20020912-3020 Received by FERC OSEC 09/12/2002 in Docket#: RM02-16-000

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

18 CFR Parts 4 and 16

Docket No. RM02-16-000

(September 12, 2002)

Hydroelectric License Regulations under the Federal Power Act

Notice Requesting Comments and Establishing
Public Forums and Procedures and Schedule

AGENCY: Federal Energy Regulatory Commission

ACTION: Notice Requesting Comments and Establishing Public Forums and Procedures and Schedule

SUMMARY: The Federal Energy Regulatory Commission (Commission) staff, in conjunction with the United States Departments of Agriculture, Commerce, and Interior, (jointly, the Federal Agencies), is providing interested entities an opportunity to enter into discussions and make comments and recommendations concerning adoption of a new hydropower licensing process.

The Commission staff and Federal Agencies are also asking for comments on:

- a proposal for a new licensing process developed by the Interagency Hydropower Committee (IHC), consisting of staff from the Commission and the Federal Agencies (Attachment A), and

- a proposal for a new licensing process developed by the National Review Group (NRG), a coalition of industry and non-governmental organizations (Attachment B).

The two proposals share several common elements. Both the IHC and NRG proposals are attached to this notice. The NRG proposal was filed on September 10, 2002 in Docket No. AD02-5.

On November 7, 2002, the Commission will lead a public forum at the Commission's headquarters in Washington, DC to discuss issues and proposals associated with establishing a new licensing process. In addition, the Commission staff and the Federal Agencies will co-sponsor public and tribal forums for oral or written comments in locations around the country.

The Commission staff and the Federal Agencies anticipate the Commission will issue a Notice of Proposed Rulemaking proposing new license application rules in February 2003. The comments and recommendations made in response to this notice will form part of the public record of that proceeding. The Commission is not, however, proposing new regulations at this time.

PUBLIC AND TRIBAL FORUMS: The forums to take oral and written comments and recommendations will be held in various locations around the country during October and November 2002, as further discussed in Sections V and VI below.

WRITTEN COMMENT DEADLINE: Written comments are due on or before December 6, 2002. See Section VI.

ADDRESS: File written comments with the Office of the Secretary, Federal Energy Regulatory Commission, 888 First Street, NE, Washington, D.C., 20426. Comments should reference Docket No. RM02-16-000. Comments may be filed electronically or by paper (an original and eight (8) copies, with an accompanying computer diskette in the prescribed format requested). See Section VI.

FOR FURTHER INFORMATION CONTACT:

Federal Energy Regulatory Commission

Timothy Welch
Office of Energy Projects
Federal Energy Regulatory Commission
888 First Street, NE
Washington, D.C. 20426
(202) 502-8760

John Clements
Office of the General Counsel
Federal Energy Regulatory Commission

Docket No. RM02-16-000

888 First Street, NE
Washington, D.C. 20426
(202) 502-8070

I. Introduction

The Commission staff and Federal Agencies that have statutory responsibilities under the Federal Power Act (FPA) (the Departments of Agriculture, Commerce, and Interior, or Federal Agencies) are inviting comments and recommendations concerning the need for the Commission to establish a new hydropower licensing process.

Comments and recommendations are requested with respect to the need for a new licensing process and regarding new licensing process proposals. This notice explains the background of this issue, and includes a list of questions and information on comment procedures. Two attachments are also included describing new process proposals of the Interagency Hydropower Committee (IHC), composed of staff from the Commission and the Federal Agencies (Attachment A), and the National Review Group (NRG), a coalition of industry and non-governmental organizations (Attachment B).

II. Background

Statutory Framework

Sections 4, 10, 14, 15, and 18 of the Federal Power Act (FPA),[1] as amended by the Electric Consumers Protection Act of 1986 (ECPA),[2] provide the regulatory framework for the licensing of non-federal hydroelectric projects.

Section 10(a)(1)[3] provides that hydropower licenses issued must be best adapted to a comprehensive plan for the affected waterways for all beneficial public uses, and must include provisions for the protection of fish and wildlife and other beneficial public uses, and that the Commission must give fish and wildlife, recreation, and environmental

---

[1]16 USC 797, 803, 807, 808, and 811. Sections 4 and 10 apply to all licenses. Sections 14 and 15 are specific to the issuance of a new license following the expiration of an initial license.

[2]Pub. L. No. 99-495, 100 Stat. 1243.

[3]16 USC 803(a)(1).

concerns equal consideration with power development. Under Section 4(e),[4] licenses for projects located within federal reservations must also include conditions mandated by the department which manages the reservation; in most cases the Departments of Agriculture or Interior. Under Section 18, licenses must also include fishways if they are prescribed by the Departments of Interior or Commerce.

In addition, Section 401(a)(1) of the Clean Water Act[5] requires a license applicant to obtain from the state in which any project discharge into navigable waters originates, certification that such discharge will comply with applicable water quality standards, or waiver of such certification. Section 401(a)(1) requires state water quality certification conditions to be included in hydropower licenses.

Other federal statutes may also be applicable to a license application. These include the Endangered Species Act,[6] Coastal Zone Management Act,[7] and National Historic Preservation Act.[8]

Current Licensing Procedures

The Commission staff processes license applications in hearings conducted by notice and comment procedures. Licensing procedures have evolved over time in response to changes in the statutory framework, increased public awareness of the need for increased environmental protection, and as a result of the Commission efforts to make the process more efficient and effective.

Under the existing "traditional" process, prior to filing an application, applicants must consult with federal and state resource agencies, affected land managing agencies, Indian tribes, and state water quality agencies and must provide the consulted entities with information describing the proposed project. The applicant must also conduct studies necessary for the Commission staff to make an informed decision on the

---

[4]16 USC 797e.

[5]33 USC 1341(a)(1).

[6]16 USC 1531-1543.

[7]16 USC 1451-1465.

[8]16 USC 470-470w-6.

application. Under the Commission's detailed regulations concerning prefiling consultation and processing of filed applications [9] the formal proceeding before the Commission does not begin until the application is filed. Accordingly, the Commission staff do not generally participate in pre-filing consultation.

After an application is filed, the Federal Agencies with responsibilities under the FPA and other statutes, the states, Indian tribes, and other participants in the licensing process have opportunities to request additional studies and provide comments and recommendations. Federal Agencies with mandatory conditioning authority also provide their conditions. The Commission staff may also ask for additional information that it needs for its environmental analysis. All of this information is incorporated into the Commission staff's environmental review under the National Environmental Policy Act (NEPA).[10]

The Commission's regulations also provide for an alternative licensing process (ALP) which combines the pre-filing consultation process under the FPA with the environmental review process under NEPA.[11] Under this process, the parties work collaboratively prior to the filing of the application to develop the application and a preliminary draft NEPA document, and generally anticipate efforts to conclude a settlement agreement. The Commission staff also participate to a greater extent than under the traditional process.

