed for water quality certification reasons in October 1997 are still pending.

A "snapshot" look at all currently pending proceedings as of May 2001 gives no reason to expect improvement in this connection. Of the 129 pending licensing cases, 73 (56 percent) are held up from normal processing; of those, 52 (71 percent) are currently held up by water quality certification issues.[94] If the data on long-delayed cases is any indicator, the percentage of this group of cases experiencing delays at any given point in time owing to lack of water quality certification is likely to increase.[95]

6. Time to Complete Programmatic Agreements

Section 106 of the National Historic Preservation Act (NHPA) requires the Commission to take into account the effect of its undertakings on properties included in or eligible for inclusion in the National Register of Historic Places (Historic Properties) and to afford the Advisory Council a reasonable opportunity to comment with regard to

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[93]The 75 long-delayed cases are more fully discussed in subsection IV.a.7.

[94]The data should not be interpreted to mean that delays identified as of that date are the only delays that may affect a proceeding. For instance, additional information may be required, followed by delay related to ESA consultation, followed by further delay from lack of water quality certification, or some other cause. Many cases have a series of such delays. Five of the projects that had delays from water quality certification also had delays from settlements, application amendments, and/or ESA requirements. An additional five projects were awaiting Commission-requested additional information. If these other cases are not included, 47 (64 percent of delayed cases and 36 percent of all cases) are held up by water quality certification.

[95]The other significant cause of delay in the January 2001 sample was suspension of processing to accommodate settlement negotiations (seven cases, or 18 percent of delayed cases). Other identified sources of delay included need to complete consultation under the National Historic Preservation Act, Endangered Species Act, applicant filing amendment to application, and consideration of the application in the context of an ALP for another project in the river basin.

the undertaking. The Advisory Council's implementing regulations[96] encourage the Commission to reach agreement with State Historic Preservation Officers, Indian Tribes, and other interested person on the avoidance or mitigation of adverse effects on Historic Properties, and to couch the agreement they reach in a Programmatic Agreement (PA) that they all sign. When these parties fail to agree, their alternative is to terminate further consultation and ask the Council to comment.

To determine if the time required to execute PAs is a source of delay, Staff examined all 14 PAs executed since January 1, 1997. The average PA takes about 6 months to execute, measured from the date the first draft is issued for comment. Six of these PAs however required substantially longer to execute, from 11 to 28 months. Two main factors appear to be responsible for these delays: (a) staff has historically been reluctant to terminate consultation as long as consensus seems attainable; and (b) PAs for non-controversial projects are linked to PAs for controversial projects in multi-project river basin proceedings. The latter instance often involves a multi-project PA where a licensee owns more than one project in a river basin. On rare occasions parties who fail to comment on a draft PA will then want to comment when the final PA is issued for signature. Seven (five percent) of all pending cases are held up from normal processing by NHPA requirements.

7. Long-Delayed Cases.

Staff reviewed a group of cases that were unresolved for over five years to establish a better understanding of why some cases take inordinate amounts of time to resolve. The group selected for analysis is 75 cases that were pending for more than five years as of October 1, 1997.[97] The analysis identified the primary reasons these cases had not been resolved and status of those cases today.

Twenty-six of the 75 cases are still pending. Not surprisingly, in 21 of the 75 cases, the primary reason for delay was lack of water quality certification. As of March 1, 2001, 18 of those twenty-one proceedings (86 percent) were still pending, either because water quality certification was not yet issued or because it was issued only recently, and the Commission is now moving to complete NEPA documents and prepare license orders.

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[96] 36 CFR Part 800.

[97] The October 1, 1997 date has no special significance. Staff periodically identifies long-pending cases and focuses special attention on resolving them. One such effort occurred at that time.

Twelve of the 75 cases were pending over five years on October 1, 1997 because of dam removal issues. These were held up because of intense controversy concerning whether the Commission has authority to deny an application for a new license and require the licensee to remove the project works and, if so, under what circumstances it should exercise such authority or even consider requests to examine the issue. The Commission issued its Policy Statement on Project Decommissioning at Relicensing in 1995.[98] Nonetheless, controversy in the principal case, the application for a new license the Edwards Dam Project No. 2389, continued to rage. The Edwards Dam application was considered in the context of a multi-project basin-wide EIS for the Kennebec River Basin, and many of the upstream projects were the subject of a related settlement agreement, implementation of which depended on the outcome of the Edwards Dam application. Thus, action on all of the applications pending in the river basin was delayed for several years. One of the twelve proceedings is still pending.[99]

In sixteen cases no overriding cause of delay can be identified because there were multiple obstacles to expeditious processing. Such cases illustrate vividly how the dispersal of decisional authority can work to paralyze a licensing proceeding.

For instance, 14 of these applications were filed in the early 1980s or 1990 for original licenses for small projects in Washington State's Skagit River Basin. Some of the proposed projects were in whole or part on Forest Service lands and therefore subject to conditioning pursuant to FPA Section 4(e). The Commission attempted for almost two years to prepare NEPA documents in cooperation with the Forest Service. Ultimately, after several meetings, Forest Service requests for additional information, extensions of time to the Forest Service to complete its portions of the analysis, and rejection of a request for the Commission to fund the Forest Service's environmental contractor as a condition of timely action, staff terminated the attempt to prepare joint

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[98]Policy Statement on Project Decommissioning at Relicensing, III FERC Statutes and Regs., Regulations Preambles ¶ 31,011 (1994), 60 Fed. Reg. 339 (1995), rehearing and reconsideration denied, 60 Fed. Reg. 10015 (1995).

[99]The sole remaining proceeding from this group is the new license application for the Condit Project No. 2342. In that proceeding the licensee determined that the cost of mandatory conditions would render the project uneconomic. Several years thereafter were consumed by negotiation of a settlement under which the project would be decommissioned. That settlement agreement and an accompanying application to amend the license have been filed and are under Commission consideration.

NEPA documents and moved ahead on its own.[100] Following staff's draft EIS the Forest Service determined that eight of the 14 projects would be inconsistent with the purposes of its National Forest Land and Resources Management Plan.

The projects were to be located in Washington State's coastal zone, and thus required CZMA certification or waiver. By the time the final EIS's for the Nooksack and Skagit River Basins were issued in 1997 and 1998, respectively, only one of the projects had received certification or waiver from the Washington Department of Ecology (Ecology). Four applications were later dismissed because the applicants declined to apply for county shoreline permits, which Ecology requires as a prerequisite to consistency certification. The applicants contended their projects were prohibited by the county regulations. The remaining projects have not yet received county shoreline permits or a waiver.

Two Indian tribes opposed the projects based on interference with their cultural practices and declined to meet with consultants for the applicants. Attempts to reach an agreement between staff and the two tribes on how best to evaluate potential harm to their cultural practices from the proposed projects were ultimately terminated when those tribes insisted that the Commission fund the preparation of a report by the tribes which would identify projects unacceptable to the tribes, but would not disclose the basis for that determination.

Portions of the Skagit River are designated as Wild and Scenic. In 1998, the Forest Service determined that, even with the environmental protection measures recommended in the Commission's final EIS, six of the projects which were to be located on tributary streams upstream from the wild and scenic corridor would unreasonably diminish the Skagit River's fishery value because of the potential for adverse impacts to anadromous fish from landslides or penstock failure at these upstream projects.

Based on the Forest Service's determination, the Commission dismissed these applications. One applicant obtained a stay of the order and time to file additional geotechnical information and modify its proposal. In February 2001, the Forest Service determined that the modified project would not unreasonably diminish the fishery values of the Skagit Wild and Scenic corridor. The applicant is now preparing revised drawings and exhibits showing the proposed modified project.

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[100] On October 27, 1992, the Commission staff issued a letter of understanding (LOU) with the Forest Service agreeing to joint participate in preparation of the NEPA documents. On June 29, 1994, the Commission staff terminated the LOU with the Forest Service.

Also following the FEIS, two applicants conducted additional studies and amended their applications. New issues must now be considered, including: (a) effects on lands protected under the Washington Department of Natural Resource's 1997 Habitat Conservation Plan; (b) new ESA listings for Chinook salmon and bull trout; (c) the 2000 Forest Service Roadless Area Conservation Final EIS; and (d) Forest Service amendments to the National Forest Plan for, among other things, surveying, managing, and buffer zones.

In the remaining proceedings, five of which are pending, a variety of circumstances have caused the cases to be delayed. The principal causes of delay was or is, untimely receipt of Section 4(e) terms and conditions, workload processing conflicts, new endangered species listings, lack of CZMA certification, or settlement discussions, jurisdictional disputes, and conflicts over land or water rights. One or more of these factors were also secondary causes of delay in over 60 proceedings.

In sum, there are many reasons why some cases require an inordinate amount of time, but the longer a proceeding is delayed, the more likely it is that lack of water quality certification is the principal reason for delay.

8. Extensions of Time

The Commission issues extensions of time to complete various actions in the licensing process. These may include, among others, submission of data in response to additional information requests, filing of draft or final recommendations, terms and conditions, responses to the REA notice or to deadlines for comments on draft NEPA documents. Many commenters identify extensions of time to applicants to provide additional data or to resource agencies to provide conditions and recommendations, as a substantial source of delay.

Staff reviewed all applications filed since January 1, 1994, to determine if individual or sequential extensions of time are a significant source of delay. As of December 31, 2000, 179 requests for extensions of time had been requested in these applications. One hundred forty-nine (83 percent) were granted and 30 (17 percent) were denied. Twenty-four percent were requested by a resource agency, 72 percent by an applicant, and four percent by a collaborative group.

Applicants requested an average of 118 days, while agencies requested an average of 53 days. The average length of extensions granted is 102 days. When extensions were granted, the full amount of time requested was allowed in nearly all cases. The discrepancy between agency and applicant requests for time is explained by the fact that applicants frequently seek extensions of time in order to complete the collection of additional information, which may be influenced by factors beyond the applicant's

control, such as seasonal or other river conditions that make data collection impossible or ineffective. It is also unusual for resource agencies to contest applicants' requests for extensions of time to file data because the data is generally being collected at the request of resource agencies. Resource agencies typically requested additional time to file recommendations, terms, and conditions in response to the Commission's REA notice. These requests are very rarely contested by the applicant.

In order to determine if sequential, multiple extensions of time have a substantial effect on the time required for licensing, Staff examined all 52 cases from the 1994-2000 group in which a license has been issued. There were sequential extension of time requests in only 6 cases (12 percent). In these cases there was an average of 2.3 extensions ranging from 60 - 180 days and with an average total of 97 days. This indicates that multiple extensions of time cause delays, but only in a small percent of cases. They may also include extensions for the purpose of conducting settlement negotiations, which may ultimately reduce the length of those proceedings.

9. Requests for Rehearing

Many commenters indicated that the time required to process rehearing requests is too long. Staff examined all license applications filed from 1986-2000 and which have resulted in an order disposing of the application on the merits to ascertain the number of licensing orders for which requests for rehearing were filed and the time required to process those requests. For purposes of comparison, the proceeding was separated into applications based on the traditional process and those based on ALPs.

Among license applications based on the traditional process, 316 orders on the merits were issued and 148 rehearing requests were filed (47 percent). An order on rehearing has been issued in 138 proceedings. The median time to act on rehearing was 13.6 months.[101] In ALP proceedings, 20 orders have been issued. Four rehearing requests were filed, only one of these was determined to be substantive in nature, and all have been completed.

While the ALP sample is necessarily small, these numbers support the conclusion that ALPs tend to result in outcomes more satisfactory to the parties, and that the issues raised on rehearing are of lesser magnitude and more readily resolved.

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[101]The minimum time required to act on rehearing for traditional processes was six months and the maximum 62 months.

Staff also reviewed the population of licensing orders prepared using the traditional process to determine if there are any trends over time within that population. The review shows that the percentage of license orders resulting in rehearing requests has significantly decreased over time. For applications filed between 1986 and 1993, 49 percent resulted in rehearing requests. For applications filed after 1993, the percent of rehearing requests has decreased to 26 percent. This may indicate a general increase in satisfaction with the result of the licensing process, or perhaps that the Commission is better explaining its decisions.

b. Costs

The cost to obtain a license has two principal components, processing costs (including supporting studies) and costs of license terms and conditions. In addition, most licensees pay annual charges to reimburse the United States for the costs of administering FPA Part I and for the use of government lands and facilities. These costs are discussed below.

Several commenters stated that the Commission should review the environmental and economic cost of delays in mitigation and enhancement measures because of delays in issuing new licenses. Section 603 directs us to address the costs and time required to obtain a hydroelectric license. Consideration of these matters is beyond the scope of this report. In any event, the Commission's public interest balancing gives appropriate weight to environmental protection measures, as reflected in the many such conditions included in original and new licenses.[102]

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[102] As we have stated, moreover, the benefits of protecting non-economic environmental values cannot be evaluated only by dollars and cents, the public-interest balancing of environmental and economic impacts cannot be done with mathematical precision, and it is inappropriate to rely too heavily on the accuracy of dollar estimates of non-power resource values, as they can be calculated using any number of reasonably disputable assumptions and methods See, e.g., Great Northern Paper, Inc., 85 FERC ¶ 61,316 (1998), reconsideration denied, 86 FERC ¶ 61,184 (1999), aff'd, Conservation Law Foundation v. FERC, 216 F.3d 41, (D.C. Cir. No. 99-1035, June 23, 2000); City of Tacoma, WA, 84 FERC ¶ 61,107 at pp. 61,571-72 (1998), order on reh'g, 86 FERC ¶ 61,311 (1999), appeal filed, City of Takoma v. FERC, D.C. Cir. No. 99-1143, et al.; Eugene Water & Electric Board, 81 FERC ¶ 61,270 (1997) aff'd, American Rivers, et al. v. FERC, 187 F.3d 1007 (9th Cir. 1999).

1. Application Preparation Costs

A. Traditional versus ALP Applications

The cost of preparing a license application, as used here, means all costs required to produce an acceptable application, including the cost of studies. License applicants are not required to provide the Commission with data concerning these costs. Some applicants have however voluntarily provided such information. Staff was able to analyze information from 44 projects licensed after January 1, 1993, and for 47 projects where the application is pending. Because a substantial majority of the completed proceedings involve applications filed before January 1, 1994, and the great majority of the pending cases are applications filed after that date, staff also analyzed the completed and pending applications separately to determine if any trends over time can be found. The results of these analyses are shown on the following table.

Table 2
License Applicants' Processing Costs ($/kW)[103]

	Overall (91)	Completed (44)	Pending (47)
Overall (91)	$85	$97	$82
Traditional (78)	$109	$96	$113
ALP (13)	$39	$99	$29

The overall figures and those for pending applications are necessarily conservative because the data sets include pending cases, and a substantial portion of total processing

[103]It is not known whether the cost figures provided by licensees include the cost of other authorizations that may be required, such as water quality certification, Special Use Authorization from the Forest Service in association with FPA Section 4(e) conditions, or CZMA consistency certification. Such authorizations may contribute substantially to the cost and time of licensing. For instance, an applicant for a license for a project in the coastal zone of Washington State must first obtain a shoreline development permit from the county in which the project is to be located pursuant to Washington's Shoreline Management Act, then file a consistency certification with the Washington Department of Ecology (WDOE). The county or the WDOE may require the applicant to conduct studies or collect data in support of its applications and the data may be different from data the Commission requires in order to conduct its public interest balancing under the FPA.

costs (approximately 25 percent[104]) occur after an application is filed. Based on the completed cases, the table shows that the costs per kW of capacity to prepare traditional and ALP applications are about the same.

In terms of total cost per application, the average application preparation cost is about $2.3 million for traditional and ALP applications combined, and $2.2 and $2.6 million for traditional and for ALPs, respectively. The higher costs for ALPs may be attributable to the fact that ALP proceedings typically involve much larger projects,[105] that the desire to obtain consensus may make applicants more willing to agree to study requests, or to additional administrative costs related to multiple stakeholder meetings and facilitation.[106] As discussed below, costs in controversial and protracted proceedings can greatly exceed these averages.

Other information, while anecdotal, is not to the contrary. For instance, EEI has stated, based on information submitted to it by its members, that pre-filing costs ranged from an average of $450,000 per project for one company to $3 million per project for another, and that pre-filing costs have been as high as $5,000,000 for a single project. EEI also reported that one company reported average post-application costs of $6 million per project to "address additional information requests and for project carrying costs."[107] It its oral comments, Erie Boulevard New York stated that it incurred nearly $20 million in post-application costs to process the applications and conduct studies for eleven projects.[108] In written comments, Idaho Power Company states that it has spent $20 million on prefiling study costs for its 1,167 MW Hells Canyon Project No. 1971.

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[104]This figure was determined based on a subsample of 20 projects for which staff was able to differentiate prefiling and postfiling processing costs.

[105]The average project size for traditional process applications is 20.5 MW. The average for ALPs is 67.6 MW.

[106] One of the ALPs had unusually high costs. If the cost of that proceeding were excluded, the average cost per application would be about the same for traditional processes and for ALPs.

[107]Letter dated November 17, 1997, to the Commission and to the Office of Management and Budget from David L. Swanson, Senior Vice President, Energy and Environmental Activities, Edison Electric Institute, p. 5.

[108]Comments of Jerry Sabattis, Hydroelectric Licensing Coordinator, Albany, p. 93. Collectively, Erie's eleven projects have a collective authorized installed capacity of about 270 MW.

PacifiCorp estimates its nine-year-old new license application for the 186-MW North Umpqua Project No.1927 has cost $39 million, and Tacoma Public Utilities states that it spent about $9 million, most of it for studies, in association with its application for a new license for the 462-MW Cowlitz Project No. 2016.[109]

One startling aspect of this analysis is that it highlights the significance of the cost of preparing an application relative to the cost of PM&E measures. The average overall cost to prepare an application of $85/kW is nearly 30 percent of the average cost to the applicant of $212/kW for PM&E measures. For very small projects this number can increase to nearly 50 percent of the total cost; that is, it costs as much to prepare the application as to implement the required PM&E measures.[110] This tends to indicate that there are significant opportunities to reduce the total cost of licensing from reducing prefiling costs, including the costs of studies, consultation, and application preparation.

2. License Conditions

A. Protection, Mitigation, and Enhancement

Every license contains terms and conditions to protect or improve recreation, fisheries, and wildlife, water quality, wetlands, or cultural resources which can also have economic as well as aesthetic value (PM&E measures). These may be required by the Commission based on its public interest balancing pursuant to FPA Sections 4(e) and 10(a)(1), or be required by an agency with mandatory conditioning authority.[111]

To determine the average cost of PM&E measures, staff reviewed the records for 228 license applications, 210 based on the traditional process and 18 based on ALPs, in which PM&E cost data were readily available. Overall, the cost per kW of installed capacity for PM&E measures for all 228 projects was $212/kW.[112] For licenses issued

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[109]Tacoma conducted an ALP for the Cowlitz Project which resulted in a settlement agreement being filed with the Commission on September 11, 2000, over a year before the original license expiration date of December 31, 2001.

[110]See Figure 4, cost relative to project size.

[111] Each NEPA document in a licensing proceeding includes a table listing each proposed PM&E measure, its estimated cost, and whether the staff recommends that it be adopted in full, adopted in part, or rejected.

[112]The figures cited here represent the net present worth of annualized capital and

(continued...)

using the traditional process, the cost per kW for PM&E measures was $264/kW, while the cost for ALP projects was dramatically lower at $58/kW.

Not unexpectedly, the greatest cost element by far for both traditionally and ALP licensed projects was fish protection measures,[113] comprising about 45 percent of the total cost of PM&E's. The overall average expense per project for fisheries was $95/kW. The average for projects using the traditional process was $116/kW, and $34/kW when an ALP was used. PM&E measures for wildlife ($25/kW), recreation ($22/kW) [114] and erosion control ($31/kW) comprise the bulk of the remaining amount, and also show a significantly higher cost under the traditional process. PM&E measures benefitting wetlands, aesthetics, cultural resources, and water quality comprise the remainder of these costs, totaling about $24/kW, or 11 percent.

i. Water Quality Certification Conditions.

It is clear that an increase in the number and variety of water quality certificate conditions since the Jefferson County and American Rivers I decisions is increasing the burden of licensing. For comparison, staff reviewed licenses issued in 1992, before these decisions were issued, and in 1999, two years after American Rivers I. In 1992, certification was waived in over 50 percent of the cases; by 1999, the figure had dropped to less than 20 percent.

Staff also reviewed the number and kinds of conditions in each license. These were categorized as pertaining to the physical characteristics of the water (temperature, dissolved oxygen, clarity, etc.), designated uses of the water body (e.g., fishing or swimming; which includes fish passage, recreation, and instream flows), or administrative (state approvals, reopener clauses, etc.).

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[112](...continued)
operating costs.