Reform Efforts

There is widespread agreement that additional improvements are needed to further the goals of reducing the cost and time of licensing without sacrificing environmental protection and the fulfillment of other statutory responsibilities. The President's National Energy Policy report included recommendations for hydropower reform to make the licensing process more clear and efficient, while preserving environmental goals. The Commission, the Federal Agencies, and hydropower program stakeholders are engaged in many activities to achieve this goal.

---

[9] See 18 CFR Parts 4 and 16.

[10] 42 USC 4321, et seq.

[11] 18 CFR 4.34(i).

The Commission staff's ongoing efforts include an Outreach Program in which interested persons meet with members of the licensing staff to learn about the licensing process and related Commission laws and regulations; various interagency training activities; encouragement of settlements through the use of Alternative Dispute Resolution, and issuance of guidance documents.[12] In May 2001, the Commission staff prepared a comprehensive report on hydro licensing, including recommendations designed to reduce the time and cost of licensing.[13] The Commission also held in December 2001, a Hydroelectric Licensing Status Workshop to identify and focus attention on long-pending license applications and find ways to bring these cases to closure.[14] The Commission staff also held regional workshops with states on how better to integrate Commission licensing processes with the states' Clean Water Act responsibilities.

Federal agencies have also worked cooperatively on a number of efforts to improve the licensing process. For example, the Commission staff, the Departments of Interior, Commerce, Agriculture, and Energy, the Council on Environmental Quality, and the Environmental Protection Agency formed an Interagency Task Force to Improve Hydroelectric Licensing Processes (ITF). The ITF's efforts resulted in a series of commitments and administrative actions intended to make the licensing process more efficient, effective, and timely.[15]

---

[12]Staff guidance documents include the Licensing Handbook, Environmental Analysis preparation, and ALP guidelines. All of these are posted on the Commission's website (http://www.ferc.gov/hydro).

[13]Report to Congress on Hydroelectric Licensing Policies, Procedures, and Regulations - Comprehensive Review and Recommendations Pursuant to Section 603 of the Energy Act of 2000, Federal Energy Regulatory Commission, May 2001 (Section 603 Report). The report can viewed at www.ferc.gov/hydro/docs/section603.htm.

[14]The Commission staff established Docket No. AD02-05 for the workshop proceeding. A number of entities have made filings in that proceeding with recommendations for improvements to the licensing process.

[15]Reports issued by the ITF, which consists of the Federal Agencies that also participated in the IHC, have been made public and are posted on the Commission's web site on the hydro page. See www.ferc.gov/hydro/docs/interagency.htm.

More recently, in July of 2001, senior managers from the Commission staff and other Federal agencies formed the IHC to build on the commitments developed by the ITF and to develop additional procedural modifications that would further reduce the process time and cost of licensing while maintaining environmental protections. The IHC developed a proposal for an integrated licensing process. A detailed description of the IHC proposal, which has not previously been made public, is attached to this notice (Attachment A).

Another integrated licensing process proposal has also been developed and circulated for comment by the NRG, a multi-stakeholder forum consisting of representatives from industry and non-governmental organizations. A detailed description of the NRG proposal is also attached to this notice (Attachment B).

A common theme that underlies all of the efforts described above is the need to reduce the time and the cost of the licensing process, improve the quality of decision-making, and ensure early resolution of disputes. One reform concept that shows particular promise is a licensing process that integrates an applicant's prefiling consultation with resource agencies, Indian tribes, and the public with the Commission staff's NEPA scoping (integrated process). Such an approach could differ from the ALP in several respects, such as ensuring the Commission staff involvement at all stages, establishing deadlines for all participants, providing a more effective vehicle for study dispute resolution than currently exists, and better integrating the Commission staff actions with the actions of other federal agencies with statutory roles under the FPA.

III. Request for Comments

The Commission staff and the Federal Agencies request comments on the need for a new licensing process.[16] In particular, the Commission staff and the Federal Agencies request that commenters address the following questions, and provide any additional comments and recommendations concerning the need for and appropriate structure and content of new licensing procedures. Commenters are strongly urged to make their responses as specific as possible and to offer tangible solutions to any identified problems so as to maximize their usefulness. Commenters are also requested to provide specific responses to these questions in relation to the IHC proposal, the NRG proposal,

[16]The U.S. Environmental Protection Agency participated in the IHC deliberations and is also expected to participate in the rulemaking proceeding.

and any other proposals, and to clearly identify the question(s) to which they are responding and the specific proposal, if any, they are addressing.

1. Need for New Licensing Process: (a) Is there a need for a new licensing process? (b) If so, what key issues should a new process address, and how might a new process be structured to resolve those key issues?

2. Integrated Process: (a) Should the Commission adopt an integrated process as referenced above in Section II? (b) How might an integrated process be structured to save time and be more efficient? (c) Are there issues unique to the processing of original license applications or new license applications that need to be addressed in an integrated process? If so, what are they and how should they be addressed? (d) Would an integrated process improve the development and timing of mandatory conditions?

3. Settlements: (a) Should a new licensing process include specific provisions to accommodate settlement negotiations? (b) If so, what might those provisions include?

4. Information Development (Studies): (a) What licensing process changes, if any, are needed to ensure development of information and studies in a timely and cost-effective manner? (b) Do elements of the IHC and/or NRG proposals adequately address this issue?

5. Study Dispute Resolution: (a) Do the existing Commission regulations provide an adequate process for resolving study disputes? (b) Do elements of the IHC and/or NRG proposals adequately address this issue?

6. Time Periods: Do the specific time periods between steps in the IHC and/or NRG proposals appear to be reasonable?

7. State Processes: How might a new licensing process better accommodate the State certification process pursuant to Section 401 of the Clean Water Act and/or a consistency determination under the Coastal Zone Management Act?

8. Tribal Roles and Responsibilities: How best can a new licensing process accommodate the authorities, roles and concerns of Indian tribes?

9. Optional Processes: If the Commission adopts a new licensing process, should it also retain the traditional and/or ALP processes?

IV. Process and Schedule for Rulemaking

The Commission staff and Federal Agencies anticipate a future Commission rulemaking proceeding proposing to establish a new licensing process. The comments and recommendations received in response to this notice will form part of the record of that proceeding. A Notice of Proposed Rulemaking (NOPR) is tentatively scheduled for February 2003. The NOPR would be followed by an opportunity for further comments and technical conferences in the Spring of 2003. A final rule would be issued in the fall. It is further anticipated that the Federal Agencies with statutory responsibilities under the FPA will work together with the Commission staff and others to develop draft and final rules. The Commission, however, is the sole decisional authority with respect to any draft or final rule.

V. Public and Tribal Forums

On November 7, 2002, the Commission will lead a public forum at the Commission's headquarters in Washington, DC to discuss issues and proposals associated with establishing a new licensing process. In addition, the Commission staff and the Federal Agencies will co-sponsor public and tribal forums for oral or written comments in the cities and on the dates established in the following table.[17] Specific details regarding meeting structure and procedures for providing oral comments with respect to each forum will be posted on the Commission's web site.

Location	Date/Time
Milwaukee, Wisconsin Courtyard Milwaukee Downtown 300 W. Michigan St. 414-291-4122	Public: October 16, 2002, 9 am - 4 pm Tribes: October 17, 2002, 9 am - 4pm
Atlanta, Georgia Marriot Century Center 2000 Century Boulevard 404-325-0000	Tribes: October 23, 2002, 9 am - 4 pm Public: October 24, 2002, 9 am - 4pm

[17]The tribal forums are intended to address tribal issues; however, anyone may attend either forum.

Commission-Sponsored Public Forum Commission Meeting Room Commission Headquarters 888 First Street, NE Washington, D.C.	November 7, 2002, 9 am - 4 pm
Bedford, New Hampshire Wayfarer Inn 121 S. River Road 603-622-3766	Tribes: November 13, 2002, 9 am - 4 pm Public: November 14, 2002, 9 am - 4pm
Sacramento, California Sheraton Grand Sacramento 1230 J Street 916-341-3600	Public: November 19, 2002, 9 am - 4 pm Tribes: November 20, 2002, 9 am - 4pm
Tacoma, Washington Sheraton Tacoma 1320 Broadway Plaza 253-572-3200	Tribes: November 21, 2002, 9 am - 4 pm Public: November 22, 2002, 9 am - 4pm

VI. Public Comment Procedures

The Commission staff and the Federal Agencies invite all interested persons to submit comments in response to this notice and attend the public forums.

Comments may be filed by paper or electronically via the Internet and must be received by the Commission by December 6, 2002. Electronic filing is strongly encouraged. Those filing electronically do not need to make a paper filing. For paper filings, an original and 8 copies of such comments (with an accompanying computer diskette in the prescribed format requested) should be submitted to the Office of the Secretary, Federal Energy Regulatory Commission, 888 First Street, NE, Washington, D.C. 20426 and should refer to Docket No. RM02-16-000.

Comments filed via the Internet must be prepared in WordPerfect, MS Word, Portable Document Format, or ASCII format. To file the document, access the Commission's web site at www.ferc.gov and click on "e-Filing," then follow the instructions on each screen. First time users will have to establish a user name and password. The Commission staff will send an automatic acknowledgment to the sender's e-mail address upon receipt of comments.

User assistance for electronic filing is available at 202-502-8258 or by e-mail to efiling@ferc.gov. Comments should not be submitted to the e-mail address. All comments will be placed in the Commission's public files and will be available for inspection in the Commission's Public Reference Room at 888 First Street, NE, Washington, D.C. 20426, during regular business hours. Additionally, all comments may be viewed, printed, or downloaded remotely via the Internet through the Commission's Homepage using the FERRIS link. User assistance for FERRIS is available at
202-502-8222, or by e-mail to public.referenceroom@ferc.gov.

VII. Document Availability

In addition to publishing the full text of this document in the **Federal Register**, the Commission staff provides all interested persons an opportunity to view and/or print the contents of this document via the Internet through the Commission's Home Page (http://www.ferc.gov) and in the Commission's Public Reference Room during regular business hours (8:30 a.m. to 5:00 p.m. Eastern time) at 888 First Street, NE, Room 2A, Washington, D.C. 20426.

From the Commission's Home Page on the Internet, this information is available in the Federal Energy Regulatory Records Information System (FERRIS). The full text of this document is available on FERRIS in PDF and WordPerfect format for viewing, printing, and/or downloading. To access this document in FERRIS, type the docket number excluding the last three digits of this document in the docket number field.

User assistance is available for FERRIS and the Commission's website during regular business hours from our Help line at (202) 502-8222 or the Public Reference Room at (202) 502-8371, TTY (202) 502-8659. Please e-mail the Public Reference Room at public.referenceroom@ferc.gov.

List of Subjects

18 CFR Part 4

Licenses, Permits, Exemptions, and Determination of Project Costs.

18 CFR Part 16

20020912-3020 Received by FERC OSEC 09/12/2002 in Docket#: RM02-16-000

Docket No. RM02-16-000

Procedures Relating to Takeover and Relicensing of Licensed Projects.

Magalie R. Salas
Secretary

20020912-3020 Received by FERC OSEC 09/12/2002 in Docket#: RM02-16-000

Attachment A

Interagency Hydropower Committee
Proposal for an Integrated Licensing Process

1. Introduction

Hydropower projects licensed by the Federal Energy Regulatory Commission (Commission) produce over five percent of all electric power generated in the United States, making them an important part of the nation's energy mix. Pursuant to Part I of the Federal Power Act of 1935 (FPA),[18] as amended by the Electric Consumers Protection Act of 1986 (ECPA),[19] the Commission is responsible for determining whether and under what conditions to issue licenses for the construction, maintenance and operation of non-federal hydropower projects. The Departments of Agriculture, Commerce, and Interior (hereafter "federal resource agencies") are responsible for providing conditions and prescriptions (hereafter "conditions"), and recommendations to protect and enhance natural, cultural, recreational and tribal trust resources, including fish and wildlife, and to ensure that hydropower projects on federal lands are consistent with the management objectives for those lands.

Streamlining the licensing process while continuing to find public interest solutions that balance power generation, natural and cultural resource protection, recreation, irrigation, flood control, and other public purposes is essential to ensuring the viability of this energy source. The Commission and the federal resource agencies recognize the need to exercise their respective authorities in a manner that best serves the public interest and each supports measures to improve coordination of their statutory responsibilities.

Accordingly, last year, the Commission staff, the Departments of Agriculture, Commerce and Interior, and the Environmental Protection Agency formed a staff-level committee, the Interagency Hydropower Committee (IHC), to assess procedures that currently govern the hydropower licensing process.[20] The IHC recognizes that improved

---

[18]16 USC 797, 803, 807, and 808.

[19]Pub. L. No. 99-495, 100 Stat. 1243.

[20]The IHC also received assistance from the Council on Environmental Quality

(continued...)

coordination will help to eliminate duplication and conflicts, expedite implementation of agreed upon measures, and reduce the overall time and cost of the licensing process while ensuring the development and implementation of necessary environmental protections. To help achieve these objectives, the IHC has developed a proposal for an integrated licensing process.

The proposal is intended to enable the early identification of issues and objectives, reduce duplication of procedures and analyses, improve environmental review and documentation, coordinate discretionary authorities, and expedite post-application procedures. The federal parties believe the proposal will help stimulate the necessary public comment and input needed to produce a new licensing process that can be supported by the Commission, license applicants, state and federal agencies, Indian tribes, non-governmental organizations (NGOs), and other stakeholders.