[113]This encompasses all fish entrainment and protection measures, upstream and downstream passage, minimum flows, and fish habitat enhancements, such as reducing reservoir fluctuations and installing vegetative cover.

[114]Recreation facilities include boat ramps, canoe portages, hiking trails, and fishing access areas, including fishing and parking access under the Americans with Disabilities Act, operational changes to augment downstream flows to create recreational opportunities, such as whitewater boating, and hydropower education programs.

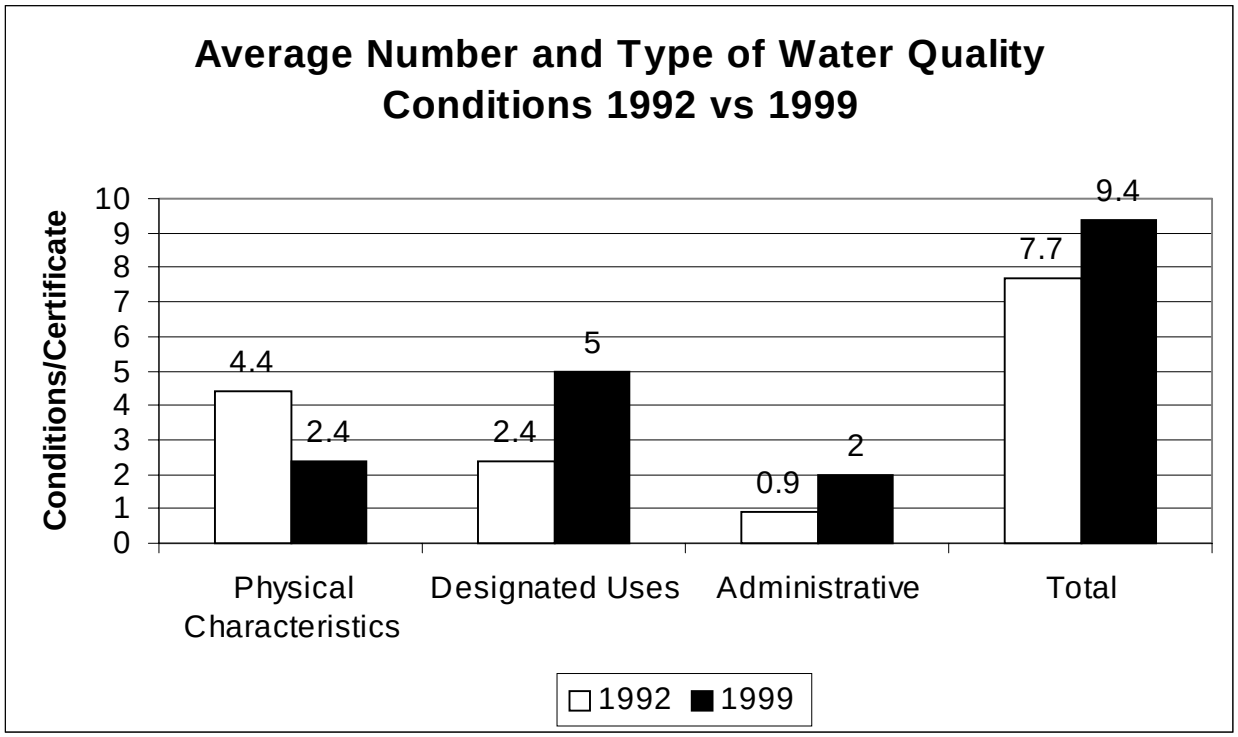

Figure 2 Average number and type of water quality certificate conditions, 1992 vs 1999.

Figure 2 clearly illustrates an increase in the number of conditions contained in water quality certifications and more than double the number of conditions related to designated uses.

B. Generation Losses

The cost of relicensing in terms of lost generation has been modest. Staff reviewed all 246 relicense proceedings in which a license was issued or denied between October 1986, when ECPA was enacted, and January 30, 2001. The analysis shows that the average annual generation loss, attributable largely to increased flows to protect aquatic resources, was 1.59 percent, while the average installed capacity increased 4.06 percent.[115] No additional dollar cost applies to lost generation, as it has already been

[115]These figures exclude one unrepresentative project. The excluded project is Seattle City Light's 700 MW Skagit River Project No. 553. In that proceeding, the parties submitted a unanimous settlement agreement which resulted in a 43 percent decrease in anticipated annual generation owing to changes in the amount and timing of flows to protect anadromous fish resources, but no loss of capacity. If the Skagit River

(continued...)

accounted for in figures for PM&E measures, such as minimum flows and reservoir stabilization requirements.

C. Costs Attributable to Mandatory Conditioning

In order to quantify extent to which mandatory conditions required pursuant to FPA Sections 4(e) and 18, or the CZMA[116] increase the cost of licensing Staff reviewed all projects licensed based on the traditional process between January 1, 1993 and January 31, 2001.[117] Figure 3 shows that PM&E costs are, on the whole, nearly three times as high for projects with Section 4(e) conditions and/or Section 18 fishway prescriptions than for those without.[118] This trend generally holds true across size categories. Application preparation costs were also higher for projects with Section 4(e) conditions and/or Section 18 prescriptions ($280/kW; N = 7) compared to those without ($81/kW; N = 20), but the sample sizes are too small to draw comparisons across size categories.

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[115](...continued)
Project data are included, the loss of generation is 4.23 percent, and the increase in capacity is 3.51 percent.

[116]State consistency certification conditions, unlike Clean Water Act section 401 certification conditions, are not required to be incorporated into the license. Niagara of Wisconsin Paper Corp., 79 FERC ¶ 62,095 (1997). Nonetheless, the licensee must abide by those conditions.

[117]The data set is 261 licenses. Staff was able to identify the cost of PM&E measures for 228 cases. Mandatory conditioning authority was exercised or authority to do so was reserved in 185 cases. Nineteen of the 185 cases were ALPs, yielding a sample of 166 traditional licenses.

[118]Included in this category is one project with fish passage requirements which Interior purported to prescribe pursuant to Section 18, but which the Commission rejected as a prescription because it was untimely filed. The Commission adopted the fish passage requirements pursuant to its Section 10(a) public interest balancing. Were the costs of that project treated as a prescription, the $531 figure for projects with conditions would be reduced reduced substantially and the $421 figure for projects with conditions would increase substantially.

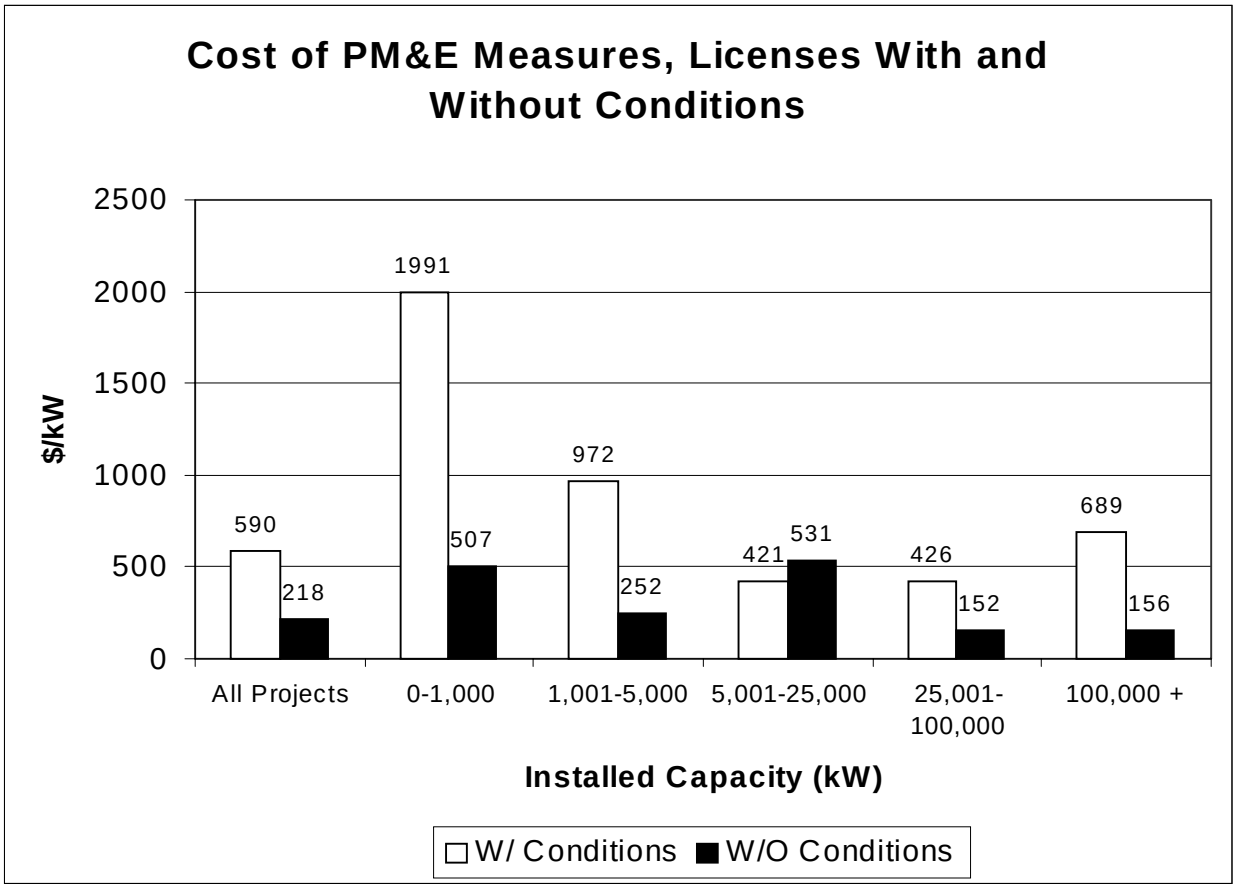

Figure 4 Cost ($/kW of Installed Capacity) of PM&E Measures Licenses With and Without S. 4(e) and S.18 Conditions.

In 31 cases (12 percent) staff was able to identify mandatory conditions determined by the Commission to exceed the conditions recommended by the Commission staff. This number is conservative because the Commission seldom takes issue in NEPA documents or license orders with mandatory terms and conditions over which it has no control, or where a settlement is involved.

Of the 31 cases, 24 involved additional water quality certification conditions. Of the 24, conditions providing for state review and approval of plans, effective dates, and other license administration matters and water quality either added no identifiable cost or minimal costs. The median annual cost for flow conditions was $27,000, exclusive of one license in which flow conditions entailed an additional annual cost of $290,000. Generation losses in addition to those that would have been required by the Commission were reported for only two projects. These totalled 7,335 MWh, but one of the projects accounted for 7,160 MWh (98 percent) of the total.

Fish passage measures were required in two of the 24 water quality certifications. Cost data are available only for one project, in which the incremental annual cost was estimated to be $229,500. Fish passage requirements pursuant to Section 18 which staff concluded are not necessary were included in four licenses. The incremental annual cost of these prescriptions ranged from $24,000 to $1,199,000, with an average cost of $467,175. One license includes fish screening and minimum flow requirements pursuant to the CZMA consistency certification estimated to annually cost $32,400 and the loss of 150 MWh of generation.

Four of the 31 cases included mandatory conditions pursuant to FPA Section 4(e). No associated generation loss was reported and only one of these cases involved significant incremental annual costs.[119]

In a few instances, licensees have stated that the cost of mandatory conditions, alone or in association with other costs, would render a project uneconomic.[120]

3. Cost Relative to Project Size

Staff also examined the costs to prepare an application and for PM&E measures for projects of various sizes. The results are shown below in Figure 4.

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[119]The license for the Wisconsin River Project No. 2113 includes an annual cost of $38,600 for restoration of wild rice and monitoring of impoundment water levels.

[120]See letter filed February 5, 2001 from Terry Flores, Director of Hydroelectric Licensing, PacifiCorp, in docket number PL01-1. In comments made during the public hearing in Albany, New York, Orion Power New York's representative stated that fishway prescriptions by Interior or Commerce, coupled with other new environmental resource measures, will render three of its projects uneconomic. Statement of Jerry Sabattis, p. 94. Mr. Sabattis did not identify the projects or state whether Orion intends to file applications to surrender the licenses. Instances where licensees have elected to surrender their license rather than seek a new license are rare. In the 10 year period from 1991-2000, 279 new license applications were filed while applications were made to surrender six expiring licenses.

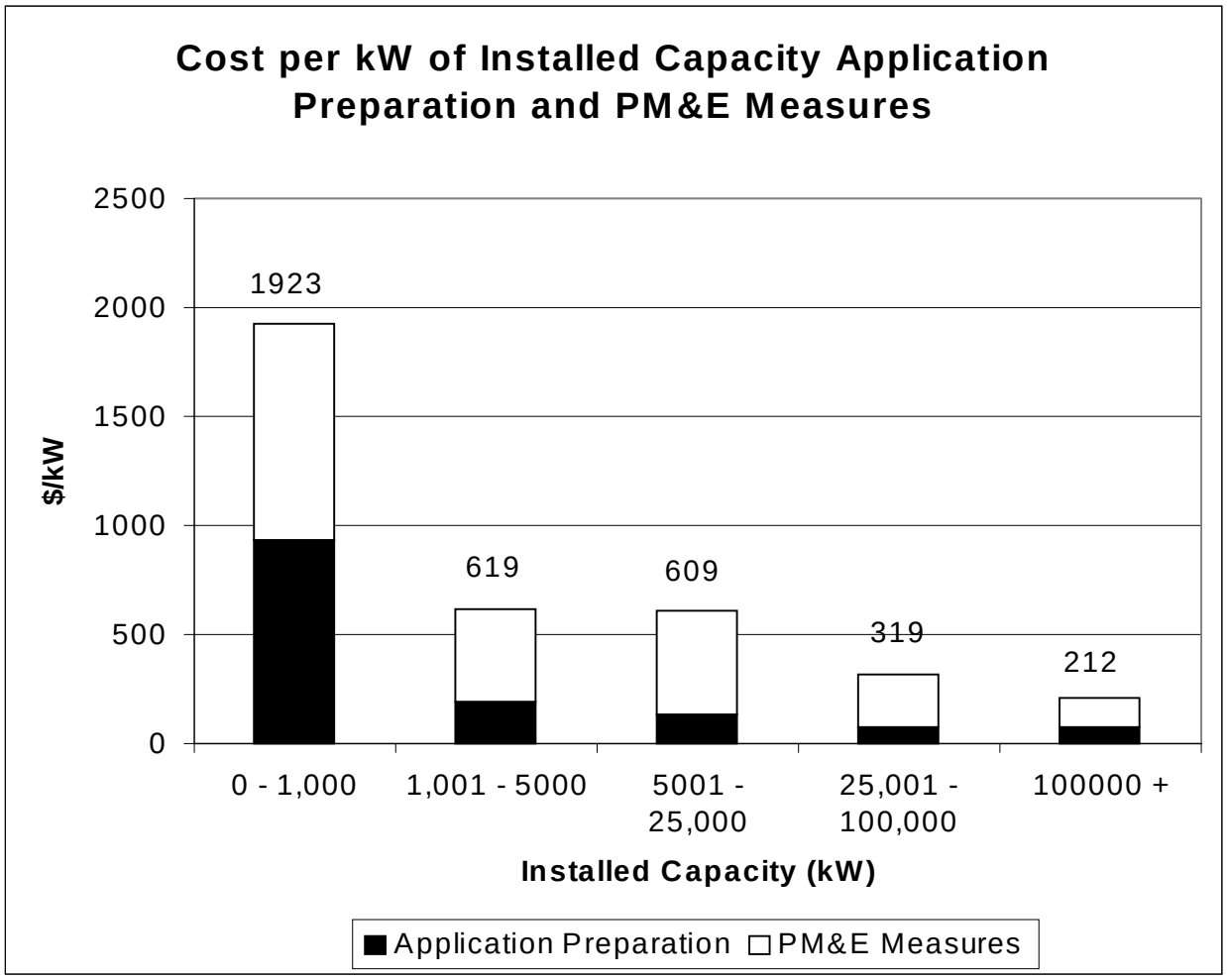

Figure 5 Cost ($ per kW of Installed Capacity) Application Preparation and PM&E Measures.

Figure 4 shows clearly that the costs of preparing a license application and implementing PM&E measures are relatively greater for smaller projects. This trend was expected, as many costs of preparing an application are affected minimally or not at all by project size, but the magnitude of the costs for very small projects was surprising. Indeed, the total cost for the smallest projects of about $1900 per kW vastly exceeds the capital cost of a new gas-fired turbine generator, which is roughly $500/kW.

For very small projects (0 - 1,000 kW) both cost categories involve what the Commission considers to be very high expense relative to project size. The Commission often finds moreover that the cost of producing project power from a small project exceeds the cost of the most likely source of alternative power.

Also surprising was the high ratio of license preparation cost to PM&E costs for small projects. While there is no objective measure which would enable one to determine that application preparation costs are too high for these projects or that PM&E measures are too stringent, the relative and absolute costs tend to indicate that agencies requesting studies or requiring mandatory terms and conditions do not consider the cost of their actions.[121]

4. Annual Charges

In addition to their processing costs, licensees are required by FPA Section 10(e)(1)[122] to pay "reasonable annual charges" to reimburse the United States for the costs of administration of FPA Part I (administrative annual charges), and for the use of U.S. lands and other property.[123] The latter includes U.S. lands or reservations, Federal facilities such as dams, and water power benefits from upstream Federal projects.[124] .

Section 10(e)(1) also provides an exemption from annual charges for the state or municipal licensees "to the extent such power is sold to the public without profit or is used by such State or municipality for State or municipal purposes." The section also provides an exemption for certain projects of 2,000 or less horsepower and meeting

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[121]In Bangor Hydro-Electric v. FERC, 78 F.3d 659, 661 (D.C. Cir. 1996), the court, in the course of its decision vacating an Interior Department fishway prescription for lack of substantial evidence, noted that Interior's response to the licensee's showing that the fishway would cost approximately $2,000,000 to build and $30,000 in lost power generation annually, was to state that "[W]e will not sacrifice fish passage effectiveness or compromise fishery management objectives . . . *simply due to cost considerations.*" (emphasis added by the court).

[122]16 U.S.C. § 803(e)(1).

[123]In 1995, the Commission amended the annual charges regulations to, among other things, adopt a maximum charge and eliminated annual charges for minor licenses (projects of 1.5 MW or less capacity). Order No. 576, III FERC Stats. & Regs. ¶ 31,016 60 Fed. Reg. 15,040 (March 22, 1995)

[124]Annual charges for licenses for projects using government dams or tribal lands within Indian reservations are subject to approval of the Secretary of the Interior.

certain other requirements (unless they are located on tribal lands within Indian reservations). Neither exemption applies to projects using a "government dam."[125]

FPA Section 17[126] requires that annual charges paid to the Commission be remitted to the Treasury, and establishes the distribution of funds to various Treasury accounts.[127]

A. Administrative Annual Charges

i. The Commission's Costs [128]

In Fiscal Year (FY) 2000, Commission's cost of administering the hydropower program was $53,076,000. Of the total amount, $20,231,000 (38 percent) relates to licensing. The average annual charge per kW based on the Commission's total cost of the hydropower program in FY 2000 is about 93 cents per kW. The licensing portion averages 34 cents/kW.[129] The net present value of the licensing portion is $4.22/kW. Compared to the license preparation and PM&E costs discussed above, Commission's administrative annual charges are a small portion of the total cost of licensing.

ii. Other Federal Agency Costs

In 1986, the Commission began including, in its assessments to licensees, the costs incurred by other federal agencies in the performance of their responsibilities in

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[125]For licensing purposes, a government dam is defined by FPA section 3(10) as a dam that is constructed or owned by the United States.

[126]16 U.S.C. § 810.

[127]Section 10(e)(4) requires the Commission to review the appropriateness of annual charge limitations and report to Congress thereon every five years. The most recent five-year report, issued in 1997, makes no recommendations for changes.

[128]Administrative annual charges are determined on a fiscal year basis. The component of administrative charges representing the Commission's costs is based on an estimate of the costs the Commission will incur to administer FPA Part I during the current fiscal year, with subsequent adjustments based on actual costs.

[129]These figures exclude federal land use charges, other federal agency costs, and federal dam use charges.

administering Part I of the FPA (OFA costs).[130] Each year the Commission requests other appropriate federal agencies[131] to submit their prior year's costs of administering Part I to the Commission, and those costs are included in current year annual charge bills. OFA costs have escalated dramatically in recent years, from $3.1 million in FY 1990 to $14.9 million in FY 1999. OFA costs currently, on average, add an additional 25 cents/kW (net present value $3.33/kW) to administrative annual charges,[132] about 73 percent of the Commission's cost of licensing.

B. Other Annual Charges

Annual charges for the use of United States lands are set based on a schedule of rental fees for linear rights-of-way. The rental fees per acre per year are governed by a schedule of land values based on acreage. The land values are established by the Forest Service for the counties in which the hydropower projects are located. These fees are

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[130]The background for Commission collection of OFA costs is discussed in City of Idaho Falls, Idaho, et al., 87 FERC ¶ 61,114 at p. 61,649 (1999). Section 1701(a) of EPACT requires the Commission to collect in annual charges reasonable and necessary costs incurred by Federal and State fish and wildlife agencies and other natural resources and cultural resources agencies "in connection with studies or other reviews carried out by such agencies for purposes of administering their responsibilities under" Part I of the FPA. The Commission has construed section 1701(a) to require Congress to appropriate funds for the purpose of reimbursing these costs directly to the agencies. See testimony of Chair Moler before the Subcommittee on Energy and Water Development of the House Committee on Appropriations, April 21, 1993, p. 11.

[131]The Bureau of Indian Affairs, Bureau of Land Management, Bureau of Reclamation, and U.S. Fish and Wildlife Service, all in the Department of the Interior; the U.S. Army Corps of Engineers; the U.S. Forest Service in the Department of Agriculture; the National Marine Fisheries Service in the U.S. Department of Commerce; and the U.S. Environmental Protection Agency (EPA). EPA has not to date submitted any costs to the Commission.

[132]Two groups of licensees have appealed the OFA portion of their administrative annual charges bills for the past several years. A settlement of these proceedings for FY 1996-1997 providing for refunds of portion of these charges was recently approved by the Commission. City of Idaho Falls, et al., 95 FERC ¶ 61,126 (2001).

then applied even-handedly to all licensees to determine the annual charges for their use of federal land.[133]

The Commission determines annual charges for any project using tribal lands within an Indian reservation on a case-by-case basis.[134] The general practice is that the charges are determined by agreement between the tribe and the licensee. In rare cases where agreement cannot be reached, the Commission will set the matter for hearing.

The charge for the use of a government dam is (except with respect to pumped storage projects) based on graduated flat rates per kWh generated each year. The rates reflect a limit imposed by Congress in ECPA, and are calculated by a formula contained in that Act.

[133] See 18 CFR 11.2. GAO is currently investigating the adequacy of payments made by licensees and some exemptees for the use of federal lands.

[134] See 18 CFR 11.4 There are less than a dozen such projects.

V. ONGOING ACTIONS TO REDUCE TIME AND COST

As discussed above in Section III, the Commission has continuously sought to improve the licensing process by making its regulations more clear and specific, enhancing opportunities for stakeholder participation, and providing flexibility to license applicants and others to design collaborative efforts that meet the needs of all participants. The efforts of the Commission and others to improve the process however do not stop with the licensing regulations.

a. Outreach Program

Since the early 1990s, the Staff has conducted outreach meetings in states and regions where there is or will be significant licensing activity. At these open meetings stakeholders in the hydropower process have the opportunity to meet with members of the licensing staff for the purpose of learning about the licensing process and related Commission laws and regulations. Licensees and agency representatives frequently participate. In recent years outreach meetings have also been used to promote expanded use of settlements, applicant-prepared environmental assessments, and third-party contractor environmental impact statements, and to foster coordination of activities in river basins with multiple projects. Continuation of this program is expected to increase substantially the percentage of applications prepared using applicant- and third party-prepared environmental documents. As indicated below in subsection c., these efforts are bearing fruit as the number of settlements and applicant-prepared EAs resulting from collaborative processes continues to increase, and the number of requests for rehearing of license orders has declined.

b. Interagency Training Activities

The U.S. Fish and Wildlife Service's National Conservation Training Center in Sheperdstown, West Virginia, periodically conducts hydropower licensing workshops at locations around the country for federal and state agency personnel and other participants. The workshop program and curriculum was developed jointly by staff from the Commission, Forest Service, U.S. Fish and Wildlife Service, Bureau of Land Management, National Park Service, and National Marine Fisheries Service. Commission staff actively participates in the training. The first workshop occurred in March 1999, in Lacy, Washington. Subsequent workshops have been held in California and South Carolina, in anticipation of the large number of relicense applications to be filed for projects in these regions during the coming decade. The next workshop will be in Portland, Oregon in July 2001.

c. Alternative Dispute Resolution and Settlement Agreements

Since the early-1990s the Commission's hydroelectric licensing staff has taken an active role in facilitating settlements and introducing alternative dispute resolution procedures (ADR) where there appear to be opportunities for bringing consensual resolution to long-standing disagreements. In recent years the Commission has stepped up this effort by establishing a Dispute Resolution Service, designed to encourage the use of alternative dispute resolution, train Commission staff and other parties in its use, and, where appropriate, to serve as neutrals to facilitate settlement negotiations. [135] Under this program all of the Commission's administrative law judges have received training in service as third party neutrals, and judges have served in that capacity in a number of hydroelectric proceedings. In addition the Commission has provided various training programs in facilitation, mediation, and dispute resolution to its staff. In just the past few years, over 90 members of the Commission staff have completed training courses in various forms of ADR, and many staff members have put their skills to work in assisting collaborative licensing processes and settlement negotiations.

These efforts are continuing to pay off. Staff identified formal and informal settlement agreements in licensing cases filed during the 21-year period from 1980-2000. In each succeeding seven-year period the number of settlements has increased, from 22 during 1980-1986; to 36 during 1987-1993; to 77 during 1994-2000.[136]

d. Electric Power Research Institute - National Review Group

In 1998, the Electric Power Research Institute (EPRI) convened a National Review Group (NRG) comprising more than 30 organizations representing a diverse cross-section of stakeholders in the hydroelectric licensing process (including the Commission) for the purpose of improving the outcomes of hydroelectric licensing. The objectives of the NRG were to:

- o Define successful relicensing principles and supporting practices based on past experiences;

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[135]The Commission issued a rule implementing the Alternative Dispute Resolution Act in 1995. See Order No. 578 (1995), 60 Fed. Reg. 19494 (April 19, 1995), III FERC Stats. & Regs. ¶ 31,018.

[136]The numbers for formal settlements show similar, dramatic increases in recent years. 16 (1980-1986); 21 (1987-1993); and 39 (1994-2000).

- o identify difficult issues and develop alternative solutions;
- o trade and share positive and negative licensing experiences;
- o improve stakeholder dialogue and foster exchange among all interested groups; and
- o coordinate with and add value to other administrative licensing reform efforts.

The NRG, Hydro Licensing Forum; Strategies, was completed in December 2000.[137] The report is useful to all stakeholder groups involved in licensing efforts who may encounter issues similar to those discussed in the report.

The report covers five areas: Stakeholder Education and Involvement; Relicensing Process; Identification of Issues and Study Designs; Protection, Mitigation, and Enhancement; and Anticipating and Addressing Issues of Post-licensing Administration and Compliance. In each section, the report broadly identifies critical issues (issue statements) and provides numerous recommendations (solution statements) designed to assist parties in reaching mutually acceptable resolutions.

The Stakeholder Education and Involvement section identifies over 50 solution statements for convening and improving a collaborative stakeholder process from the beginning of prefiling consultation throughout the licensing process.

The section on the relicensing process provides guidance on things to consider when selecting the most appropriate process (i.e., traditional or ALP) under the circumstances of the case. It includes sections on coping with multiple or shared authority, dispute resolution, and watershed or basin-wide planning.

The section on issue identification and study design covers a broad range of topics, including early identification of resource goals and objectives, joint NEPA scoping, defining reasonable alternatives, study and methodology selection, and implementation and analysis.

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[137] The EPRI/NRG report is available on the EPRI web site at: http://www.epri.com/targetHigh.asp?program=149&objid=232146.

The section on PM&E measures distinguishes among the various types of measures and discusses selection of resource measures, on- and off-site measures, cost, successful approaches to mandatory conditioning, adaptive management, and liability.

The section on post-licensing administration and compliance provides guidance on such matters of transference of intent between the pre- and post-license phases, interdependent conditions, continuity and coordination, stakeholder notification, and extensions of time to implement license conditions.

The extent to which the EPRI-NRG report will reduce the time or cost of obtaining a license is uncertain. It reflects however the lessons learned by many people with a great deal of collective experience bringing resolution to recurring issues in licensing, and should serve as a valuable tool for stakeholders developing solutions to their cases.

e. Interagency Task Force Reports.

In 1998, the Commission and other federal agencies with roles to play in the licensing process[138] established an Interagency Task Force (ITF), the primary goal of which is to develop practical ways to improve and make more efficient the traditional licensing process. The ITF consists of a Steering Committee and five Working Groups.[139] The Steering Committee is composed of senior representatives of the participating agencies. It reviews proposals from the Working Groups and generally oversees all aspects of the effort.

The ITF examined means by which the parties can avoid unnecessary delays, ensure consistency, improve routine communications, reduce duplication, and make use of relevant expertise throughout the licensing process. The Working Groups have produced seven reports providing guidance to agency staff and participants in the licensing process.[140] The Working Group reports were submitted for review and

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[138]The participating agencies are the Departments of the Interior, Commerce, Agriculture, and Energy, the Council on Environmental Quality, and the Environmental Protection Agency.

[139]The five working groups are: federal agency coordination, state agency coordination, collaborative process, ex parte communications, and economics.

[140]The ITF's agency guidance documents have been made public and are posted

(continued...)

comment to an Advisory Committee composed of 20 members representing the industry, federal, state, and local governments, Indian tribes, and NGOs. The Advisory Committee approved the reports.

Alternative Licensing Process Report This report provides step-by-step guidance for participants in the ALP, from the time an applicant considers using the ALP through completion of the process by filing an application with a draft NEPA document and, where possible, a settlement agreement. Specifically, the report recommends that ALP participants should look for ways of sharing resources and coordinating or combining related processes.

NEPA. This report establishes guidance for Commission and resource agency staff on the range of alternatives to be considered, appropriate characterization of environmental impacts and environmental protection, mitigation, and enhancement measures, assessment of cumulative environmental impacts, and other methods of expediting the process. A potentially time and cost-saving agreement is that in cases where an EIS is not required, the Commission will consider prefiling consultation to encompass environmental scoping and issue one EA, rather than draft and final EAs, if there are no objections to do doing so.

Study Requirements. This report identifies actions that can be taken to improve the process by which studies are selected, designed, and implemented, and to resolve disputes. Resource agencies and applicants often disagree concerning studies, which can add time and expense to the process. The focus of the report is on resolution of key problems associated with studies, such as lack of clear study objectives or nexus between the study and project operations. Resource agencies agree that they should provide the applicant with an explanation of agency management goals, study objectives, suggested methodologies, and data collection and analysis techniques as early in the process as possible. The agencies also agree that they should demonstrate a nexus between project operations and the resources to be studied and between information needs and statutory responsibilities. The report also commits the Commission staff in dispute resolution proceedings to hold a technical conference where appropriate and, whenever possible, issue a letter resolving any study disputes within 30 days of a technical conference.

Notice Procedures. This report provides for improvements in the content and timing of notices, NEPA scoping procedures, and advance notice and schedules for REA notices. Of particular note is Commission staff's agreement to include a tentative

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[140](...continued)
on the Commission's web site at www.ferc.fed.us, on the hydro page.

schedule for issuance of the REA notice in its scoping documents. Because the REA notice serves as a key milestone for submission of resource agency recommendations, terms, and conditions, resource agency awareness of the Commission's schedule will help ensure timely filing of these recommendations and mandatory conditions.

Endangered Species Act. This report outlines means of integrating and coordinating the procedural steps of the licensing process and ESA Section 7 consultation process. The same issues are commonly raised in both processes, with the same or similar information necessary for resolution. Historically, these two processes have not been well integrated, unnecessarily extending the required time. The intent of the agreement is to incorporate ESA issues into prefiling consultation on study needs, filing where possible a draft biological assessment with the license application, and integrating ESA issues with the NEPA document and 10(j) negotiations, so as to keep ESA issues on the same track as other issues.

Administration of FPA Sections 4(e), 10(j), and 18. This report examines means of clarifying and coordinating procedures for incorporating resource agency recommendations, conditions, and prescriptions in the licensing process, and contains commitments by the Commission and agencies to carry out certain practices intended to make the process more efficient and effective. One noteworthy agreement is the resource agencies' commitment to consider, where sufficient information is available, the least expensive PM&E measure that will meet resource agency management goals. Equally noteworthy is the resource agencies' commitment to coordinate among agencies to eliminate inconsistent conditions and recommendations.

Trackable and Enforceable License Conditions. This report gives guidance on development of, and gives examples of, license conditions that can be effectively tracked and enforced by identifying the goal of the condition, criteria for successful implementation, and any necessary monitoring and reporting requirements. This report should help to achieve consistency, improve communications, reduce duplication, and ensure that the best use is made of relevant expertise throughout the licensing process.

An interagency team is currently conducting seminars on implementation of the ITF reports for resource agency and Commission personnel. Eight seminars have been or will be held in locations nationwide between February and May 2001.

f. Improvements in Information Technology

Improvements to the Commission's website have enabled the public to view and print over 9 million pages of documents filed with the Commission along with Commission issuances, including notices, orders, and rulemakings. Comments and

protests can now be filed with the Commission through its website (e-filing), making it easy for members of the public to participate in the relicensing process. E-filing for motions to intervene became available in February 2001. E-filing will reduce the burden on all participants by eliminating costs associated with paper filings (i.e., paper, copying, envelopes, postage) and make filing less time consuming.

Enhancements to the Commission's information technology infrastructure have improved reliability and security for the local area network at headquarters and the wide area network that serves the Commission's regional offices, as well as the website. Increased reliability supports both agency staff and outside parties making filings or retrieving information through the Commission's website. Construction and inspection reports by regional office dam safety inspectors are posted on the website when they are filed with headquarters, making them immediately available to the public. A new agency-wide document tracking system enables staff to be notified within minutes of a filing being made.

g. Environmental Mitigation Effectiveness Tracking

The Commission is also re-engineering developed databases into an environmental measures effectiveness database that will be used to track the success of environmental requirements in licenses. This tracking capability is in the pilot program stage and when completed will be capable of storing the requirements and the results of monitoring studies conducted to verify whether the license requirements are working to achieve their desired result. On a site-specific level, this information can be used to fine-tune requirements, or to eliminate requirements that are ineffective. At the programmatic level, the database allows identification of the types of PM&E measures that may be effective at other projects, after taking into account operational and biogeographical similarities among the projects, thus improving the Commission's ability to correctly identify effective PM&E measures for those projects.

h. Guidance Documents

Licensing handbook - Staff recently combined the existing handbooks for licensing and relicensing, and updated the combined handbook to reflect current regulations, policies, and procedures. This new handbook was issued in April, 2001 and is available on the Commission's web site.[141]

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[141] See http://www.ferc.fed.us/hydro/hydro2.htm. Another handbook is concurrently being prepared to address other hydropower issues at the Commission (e.g., (continued...)

EA guidelines - Staff recently prepared detailed guidelines to assist applicants and collaborative groups in the preparation of draft APEAs. The guidelines were posted on the Commission's web site in March 2001 (http://www.ferc.fed.us/hydro/hydro2.htm)

ALP guidelines - The Commission is preparing procedural guidelines for applicants and other stakeholders to use in alternative licensing processes. They are expected to be posted on the Commission's web site by end of 2001.

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[141](...continued)
amendments, surrenders, and preliminary permits).

VI. CONSULTING AGENCY COMMENTS AND RECOMMENDATIONS

Section 603 directs the Commission to prepare its report in consultation with appropriate agencies. Staff consulted directly with the federal Departments of Interior, Commerce, and Agriculture, EPA, and the Advisory Council. Staff met with representatives of these agencies on November 27, 2000 and February 13, 2001 to discuss sharing of pertinent information and data and clarification of consultation procedures. Consulting agencies were provided with a summary of the comments made in the context of public hearings discussed below and, upon request, copies of all the written comments.

This section of the report discusses the written comments of the consulting agencies. The consulting agencies have requested that we attach their comments to this report and we have done so (Appendix A) .

Interior states that the ITF, EPRI-NRG, and the joint Interior/Commerce Mandatory Conditions Review Process and Fishway Prescription Policy are expected to significantly improve the timeliness of the process, quality of decisions, and the prompt implementation of mitigation measures, that cooperative efforts have resulted in several successful agreements that will save time and money in the long run, and that the Commission should do nothing that might undermine them. NOAA, the Forest Service, and EPA make similar statements, and NOAA and the Forest Service state that legislation is not needed at this time. These agencies do, however, recommend action in certain areas.

a. Cooperating Agencies Policy

The Commission has a long-standing policy that an agency that has served as a cooperating agency in a proceeding may not thereafter intervene in that proceeding. The Commission established this policy because staff of a cooperating agency are treated in some respects as though they are Commission staff, including having conversations and exchanging information that may not be put in the record, just as Commission staff properly shares predecisional information internally. Thus, the policy serves to ensure the consistency of our practices with the Commission's rules concerning ex parte communications.[142]

[142] See 18 CFR 385.2101.

Interior, NOAA, Forest Service, and EPA believe that Commission should change this policy. Interior and NOAA state that the policy forces them to protect their interests and right to appeal adverse Commission actions by intervening before it is known whether they will need to file an appeal.[143] They state that this restricts cooperation, may trigger an adversarial relationship, and forces duplication of effort. Interior states as well that the Commission's policy is not required by its ex parte rule or based on any requirement of NEPA, the CEQ regulations, the FPA, or other Commission rules. All the agencies assert that eliminating this policy would make the licensing process more efficient, provide the Commission and resource agencies with better information and analysis to support their respective decisions, improve working relations and be consistent with the ITF, and reduce the likelihood of rehearings and appeals.

It may be that relaxation of this rule would marginally increase the efficiency of the process in those cases with joint NEPA documents. Nonetheless, the Commission is equally concerned about the fairness of its proceedings and believes that no party should have an advantage over other parties in the form of off-the-record access to Commission decisional staff. The fact that the Commission's policy is not required by statute or regulation makes it no less valid. The Commission also pointed out in prior proceedings that although this policy prevents a federal agency which has acted as a cooperating agency from seeking judicial review of the Commission's orders in the proceeding, Rule 29 of the Federal Rules of Appellate Procedure gives federal agencies the right to file a brief as an amicus curiae in any appellate proceeding. The agency may also be able to intervene in any appellate proceeding pursuant to Rule 15(d). Neither of these rules lists as a prerequisite intervention in the agency proceedings that are the subject of judicial review.[144]

b. Schedules

The Commission has committed, through the ITF, to publish and update anticipated schedules for the REA notice, NEPA scoping documents, and subsequent additional information requests. Interior, NOAA, and the Forest Service suggest that this is a good beginning, but that the Commission should issue additional schedules for itself. They specifically recommend notification 60 days before the Commission issues the REA notice, proposed schedules for issuance of draft and final NEPA documents,

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[143]Section 313(a) of the FPA, 16 U.S.C. § 825l(a), provides that judicial review of Commission decisions may only be sought by parties to the Commission proceeding.

[144]Rainsong Company , 79 FERC ¶ 61,338 (1997), appeal on other grounds dismissed, Rainsong Company v. FERC (9th Cir. No. 97-70914, August 18, 1998).

and a schedule or deadline for acting on requests for rehearing. They state that this would benefit them by better enabling them to re-task staff resources to satisfy their own commitments, and eliminate uncertainty concerning when events will occur.[145]

Staff agrees generally that the more advance notice participants have of future Commission actions the better able they should be to carry out their roles in the licensing process, and that this has potential to save time and money. The Commission's ability to predict the timing of its actions beyond the commitments already made (e.g., in the ITF) is however problematic because of uncertainties in the timing of state action on water quality certification and coastal zone management certification, requests for extension of time to submit recommendations, terms, and conditions, interagency negotiations on the content and timing of jointly-prepared NEPA documents, requests for deferral of action pending settlement discussions, parties raising novel or complex legal arguments, and other factors both before issuance of a license and on rehearing. Under these circumstances, further attempts to schedule future Commission actions are unlikely to provide any reduction in the time or cost of obtaining a license.

c. Commission Staff Participation in Prefiling Consultation

NOAA states that time and effort may be wasted in the licensing process because participants are unclear about their roles and responsibilities or the Commission's policies and procedures, and because the Commission staff is not on hand to resolve study disputes or provide guidance on the kinds of settlement provisions that may not be acceptable to the Commission. NOAA recommends that the Commission staff become involved at all stages of the proceeding. It believes that Staff can minimize such problems by advising the participants on policies and procedures, suggest solutions to matters based on experience in other cases, identify problem areas early, and that being fully involved from the beginning will enable staff to act more quickly when issues arise.