2. Benefits of the Proposal

The IHC proposal addresses aspects of the existing license process that have: (1) caused lengthy delays in processing license applications, (2) interfered with the development of a single consistent record from which each federal agency with statutory and trust responsibilities can base its decisions, (3) affected the quality and timeliness of information needed by the agencies to carry out their responsibilities, and (4) resulted in litigation on individual licensing actions. Addressing these problems should streamline the licensing process, reduce costs, and add certainty and predictability for the license applicant and all stakeholders. Specifically, the proposal addresses the issues listed in sections 2.1 through 2.6.

2.1 Eliminates Duplication in the National Environmental Policy Act (NEPA) Scoping and Information Development Processes

The Commission's traditional and alternative licensing processes both require that the license applicant identify issues associated with the project and propose measures to address those issues before a license application is filed. The public, federal and state agencies, NGOs, and Indian tribes currently assist the license applicant to varying degrees in identifying and analyzing resource issues associated with the project during this pre-application period. However, the Commission staff generally does not engage in

---

[20](...continued)
and the Advisory Council on Historic Preservation.

formal NEPA scoping until after the license application is filed. At that time the Commission staff scopes the issues, accepts additional study and information requests by stakeholders, and develops its own analysis of the potential project effects.

The proposal combines the license applicant's pre-filing consultation with the Commission staff's NEPA scoping process to improve efficiency, reduce duplication, and expedite the development of necessary information to meet the needs of all parties. By initiating the formal proceeding early in the pre-application stage, scoping would occur one time, and agreement could be reached on study and information needs by the Commission staff and the resource agencies and Indian tribes before the studies are implemented.

The proposal further facilitates the Commission staff's scoping process by replacing the applicant's existing Initial Consultation Document with a "Pre-Scoping Document," developed in the same format as the Commission staff's NEPA scoping document. The Pre-Scoping Document would identify information gaps and include project information, documentation of previous consultations, a description of project effects and issues, and an initial list of potential stakeholders. The Commission staff, federal resource agencies, and stakeholders would comment on the Pre-Scoping Document immediately following the filing of the license applicant's Notice of Intent to seek a new license. The applicant would then file a revised Pre-Scoping Document with the Commission in light of the comments it received. The Commission staff would use the applicant's Pre-Scoping Document to develop its Scoping Document 1.

2.2 Resolves Disagreements Early in the Licensing Process and Ensures an Adequate Evidentiary Record

The Commission and the federal resource agencies with conditioning authority are required to support their decisions with substantial evidence. Federal resource agencies may find that studies required by the Commission staff are not sufficient to support the substantial evidence requirement with respect to the exercise of their own conditioning authorities. Study disputes between resource agencies and applicants are often not resolved during pre-filing consultation. This may lead to delays in the filing of conditions and to requests for rehearing of licensing orders, further delaying the ultimate conclusion of the proceeding.

The IHC proposal includes a dispute resolution process that ensures study disputes will be resolved pursuant to clear criteria and that studies will be conducted without unnecessary delay. The intent of this process is to resolve issues before costly studies are

implemented, to help ensure that the licensing process continues on schedule, and to help ensure that all agencies with statutory and trust responsibilities have a record adequate to support their decisions.

2.3 Includes Time Frames for all Participants

The existing licensing processes lack predictable time frames. This affects the ability of all participants to efficiently utilize their time and resources.

The proposal provides specific time frames for each step of the process, including actions by the Commission staff, applicants, Indian tribes, federal resource agencies, and other stakeholders. The proposal, with its associated time frames, is expected to significantly reduce the time required to conclude a licensing proceeding.

2.4 Facilitates Earlier Stakeholder Involvement

The traditional licensing process emphasizes pre-filing consultation with resource agencies and Indian tribes, but provides limited opportunity for involvement by other potential stakeholders. As a result, public involvement in the licensing process is often delayed until after an application is filed. This can result in new issues being raised after an application is filed, as well as additional study requests, thereby lengthening the process.

The proposal would address this problem for new licenses by requiring an existing licensee to broadly distribute a Pre-Scoping Document to resource agencies, Indian tribes, and other potential stakeholders at the time it files its Notice of Intent to seek a new license, 5 to 5 ½ years before license expiration. The Commission staff's public notice of the applicant's decision to seek a new license would invite comment by all concerned entities on the Pre-Scoping Document.

2.5 Enables Concurrent Filings of Federal Resource Agency Conditions

Under the existing licensing processes, the Departments of Commerce and Interior file their modified conditions after the close of the Commission staff’s draft NEPA comment period and the Department of Agriculture files its final conditions after the final NEPA document has been completed. Non-concurrent filings by the federal

resource agencies could result in conflicting conditions and may delay the licensing process.

The proposal provides for concurrent filing of agency conditions prior to the completion of the Final NEPA document, which minimizes the potential for conflicting conditions, and helps to avoid the need for additional post-NEPA analysis.

2.6 Ensures the Development of Adequate Information in Support of any Settlement Discussions

The Commission's policy is to support settlement agreements that are consistent with the law and Commission policies. The federal resource agencies also support efforts to achieve settlement during the licensing process. Settlement agreements are more likely to result in the early implementation of environmental measures, continued cooperation among the stakeholders, and a license that is acceptable to all participants.

The proposal establishes a process by which licensing issues are scoped and studies are agreed to within a time frame that will allow the developed information to be used for settlement discussions. This should ensure that agreements reached will be supported by adequate information in the record.

3.0 IHC Proposal

The following discussions outline the specific steps and associated time frames of the IHC proposal. The proposal would provide for an advanced notice of license expiration; initiate the formal Commission proceeding when a license applicant files its Notice of Intent to seek a new license (NOI); allow for early NEPA scoping and timely resolution of study disputes; implement studies to ensure the development of complete information in support of a license application; and provide for the concurrent submission of the federal resource agencies' mandatory conditions.

Sections 3.1 through 3.7 describe the proposal in detail. A step-by-step flowchart is provided at the end of the attachment and is posted on the Commission's website (www.ferc.gov).

3.1 Advance Notice of License Expiration

In order to ensure that as much existing information as possible is available for the Commission staff's scoping efforts, three years prior to the NOI, the Commission staff would notify the licensee of its pending license expiration and would provide a list of basic information needs and resource agency and tribal contacts. The licensee would be encouraged to contact the resource agencies and Indian tribes regarding their upcoming licensing activities.

3.2 Pre-scoping, Initiation of Formal Commission Proceeding

Between 5 and 5 ½ years before the license expires, the license applicant would file its Notice Of Intent to seek a new license (NOI) with the Commission. In lieu of the Initial Consultation Document required by the existing regulations, the license applicant would distribute a Pre-Scoping Document (PSD) to the Commission and other stakeholders (e.g., state and federal resource agencies, Indian tribes, non-governmental organizations, local communities, and the public). The PSD would include project information, documentation of previous consultations, a description of project effects and issues, and an initial list of potential stakeholders. The license applicant would be encouraged to work with stakeholders and with the Commission staff to determine resource impacts and information needs before issuing its PSD. Within 15 days of the NOI, the Commission staff would initiate the proceeding by issuing public notice of the applicant's NOI and commencing NEPA scoping.