NOAA's assertion that participants are not clear about their roles and responsibilities or the Commission's policies and procedures is surprising in light of the many years of agency and public education efforts documented in the previous section of the report, and NOAA's extensive involvement in Commission proceedings. Staff agrees nonetheless that a stronger staff presence in prefiling consultation has the potential to reduce licensing times and costs for the reasons cited by NOAA. There may be staffing

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[145]Interior and NOAA note that they have committed in the Mandatory Conditions Review Process to publishing preliminary conditions and prescriptions within the time limit given in the REA notice, but state that their commitment rests in part on the Commission providing tentative schedules for certain elements of the process.

constraints associated with this recommendation, depending on the number of proceedings and extent to which staff is involved, but the degree of constraint is difficult to predict. Staff's experience in this regard in the context of ALPs is that a substantial amount of time is involved, but that staff time devoted to the proceeding during prefiling consultation tends reduces staff time that would otherwise be required following filing of the application because applications are accompanied by a preliminary draft NEPA document that reflects a substantial degree of consensus, and are often submitted as part of a settlement package. Overall, staff hours spent on ALP proceedings are lower than on traditional applications. The fact that ALP applications are processed in about half the time as traditional applications supports this assessment.

Whether the benefits of the ALP can also be fully or partially realized by prefiling staff participation in the context of the traditional process is uncertain. The greatest likelihood that this benefit would occur (assuming the absence of externalities such as delayed Clean Water Act certification) is if staff's participation is part of a package including other measures, such as expanded public and NGO participation in prefiling consultation and requirements that agencies and other participants make their study requests early in the process. Proposals for regulatory and policy changes toward this end are discussed in Section VIII.

d. Annual Licenses and Interim PM&E Measures

Interior and NOAA submit that the length of many relicense proceedings benefits the hydropower industry because licensees continue to use public waterways to operate their projects under annual licenses subject to the terms of original licenses[146] that do not contain appropriate environmental protections. Interior asserts that it is arbitrary and capricious for the Commission not to consider whether annual licenses should be subject to interim environmental enhancement conditions. Both agencies recommend that all annual licenses be subject to interim mitigation measures submitted by resource agencies with mandatory conditioning authority which are supported by evidence in the record. This, they state, will eliminate the licensee's incentive to delay relicensing and timely put into place needed mitigation measures. NOAA also recommends generally that the Commission amend its regulations "to place strict requirements on the issuance of annual licenses."[147] In addition, Interior recommends that the Commission deny licensee requests for extension of time to implement license requirements pending their requests

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[146] See n.16, supra.

[147] NOAA comments, pp. 7-8.

for rehearing of those conditions unless the extension is approved by resource agencies required to be consulted with respect to the license article in question.

Staff does not recommend any legislative changes to the FPA provisions concerning issuance of annual licenses. Issuance of annual licenses subject to the same terms and conditions as the expired license does suggest that licensees have an incentive to delay relicensing and, thereby, the incurrence of new PM&E costs. However, the record indicates that the incentive is more theoretical than factual. The longer a license proceeding takes, the longer the applicant must incur the costs of staff and consultants dedicated to that effort and to conduct additional studies. Moreover, the increasing use by licensees of settlements and collaborative proceedings indicates that there is in fact a significant cost burden associated with extended proceedings.

Staff also concludes that it would be counterproductive to use whatever authority the Commission may have to impose interim PM&E measures.[148] The principal problem with this recommendation is that such measures must be supported by substantial evidence and require the Commission to comply with NEPA and conduct a public interest analysis under FPA Section 10(a)(1) before acting. In most cases, the substantial evidence necessary to support new PM&E measures comes from the studies submitted by the applicant, which are considered, along with most other aspects of the public interest, in the Commission's NEPA analysis for relicensing. Thus, we would rarely have the necessary information to defend such interim conditions until the NEPA document is completed. Any order imposing interim measures prior to the completion of the licensing proceeding would be a final order subject to rehearing and judicial review. Thus, in addition to delaying the ultimate conclusion of the licensing proceeding it would create an additional workload burden. Only in emergency circumstances would it make sense to consider such a course of action. Imposition of interim conditions would substantially erase any incentive for the federal agencies to timely respond to the REA notice with final conditions or make any other necessary submissions.

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[148]Some commenters suggest that the Commission has ample authority to impose such conditions, citing Platte River Whooping Crane Critical Habitat Maintenance Trust v. FERC, 876 F.2d 109 (D.C. cir. 1989). That case holds that the Commission can amend an annual license to impose interim PM&E measures against the licensee's will only if the original license contains a reservation of authority for the Commission to amend the license encompassing that purpose. That case was decided moreover in the context of protecting federally endangered whooping cranes, and in no way did the court purport to relieve the Commission of its responsibility to act based on substantial evidence or to comply with procedural requirements of NEPA or the Endangered Species Act.

e. Enforcement of Settlements

Interior and NOAA state that the full benefit of the ALP in terms of encouraging early communication, identifying issues, and fostering settlements will be realized only if the Commission acts to ensure that "confusion" concerning the enforceability of settlement provisions is resolved. Interior states that settlements are being delayed in applications using the ALP because the Commission has not yet clarified its position on the enforceability of settlement provisions. Interior, without providing any specific suggestion, recommends that the Commission end the asserted uncertainty by "tak[ing] action to allow it to enforce all terms included in the settlement agreement that have been incorporated into the license."[149] NOAA similarly suggests that the Commission take whatever action is necessary to take jurisdiction over all parties to a settlement, instead of just the licensee, and asserts that it has no means other than enforcement of the Commission's license to enforce settlement agreements.

The Commission has repeatedly stated that while parties are free to include in a settlement agreement whatever provisions they feel best resolve the matter, and that agencies with mandatory conditioning authority may require those provisions to be included in licenses, the Commission has no jurisdiction to enforce settlement provisions binding entities other than the licensee.[150] Thus, the Commission will not enforce settlement provisions or mandatory conditions in licenses governing relations among the parties to the settlement agreement.[151] Interior and NOAA's recommendations

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[149]Interior comments, p. 9.

[150]See Avista Corporation, 90 FERC ¶ 61,167 (2000), order on rehearing, 93 FERC ¶ 61,116 (2000) (Avista) and Wolverine Power Co. v. FERC, 963 F.2d 466 (D.C. Cir. 1992) (vacating civil penalty assessed against license applicant because it was not a licensee or exemptee, as required by FPA Section 31).

[151]See, e.g., Avista (including in license Section 4(e) condition requiring licensee to comply with the terms of a comprehensive settlement order underlying the license, plus obtain Forest Service approval for any changes, plus submit various environmental plans to the Forest Service for approval; but stating that it has no jurisdiction to enforce provisions governing relations among the parties to various committees established by the settlement). For this reason, the Commission has for many years declined to include in licenses, where it has had the ability to do so, procedural provisions of settlement agreements requiring the participation of entities not subject to the Commission's jurisdiction in activities during the term of the license. See, e.g., Southern California

(continued...)

notwithstanding, the Commission cannot administratively create jurisdiction where none lies under its enabling statutes. We note in response to NOAA's assertion of helplessness that many parties craft settlement agreements with provisions that enable any party to enforce the agreement as a contract in state courts.

f. Trust Responsibility

Interior and NOAA also assert that licensing proceedings take longer than necessary because the Commission does not take seriously its trust responsibility to Indian tribes. They contend that the Commission's NEPA documents fail to consider project impacts to treaty rights and resources, and that tribal rights and resources are to be accorded a higher standard of consideration than is accorded other matters under the Commission's FPA requirements.[152] Without being specific, they recommend that the Commission acknowledge its trust responsibility and require licensees to provide early in Stage I consultation "sufficient information . . . to assure the early identification of the Indian lands, treaty rights, and trust property resources that may be affected by project operations."[153] Interior suggests that this more timely information will lead to better identification of study needs, and thereby reduce the likelihood of delays in receiving Interior's mandatory conditions or prescriptions.

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[151](...continued)
Edison Co., 77 FERC ¶ 61,313 n.46 (1996), order on reh'g, 81 FERC ¶ 61,162 (1997); City of Seattle, WA, 71 FERC ¶ 61,159 (1995), order on reh'g, 75 FERC ¶ 61,319 (1996).

[152]Interior also asserts that the Commission gives inadequate consideration to environmental justice. The Presidential Memorandum on government-to-government relations with Indian Tribes and Executive Order on consideration of environmental justice issues (Presidential Memorandum, Government-to-Government Relations with Native American Tribal Governments (April 29, 1994), reprinted at 59 Fed. Reg. 22,951; Executive Order No. 12,898, Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations (February 11, 1994), reprinted at 59 Fed. Reg. 7629) apply, by their own terms, to Executive Branch agencies, and exclude independent regulatory agencies. The Memorandum and Executive Order also state that they are not intended to create any legally enforceable rights. They therefore do not require the Commission to make any changes to its practices. City of Tacoma, 89 FERC ¶ 61,275 (1999).

[153]Interior comments, p. 11.

We see no need for additional action in this regard. The Commission carries out its trust responsibility in the context of the FPA.[154] Section 10(a)(3) requires the Commission to solicit recommendations for proposed license terms and conditions of, among others, Indian Tribes "affected" by the project.[155] Our regulations moreover reflect that the fact that Indian tribes have, by virtue of Section 10(a)(2)(B) and 10(a)(3), "a special status of their own" in the licensing process parallel to that of resource agencies.[156] Consistent with that special status, sections 16.8(a) and (b) of the Commission's rules require license applicants to provide any Indian tribe that may be affected by the project (as well as Interior and NOAA, as appropriate) with the complete package of first stage consultation information, including its proposed studies. Interior identifies no information lacking from the initial consultation package or any instance where a relicense applicant failed to abide by the Commission's regulations in this regard. The Commission has never received a formal or informal complaint from any Indian tribe in this connection. Interior, NOAA, and the tribes themselves are best positioned to identify Indian lands, treaty rights, and trust property resources that may be affected by project operations, and our regulations afford them ample opportunity to do so, as well as to bring to the Commission related study disputes.

NOAA also suggests that the Commission may not learn of tribal concerns regarding treaty rights and trust resources until late in the licensing process, causing delays at that point. However, in addition to the prefiling consultation mechanisms for raising their concerns, tribes have opportunities to bring these matters to the Commission's attention when a license application is noticed for public comment and when the REA notice is issued or, for that matter, at any time. Finally, in the ITF the Commission committed to increase direct consultation with tribes. An example of this is the Commission's decision to hold a NEPA scoping meeting for the relicensing of the

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[154] See City of Tacoma, Washington, 71 FERC ¶ 61,381 at p. 62,493 (1995) and cases cited therein. These responsibilities do not require the Commission to afford Tribes greater rights than they would otherwise have under the FPA. Skokomish Indian Tribe, 72 FERC ¶ 61,268 (1995); FPC v. Tuscarora Indian Nation, 362 U.S. 99 at 188 (1960).

[155] An "affected" Indian Tribe is defined in 18 CFR § 4.30(b)(10) as one whose "legal rights as a tribe may be affected by the development and operation of the hydropower project proposed (as where the operation of the proposed project could interfere with the management and harvest of anadromous fish or where the project works would be located within the tribe's reservation)."

[156] See Order No. 533, FERC Stats. & Regs. ¶ 30,921 at p. 30,107.

Box Canyon Project No. 2042 on the reservation of the Kalispel Tribe of Indians, which encompasses project lands.

f. Federal Reservations

Interior also states that disagreements between the Commission and itself concerning whether particular lands belong to a federal "reservation" as that word is used in Section 3(2) of the FPA,[157] and are therefore subject to Interior's mandatory conditioning authority under FPA Section 4(e), delay licensing by requiring Interior to file motions, rehearing requests or judicial appeals. Interior asserts that such delays could be avoided if the Commission would simply defer to Interior on this matter. In fact, disagreements over whether project lands are encompassed within a federal reservation are exceedingly rare. Only one such case, involving an Indian reservation, has come before the Commission in recent decades.[158] In any event, the Commission cannot simply defer to Interior concerning matters central to the Commission's jurisdiction.

g. Agency Study Requests

NOAA indicates that the cost of obtaining a license may be higher because licensee resistance to NOAA's study requests leaves NOAA with less information than it believes it needs to provide project-specific recommendations. This, it asserts forces it to provide broad recommendations and prescriptions for fish protection that may be more costly to implement. NOAA suggests that less time would be spent negotiating study requests and possibly less money on PM&E measures if the Commission would amend its prefiling consultation regulations "to require applicants to work with NOAA and other resource agencies to conduct requested studies in a timely fashion."[159]

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[157] 16 U.S.C. § 796(2).

[158] In Bangor Hydro-Electric Co., 83 FERC ¶ 61,037 (1998), reh'g pending ,the Commission rejected Interior's claims that certain islands in Maine's Penobscot River encompassed within the boundaries of a licensed project are federal reservation lands within the meaning of FPA Section 4(e). Other disputes over the applicability of Section 4(e) to project lands have been between the licensee and Interior or a tribe and have been judicially resolved.

[159] NOAA comments, p. 11.

Disagreements concerning study requirements are a fact of life which no legislative or administrative reforms will eliminate. The Commission thinks it is inappropriate to promulgate a regulation requiring applicants to perform whatever studies a resource agency may desire. The Commission itself sometimes disagrees with the need for studies requested by resource agencies. There is moreover wide agreement among commenters, including federal agencies, that resource agencies need to do a better job of linking their study requests to resource goals and objectives. Under these circumstances, there is no basis for amending the regulations as proposed by NOAA. The best thing that can be done with respect to study disputes is for the resource agencies to make their requests in a more timely manner and better support the need for them, and to make use of the Commission's prefiling dispute resolution process. Our recommendations toward that end are discussed in Section VIII.

h. Implementation of Programmatic Agreements

The Advisory Council notes that a Model PA for protection of cultural resources has been developed and that it is presently working in consultation with the Commission and the hydropower industry on a guidance document for the preparation of Historic Properties Management Plans (HPMP) to guide license applicants on how to implement that aspect of the model PA. The Advisory Council urges the Commission to continue working with it to finalize the guidance document. Staff is committed to assisting the Advisory Council in this regard.

i. Further Studies

Interior makes three[160] additional recommendations involving joint studies with Interior and others. First, Interior suggests that it and the Commission should jointly undertake more detailed studies than those conducted by Interior of the time required to complete major milestones in the licensing process and develop additional joint measures to minimize the time required for each step. This is unnecessary, as our own analysis includes a more detailed review of the times required for major milestones. Staff's recommendations reflect its views on how best to make the process more efficient.

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[160]Interior makes a fourth recommendation that federal resource agencies develop a streamlined issue resolution process to resolve any incompatibilities between federal agencies making recommendations, or in establishing mandatory conditions under FPA Sections 4(e) and 18. We are not aware of any significant problem in this connection, but see no reason why, in specific cases where such incompatibilities may occur, that the federal resource agencies involved can not simply contact one another and resolve the matter.

Interior also recommends that the Commission conduct a joint analysis with stakeholders of the kinds of information typically not being made available when applications are filed and incorporate the results into the Commission's outreach efforts, with the intent of reducing the time required to collect additional information after the application is filed. Staff agrees that this kind of information is valuable. For that reason, the Commission's updated Licensing Handbook contains guidelines for preparing Exhibit E, the environmental information exhibit required to be included with each application, which include a list of important items that are most frequently lacking in submitted applications.[161]

Finally, Interior suggests that the results of the two efforts it recommends above should be used by the Commission, states, and federal resource agencies jointly "to develop an optimum schedule for processing licenses." We see no promise in this recommendation. Every agency must be able to control its own schedule to the extent permitted by its enabling legislation. Such a schedule would moreover be purely hypothetical in a statutory regime in which the Commission has no control over the timing or content of state water quality certification. Also, no state has indicated any interest in subjecting the content of water quality certification applications before it or the timing of its processes to negotiation with 49 other states and multiple federal resource agencies and the Commission.

[161] See n.139, supra.

VII. STAKEHOLDER COMMENTS AND RECOMMENDATIONS

To ensure a comprehensive review, the Commission also solicited the views of all stakeholders in the licensing process. To this end, public hearings were conducted during January 2001 in Washington, D.C., Atlanta, Georgia, Albany, New York, Lansing, Michigan, Portland, Oregon, and Sacramento, California. The Commission also invited written comments, to be filed by February 1, 2001. Oral comments were made by over 150 people representing licensees, federal and state agencies, NGOs, Indian tribes, businesses serving the hydropower and recreation industries, and themselves. Written comments were filed by a likewise diverse group of over 100 organizations and hundreds of individuals.[162]

The Commission also sent letters on December 15, 2000 to the water quality certification agencies of all 50 states soliciting their input. Only five[163] such agencies responded. Their responses are included in the following summary.

In this section, the Commission summarizes the stakeholder comments.[164] These commenters filed too many recommendations to warrant individual discussion and analysis. Some of the comments are addressed however in the preceding section, and others are considered in the context of the discussion in Section VIII.

Generally speaking, licensees contend that the licensing process is too long, costly, and uncertain. Other commenters often take the position that the length of the process is a function of the significance of the issues under consideration, particularly in light of the length of new license terms, and that licensees themselves have incentives to

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[162]Appendix B is a table summarizing all of the organizational commenters' recommendations. The abbreviation for each commenter used in Appendix B is also used in the text of the Report. Appendix C is a summary of the comments of individuals. Staff also distributed a survey to attendees at the public meetings requesting suggestions for reducing the cost and time of obtaining a license. The number of respondents was modest, and their comments closely reflect the written and oral comments summarized in Appendix B and discussed in this section of the Report.

[163]California Department of Water Resources, Louisiana Department of Environmental Quality, Vermont Agency of Natural Resources, Virginia Department of Environmental Quality, and Washington Department of Ecology.

[164]For the sake of completeness, consulting federal agency recommendations to the same effect as those of other commenters are also noted in this section.

delay. While there are some commonalities in the identification of specific causes of delay and expense, and potential means of reducing both, the areas of agreement tend to be overshadowed by disagreements.

Licensees attribute the time and cost of obtaining a license principally to the dispersion of decision-making authority among different federal and state agencies that are not required to make their decisions in light of the overall public interest. They contend that this results in multiple agencies with different agendas conducting different processes on different schedules and making study requests and mandatory license conditions without appropriate consideration of the cost of their decisions. Many recommend that this situation be alleviated by amending the FPA to provide the Commission with ultimate authority to establish license terms and conditions; in effect eliminating the mandatory conditioning authorities found in FPA Sections 4(e) and 18.[165]

NGOs, Indian Tribes, and one state agency oppose any reduction in federal agency mandatory conditioning authority, arguing that it is needed to protect non-hydropower resources and tribal treaty and cultural resources.[166]

As an alternative to establishing the Commission as the final arbiter of license requirements, many licensees recommend amending the FPA to require agencies with mandatory conditioning authority to document the basis for their decisions, including consideration of the economic impacts on licensees of PM&E measures, to choose the least-cost comparable alternative PM&E measures, and to discuss the environmental impacts of alternative forms of generation that replaces lost hydropower generation. They also recommend that mandatory conditions be subject to scientific peer review and that administrative appeal procedures be established.[167] These commenters suggest that these requirements would cause resource agencies to moderate and better justify their study requests and PM&E conditions, thereby reducing licensees' costs.

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[165]APC, IPC, PG&E, PacifiCorp., Douglas County, Grant County, PSE, YCWA, EEI, Orion, SMUD, Chugach, Duke, NU, Placer, KA, Summit, SCE, Pend Oreille, Glacier, Moss, Urban Water, Cowlitz, and Pend Oreille.

[166]AR, HRC, CRITFC, Yakima, Umatilla, WDOE, Colville, Pacific Fishermen, SWRCB.

[167]Chelan GPC, PG&E, Douglas County, Grant County, SMUD, UAE, NYRECA, Licensing Reform, NYPA, Orion, Alcoa, Chugach, Duke, NU, EEI, MMEA, NAH, APPA, Pend Oreille, WSFB, SWRCB, Urban Water, Puget, and NHA.

Licensees also suggest that time and money could be saved if all federal agencies with conditioning authority participated in a single NEPA document with the Commission as lead agency,[168] or, similarly, that the FPA be amended to designate a single, coordinated process for addressing issues related to licensing in a single proceeding with consistent timelines and one administrative record.[169] Some NGOs also support joint or concurrent NEPA processes among federal agencies, but do not suggest that legislation is needed to accomplish that.[170]

A few licensees and one NGO recommend that the Commission establish separate, less onerous licensing proceedings for small projects,[171] based on the premise that such projects have few or no environmental impacts or that it is bad policy for the cost of obtaining a license and complying with its conditions to make a project unprofitable.

Some licensees recommend that the Clean Water Act be amended to eliminate state authority to issue water quality certification for hydropower projects, that the scope of certification be limited to physical and chemical water quality parameters, or that the FPA be amended to allow the Commission to review and reject water quality certification conditions that are inconsistent with the Commission's public interest balancing under FPA Section 10(a)(1).[172] Only three state agencies address the matter; all oppose any diminution of state water quality certification authority.[173]

Resource agencies, Indian tribes, and NGOs do not generally regard the statutory scheme as a source of needless cost or delay. They believe that it reflects an appropriate balance among federal and state agencies and that the length of the process is a function of the importance of the decisions to be made for a license with a 30- to 50-year term. With two exceptions, these entities oppose any legislative changes or substantial changes in Commission policies and practices, at least until current process reform efforts

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[168]Consumers, PG&E, Licensing Reform, SMUD, SCE, APC, Chelan, NYPA, Duke, NU, EEI, MMEA, KA, APPA, Pend Oreille, and Glacier.

[169]Chelan, SMUD, NYPA, KA.

[170]NHRC, CalHRC, FOR, TU.

[171]HEDC, HTS, Adirondack Club, NAH, Puget.

[172]Wausau, NAH, Summit, IPC, Consumers, and Duke.

[173]VANR, ODEQ, SWRCB.

discussed above have had more time to be fully implemented and reviewed for effectiveness.[174]

The first exception is the requirement of FPA Section 15 for the issuance of annual licenses under the same conditions as the original license pending the conclusion of a relicense application or other disposition of the project. Resource agencies, tribes, and NGOs echo the assertion of consulting federal agencies that licensees have a financial incentive to stretch out the relicensing process to delay new PM&E measures, and that interim PM&E measures would eliminate the incentive. Some also assert that interim PM&E measures should be used to discipline license applicants who fail to timely complete necessary studies.[175] These arguments were considered and rejected above.

Several resource agencies and NGOs also suggest that the 30-50 year term of new licenses means that the licensing decision will "lock in" the license requirements for that length of time, requiring the parties to be more vigilant in their advocacy for nonpower resources, and that licensing would go more quickly if new license terms were reduced to 15-20 years. They suggest that they would be more willing to compromise if the next opportunity to revisit the license decision came earlier.[176] Some suggest the same time savings could be achieved absent a reduction in license terms if every license included an adaptive management program.[177] Licensees respond that reducing license terms would simply require the same expenses to be incurred more frequently, further jeopardizing

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[174]WDOE, Alabama Rivers, AR, HRC, Whitewater, AMC, CalHRC, TU, CSPA, Chattahoochee, CRWC, IRU, MUCC, RAW, Willamette, Plumas, Interior, MDNR, AMS-M, AWE, Colville, NOAA, Forest Service, NYSDEC, VANR, EA!, Nez Perce, MWPDC, Pacific Fishermen, VDEQ.

[175]Interior, MDNR, Silver Cloud, AR, HRC, Whitewater, CPSA, FOR-SN, MEC, MCC, RCA, SP, SC-Columbia, Chattahoochee, CRITFC, Yakima, Umatilla, AFS, AMC, CalHRC, TU, FFF, Finger Lakes, NOAA, NYSDEC, ODEQ, Audubon, IRU, KCCNY, Nez Perce, Overlake, NEW, RRS, Pacific Fishermen.. A few commenters suggest putting time limits on annual licenses (FOR, SRFPC, TU-National, CDFG, Whitewater, IRU) or that annual licenses be eliminated altogether (Chattahoochee, NYRU), but none indicates what it expects might happen if the new license proceeding is not concluded before the original license expires.

[176]CDFG, Chattahoochee, FOR-SN, SWSC, SC-Columbia, Willamette, AR, HRC, EA!

[177]CDGF, CalHRC, TU, ODEQ, VANR.

project economics,[178] or that licenses which do include adaptive management programs should define the limits of the licensee's financial obligations and the standards for requiring additional PM&E measures at the time the license is issued.[179]

Non-licensees also attribute the time required to complete the licensing process to many other factors. Common themes are that expedition is hampered by the reluctance of applicants to do necessary scientific studies, required prefiling consultation with the public under the current rules is limited to a single meeting during first stage consultation, and there is inadequate funding of resource agencies and NGOs.

The need for studies is perhaps the single greatest point of contention among commenters. One area of broad agreement in this regard is that resource agencies and stakeholders should be required to develop clear resource goals and objectives at the beginning of the process and link their study requests to those goals and objectives.[180]

NGOs and some state agencies believe that disputes over studies would be reduced if the Commission were also to establish and enforce standards, and/or schedules, for study design and implementation.[181] TU and CalHRC suggest that study criteria should be established for the purposes of imposing across-the-board baseline study requirements. Licensees who address the issue of studies tend to see the coin from the other side, seeing study standards as a means of reining in unreasonable study requests. Some licensees suggest that the Commission could prevent many disputes over studies by publishing or codifying criteria for determining what types of studies will or will not be required, and requiring resource agencies to demonstrate the need for studies based on the criteria.[182] Both groups tend to agree that the Commission should participate actively to resolve study disputes, preferably during prefiling consultation.

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[178]PG&E, GPC.

[179]PG&E, SMUD, Chelan, and NYPA.

[180]Alabama Rivers, IRU, MEC, MUCC, TU-OR, Chattahoochee, PacifiCorp, Tacoma, MDNR, AFS, AMC, FOE, Alcoa, NC Wildlife, ODEQ, NAH, Nez Perce, Pacific Fishermen, Urban Water, Cowlitz

[181]AR, HRC, AMC, EHL, FOR-SN, IRU, MEC, MUCC, MCC, TU-OR, Chattahoochee, CRITFC, Yakima, Umatilla, MDNR, AWE, NC Wildlife, ODEQ, KCCNY, Nez Perce, MWPDC, Pacific Fishermen.

[182]Consumers, GPC, PG&E, PacifiCorp, Duke, SCE, APC, EEI, Urban Water.

Some NGOs also contend that delays associated with study disputes would be reduced if all participants, rather than just the applicant and resource agencies, had a consulting role in what studies are needed, study methods, and selection of consultants to perform the studies. They suggest that this would help to build consensus during prefiling consultation and reduce the incidence of post-application disputes in this area.[183] On the contrary, Georgia Power suggests that unreasonable study requests would be diminished if the Commission were to state the applicants are not required by law or regulation to do any studies, and recommends, along with EEI, that resource agencies and NGOs should fund any study requests beyond those the applicant voluntarily undertakes.

NGOs also state that the process would be more expeditious if applicants were required under the traditional process to consult with NGOs and the general public during prefiling consultation, rather than required only to consult with resource agencies and Indian tribes, because the former entities may, after the application is filed, raise issues or request studies not considered during prefiling consultation, causing delays while those matters are resolved or to complete additional studies.[184] This recommendation, although not often explicitly linked by commenters to merging the NEPA process into prefiling consultation, is a logical corollary to recommendations to combine the pre- and post-filing processes.

NGOs and Indian tribes also contend that the efficiency of prefiling consultation and the process overall is hindered by inadequate funding for the participation of resource agencies and themselves and that Congress should appropriate adequate funds

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[183]AR, HRC, CalHRC, TU, IRU, NYRU, SWSC, TU-OR, Nex Perce, Pacific Fishermen. A few NGOs also suggest that the process would be less contentious and protracted if either the Commission or license applicants were required to fund independent studies to perform necessary environmental studies and computer modeling. Chattahoochee, AMC, Adirondack Club, EA!, KCCNY

[184]FLOW, SP, AMC, NC Wildlife, Mondamin, KCC, Finger Lakes, Nez Perce, Overlake, RRS, Pacific Fishermen, VDEQ. Some entities also contend that timeliness would be enhanced if the Commission were to issue joint public notices with federal or state agencies (LDEQ), expand the geographic scope of public notice during prefiling consultation (Adirondack Club), notify NGOs of license proceedings by mail (Finger Lakes), and extend comment periods for individuals (KCC).

for this purpose.[185] Some NGOs and state agencies and one licensee also recommend that the Commission be authorized to remit directly to federal agencies and state resource agencies, rather than to the U.S. Treasury, the portion of administrative annual charges based on other federal agencies' cost submissions to the Commission, to help ensure the availability of funding for agency participation.[186] Some NGOs and the Skagit System Cooperative also recommend that licensees be required to directly fund participation by these entities.[187]

Some NGOs support the request of consulting agencies that the Commission revoke its policy that a resource agency cannot be both an intervenor in a licensing proceeding and a cooperating agency for preparation of the NEPA document.[188] This was addressed above.

NGOs and the Nez Perce Tribe state that licensees, citing competitive considerations, decline to disclose financial information concerning their projects. They contend that the Commission should require license applicants to disclose more information about project economics because the lack of such information forces them to discount applicant assertions that recommended PM&E measures are too costly. They assert that better information would enable them to resolve more issues instead of disputing them.[189] Some of these entities state their willingness to receive such information subject to confidentiality agreements.

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[185] Silver Cloud, AR, HRC, CalHRC, TU, FOR-SN, HRC, RAW, MHRC, MCC, NYRU, RCA, SWSC, SC-Columbia, Chattahoochee, Plumas, AMC, CalHRC, TU, ODEQ, Whitewater, Audubon, IRU, Nez Perce, Overlake, Pacific Fishermen.. CRITFC, Yakima, Umatilla, Skagit, Nez Perce, CSPA, NAS, Yakima, Umatilla. American Rivers and the Hydropower Reform Coalition recommend that the Commission establish an Office of Public Participation for the express purpose of allocating funds to NGOs.

[186] CalHRC, TU, Foothills, HRC, RAW, MHRC, AR, HRC, PG&E, VANR, WDOE, Pacific Fishermen. See Section IV.b.4, discussing annual charges paid by licensees.

[187] EA!, MCC, NAS, NYRU, Silver Cloud, FLOW, RAW, AWE, CalHRC, TU, Mondamin, Whitewater, Overlake, Skagit.

[188] CalHRC, TU, Whitewater.

[189] AR, HRC, FOR-SN, IRU, AMC, Audubon, and Nez Perce.

One area of general agreement is that the process, whether traditional or ALP, would be more efficient and timely if the Commission staff were involved actively from the beginning of prefiling consultation and took a greater hand in managing the prefiling proceedings by resolving disputes over study requirements.[190]

There is also general agreement that the Commission should establish and enforce schedules and deadlines, but not on who should be subject to them. NGOs and resource agencies contend they should apply to license applicants to ensure timely scientific study design and implementation.[191] Licensees want deadlines on resource agencies to provide recommendations, terms and conditions, and fishway prescriptions.[192] Other commenters make no effort to assess responsibility for lagging schedules, but agree that the Commission should establish schedules and stick with them to the extent possible.[193]

NGOs and resource agencies also recommend that the Commission set schedules for itself. Several suggest that the Commission issue prenotification that the REA notice is going to be issued and establish public schedules for issuance of draft and final NEPA documents, license orders, and orders on rehearing.[194] They assert that prior notification and schedules (at least in draft) would enable them to better allocate their resources, and thus require fewer requests for extensions of time to respond to notices and other Commission issuances. This was addressed above.

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[190]CalHRC, TU, CSPA, Cal Trout, NHRC, SWSC, Chelan, Consumers, PSE, SMUD, SCE, CDFG, AMC, Chelan, NYPA, NC Wildlife, ODEQ, EEI, Nez Perce, SWRCB, Urban Water, NHA, and AFDG.

[191]AR, HRC, AMC, EHL, FOR, IRU, MEC, MUCC, MCC, TU-OR, Chattahoochee, CRITFC, Yakima, Umatilla, MDNR, , AWE, NC Wildlife, and ODEQ.

[192]GPC, Grant, Chugach, Duke, EEI, MMEA, SCE, Placer, and APPA. Licensing Reform and APPA suggest that the time periods for agency actions in the existing regulations be established instead by legislation.

[193]Silver Cloud, Whitewater, Chattahoochee, Foothills, FOR-SN, KCC, NYRU, RCA, Chelan, Orion, SCE, MDNR, NC Wildlife, Mondamin, Whitewater, Audubon, IRU, Nez Perce, Overlake, RRS.

[194]Interior, MUCC, Chugach, NOAA, Forest Service, NC Wildlife, NHRC, CalHRC, Chugach, CWRC, NHRC, CDFG, MDNR, AFS, CRITFC, Pacific Fishermen. A few commenters recommend that Congress establish a 180-day period for substantive action on rehearing, which the Commission can extend once for 30 days. AR, HRC, Nez Perce, Pacific Fishermen.

The length of the traditional process is also considered by some to be caused in part by the fact that the NEPA process does not begin until after the application is filed and additional information is received. Although the ALP is generally viewed positively as a means of alleviating this situation and having other benefits, there is no consensus that the ALP is overall better than the traditional process. Some licensees and others recommend that the traditional process continue to be available to applicants that wish to use it.[195] Other licensees support allowing applicants to prepare a draft NEPA document during prefiling consultation and submit it with the application in lieu of the environmental exhibit regardless of the process model used, and regardless of whether a collaborative proceeding was conducted.[196] A few commenters would phase out the traditional process altogether, but don't agree on whether a collaborative process is necessary.[197] Some emphasize retaining flexibility to design hybrid processes.[198]

Some licensees assert that administrative annual charges are burdensome and recommend that the Commission issue a rulemaking establishing criteria for the inclusion of costs, including those of the Commission, in administrative annual charges.[199] SCE recommends that administrative annual charges be based on a licensee's costs of licensing rather than the amount of power generated.

There were also many recommendations which, although they may have merit, are not directed to reducing the time and cost of obtaining a license or concern matters rarely

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[195]TU-MI, EEI, NYSDEC, Pend Oreille, and NHA

[196]Chelan, SMUD, NYPA, Grant, EEI, Duke, Pend Oreille, PSE, Alcoa, and Avista. Chelan, SMUD, and NYPA also specifically recommend that the Energy Policy Act of 1992 be amended to permit the filing of an applicant-prepared draft EIS with the license application. Section 2403 of that Act currently authorizes the Commission to permit an applicant or its contractor, subject to certain requirements, to prepare a draft EA and, at the applicant's elective, a contractor funded by the applicant and chosen by the Commission from a list of qualified contractors to prepare an EIS for the Commission, with the Commission establishing the scope of work and procedures, and directing preparation of the EIS. Applicant-prepared draft EIS' are not authorized, but an APEA may be used as the basis for a draft EIS.

[197]Ayers, CalHRC, TU, Finger Lakes, Adirondack Club.

[198]Puget, Ayers, CalHRC, TU, Pend Oreille.

[199]EEI and Urban Water.

encountered or that have only a tenuous connection to the subject of this report. For instance, the Skagit System Cooperative states that the Commission should deny applications for licenses that pose a significant risk to Indian treaty resources. Indian tribes are already free to make the case that a particular proposed project has negative impacts on treaty resources of sufficient gravity that the public interest requires the application to be denied, and the Commission will weigh that evidence in its public interest balancing.[200] We could not, consistent with our obligation to consider all issues affecting the public interest in each case, implement Skagit's proposed policy, notwithstanding that it might save some time in some cases.

Another example in this connection is opposition by some licensees to actions at other federal agencies which may change the basis for assessment of federal land use charges from the rental value of the land to some other basis.[201] These concerns should be raised with the relevant federal agencies.

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[200] See, e.g., Northern Lights, Inc., 39 FERC ¶ 61,352 (1987) (denying license application based on, inter alia, negative impacts to Indian cultural resources).

[201] EEI, Pend Oreille, Urban Water.

VIII. CONCLUSIONS AND RECOMMENDATIONS

Congress has charged the Commission with preparing a comprehensive review of policies, procedures, and regulations for licensing hydroelectric projects, determining how to reduce the cost and time of obtaining a license, and including in its report to Congress any recommendations for legislative changes.

Staff's review of the record and its experience administering FPA Part I leads it to conclude that the principal reason why some hydroelectric licensing proceedings entail undue expense and time is the dispersal of authority for critical licensing decisions among several federal and state agencies. Agencies other than the Commission have different legislatively determined priorities and act independently of one another and of the Commission. Staff believes critical licensing decisions should be rendered by a single agency responsible for considering all aspects of the public interest.

Subsection a. recaps the problems stemming from the statutory scheme, makes recommendations for legislative changes and explains how the recommended changes thereto should help to reduce the time and cost of obtaining a license. Subsection b. identifies changes in Commission regulations and policies the Commission could make to reduce the timeliness and cost of licensing while Congress considers the Staff's legislative recommendations. *Commission Staff emphasizes that changes in regulations, policies, and procedures, while expected to alleviate the situation, are no substitute for legislative action. They are, at best, partial mitigation for the unorthodox legislative scheme.*

a. Legislative Recommendations

As discussed in Section IV.a., many factors can be responsible for delays in completing licensing proceedings and it is common for one proceeding to be delayed for multiple reasons. The single most common source of delay however is untimely receipt of state water quality certification, and that is the principal cause of delay in most proceedings delayed five years or more.

It is equally clear that other federal agency mandatory conditioning authority substantially increases the cost of licensing. Overall, the cost per kW of PM&E measures at projects where FPA Section 4(e) and 18 mandatory conditions are imposed is almost three times the cost per kW of PM&E measures at projects where such conditions are not imposed. This is important because the bulk of licensing costs for most projects lie in PM&E measures. PM&E costs have nearly doubled for licenses issued in recent years using the traditional process.

Additional administrative costs are another consequence of the legislative scheme. The situation is particularly acute for license applicants, as they bear the direct costs of preparing and seeing through multiple applications and conducting studies at the behest of several agencies. Overall, the cost of application preparation alone is about 30 percent of the combined cost of PM&E measures and application preparation. For small projects, the costs of preparing the license application range up to 50 percent of the combined cost of application preparation and PM&E measures. Licensees bear in addition the expense of federal agency participation through the "other federal agency" component of their administrative annual charge bills, and this cost has soared in recent years.

The Commission and many stakeholders have worked diligently over the years to overcome these problems. The Commission has continuously updated and improved the licensing regulations in light of experience and new legislative requirements, conducted interagency and public outreach efforts, issued handbooks and guidelines, participated in interagency training, established memoranda of agreement with other agencies on coordination of NEPA review and other matters, worked through the ITF to improve coordination of federal agency action, fostered settlements, and developed the ALP.

All of these efforts are having beneficial effects, but the most clear cut example of effective reduction in the time and cost of licensing is the ALP. As shown above, successful ALPs can slash the time from application to license order in half, result in substantially lower PM&E costs, generate fewer substantive rehearing requests, and increase the likelihood of a settlement.

The ALP is not however a cure for the legislative balkanization of decisional authority. There are instances where the applicant is not able to enlist the cooperation and commitment of all stakeholders necessary for the process to go forward. Other applicants report that certain stakeholders are less interested in using the ALP as a cooperative means to mutually agreeable ends than as leverage to accomplish only their own goals. Some agencies and NGOs state that they have insufficient resources to timely and effectively participate in ALPs.

In sum, Staff is committed to the ALP and other efforts to reduce the time and cost of licensing without compromising environmental protection. These are however largely necessitated by the legislative scheme for licensing. Staff's recommendations to reform the legislative scheme follow.

1. Establish one-stop shopping at the Commission for all federal authorizations.

Under this reform, federal agencies with mandatory conditioning authority would retain that authority, subject to a statutory reservation of Commission authority to reject or modify the conditions based on inconsistency with the Commission's overall public interest determination.

The license would also be the only federal authorization required to operate the project, e.g., special use authorizations for projects on Forest Service lands and similar authorizations would be eliminated. A single administrative process would be established by the Commission to address all federal agency issues in a licensing case, with schedules and deadlines established by the Commission, with one administrative record compiled by the Commission in consultation with the other federal agencies. Other federal agencies could request that applicants conduct studies, but the final decision would be for the Commission to make. The Commission would prepare a single NEPA document. The federal agencies would not be required to adopt the Commission's conclusions, but would have to provide for the record their own analysis and conclusions based on the evidentiary record. The agencies' analyses and conclusions would be included in the record of the Commission's order acting on the application, and judicial review would be obtained by seeking rehearing of the Commission's order

This recommendation could save time and money in two ways. First, the cost of PM&E measures would be reduced in those instances where the Commission determined that the overall public interest is better served if resource agency conditions are excluded or modified to ensure environmental protection at a lower cost. It is also possible that the possibility of their conditions being overridden by the Commission would cause other federal agencies to moderate their conditions. Second, it would reduce the administrative costs associated with proceedings before multiple federal agencies. This would take the form of reduced application preparation costs. The "other federal agency" cost component of administrative annual charges to licensees would also be reduced because eliminating other federal agency administrative proceedings would reduce the time and expense of other federal agencies having to establish decision records, conduct separate analyses under NEPA, the ESA, and other statutes, and conduct associated administrative appeal procedures and defense of conditions on judicial review.