Within 60 days of initiating the formal proceeding, stakeholders and the Commission staff would provide comments on the PSD and have the opportunity to submit study requests to the license applicant. The license applicant would have 45 days to incorporate comments into its PSD (including an explanation of why any comments were not adopted) and to develop and include a detailed study plan (e.g., study proposals, methodologies, progress reports, and schedules) that considers any study requests. The PSD would then be filed, and the Commission staff and the license applicant would coordinate scoping meetings and a site visit.

3.3 Scoping, Development of Final Study Plan

Within 45 days after the license applicant files its PSD, the Commission staff would issue its Scoping Document 1 (SD-1) based on the PSD provided by the applicant and notice the scoping meeting(s). The Commission staff would include the license

applicant's study plan as an appendix to SD-1. The scoping meetings would be an opportunity for discussion of project-related issues including the applicant's study plan. Within 30 days of the scoping meetings, the license applicant and stakeholders would file comments on SD-1 with the Commission, and the Commission staff and stakeholders would provide comments regarding the study plan to the license applicant. The license applicant would then have an additional 30 days to revise its study plan as necessary to reflect stakeholder comments and file it with the Commission.

If a federal resource agency or Indian tribe disagreed with the Commission staff's initial decision on the applicant's revised study plan, it would request the Commission staff to initiate the study dispute resolution process. The purpose of the study dispute resolution process would be to resolve disagreements between the resource agencies, Indian tribes, and the Commission staff regarding the need for and technical aspects of a requested study prior to implementation of the study phase of the process. By resolving studies at that time, additional information and study requests after the application has been filed should be rare.

If there were no disagreements on the study plan, the Commission staff would complete Scoping Document 2 (SD-2) within 30 days and studies would be implemented according to the final study plan and schedule included in SD-2.

3.4 Study Dispute Resolution Process

The proposed study dispute resolution process would maintain the Commission's ultimate authority to determine which studies were required, based on objective criteria that account for the information needs of the Commission staff and the federal resource agencies with statutory responsibility for formulating recommendations and conditions. The license applicant and all other stakeholders would have the opportunity to provide input that would be considered during the process. The study dispute resolution process would be completed within 60 days from the date that the final study plan was filed with the Commission and the Commission staff would have an additional 30 days to complete SD-2. See section 4 for a detailed description of the study dispute resolution process.

3.5 Study Period, Development of Draft License Application

Studies included in the final study plan would be implemented according to the schedule in SD-2. The study period would include an ongoing evaluation and review process in which the applicant, the Commission staff, and stakeholders, would ensure that studies were being conducted as described in the study plan and would periodically

review the data being collected. This review could result in proposed modifications to the study plan, which would be subject to the study dispute resolution process. It is assumed that in most cases two years would be required to conduct studies.

Following completion of the first year of studies, the license applicant, the Commission staff, and stakeholders would review the data and determine whether modifications to the study plan were warranted based on the initial results. The study dispute resolution process would be utilized to resolve any differences. The second year of studies would then be conducted, and would include the ongoing evaluation and review process.

At the conclusion of the second year of studies, the license applicant, the Commission staff, and stakeholders would meet to determine: (1) if the studies had or would yield information necessary to complete the Commission staff's NEPA document, and (2) if the information collected was sufficient for the federal resource agencies to develop their recommendations and conditions. Continuation or modification of the study plan may be requested and dispute resolution would again be available.

Following the second year of studies, the applicant would file a draft license application with the Commission, even though some final study results may be pending. The environmental section in the draft application would be in a similar format as the environmental analysis section of the Commission staff's NEPA document. Within 60 days, stakeholders would file detailed comments on the draft application, including preliminary input on the appropriate level of NEPA analysis. The Commission staff comments would be filed 30 days after stakeholder comments to ensure that the Commission staff had all necessary information before providing its input.

If additional information were needed, the applicant, the Commission staff, and stakeholders would develop a schedule allowing such information to be obtained prior to the applicant filing its draft application. If sufficient time was not available to develop the information before filing the license application (two years before the current license expired), then the Commission staff, applicant, and stakeholders would develop a time line for providing that information and the Commission staff would issue a revised schedule for its post-application actions. The study dispute resolution process would be available as needed.

3.6 Development of Final License Application

Within 60 days after receiving comments on the draft license application, the applicant would file its final license application (including applicable responses to comments and an application summary) with the Commission. Within 15 days, the Commission staff would issue a notice that the application was filed, which would include a processing schedule.

Following the notice of application filed, the Commission staff would have 45 days to: (1) determine if the application met the Commission's filing requirements (i.e., to determine if any additional information was needed by the Commission staff to process the license) and (2) to issue a notice accepting the application and requesting interventions, recommendations, and conditions. The notice would also request recommendations on the level of NEPA analysis to be completed [Environmental Analysis (EA) or Environmental Impact Statement (EIS)], and on whether issuance of a draft is necessary should the Commission staff decide to develop an EA. If the application did not meet the Commission staff's needs, it would request additional information.

Stakeholders would have 60 days from the date of the Commission staff's notice to file requests to intervene and to file comments, recommendations, and conditions. If submitting preliminary conditions, the federal resource agencies would also submit a schedule for producing final conditions.

3.7 Post-Filing, NEPA Analysis, License Issuance

The IHC proposal includes separate tracks depending on whether the Commission staff issues a draft NEPA document. Track A anticipates draft and final NEPA documents and Track B anticipates a final NEPA document with comments addressed in the licensing order.

3.7.1 Track A

Within 180 days after requesting comments and interventions, the Commission staff would issue its draft EA or EIS and request comments. Additionally, on behalf of the federal resource agencies, the Commission staff would specifically request comments on agency conditions. The license applicant and stakeholders would have up to 60 days to file comments on the draft NEPA document and on the agencies' preliminary conditions. All comments would also be served on the intervenors. The federal resource agencies would then file their updated conditions within 30 to 60 days after close of the draft NEPA comment period. The Commission staff would issue the final NEPA

document within 90 days of receiving the agencies' updated conditions and the draft license order would be provided to the Commission staff within an additional 30 to 90 days.

3.7.2 Track B

Within 90 to 120 days after requesting comments and interventions, the Commission staff would issue its EA. The stakeholders and the applicant would have 30 to 45 days to comment on the EA and on the resource agencies' preliminary conditions. All comments would be filed with the Commission and served on the intervenors. Within 60 to 90 days after receiving comments, the federal resource agencies would file their updated conditions. The Commission staff would prepare a draft order for Commission issuance within 15 to 60 days after receiving the federal resource agencies' updated conditions.