Commenters who oppose Commission authority to determine license conditions base their opposition on the belief that the Commission will not adequately protect non-developmental resources and tribal treaty and cultural resources. Staff vigorously disagrees. The Commission is responsible under FPA Sections 10(a)(1) and 4(e) for considering all these resources in determining whether to issue a license and, if so, under

what conditions. The Commission must also abide by the requirements of the ESA and all other relevant laws, including the requirement of the Administrative Procedures Act that Commission decisions be based on substantial evidence. These responsibilities are taken very seriously, and the Commission will not permit the protection of fish and wildlife, water quality, wetlands, cultural resources, Indian treaty rights and resources, recreation, and other resources to be compromised. Every modern day license, whether or not it includes Section 4(e) conditions or Section 18 prescriptions, is replete with measures to protect non-power resources.

The Commission must retain discretion whether to permit other agencies to have cooperating agency status for NEPA compliance. The Commission's experience with joint NEPA documents has been mixed. Joint documents enhance communication between agencies, but Staff's experience has been that notwithstanding the Commission's status as lead agency, the search for consensus may cause the schedule for preparation of the NEPA document to expand and the content to become as much a creature of negotiation as of analysis. This is because joint documents typically involve extensive discussion and negotiation with the cooperating agency over product and review deadlines, sufficiency of data, and analysis and conclusions. In this regard, our experience with the Skagit and Nooksack River applications, detailed above, is instructive. In sum, a spirit of true cooperation cannot be compelled by legislation, and the Commission needs to have the discretion to determine on a case-by-case basis whether that is feasible.

2. Require agencies to better support their conditions.

If the Commission is not given authority to balance conditions to reflect the public interest, and agencies with conditioning authority continue to conduct separate proceedings, an alternative to a.1. would be to require resource agencies to consider the full panoply of public interest consideration, support their conditions on the record, and provide a clear administrative appeal process.

This alternative might also be beneficial. Requiring other federal agencies to consider on the record aspects of the public interest not currently considered, such as the impact of their conditions on project economics, or the relative costs and benefits of their conditions, may cause these agencies to moderate their PM&E conditions. Providing an administrative appeal procedure will also help to ensure that agencies document the basis for their conditions.

3. Focus Clean Water Act Authority. Limit water quality certification to physical and chemical water quality parameters related to the hydropower facility.

Untimely issuance of state water quality certification is a significant factor in most delayed license proceedings and is the most common cause of long-delayed proceedings. Water quality certification often entails a parallel licensing process, with the certification including conditions for recreation, fish passage, and cultural resources. As shown above in Section IV.b.2.A.1, the number of conditions overall has risen dramatically in recent years, including a doubling of the number of non-water quality conditions related to designated uses. This adds costs to the licensee, the Commission, and the state governments, and has made it increasingly difficult for the Commission to craft a license under the comprehensive development and public interest standards of the FPA. Staff has no reason to think these costs are balanced by measurable additional protection of the environment or other public benefits.

Congress can best alleviate this situation by amending the Clean Water Act or Federal Power Act to clarify that water quality certification is limited to physical and chemical water quality parameters related to the hydropower facility. Reducing the ambit of the certification to water quality itself would reduce the need for licensees to conduct studies of other matters relating to the use of project waters and enable the state agencies to much more quickly make an objective determination of the conditions that will apply to the license, as well as eliminate much of the time and cost associated with the administration of broadly-based certification proceedings. This should also reduce the number of instances in which the applicant repeatedly withdraws and refiles its certification application, consistent with the intent of Congress in enacting ECPA that relicensing be concluded prior to expiration of the original license. The recommendations of state water quality agencies concerning matters that are related to the use of project waters, such as instream flows, recreation plans and facilities, and fish passage, could be given the same elevated consideration required for fish and wildlife agency recommendations by FPA Section 10(j).

4. Provide a statutory definition of fishway.

If Congress does not provide the Commission with authority to reject or modify fishway prescriptions in light of its comprehensive analysis of the public interest, staff recommends that it clarify the existing statutory definition of a fishway.

As discussed in Section II, the Departments of Interior and Commerce have proposed a policy concerning implementation of their authority under FPA Section 18 to prescribe fishways. Commission Staff filed comments calling into question, among other

things, the authority of the Departments to promulgate a definition of "fishway" and the consistency of their proposed definition with the definition established by Congress in EPACT.[202] Staff is particularly concerned with the expansiveness of the proposed fishway definition, which appears to encompass the entire hydroelectric facility and its operation.

Staff believes that, at a minimum, any definition proposed by the Departments should require the concurrence of the Commission, in the same manner that EPACT requires the Departments' concurrence in any definition proposed to be promulgated in a Commission rule. The uncertainty and potential to undercut Congress' intent created by the Departments' proposed policy could, however, better be eliminated if Congress were to clarify by legislation the extent of the Departments' authority in this regard.

5. Remit annual charges for other federal agency FPA Part I costs directly to agencies.

The FPA or other appropriate laws should be amended to permit the Commission to remit directly to other federal agencies with FPA Part I responsibilities the portion of administrative annual charges attributable to their costs, and to specify that such remittances are to be used for purposes of implementing FPA Part I. Such legislation, recommended by many commenters, would better ensure that federal agencies are able to participate in the licensing process by ensuring that agencies recover appropriated funds spent for this purpose.

The current method of collecting these costs by including them in the Commission's administrative annual charges to licensees is far more administratively efficient than to have each other federal agency attempt to replicate the Commission's billing mechanisms for licensees with respect to its own costs. Staff however believes it is inconsistent with existing law and unsound policy for the Commission to review the appropriateness of the other federal agencies' expenditures. These are matters Congress has wisely left to the agencies' discretion. The Commission's only role in the collection and remittance of other federal agency costs should therefore be to act as the administrative conduit for collecting these costs from the licensees and remitting them directly to the agencies.[203] Licensees should be able to obtain an administrative appeal

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[202] See page 14 supra.

[203] In June 2000 GAO issued a report (GAO/RCED-00-107) which concluded that some of the Other Federal Agency costs of administering FPA Part I are not being

(continued...)

of other federal agency cost submissions from the agencies themselves and, if necessary, seek judicial review of the other federal agencies' determinations. The Commission can adjust licensees' annual charge bills as necessary to reflect the outcome of any successful challenge to the other federal agencies' actions.

b. Regulatory and Policy Recommendations

In this section, Staff makes recommendations for regulatory and policy changes the Commission may wish to consider implementing.

1. Require license applicants to submit during prefiling consultation a status report focusing on study requests, to enable Staff to determine if prefiling involvement is warranted.

As discussed above, except in the case of ALPs, it is rare for staff to be involved in prefiling consultation and for the participants to seek prefiling dispute resolution. As a result, continuing disputes over study requests are a feature of nearly every license application and delays attributable to the collection of additional information needed by Staff can add as much as two years to the length of a proceeding.

Under this proposal, all applicants would be required to file with the Commission, one year after the initial consultation package is released (about two years before the application is filed), a report to the Commission on the status of consultations. The focus of the report would be ongoing disagreements over studies. Staff would review these reports and, based on the totality of circumstances, determine whether to commit staff resources to mediating the conflicts with the aim of having all necessary studies completed during the prefiling period. Factors to be considered in determining whether to become involved during the prefiling period may include; availability of staff, the nature of the disputes, the identity of the parties and their history of cooperative dispute

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[203](...continued)
recovered. GAO attributed this underrecovery of costs to a lack of guidance from the Commission to other federal agencies on what costs should be reported and the inability of other federal agencies to account for their costs. The Commission recently provided direction to other federal agencies concerning which costs are recoverable and how they should be reported, and established a policy that it will include in annual charges bill any costs consistent with this direction that are accompanied by a certification that the costs comply with Federal Government Statement of Federal Financial Accounting Standard Number 4 and OMB Circular A-25, and that supporting documents are available for review. See City of Idaho Falls, et al., 93 FERC ¶ 61,145 (2000).

resolution or lack thereof, the significance of the project in terms of generating capability or affected nondevelopmental resources, or others. This proposal is consistent with the view expressed by many commenters that the presence of Staff during prefiling consultation is highly beneficial.

The approximate one-year period between the ICP and filing of the report should provide sufficient time for resource agencies and other consulted parties to determine which studies they believe are necessary to enable them to carry out their role in the licensing process, particularly in the case of applications for new licenses. License expiration dates, and the associated dates for notice of intent to file a new license application and the filing date of the application itself are for all intents and purposes known well in advance of these events.[204] There is no reason why resource agencies or other interested parties cannot plan ahead for these events and be ready to make their interests and needs known shortly after the ICP is issued.

As discussed in Section IV.a., the median time from application filing to REA notice for traditional applications is about 17 months, compared to 2 months for ALPs. Thus, in cases where staff intervention is warranted and successful, this recommendation has the potential to reduce the length of a proceeding by about 18 months. It also has the potential to reduce the cost of licensing by relieving applicants of study requirements Staff believes are not necessary to establish a sufficient record for decision.

2. Agencies would be allowed to revise their recommendations, terms and conditions only in agreement with the Commission.

As noted previously, the Commission's existing rules give agencies with Section 4(e) and 18 conditioning authority the option of responding to the REA notice by filing preliminary conditions and a schedule for filing final conditions. Final conditions are often filed after the draft NEPA document, and sometimes after the final NEPA document, and the rules contain no limit on when the final conditions may be filed. This creates a disincentive for agencies to expeditiously conclude their review and analyses. As shown in Section IV, these delays can be very lengthy, with an average time for filing of 4(e) conditions of almost 17 months beyond the REA due date.

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[204] As noted by Interior in the context of recommending that the relicense process be initiated earlier: "Relicensing projects is an entirely predictable workload. The Commission, the resource agencies, and the applicants know when licenses are due to expire; they know the nature of the individual projects and the prevailing issues at each project." (p. 6).

A new rule would eliminate the option to provide draft conditions and an open-ended schedule for submitting final conditions. This provision was established in 1991 (in Order 533). The Commission stated that the reason for permitting agencies to submit schedules for final conditions was that in some instances federal agency proceedings to develop the conditions would not be concluded by the date specified for receipt of comments in response to the REA notice. The Commission however also recognized the importance of timely receiving these final recommendations. It was not anticipated that mandatory conditions, particularly 4(e) conditions, would commonly be filed so late in so many instances.

Under this recommendation, agencies would be permitted to revise their conditions only within a reasonable period of time following the first[205] environmental analysis, and only if the Commission agrees to accept the revisions. At this point in the proceeding the necessary information has long since been filed and the parties have the benefit of the Commission's environmental analysis. Resource agencies should have everything they need to finalize their conditions.

3. Require applicants to include the public and NGOs in prefiling consultation.

Currently, applicants are required to include only resource agencies and tribes in prefiling consultation. Prefiling consultation with the public is limited to a single meeting early in the process. Many NGOs request that consultation include them as well. In light of the success of the ALP, Staff no longer sees any reason for applicants to have discretion to exclude the public from prefiling consultation. NGOs are active participants in most license proceedings and in all ALPs, so their concerns must be addressed in any event, and excluding them from prefiling consultation can only lengthen the post-application process because study needs and other issues are not known prefiling. [206]

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[205] As discussed in VIII.b.6. below, the practice of issuing draft EAs would be discontinued in most cases.

[206] Several NGOs also recommended that they be permitted a voice in the applicant's selection of contractors employed to perform studies. While agencies and NGOs may express their views on this to the applicant, selection of contractors is a business decision to be made by the applicant alone, unless it chooses to solicit agency or NGO comment.

In order to ensure the efficacy of this consultation, applicants would be required to specifically notify and invite to consult regional NGOs known to have an interest in licensing proceedings. Applicants unsure of which NGOs are reasonably required to be specifically invited to consult could contact the Commission to obtain a list of appropriate NGOs.

No specific time or cost savings can be estimated for this action because there is no data set to be analyzed.

4. Allow applicants to maintain public information electronically.

The rules currently require applicants for new licenses to maintain on file and available for public inspection certain data regarding the existing project facilities and operation.[207] Licensees propose to replace it with an option to catalogue the data on a web site and make it available on line or by hard copy on request at no cost within a defined period.

The licensees' assertion that the existing requirement is costly and seldom used appears reasonable. The current requirement was established prior to the existence of the internet. The absence of widespread use of the required data at the applicant's place of business is explained in part by the fact that it is made available to consulted entities in the ICP or otherwise during the course of consultation. The Licensees' proposal to make the data available electronically would make it more accessible to the public and agencies and would reduce licensee costs.

Licensees who propose the rule change have not provided specific estimates of the cost savings.

5. Continue to promote the ALP and encourage settlements.

The benefits of the ALP are evident. To date, 20 licenses have been issued based on ALPs, and applications based on ALPs have been filed for ten licenses, and 33 more applications using the ALP are in various stages of prefiling consultation.

Although Commission Staff invests substantial time and effort on these projects during the pre-filing stage, the savings in processing time and efficiency are evident after the applications are filed. As shown above, license applications based on ALPs take on average only 17 months to process, about half the time required for recent traditional

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[207] See 18 CFR 4.32(b)(4)(i)(2)

applications, and appear to result in markedly lower PM&E costs. Moreover, where the ALP has been used, there has been little, if any, additional information requested of the applicants post-filing, and there has been only one substantive rehearing request. There is also a greater likelihood of settlement with ALPs. It thus appears that the alternative procedures lead not only to faster, lower cost decisions, but to decisions that better meet the needs of all participants. Moreover, staff has found that the positive relationships built during one collaborative process often carry over to other proceedings, thus generally improving the climate for the hydropower program. For all these reasons, the ALP will continue to be encouraged.

A settlement agreement clearly reduces the amount of time required to complete a proceeding. Although there is no evidence one way or another concerning the processing and PM&E costs of traditional applications that settle compared to those that do not, they result in outcomes that are better accepted by the parties and frequently establish the basis for sound working relationships during the license term. Thus, and consistent with Commission policy, Staff will continue to support settlement agreements to the extent possible consistent with the law and sound policy.

6. Issue a draft EA only if necessary.

The issuance of a draft EA would be eliminated in most cases. Staff would issue an EA and request comments on it. The Commission would respond to the comments on the EA and any unresolved disagreements with fish and wildlife agencies in the order acting on the license application, except where it is determined that comments on the EA or other considerations require issuance of a supplemental EA.

Issuance of draft EAs is a relatively recent practice which commenced in 1993. Draft EAs add about two months to the average license proceeding, but there is no evidence that the practice enhances the evidentiary record or quality of decisions. Rather, it simply provides an additional opportunity for participants to express or refine their views. Elimination of draft EAs will not materially diminish the record or substantive consideration of agency and public recommendations. Resource agencies will continue to have the opportunity to discuss and resolve outstanding issues in the context of the 10(j) meeting, which typically encompasses all outstanding issues.[208]

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[208]License applicants and non-fish and wildlife agency intervenors are not parties to the 10(j) negotiation. The Commission's practice is nonetheless to permit them to attend for the purpose of assisting in the search for consensus. That practice would continue under this recommendation.

This action will reduce the time required to process most new license applications by about two months, with an approximate cost saving in each instance of $24,000 in a traditional proceeding and $8,000 in a draft proceeding.

7. Eliminate issuance of second scoping documents.

The Commission typically issues a NEPA scoping document, followed by an opportunity for comments, followed by a second scoping document. This requires a significant amount of staff time, but rarely produces any significant new issues or information. Instead, the Commission would no longer issue a second scoping document. Any comments on the scoping document would be addressed in the Commission's NEPA document.

Staff estimates eliminating a second scoping document would reduce the time required to complete licensing by two months. Cost savings would be about $7,500 per traditional proceeding. ALPs do not have a second scoping document.

8. Increase the standard new license term to 50 years.

Section 15 of the FPA currently provides for a minimum new license term of 30 years, and a maximum term of 50 years. The Commission's current policy is to link the length of the new license term to the amount of new hydropower development or investment in environmental mitigation measures, or both. In brief the Commission issues a 30-year license for projects with little or no new development, construction, capacity or environmental measures; a 40-year license for projects with a moderate amount of new development, construction, capacity, or environmental measures; and a 50-year license for projects with extensive new development, construction, capacity, or environmental measures.[209]

The presence of standard reopener provisions, case-specific reopeners, amendable resource management plans, and increasing inclusion of adaptive management provisions in licenses creates multiple vehicles for making pragmatic adjustments to license conditions during the license term in response to changing conditions. In addition, current generation licenses contain many PM&E measures not included in the original licenses issued many years ago. Absent compelling reasons to do otherwise; for instance, to ensure a cumulative basin-wide analysis in future relicense proceedings, there is no reason a new license should not be issued for the maximum term permitted by the statute.

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[209] See Consumers Power Company, 68 FERC ¶ 61,077 at 61,383-84 (1994).

This action would not reduce the time required for licensing, but would reduce the frequency with which licensees need to incur the expense of a relicense proceeding.

Recommendations to reduce license terms to 15-20 years overlook the important changes in content of licenses and rest solely on assertions that the opportunity for another comprehensive review at any earlier date would make it easier for resource agencies and NGOs to compromise with applicants. No evidence, anecdotal or otherwise, support these assertions. Reducing license terms would in fact dramatically increase the cost of relicensing and the time devoted to it by all stakeholders by needlessly requiring that the process be repeated more frequently.

APPENDICES

APPENDIX A

Comments of Consulted Agencies

Department of Interior letter dated January 19, 2001
http://rimsweb1.ferc.fed.us/rims.q?rp2~getImagePages~2119227~28~22~1~50

Department of Interior letter dated April 16, 2001
http://rimsweb1.ferc.fed.us/rims.q?rp2~getImagePages~2142975~46~10~1~50

Department of Commerce letter dated February 1, 2001
http://rimsweb1.ferc.fed.us/rims.q?rp2~getImagePages~2122049~28~15~1~50

Department of Agriculture letter dated January 29, 2001
http://rimsweb1.ferc.fed.us/rims.q?rp2~getImagePages~2122382~28~7~1~50

Environmental Protection Agency letter dated January 25, 2001
http://rimsweb1.ferc.fed.us/rims.q?rp2~getImagePages~2121926~28~2~1~50

Advisory Council on Historic Preservation letter dated February 8, 2001
http://rimsweb1.ferc.fed.us/rims.q?rp2~getImagePages~2124825~28~12~1~50

APPENDIX B

Summary of Recommendations by Commenting Organizations

Summary of Recommendations by Commenting Organizations

Recommendation	Commenter(s)[210]
Legislative Recommendations	
Commission and Agency Decision-Making Authority under the FPA	
Provide the Commission with ultimate authority to establish license terms and conditions.	APC, IPC, PG&E, PacifiCorp., Douglas County, Grant County, Puget, YCWA, EEI, Orion, SMUD, Chugach, Duke, NU, Placer, KA, Summit, SCE, Pend Oreille. Glacier, Moss, Urban Water, Cowlitz, Pend Oreille, Tri-Dam
Do not reduce federal agency mandatory conditioning authority	AR, HRC, CRITFC, Yakima, Umatilla, WDOE, Colville, Coast Fishermen, SWRCB
Require agencies with mandatory conditioning authority to document the basis for their decisions, including consideration of economic impacts, least-cost comparable alternative mitigation measures, and environmental impacts of alternative sources of generation. Subject mandatory conditions to scientific peer review and establish appeal procedures.	Chelan GPC, PG&E, Douglas County, Grant County, SMUD, UAE, NYRECA, Licensing Reform, NYPA, Orion, Alcoa, Chugach, Duke, NU, EEI, MMEA, NAH, APPA, Pend Oreille, WSFB, SWRCB, Urban Water, Puget, NHA

[210] A list of commenters and abbreviated names follows the table.