4. Study Dispute Resolution Process

4.1 Background

The purpose of the proposed study dispute resolution process would be to resolve disagreements between the federal resource agencies, Indian tribes, and the Commission staff regarding the need for and technical aspects of a requested study prior to implementation of the study and during the study phase of the process (as necessary). By resolving study disputes early, requests for additional studies and information after the application has been filed with the Commission should be rare.

The proposed study dispute resolution process maintains the Commission's ultimate authority to determine which studies were required, based on objective criteria that account for the information needs of the Commission as final decision-maker, and for the resource agencies with statutory responsibility to formulate recommendations, terms, conditions or prescriptions. The applicant and all other stakeholders would have an opportunity to provide input during the process. The dispute resolution process would be completed within 60 days and the Commission staff would have an additional 30 days to complete SD-2.

4.2 Disputed Issues, Dispute Resolution Team

To facilitate the process, disputes would be limited to two issues: (1) whether a study was necessary for either the federal agencies, Indian tribes or the Commission staff

to develop their recommendations, conditions, prescriptions, or license terms, and (2) whether a specific study methodology was necessary to obtain the information.[21] Each dispute would be measured against predetermined criteria by a dispute resolution team. The team would review the available information and document findings in a report filed with the Commission Secretary, to be forwarded to the Director of the Office of Energy Projects for inclusion into the administrative record. The Commission staff would then consider the findings of the team when making its final determination on studies to be required of the applicant. The entire process would take approximately 60 days. Once the team filed its findings with the Commission and the Commission staff made its decision, the issue would be considered resolved for purposes of completing the final study plan and proceeding with the study implementation phase of the licensing process.

The team approach would help to ensure that the issue was broadly considered and potential compromises were discussed before a final Commission staff decision. The team would include one person from the Commission staff, one person from the federal agency or Indian tribe requesting the study and an agreed-upon neutral party. If the team determined that the study criteria were met based on the information provided, then a finding that the study was needed would be provided to the Commission staff. If the team determined that the criteria were not met based on the information provided, then a finding that the study was not needed would be provided to the Commission staff.

4.3 Study Request Criteria

All study requests subject to dispute resolution under this process would include supporting information sufficient to satisfy the following criteria:

a) Whether the request describes available project-specific information, and provides a nexus between project operations and effects on the resource to be studied.

b) Whether the request includes an explanation of the relevant resource management goals of the agencies with jurisdiction over the resource to be studied.

c) Whether the study objectives are adequately explained in terms of new information to be yielded by the study and its significance relative to the performance of agency roles and responsibilities in connection with the licensing proceeding.

---

[21]Studies not in dispute would proceed in accordance with the study plan.

d) If a study methodology is recommended, whether the methodology (including any preferred data collection and analysis techniques) is consistent with generally accepted practice in the scientific community.

e) Whether the requester has considered cost and practicality, and recommended a study or study design that would avoid unnecessary costs while still fully achieving the stated study objectives.

f) If the license applicant has provided a lower cost alternative, whether the requester has considered this alternative, and if not adopted, explained why the lower cost alternative would not be sufficient to achieve the stated study objectives.

4.4 The Commission Staff's Consideration of Findings

Based on the team's findings, the Director of the Office of Energy Projects or the Director's delegate would determine within 30 days whether the requester has adequately justified the need for the study (including any technical aspects in dispute) according to the criteria set forth above. Resource agency goals and objectives would be considered valid if they were relevant to the proceeding, expressly stated or referenced in the study request, and identified by the resource agency with jurisdiction over the resource in question. The decision maker would take into account the team's findings, the views of the parties, the expertise of the resource agencies, and any other relevant information in the administrative record. If the team's findings were adopted, the decision would be issued in writing under delegated authority. If not, the Director of the Office of Energy Projects would be required to render a decision in writing.[22] The decision would be included in SD-2.

5. Other Issues

The IHC emphasizes that its proposal is in an early stage of development. All stakeholders should have substantial opportunity to participate in fully developing any new licensing process. The IHC proposal has been sufficiently developed to ensure that the key steps in the process have been identified, although significant detail has yet to be

---

[22]Requests for dispute resolution would be filed within 20 days of the issuance of the revised study plan. The team would convene within 10 more days, and have 30 days to develop and file its findings and recommendation with the Commission. A decision would be rendered within an additional 30 days.

determined. For example, the IHC is aware of specific issues that have not yet been addressed, including those relating to preparation of the NEPA document, consultation under the Endangered Species Act, and inclusion of recommendations under Section 10(j) of the Federal Power Act. The IHC is also aware that other stakeholders may have additional or alternative ideas for addressing the identified process issues or may have concerns and issues not anticipated by the federal parties while drafting this proposal.

Comments on the IHC proposal should be made according to the instructions described in the Commission staff's accompanying **Federal Register** notice. Any and all comments are solicited, although specific responses to the questions contained in the notice would be helpful.