Do not amend the FPA to require resource agencies to consider economic impacts or other areas outside of their expertise.	AR, HRC, RAW, MHRC
NEPA and Coordinated Processing	
Require one joint NEPA document for all federal agencies with licensing responsibilities with FERC as the lead agency.	Consumerss, PG&E, Licensing Reform, SMUD, SCE, APC, Chelan, NYPA, Duke, NU, EEI, MMEA, KA, APPA, Pend Oreille, Glacier, Urban Water, Cowlitz, NHA
Amend FPA to designate a single, coordinated process for addressing all licensing issues in a case, with consistent timelines and one adminstrative record.	Chelan, SMUD, NYPA, KA
Require the notice of intent to seek a new license to be filed six years before license expiration to allow another year of prefiling consultation and studies before application filing.	Vermont
Allow applicants using collaborative processes additional time to file a relicense application.	PG&E
Codify deadlines for agency action now in the regulations.	Licensing Reform, APPA
Specific Legislative Proposals	
Enact H.R. 2335 and/or S. 740	HEDC, UAE, NHA,OCTA, APC, Petersburg, Grant, Cowlitz, IPC
Don't enact H.R. 2335 or S. 740.	ODEQ, IRU, Nez Perce
Funding	

Appropriate adequate funds for federal and state agencies to fully and timely participate.	Silver Cloud, AR, HRC, CalHRC, TU, FOR-SN, HRC, RAW, MHRC, MCC, NYRU, RCA,SWSC, SC-Columbia, Chattahoochee, Plumas, AMC, CalHRC, TU, ODEQ, Whitewater, Audubon, IRU, Nez Perce, Overlake, Pacific Fishermen, NH Rivers, EWEB
Require applicants to fund agency participation	EA!, MCC, NAS, NYRU
Appropriate additional (non-licensee reimbursed) funds for resource agency participation.	GPC
Remit directly to federal and/or state resource agencies the portion of administrative annual charges attributable to their costs.	CalHRC, TU, Foothills, HRC, RAW, MHRC, AR, HRC, PG&E, Vermont WDOE, Pacific Fishermen, NHA, EWEB
Appropriate federal funds to assist public/NGO participation	AR, HRC, Whitewater, CSPA, FOR-SN, HRC, RAW, MHRC, NAS, RCA, RAW, SWSC, SC-Columbia, Chattahoochee, CRITFC, Yakima, Umatilla
Require applicants to fund public/NGO participation	Silver Cloud, FLOW, RAW, AWE, CalHRC, TU, Mondamin, Whitewater, Overlake, NH Rivers, ONRC
Clarify that public/NGOs not entitled to applicant funding.	Alcoa
Appropriate federal funds to assist participation of Indian tribes in traditional and/or ALP.	CRITFC, Yakima, Umatilla, Skagit, Nez Perce
Require licensees to fund participation of Indian tribes.	Skagit

Require applicants to fund independent consultants to perform environmental studies and computer modeling.	Chattahoochee, AMC, EA!, KCCNY, Adirondack Club
Establish Office of Public Participation with authority and funds to compensate public/NGO costs of participation.	AR, HRC
Annual Charges	
Continue to base federal land use charges on rental value.	EEI, Pend Oreille, Urban Water
Annual Licenses	
Issue interim environmental mitigation measures during periods of annual license pending completion of relicensing, when supported by evidence in the record or when applicants fail to timely complete needed studies.	Interior, MDNR, Silver Cloud, AR, HRC, Whitewater, CPSA, FOR-SN, MEC, MCC, RCA, SP, SC-Columbia, Chattahoochee, CRITFC, Yakima, Umatilla, AFS, AMC, CalHRC, TU, FFF, Finger Lakes, NOAA, NYSDEC, ODEQ, Audubon, IRU, KCC, Nez Perce, Overlake, NWF, RRS, Pacific Fishermen, NH Rivers, ONRC
Consider eliminating annual licenses.	Chattahoochee, NYRU
Put a time limit on annual licenses, or reduce the term of the new license to reflect the time spent under annual license.	FOR/SRFPC, TU-National, CDFG, Whitewater, IRU
Settlement Agreements	
Enforce all terms of settlement agreements that are included in the license against all signatories.	Interior, NOAA
Include all settlement agreement terms, regardless of project boundary, in the license.	Adirondack Club

License Terms	
Reduce the license term for new licenses to 15-20 years.	CDFG, Chattahoochee, FOR-SN, SWSC, SC-Columbia, Willamette, AR, HRC, EA!
Make no change in the term of new license provisions.	PG&E, GPC
Limiting Licensee Obligations	
Where the license includes adaptive management provisions, define limits of licensee's obligations at the time of licensing.	PG&E, SMUD, Chelan, NYPA, SCE
Rehearing Requests	
Establish 180-day period for substantive action on rehearing request, with one 30-day extention.	AR, HRC, Nez Perce, Pacific Fishermen
Clean Water Act	
Amend FPA to allow Commission review and rejection of Clean Water Act certifications not consistent with the FPA.	Consumers, IPC
Amend the FPA to enable the Commission to coordinate receipt of Clean Water Act conditions and consider them in its balancing.	Duke
Do not diminish state authority under the Clean Water Act.	Vermont, VDEQ
Limit the scope of 401 certification to physical and chemical water quality parameters.	NAH, Summit, IPC
Eliminate state authority to issue 401 certifications for hydro projects.	Wausau

Urge Congress to reexamine the mandatory conditioning authority of 401.	NHA
Miscellaneous	
Make no legislative changes.	MDNR, MUCC, NWF, Willamette, FOE, NOAA
Amend the FPA retroactively to provide that a license application is reviewed by the Commission and the states pursuant to the statutes and regulations in force at the time the application or preliminary permit is filed.	Glacier
Limit information and study requirements imposed by the U.S. Forest Service in connection with Special Use Authorizations or 4(e) conditioning.	HEDC
Amend Energy Policy Act of 1992 to permit applicant-prepared draft environmental impact statements.	Chelan, SMUD, NYPA, NHA
Reexamine FPA Section 13 restrictions on commencement of construction in light of market conditions and need to acquire state and local permits.	HEDC
Require states to develop policies or plans identifying where hydroelectric projects should not be permitted and identifying dams which should be removed.	MEC
Policies and Procedures	
Processing Model (See also NEPA)	

Make no substantial changes in policies and procedures until current reform efforts (ALP, ITF, EPRI-NRG) have had more time to be fully implemented and reviewed for effectiveness	WDOE, Alabama Rivers, AR, HRC, Whitewater, AMC, CalHRC, TU, CSPA, Chattahoochee, CRWC, IRU, MUCC, RAW, Willamette, Plumas, Interior, MDNR, AMS-M, AWE, Colville, NOAA, Forest Service, NYSDEC, Vermont, EA!, Nez Perce, MWPDC, Pacific Fishermen, VDEQ
Allow flexibility to design hybrid processes.	Puget, Ayers, CalHRC, TU, Pend Oreille, NHA, Tri-Dam
Phase out the traditional process. Do not make ALP the only alternative, but fully integrate NEPA into prefiling consulation by allowing all applicants to file a draft NEPA document with their application, whether or not there is a collaborative process.	Ayers, CalHRC, TU
Keep the traditional process, but allow applicants to file a draft NEPA document with the application even if they don't have a collaborative process.	Pend Oreille
Make the ALP, or variations of it, the default procedure.	Finger Lakes, Adirondack Club
Maintain the traditional process for those who want it.	TU-MI, EEI, NYSDEC, EEI, Pend Oreille, NHA
Clarify that ALP does not require unanimity, Commission will resolve study and other disputes. Establish a model communications protocol limiting applicant's obligation to provide information. Require participants in ALPs to be prepared and empowered to commit.	Alcoa
Eliminate or drastically reduce the three-stage consulation requirements.	SCE

ALP should not be permitted.	Chugach
Prefiling Consultation	
Involve Commission staff from the outset of prefiling consultation, or at least early in the process. Take a more active role managing each case.	CalHRC, TU, CSPA, Cal Trout, NHRC, CalHRC, SWSC, Chelan, Consumers, Puget, SMUD, SCE, CDFG, AMC, Chelan, NYPA, NC Wildlife, ODEQ, EEI, Nez Perce, SWRCB, Urban Water, NHA, ADFG
Require applicants to consult with public/NGOs during first stage consultation.	FLOW, SP, AMC, NC Wildlife, Mondamin, KCC, Nez Perce, Overlake, RRS, Pacific Fishermen, VDEQ, NH Rivers, ONRC
Require applicants to include Indian tribes in first stage consultation.	Shoshone
Require first stage consultation to begin when the notice of intent to seek a new license is issued.	CDFG
Issue joint public notices with federal or state agencies.	LDEQ, SWRCB
Expand geographic scope of public notice during prefiling consulation and include agenda for joint public/agency meeting.	Adirondack Club
Develop list of national and regional NGOs with a general interest in relicensing and notify them of every license proceeding.	Finger Lakes
Address cultural resources issues directly with Indian tribes rather than athropology consultants hired by applicants.	Shoshone
Establish an Indian policy and staff dedicated to Indian issues.	Shoshone

Require applicants to do more earlier in the process to identify Indian lands, treaty rights, and trust property resources affected by the project.	Interior, NOAA
Involve tribes in the process to the same extent as resource agencies, particularly as regards Section 18.	Skagit
Extend the comment periods for citizen stakeholders.	KCC
Require applicant to provide transcripts of all prefiling consultation meetings to all attendees.	Adirondack Club
Revise or eliminate the requirement to specified data on file and available to the public; replace with an "upon request" policy.	EEI, APC, Pend Oreille, NHA
Eliminate Exhibit H. Reduce the paper copy requirements in favor of e-filing, CD ROM , etc.	NHA
Study Requirements	
Require agencies and stakeholders to develop clear resource goals and objectives at the beginning of the proceeding, and to link study requests to them.	Alabama Rivers, IRU, MEC, MUCC, TU-OR, Chattahoochee, PacifiCorp, Tacoma, MDNR, AFS, AMC, FOE, Alcoa, NC Wildlife, ODEQ, NAH, Nez Perce, Pacific Fishermen, Urban Water, Cowlitz, NHA, Tri-Dam
Define criteria for determining whether types of studies (e.g., entrainment) will or will not be required, and agencies to show need for studies per the criteria. Codify Commission precedent on need for or not for studies.	Consumers, GPC, PG&E, PacifiCorp, Duke, SCE, APC, NHA
Assume agency-requested studies are needed and do not need to be justified.	EA!

Allow all parties a consulting role on what environmental studies are needed, what methods should be used, and which contractors should be selected.	AR, HRC, CalHRC, TU, IRU, NYRU, SWSC, TU-OR, Nez Perce, Pacific Fishermen
Do not allow anyone but the license applicant a voice in selecting contractors to do studies.	GPC
Don't require any studies that might be used to support mandatory terms and conditions.	GPC
Establish standard baseline study requirements required of all applicants.	CalHRC, TU
Establish and enforce standards for study design and implementation.	AR, HRC, AMC, EHL, FOR-SN, IRU, MEC, MUCC, MCC, TU-OR, Chattahoochee, CRITFC, Yakima, Umatilla, MDNR, , AWE, NC Wildlife, ODEQ, EEI, KCCNY, Nez Perce, MWPDC, Pacific Fishermen, Urban Water, NHA
Require resource agencies and NGOs to pay for (all or more) of the studies they want done.	GPC, EEI, Moss
Clarify that applicants are not actually required to do any studies.	GPC
Do not allow decommissioning studies unless the licensee proposes decommissioning.	GPC
Don't require applicants to do studies before the application is submitted, just file descriptive information. Then let the agencies make study recommendations, and FERC decides which studies are need.	PCA
NEPA	

Allow applicants to combine NEPA with prefiling consultation and include a preliminary draft EA with all applications regardless of process used. Have Commission staff assist with NEPA scoping and preliminary NEPA analysis.	Chelan, SMUD, NYPA, Grant EEI, Duke, Avista
Do NEPA scoping at the beginning, regardless of process used.	NC Wildlife, Whitewater, NHA
Change of policy that an agency which is a cooperating agency for NEPA review cannot also be an intervenor.	Interior, CalHRC, TU, EPA, Forest Service, Whitewater
Include in NEPA analyses the nonpower benefits of hydro, like flood control and recreation	APC, AFPA
Revise cost to establish economic values for non-developmental resources and recreation and/or costs to the public and environment of delayed relicensing, and/or economic and cultural costs to Indian tribes of diminished fisheries, and/or costs of participation by agencies, tribes, and NGOs, and/or profitability of applicant.	FOE, Cal Outdoors, Adirondack Club, IRU, Skagit, Nez Perce, Pacific Fishermen, ADFG
Document in NEPA analysis all economic costs to local community of the project.	Niagara
Conduct joint or concurrent NEPA analyses with other agencies.	FOR-SN, NHRC, CalHRC, TU
Include Forest Service analyses supporting 4(e) conditions in Commission NEPA document.	Forest Service
Establish a process for reviewing consistency of mandatory conditions with the evidentiary record.	GPC, Grant
Include a decommissioning alternative in every NEPA document.	FOE, SWSA
Treat each agency's recommendations as a reasonable alternative in NEPA without modifications.	FOE

Require license applicants to disclose information about project economics, subject to confidentiality agreements.	AR, HRC, FOR-SN, IRU, AMC, Audubon, Nez Perce
Allow applicants to use the results of studies at similarly situated projects.	GPC
Use preproject conditions as the baseline for NEPA analysis.	Chattahoochee, EA!
Make it even more clear to participants that current conditions are the baseline for NEPA analysis.	NYPA, Pend Oreille, GPC
Define "reasonable alternative" in the regulations.	Alcoa
Schedules and Deadlines	
Establish public schedules for Commission issuance of draft and final NEPA documents, pre-notification that the ready for environmental analysis (REA) notice is going to be issued, issuance of orders, and/or issuance of rehearing.	Interior, MUCC, Chugach, NOAA, Forest Service, NC Wildlife, NHRC, CalHRC, Chugach, CWRC, NHRC, CDFG, MDNR, AFS, CRITFC, Pacific Fishermen
In the traditional process, require applicant to submit study plan to FERC for review and approval following agency study recommendations. Set deadline for Commission review.	GPC
Establish and enforce and schedules for study design and implementation by applicants.	AR, HRC, AMC, EHL, FOR-SN, IRU, MEC, MUCC, MCC, TU-OR, Chattahoochee, CRITFC, Yakima, Umatilla, MDNR, , AWE, NC Wildlife, ODEQ, EEI, KCCNY
Establish and enforce deadlines for agencies to provide terms and conditions	GPC, Grant, Chugach, Duke, EEI, MMEA, SCE, WSFB, Urban Water, Cowlitz

In traditional process, require submission of draft terms and conditions earlier, or before application filed.	GPC, Duke, Placer, EEI, APPA, Grant
In general, establish and enforce appropriate deadlines, including for Commission actions.	Silver Cloud, Whitewater, Chattahoochee, Foothills, FOR-SN, KCC, NYRU, RCA, Chelan, Orion, SCE, MDNR, NC Wildlife, Mondamin, Whitewater, Audubon, IRU, Nex Perce, Overlake, RRS, NHA
Establish expedited schedules for reaching settlements in collaborative proceedings.	NHRC, CalHRC
Establish a cut-off date for participation in ALPs.	Alcoa
License Terms and Conditions	
Establish standards for evaluating terms and conditions and recommendations, such as nexus to project operations, effectiveness, and scientific justification.	GPC
Require licensees to compensate local governments for negative project impacts on community economics.	Niagara
Standardize guidelines for acquisition of mitigation lands.	HEDC
Establish clear guidelines limiting when reopener clauses can be invoked, and limit their economic impact.	SCE, EEI, Pend Oreille, Urban Water
If license terms are not shortened, require an adaptive management program for every license.	CDFG, CalHRC, TU, ODEQ, Vermont
Require each applicant to include a dam removal contingency plan.	CRITFC, Yakima, Umatilla

Don't require licensees to pay for recreation improvements. Make the public pay.	Wausau
Annual Charges	
Issue a rulemaking establishing criteria for inclusion of costs (including Commission costs) in administrative annual charges.	EEI, Urban Water
Amend the method for assessing annual charges to base it on licensee's costs of licensing rather than project generation.	SCE
Conduct independent audits of administrative annual charge costs.	EEI
Miscellaneous	
Provide facilitators and/or increase Commission staff training in mediation and facilitation. Provide separated staff to assist collaborative efforts regardless of the process model used.	CSPA, Cal Trout, Foothills, Orion, Ayer, FFF, PG&E, PacifiCorp, Cowlitz
Encourage use of the EPRI-NRG recommendations.	PG&E
Establish separate, less onerous licensing procedures for small projects.	HEDC, HTS, Adirondack Club, NAH, Puget, NHA
Consolidate relicensing of all projects in a watershed, if necessary, adjust license terms to do so. CDFG	NYSDEC, CDFG
Take a more proactive role in implementing the ESA, particularly regarding ongoing impacts of project operations.	NOAA
Compile a library of of studies performed in connection with other proceedings for use by applicants to determine need for and type of studies likely to be required.	EEI, Pend Oreille

Reconsider the Decommissioning Policy Statement	EEI, AFPA, Urban Water
Defer to Interior's judgement concerning whether reservations are subject to Section 4(e) conditioning.	Interior
If agency study requests are subjected to peer review, require applicants to submit study plans for peer review.	SWRCB
Require only one intervention for an entity to become a party to all proceedings involving the license for its entire term.	NOAA
Encourage settlements.	FFF, MLC, Mondamin, Whitewater, Overlake, MUCC, RRS, Cowlitz, NH Rivers, ONRC, EWEB
Encourage development of clear, achievable resource goals and criteria to measure success of mitigation efforts.	Chelan
Deny applications for licenses for projects that would pose a significant risk to Indian treaty resources.	Skagit
Oppose the DOI/NMFS fishway prescription policy.	SMUD, Chelan, NYPA
Increase licensing staff in the Regional Offices.	Tacoma
Interview participants in successful ALPs and educate participants on what works and doesn't.	Tacoma
Reject intervention petitions by agencies without jurisdiction over a project.	HEDC
In general, act more quickly	ADFG
States should consider using the FERC NEPA document to satisfy their own environmental review requirements.	EWEB

Coordinate project monitoring and enforcement with other agencies and clarify responsibilities.	EWEB
Issue a rulemaking defining fishways.	EWEB
Base mandatory conditions on objective performance standards instead of detailed prescriptions. Include applicants in the development of conditions.	EWEB

Commenter (Abbreviation)

Adirondack Council (Adirondack)
Adirondack Mountain Club (Adirondack Club)
Alabama Power Company (APC)
Alabama Rivers Alliance (Alabama Rivers)
Alaska Department of Fish and Game (ADFG)
Alcoa Power Generating Company (Alcoa)
American Fisheries Society - Michigan Chapter (AFS)
American Forest and Paper Association (AFPA)
American Public Power Association (APPA)
American Rivers/Hydropower Reform Coalition (AR, HRC)
American Whitewater/Chota Canoe Club (Whitewater)
Appalachian Mountain Club (AMC)
Appalachian Wilderness Experience (AWE)
Audubon Society of Omaha (Audubon)
Avista Corporation (Avista)
California Department of Fish and Game (CDFG)
California Hydropower Reform Coalition/Trout Unlimited (CalHRC, TU)
California Outdoors (Cal Outdoors)
California Sportfishing Protection Alliance (CSPA)
Calfornia State Water Resources Control Board (SWRCB)
California Trout (Cal Trout)
Camp Mondamin (Mondamin)
Chelan Public Utility District (Chelan)
Chugach Electric Association (Chugach)
Columbia River Inter-Tribal Fish Commission/Yakima Nation (CRITFC, Yakima)
Confederated Tribes of the Colville Reservation (Colville)
Connecticut River Watershed Council (CRWC)
Consumers Energy Company (Consumers)
Duke Power Company (Duke)
Edison Electric Institute (EEI)
Endangered Habitats League (EHL)
Environmental Action! (EA!)
Eugene Water and Electric Board (EWEB)
Federation of Fly Fishers (Northern California) (FFF)

Finger Lakes Ontario Paddlers Club/Genessee Watersport Center (Finger Lakes)
Fish First (FF)
Flow Paddlers Club (Flow)
Foothills Conservancy (Foothills)
Fred Moss (Moss)
Friends of the Earth (FOE)
Friends of the River, Sierra Nevada Forest Protection Campaign (FOR-SN)
Georgia Power Company (GPC)
Georgia River Network (Georgia Rivers)
Glacier Energy Company (Glacier)
Granite State Flycasters (GSF)
Hydro Energy Development Corporation (HEDC)
Hydro Technology Systems, Inc. (HTS)
Hydroelectric Licensing Reform Task Force (Licensing Reform)
Hydropower Reform Coalition (River Alliance of Wisconsin, Michigan Hydro Relicensing Coalition) (HRC, RAW, MHRC)
Idaho Power Company (IPC)
Idaho Rivers United (IRU)
Kayak and Canoe Club of New York (KCCNY)
Keelhaulers Canoe Club (KCC)
Kleinschmidt Associates (KA)
Louisiana Department of Environmental Quality (LDEQ)
Michigan Department of Natural Resources (MDNR)
Michigan Environmental Council (MEC)
Michigan Municipal Electric Association (MMEA)
Michigan United Conservation Clubs (MUCC)
Mississippi Whitewater Park Development Corporation (MWPDC)
Mohawk Canoe Club (MCC)
Mono Lake Committee (MLC)
National Audubon Society (NAS)
National Hydropower Association (NHA)
National Hydropower Reform Coalition (NHRC)
National Oceanographic and Atmospheric Administration (NOAA)
National Wildlife Federation (NWF)
New England FLOW (FLOW)
New Hampshire Rivers Council (NH Rivers)
New York State Department of Environmental Conservation (NYSDEC)