6. Contact Information

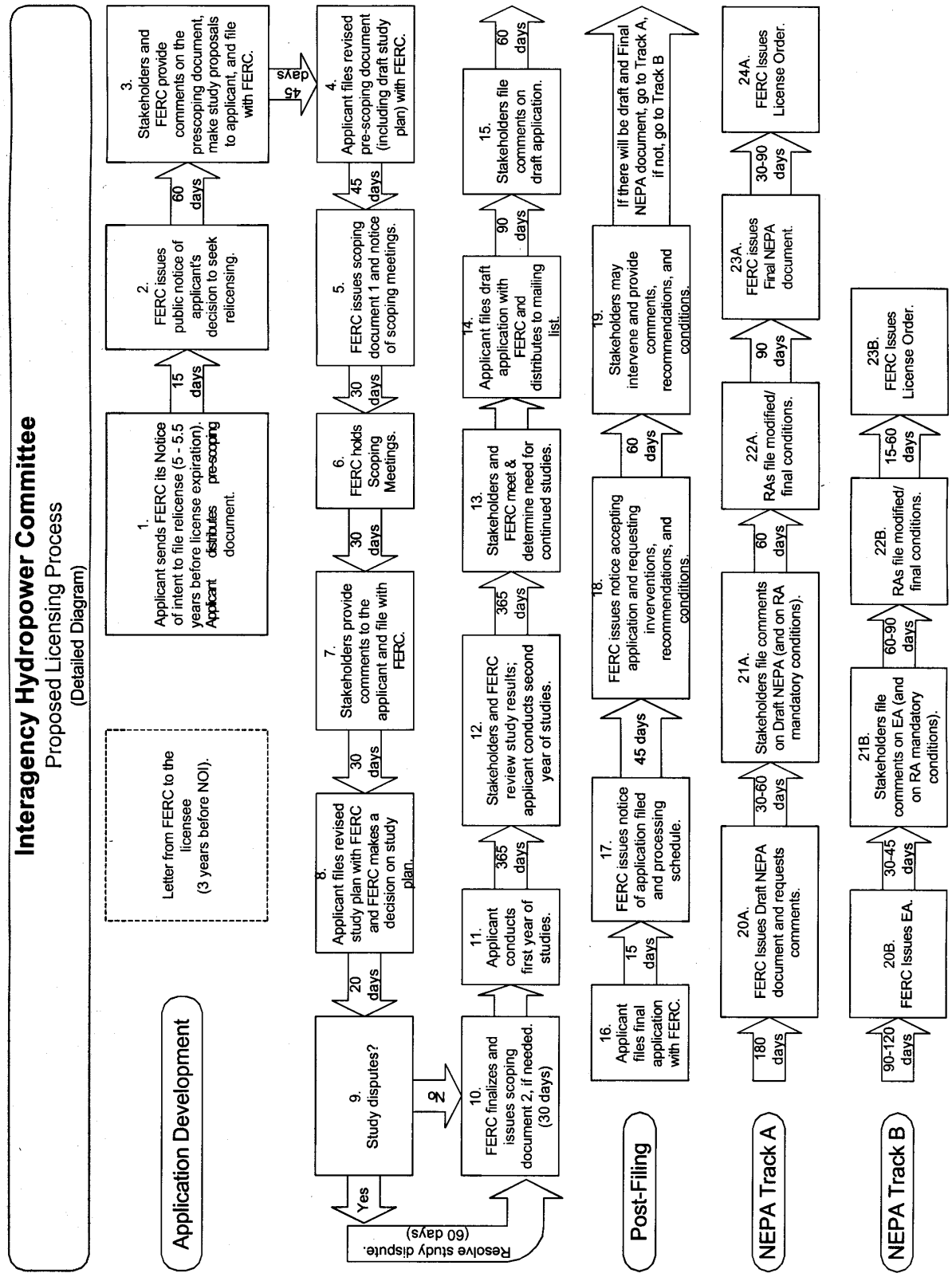
For further information regarding the IHC proposal, representatives of the IHC New Issues Subgroup may be contacted. Specifically:

Kathryn Conant, Office of Habitat Conservation, National Marine Fisheries Service, telephone: (301) 713-2325 (e-mail: kathryn.conant@noaa.gov).

Tom DeWitt, Office of Energy Projects, Federal Energy Regulatory Commission, telephone: (202) 502-6070 (e-mail: thomas.dewitt@ferc.gov).

Bob Dach, Division of Federal Program Activities, U.S. Fish and Wildlife Service, telephone: (703) 358-2183 (e-mail: robert_dach@fws.gov).
David Diamond, Office of Policy Analysis, Department of the Interior, telephone: (202) 219-1136 (e-mail: david_m_diamond@ios.doi.gov).

Mona Janopaul, Lands, U.S. Forest Service, telephone: (202) 205-0880 (e-mail: mjanopaul@fs.fed.us).


Interagency Hydropower Committee
Proposed Licensing Process
(Detailed Diagram)
Application Development
Letter from FERC to the licensee (3 years before NOI).
1. Applicant sends FERC its Notice of intent to file relicense (5 - 5.5 years before license expiration). Applicant distributes pre-scoping document.
15 days
2. FERC issues public notice of applicant's decision to seek relicensing.
60 days
3. Stakeholders and FERC provide comments on the prescoping document, make study proposals to applicant, and file with FERC.
45 days
4. Applicant files revised pre-scoping document (including draft study plan) with FERC.
45 days
5. FERC issues scoping document 1 and notice of scoping meetings.
30 days
6. FERC holds Scoping Meetings.
30 days
7. Stakeholders provide comments to the applicant and file with FERC.
30 days
8. Applicant files revised study plan with FERC and FERC makes a decision on study plan.
20 days
9. Study disputes?
Yes
No
Resolve study dispute. (60 days)
10. FERC finalizes and issues scoping document 2, if needed. (30 days)
365 days
11. Applicant conducts first year of studies.
365 days
12. Stakeholders and FERC review study results; applicant conducts second year of studies.
365 days
13. Stakeholders and FERC meet & determine need for continued studies.
90 days
14. Applicant files draft application with FERC and distributes to mailing list.
60 days
15. Stakeholders file comments on draft application.
Post-Filing
16. Applicant files final application with FERC.
15 days
17. FERC issues notice of application filed and processing schedule.
45 days
18. FERC issues notice accepting application and requesting inverventions, recommendations, and conditions.
60 days
19. Stakeholders may intervene and provide comments, recommendations, and conditions.
If there will be draft and Final NEPA document, go to Track A, if not, go to Track B
NEPA Track A
180 days
20A. FERC Issues Draft NEPA document and requests comments.
30-60 days
21A. Stakeholders file comments on Draft NEPA (and on RA mandatory conditions).
60 days
22A. RAs file modified/ final conditions.
90 days
23A. FERC issues Final NEPA document.
30-90 days
24A. FERC issues License Order.
NEPA Track B
90-120 days
20B. FERC Issues EA.
30-45 days
21B. Stakeholders file comments on EA (and on RA mandatory conditions).
60-90 days
22B. RAs file modified/ final conditions.
15-60 days
23B. FERC Issues License Order.

20020912-3020 Received by FERC OSEC 09/12/2002 in Docket#: RM02-16-000

Docket No. RM02-16-000

Attachment B

National Review Group

Summary of Proposal for a Coordinated Environmental Review and Application Development in the Relicensing Process

Introduction

The National Review Group ("NRG") is a task force of individual representatives from the hydropower industry and conservation organizations who share a common interest in improving the relicensing process for non-federal hydropower projects under the Federal Power Act ("FPA"), Part I. These representatives are listed below. The NRG originally convened in 1998 and published a report on voluntary practices that may be implemented under existing rules to serve this interest. *[See http://www.ferc.gov/hydro/hydro2.htm]*

Since 2000 the NRG has worked to develop a proposal for administrative reforms (including amendments to existing rules) to reduce the time, costs, and complexity of the relicensing process. The Federal Energy Regulatory Commission ("FERC"), the U.S. Departments of Agriculture, Commerce, and Interior, and the U.S. Environmental Protection Agency have participated in a limited fashion to comment on the process.

The NRG now releases the attached proposal for administrative reform. **This proposal does not involve a statutory change and, therefore, does not change any agencies' statutory authority or responsibility.** The proposal focuses on coordination through the administrative process of license application development and environmental review under the National Environmental Policy Act ("NEPA") and related laws, and further on resolving disputes related to such review early in the process. While this proposal is written in the context of the relicensing of an existing project, we believe that the fundamental concepts may be applicable to the licensing of a new project.

The attached proposal is stated in conceptual form and language. The NRG has solicited and considered public comments submitted, and based on comments received has revised this proposal to reflect areas where commenters believed the intent of the NRG was not clear. Comments received are summarized in a matrix to be attached to the proposal when submitted to the FERC.