New York Power Authority (NYPA)
New York Rivers United (NYRU)
New York State Rural Electric Cooperative Association (NYRECA)
New York Power Authority (NYPA)
Nez Perce Tribe (Nez Perce)
Niagara Coalition (Niagara)
North American Hydro (NAH)
North Carolina Wildlife Resources Commission (NC Wildlife)
Northeast Utilities Service Company (NU)
Orange County Taxpayers Association (OCTA)
Oregon Department of Environmental Quality (ODEQ)
Oregon Natural Resources Council (ONRC)
Overlake Fly Fishing Club (Overlake)
Pacific Coast Federation of Fishermen's Associations (Pacific Fishermen)
Pacific Gas and Electric Company (PG&E)
PacifiCorp
Packaging Corporation of America (PCA)
Pend Oreille County Public Utility District (Pend Oreille)
Peterburg (AK) Municipal Power and Light (Petersburg)
Placer County Water Agency (Placer)
Plumas County (Plumas)
Public Utility District No. 1 of Cowlitz County (Cowlitz)
Public Utility District No. 1 of Douglas County, WA (Douglas County)
Public Utility District No. 2 of Grant County, WA (Grant County)
Puget Sound Energy (Puget)
Rendezvous River Sports - Jackson Hole Kayak School (RSS)
Rock Creek Alliance (RCA)
River Alliance of Wisconsin (RAW)
Save our Wild Salmon Coalition (SWSC)
Shasta Paddlers (SP)
Shoshone/Piute Tribes (Shoshone)
Sierra Club (Columbia Group) (SC-Columbia)
Silver Cloud Expeditions (Silver Cloud)
Skagit System Cooperative (Skagit)
Southern California Edison Company (SCE)
Summit Hydropower (Summit)
Tacoma Power (Tacoma)

Tri-Dam Authority (Tri-Dam)
Trout Unlimited (National) (TU-National)
Trout Unlimited (Michigan Chapter) (TU-MI)
Trout Unlimited (Oregon Chapter) (TU-OR)
Umatilla Fish and Wildlife Committee (Umatilla)
United American Energy (UAE)
Upper Chattahoochee River Keeper (Chattahoochee)
U.S. Department of the Interior (Interior)
U.S. Forest Service (Forest Service)
State of Vermont (Vermont)
Virginia Department of Environmental Quality (VDEQ)
U.S. Environmental Protection Agency (EPA)
Washington Department of Ecology (WDOE)
Washington State Farm Bureau (WSFB)
Wausau-Mosinee Paper Corp. (Wausau)
Western Urban Water Coalition (Urban Water)
Willamette Riverkeeper (Willamette)
World Wildlife Fund (WWF)
Yuba County Water Agency (YCWA)

APPENDIX C

Summary of Recommendations by Commenting Individuals

Summary of Recommendations by Commenting Individuals

Recommendation	Number of Commenter(s)[211]
Reduce delays by requiring applicants to conduct proper resource studies and provide adequate information to stakeholders in a timely fashion.	44
Enhance incentives to dam owners to negotiate settlements with stakeholders rather than litigate.	85
Allow adequate timelines for well-considered input in all aspects of the licensing process. Enforce the timelines.	125
License applicants should fund public involvement; Congress should provide agencies with adequate resources to fully participate in the licensing process	123
Give applicants incentives to conduct studies.	54
Allow time for the ALP and other recent initiatives to be thoroughly implemented before making any major changes to the relicensing process (no evidence of a problem with relicensing).	129
Set interim conditions on annual licenses for applicants that cause delays.	15

[211] A list of commenters and abbreviated names follows the table. All individual commenters are designated as IND.

Data should be collected by neutral third parties, not ustry consultants.	3
Implement strong measures to punish licensees that fail to comply with environmental protection measures.	1
Expand the 30-day intervention period, as people cannot be expected to read the federal register daily.	1
Improve participation in the process by improving web access and service; provide better information, post all documents, allow others to automatically generate notifications of filings.	2
Provide incentive for power companies to explore cheaper, more efficient, and environmentally sound ways of providing energy.	1
Link relicensing and awards of federal funds to other clean water issues in the same river.	2
Eliminate consideration in the NEPA document of alternatives that are beyond the scope of the relicensing decision, such as decommissioning.	1
Shorten new license terms to 15 years	1
Limit the cost of studies to 15% of the 10-year net revenue of the project.	1
Make a recovery plan for an endangered species a prerequisite to requiring applicants to do any studies regarding that species.	1

Federal agencies should be required to conduct the studies they request, instead of applicants, because federal agencies have the necessary expertise.	1
Exemptions should be available for facilities up to 25 megawatts.	1
Better define the criteria for determining whether to do an EA or EIS.	1
Better define criteria for Commission authority to regulate activities such as boat docks and fees.	1

List of individual commenters (n = 151):

Barry Tuscano, Douglas G. Kretzmann, William J. Cross, Clinton A. Kennedy, Lawrence A. Stewart, Bob Tonnies, James F. Hunt, Richard Spotts, Astrid Ensign, Stephen D. Ensign, Arden Olson, Paul A. Schelp, Karen Lipsey, Thomas McCloud, Alex Harvey, Sherry Olson, Charles Williams, Michael Snead, Dennis Steiger, Andrew Parker, Eli Helbert, Leland Hughes, Gary Adams, Paul Lang, Barry Grimes, Charles Vincent, Parkin Hunter, James R. M. Collom, Todd Folsom, Simon Barnett, Greg Burak, Steve Kittelburger, Clarence Peterson, Alan Artim, Tom Meagher, Emily Savage, Tom Diegel, Matt Brake, Craig Anderson, Saira Khan, Michael Shafer, Steve Scheuerell, Jennie Goldberg, Dennis Pennell, Aaron Sarver, Kevin Brackney, Keir Mussen, Timothy Schaeffer, J.D. Gaffney, Njord Rota, Mary Halligan, Charles C. Walbridge, Stephen Trent McClain, Aubrey Eastman, Keech T. LeClair, Jack Leishman, Brad Snow, Larry Stewart, Paul Rodriguez, David L. Luinstra, Wallace B. Trueworthy, William M. Lukens, Andrew Stouppe, Devin C. Donohue, Barbara M. Kurman, Jayne H. Abbot, William H. Koenig, Rhonda Goetter, Rob Keller, John E. Lee, Viola Wallace, Tina Horowitz, Adam T. Savett, Steve Kobak, Charlene C. Thompson, Stacy Karacostas, Clark Watry, Dale Karacostas, David Morgan, Bruce Bradshaw, Hunter Coleman, Frederick Reimers, Ron Whiteley, Triel D. Culver, Andrew C. Meyer, Henry Charles Foster, Michael Dezzani, Clifford I. White, Al Benton, Kenneth R. Olsen, Scott Olsen, Michael J. Swoboda, Allison Mannos, Judith Miller, Richard Mackowiak, J. Brad Brewer, Richard Rosen, Rudy Altieri, Charles Crom, Cynthia Boisfeuillet, Patricia Kelly, Diane Silfeo, Sheila Dufford, Dan Keifer, Thomas Walter, Jean Lown, Dan Newman, Drew Wilson, William Kessler, Scott Strausbaugh, Nicole Haller, Lecky Haller, Peggy

Blanchard, Julie Dauphine, Russell Partain, David Garritt, Floyd Nichols, Wendy Watson, Clarence Peterson, Micheal Wellborn, William Blaufuss, Steven Formanek, Bobbie Flowers, Robert Gedekoh, David Cernicek, Robert Rutkowski, Daniel Spencer, R.J. Slingerlen, Catherine Walling, David Norell, Douglas Fagerness, Catherine Stapp, David Fiore, Dorothy Caine, John Fowler, N. Ninth, Matthew Nahan, Raymond Johns, Sherrill Myers, Lowell Ashbaugh, Fred Gienke, Susan Julian, Ken Kearns, Richard Kennon, Don Kinser, Frank Lupi, Michael Moore, Rebecca Post, Karen Sjogren, Pete Skinner

APPENDIX D

Comments of the Commission Staff on the
Joint Departments of Interior and Commerce
Notice of Interagency Proposed Policy on the Prescription of
Fishways Under Section 18 of the Federal Power Act

February 27, 2001

Chief, Division of Federal Program Activities
400 ARLSQ
United States Fish and Wildlife Service
1849 C Street, NW
Washington, D.C. 20240

Director, Office of Habitat Conservation
National Marine Fisheries Service
1315 East-West Highway
Silver Spring, MD 20910-3282

Dear Sirs:

Enclosed please find the comments of the staff of the Federal Energy Regulatory Commission on the Notice of Proposed Interagency Policy on the Prescription of Fishways under Section 18 of the Federal Power Act, issued by the Departments of the Interior and Commerce. Please feel free to contact Mark Robinson at (202) 219-2750 or John Katz at (202) 208-1077 if you have any questions about these comments or if we can be of further assistance as you pursue this initiative.

Very truly yours,

Kevin P. Madden
General Counsel

Enclosure

Department of the Interior	)	Notice of Proposed Interagency
	)	Policy on the Prescription of
	)	Fishways Under Section 18
Department of Commerce	)	of the Federal Power Act

Comments of the Federal Energy Regulatory Commission Staff

The following are the comments of the staff of the Federal Energy Regulatory Commission (Commission) on the joint Notice of Proposed Interagency Policy on the Prescription of Fishways Under Section 18 of the Federal Power Act (FPA) published by the Department of the Interior and the Department of Commerce. These comments represent the views of Commission staff only, and not those of the Commission or any individual Commissioner. In these comments, Commission staff expresses its support for the Departments' codification of their procedures for prescribing fishways. However, Commission staff believes that the fishway definition proposed by the Departments is over broad, and could lead to delay, expense, inefficiency, and uncertainty in the hydropower licensing process.

BACKGROUND

Pursuant to Part I of the FPA, 16 U.S.C. § 791a-823(b), the Commission is authorized to license non-federal hydropower projects. Section 18 of the FPA, 18 U.S.C. § 811, provides that the Commission shall require the construction of such fishways as may be prescribed by the Secretary of the Interior or the Secretary of Commerce. These prescriptions often are crucial elements of licenses issued by the Commission.

On December 22, 2000, the Departments of the Interior and Commerce issued the Notice of Proposed Policy. The Departments state that the policy does not introduce new procedures but standardizes current practices and existing procedures for providing fishway prescriptions.

COMMENTS

A. Introduction and Discussion

1. The Departments state as a matter of fact that "accomplishing fish passage is in the public interest and is an appropriate project purpose." While this may be true in many cases, it is not always the case. Only by balancing all of the public interest considerations concerning a specific project, giving equal consideration to developmental and non-developmental purposes, can a determination be made as to whether particular measures, such as fish passage, are in the public interest.

2. The Departments correctly note that, in Section 1701(b) of the National Energy Policy Act of 1992,Congress vacated a definition of "fishway" issued by the Commission. However, in Commission staff's view, the Departments ignore significant aspects of that legislation.

First, Congress provided that its vacating the Commission's then-current fishway definition was "without prejudice to any definition or interpretation by rule of the term 'fishway'" by the Commission, and that any future definition must be concurred in by the Secretaries of the Interior and Commerce. The commonsense reading of this legislation is that the Congress envisioned the Commission defining "fishway," with the

Departments' concurrence. Here, the Departments are proposing to define "fishway" themselves (albeit only for their own internal purposes), without even seeking the Commission's concurrence. This appears inconsistent with Congress' intent in the Energy Policy Act.

Second, in the Energy Policy Act, Congress provided a definition of "fishway" limited to physical structures necessary to maintain the life stages of fish, along with related operations and measures. As discussed below, the Departments' proposed definition of "fishway" is so broad as to be inconsistent with that promulgated by Congress.

B. Definition of Fishway

The Departments begin by citing Congress' definition of fishway, which is as follows:

> the items which may constitute a "fishway" under section 18 for the safe and timely upstream and downstream passage of fish shall be limited to physical structures, facilities, or devices necessary to maintain all life stages of such fish, and project operations and measures related to such structures, facilities, or devices which are necessary to ensure the effectiveness of such structures, facilities, or devices for such fish.

The Departments then go on to provide "clarification" of Congress' "guidance." The Departments' definition is, in Commission's staff's opinion, inconsistent with that enacted by Congress. For example, the Departments include as fishways not just fish passage structures, facilities, and devices, and related operations and measures, but: breaches, notches, spillways, gates, tunnels, flumes, pipes, and other conveyances, which may have nothing to do with fish passage; water spill, flow, temperature, and level,

which, unless they are tied to the proper operation of fish passage structures, facilities, and devices, are outside of Congress' definition; operating schedules, which, again, unless tied to the operation of physical passage facilities, are beyond Congress' definition; fish barriers and screens (which, at least in some instances prevent fish passage); and "any other facilities, structures, devices, measures, or project operations necessary" for providing or studying fish passage. This last category is so broad as to potentially exclude nothing.

Commission staff considers this sweeping definition to be essentially the equivalent of the declaration by Interior, in licensing proceedings in the mid-1990s, that entire hydroelectric projects constituted fishways. In response, Senator Murkowski explained in an April 3, 1995 letter to Secretary Babbitt (copy attached) that Congress intended a far more limited definition of "fishway," and that many parts of projects (included some specifically included in the Departments' proposed definition, such as spillways and gates) were not fishways. As Senator Murkowski emphasized, Congress did not intend "that section 18 be used as a back-door means for the Departments of Interior and Commerce to take control of the FERC's hydroelectric licensing process." In Commission staff's view, the proposed definition crosses that line.

C. Other Definitions Used in the Policy

The Departments define "fish" to include "mollusks, crustaceans, and other forms of freshwater, estaurine, and marine animal life other than mammals and birds." This definition appears over broad. Under the Departments' definition, reptiles, insects, amphibians, and other animal life could be considered fish. Moreover, it is not clear that Section 18 was intended for the protection of mollusks, crustaceans, etc, as opposed to fish.

In addition, under "Need for Fishways," the Departments state that they will consider, among other things, whether a project is located "on a water body that is presently used by or provides habitat for riverine fish . . ." This is overly broad, since many riverine fish do not need to move upstream or downstream to sustain all of their life stages.

Further, under the Departments' definition, a fishway could be justified merely on the existence of potential fish habitat. The courts have held otherwise. See Bangor Hydroelectric Co. v. FERC, 78 F.3d 659, 664 (D.C. Cir. 1996) (ruling invalid an "if you build it, they will come" justification for a fishway prescription).

D. The Fishway Prescription Process

1. The Departments state that they provide preliminary prescriptions to the Commission for inclusion in its NEPA analysis, and that, after the Commission finishes its analysis, the Departments then modify the prescriptions as necessary for inclusion in the Commission's final NEPA document and in the project license.

The process as outlined is somewhat unclear. Commission staff presumes that the Departments intend to provide preliminary prescription for inclusion in the Commission's draft NEPA documents, and then may modify them for inclusion in final NEPA documents. If so, this should be clarified in the final policy. Also, the Commission is not required to prepare both draft and final environmental assessments (although, if it decides to prepare an environmental impact statement, it must prepare draft and final versions of those documents). It is not clear how the policy would apply in instances where the Commission decides to prepare only a final environmental assessment.

Of greater significance, the policy on its face is not consistent with the Commission's regulations. The Commission's regulations provide, at 18 C.F.R. § 4.34(b), that mandatory and recommended terms and conditions and prescriptions must be filed with the Commission no later than 60 days after issuance by the Commission of public notice declaring that an application for a hydropower license is ready for environmental review. Late-filed terms and conditions and prescriptions will be considered only as nonmandatory recommendations under Section 10(a) of the FPA. The agencies appear to presume, contrary to the regulations, that late-filed prescriptions would be treated by the Commission as mandatory.

Commission staff notes that the Commission's regulations, 18 C.F.R. § 4.34(b)(1), further provide that if ongoing agency proceedings to determine the terms and conditions or prescriptions are not completed by the 60-day deadline, the agency may submit to the Commission preliminary terms and conditions or prescriptions and a

schedule showing the status of, and an anticipated completion date for, the agency proceedings. Thus, the Departments can comply with the Commission's regulations by following these procedures.

As a general matter, however, the later in the process that the Departments submit either preliminary or final prescription, the greater the likelihood that the prescriptions may delay or disrupt the licensing proceedings. Thus, Commission staff strongly recommends that, consistent with the Departments' recently-promulgated policy on the development of mandatory license conditions, the Departments commit to filing at least preliminary prescriptions within the time frame established by the Commission's regulations.

2. In addition, the Departments state that they will, where they deem it appropriate, reserve their authority to impose fishway prescriptions in the future. It is not certain that the Departments have the authority to do so. Unlike the mandatory conditioning authority provided by the broad Section 4(e) of the FPA, which empowers the relevant Secretary to impose "conditions" (a reservation of authority or reopener being a condition), the narrower Section 18 only allows for the prescription of "fishways." A reservation of authority or reopener is not on its face a fishway. The Commission has generally chosen to honor the Departments' requests that the Commission include fishway reservations or reopeners in licenses; it is not clear, however, that the Departments have the authority to do so on their own.

3. The Departments assert that they can require fishways in cases involving project abandonment or decommissioning. In instances involving project retirement, the Commission only imposes "one-time" measures that can be accomplished contemporaneously with license termination. Requiring construction of a fishway, which involves ongoing operation and maintenance, would be inappropriate in those circumstances.

4. Commission staff supports the Departments' commitment to providing documentation of fishway prescriptions. Such documentation can lead to better public understanding and a more complete record.

E. Post-Licensing Modification of Fishway Prescriptions

The Departments assume that they have the authority to reopen and modify fishway prescriptions throughout a license term. As noted above, the Departments may not have the statutory authority to impose such reservations. The Commission itself does reserve the authority to modify all fish and wildlife conditions, if required by the public interest, following notice and the opportunity for comment.

F. Relationship to the Endangered Species Act

Commission staff supports the Departments' statement that they will fully coordinate fish passage and endangered species efforts to provide consistent and unified prescriptions. The Departments then state that "[f]ishway prescription formulation should be fully integrated with the ESA section 7 consultation process in FERC's licensing or during the license term." Commission staff agrees with this statement, but wants to be clear that, because the timing of fishway prescriptions is solely up to the Departments and because the Departments play a major role in the timing of ESA consultation, it is the Departments who control whether these efforts are in fact coordinated. A failure to coordinate these processes can lead to increased delay, cost, inefficiency, and uncertainty in licensing.

CONCLUSION

Commission staff strongly supports the Departments in clarifying their policy on prescribing fishways. At the same time, as noted above, the Energy Policy Act contemplates the Commission drafting a fishway definition in consultation with the Departments, rather than the Departments undertaking unilateral action. Commission staff therefore suggests that, rather than implementing the proposed, over broad definition, the Departments work with the Commission to develop a mutually-agreeable definition. At a minimum, Commission staff urges the Departments to define "fishway" more narrowly, in a manner that is consistent with the Congress' definition in the Energy Policy Act, and to utilize procedures that are consistent with the Commission's

regulations. To do otherwise would risk adding delay, expense, inefficiency, and uncertainty to the hydropower licensing process. Commission staff is prepared to assist the Departments as they proceed to develop their procedures.

THE DEPUTY SECRETARY OF THE INTERIOR
WASHINGTON

ORIGINAL

January 19, 2001

David P. Boergers, Secretary
Federal Energy Regulatory Commission
888 First Street, NE
Washington, DC 20426

Docket No. PL01-1-000
Hydroelectric Licensing Policies, Procedures, and Regulations – Comprehensive Review

Dear Secretary Boergers,

This letter provides written comments of the U.S. Department of the Interior (Department) to the Federal Energy Regulatory Commission (Commission) on section 603 of the Energy Act of 2000 (Public Law No. 106-469). Section 603 directs the Commission to immediately undertake, in consultation with the Federal resource agencies, a comprehensive review of policies, procedures, and regulations for the licensing of hydroelectric projects to determine how to reduce the cost of and the time for obtaining a license. The Commission is to report its findings, including any recommendations for legislative changes, to Congress by May 8, 2001.

I. General Comments

The Department has made improving hydropower licensing under the Federal Power Act (FPA) a critical priority during the past several years. The Department has an important role and significant responsibilities under the FPA to provide input to the Commission as it decides whether and under what conditions to license hydropower projects. Our mission is not to interfere with licensing, but to ensure that resources under the Department's jurisdiction are protected when a navigable waterway – a public resource - is dedicated, pursuant to an FPA license, to hydropower generation for thirty to fifty years.

The Commission's licensing process is complex, time-consuming, and resource intensive for all parties. This is a consequence of the Commission's process itself, not the Department's role in that process. However, the Department is also of the view that the licensing process can be improved to avoid delay and inefficiencies. In order to put this view into effect, the Department, with the other resource agencies and the Commission, has undertaken major initiatives to understand and to improve the licensing process. These include the Interagency Task Force on Improving Hydroelectric Licensing Processes (ITF), participation in the Electric Power Research Institute - National Review Group (EPRI/NRG), development of an interagency policy on fishways, and adoption of the Mandatory Conditions Review Process (MCRP).

The Department expects the cumulative effect of these initiatives to significantly improve the timeliness of the licensing process, the quality and cost-effectiveness of the decisions made through

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