Docket No. RM02-16-000

Key Elements

The proposal includes four key reforms of existing rules, including 18 CFR Parts 4 and 16 as administered by FERC. These are:

- Before the start of a relicensing proceeding, a License Applicant may undertake early consultation, to identify issues, share available information, and obtain needed information. Such early disclosure of issues should help a License Applicant develop its application in a manner that meets the informational requirements of all agencies and reduces the potential for additional information requests.

- FERC and Cooperating Agencies will execute general Memoranda of Understanding ("MOU") and project-specific Memoranda of Agreement ("MOA") to establish procedures for cooperation, including development of the record, dispute resolution, and decision-making. These documents will provide for the License Applicant's appropriate involvement. The MOU will help to define which agency is generally responsible for assembling information and substantive drafting within an area of expertise under NEPA. The MOA will apply that general construct to a specific licensing proceeding. This procedure is intended to reduce duplicative requirements on the Licensee and provide for maximum cooperation among the agencies and FERC. All agencies will be encouraged to participate as Cooperating Agencies.

- Before publication of the draft NEPA document, FERC and the Cooperating Agencies will use an advisory opinion procedure to identify studies necessary for their respective decisions. They will use a dispute resolution procedure when they disagree on the scope of that advisory opinion. This procedure includes an inter-agency advisory panel, and if necessary, a decision at the Chairman/Secretary level to resolve disputes. Under this approach, the License Applicant gains greater certainty that, if it complies with study requests deemed reasonable at the beginning of the procedure as set forth in the advisory (or revised advisory) opinion, there is a strong presumption that no additional studies will be required by FERC. Other stakeholders also gain certainty, since the procedure will help define the study requirements early in the proceeding and is intended to create an incentive for the License Applicant to implement the study plan as described in the advisory opinion.

- FERC and the Cooperating Agencies will publish a single informational (not decisional) NEPA document. This procedure is intended to eliminate the need for FERC and these other agencies to conduct separate and potentially duplicative or conflicting NEPA reviews and may reduce the average period of time for a relicensing proceeding.

While the single NEPA document will be used as the basis for decision-making, FERC will, and each Cooperating Agency may, publish a separate record of decision stating each agency's preferred alternative. This will minimize conflict over the informational NEPA document that contains the scientific and analytic basis for a decision and will allow agency preferences to be represented in separate decisional documents. Conflicts may then be limited to the outcome resulting from the separate decisional documents rather than potentially divergent NEPA records, studies, and background information.

Public Comments and Responses

Several themes emerged from the comments.

- Tribal rights: Commenters expressed concern that this proposal would adversely affect Tribal rights. However, the NRG proposal encourages at least the same if not greater Tribe participation. The NRG recognizes the consultation requirements with Tribes. The proposal encourages early and frequent discussions with important stakeholders like the Tribes so that the full breadth of their interests is addressed. Although not specific addressed in detail, the proposal recognizes that the Tribes may exercise independent regulatory authority in areas such as water quality and cultural resources.

This proposal does not address the issue of Tribal sovereignty, but it does include early consultation with all stakeholders (which includes all persons, entities, etc.), and early issue identification. Including Tribal issues in these early phases will minimize the chances that Tribal issues will be overlooked or that insufficient information will be gathered to adequately address the issues.

- State role: The overlap of state and federal authorities in FERC licensing proceedings can lead to uncoordinated efforts and delay and can be especially acute in water resource management issues, where FERC and federal agencies have broad ranging authority and also the states have broad ranging authority over water quality and quantity.

This proposal for administrative change can retains current federal and state authorities. However, we suggest that the exercise of these authorities can be rationalized so as to make the process more efficient and to encourage better licensing outcomes. While the NRG proposal does not directly address state authorities, integration of the states into the process is a critical next step.

- Public participation: The public must have an opportunity for meaningful participation in the licensing process.

The NRG proposal would not diminish opportunities for public involvement. Although the proposal is not specific as to all points at which the public would be actively involved in the process, there is a clear intent to have substantial opportunities for all stakeholders to participate in the process. In its current state, it does not address the role of collaborative processes, which are often the most effective forums for public participation. We do not believe, however, that collaboration is foreclosed by a consolidated environmental review process.

- Licensee roles and responsibilities: Any process for relicensing a hydro project must provide an appropriate role for the current licensee. As the party responsible for funding and executing the required studies, and implementing any license conditions, licensees must be intimately involved in all phases of the process.

The NRG proposal actively involves the licensee in information gathering, scoping, study development, proposed licensing alternatives and environmental analysis. However, refining and clarifying the role of the licensee throughout the process will be an important task in the development of a functional and supportable rule.

- Time frames: Many parties believe that, as a matter of principle, relicensing a hydro project should not take as long as it does. However, there is a great deal of work that must be accomplished within the available 5-year window. The desire to move expeditiously must be weighed against the need for adequate study seasons, appropriate consultation and dispute resolution timelines and sufficient time for document preparation. The NRG proposal attempts to balance those considerations.

Some commenters have indicated that they believe the timelines suggested in the NRG proposal are tight. The time line in the proposal can be evaluated further to determine if it is unrealistic. Other commenters expressed concern that the dispute resolution process could cause substantially delay. If a dispute arises over necessary studies, steps to keep the rest of the process on track and resolve the dispute(s) expeditiously will be in the interests of all participants.

- Integration of other processes (CWA, ESA): Not all authorities affecting relicensing arise from the Federal Power Act. Integration of these parallel authorities such as the Clean Water Act, Endangered Species Act, and the National Historic

Preservation Act is difficult.. Nonetheless, integration of these authorities and their attendant processes is critical to development of a process that minimizes duplication and uses available agency resources wisely.

- Consideration of additional studies: The NRG proposal is based on the concept that information be gathered and studies executed once, early in the process of relicensing. However, commenters have pointed out that long-term resource management decisions demand appropriately rigorous development of information. If unusual circumstances require additional studies to be performed, the process should allow this to happen.

- Role of non-cooperating agencies: Commenters expressed concern that the proposal addresses the role of non-cooperating agencies in some, but not all, elements. The NRG proposal does not diminish the role of non-cooperating agencies as currently exercised in the FERC process; however, the proposal encourages agencies to accept cooperating agency status to make the process more efficient. To the extent that the role of non-cooperating agencies needs to be more fully developed, that development can occur in the context of the FERC's rulemaking proceeding.

Members of the NRG

Utility and NGO Members:

- American Rivers
- American Whitewater
- Chelan County Public Utility District
- EPRI
- Grant County Public Utility District
- Kearns &West *(Facilitator)*
- Kleinschmidt & Associates
- Law Offices of GKRSE
- Natural Heritage Institute
- New York Power Authority
- Pacific Gas and Electric
- PacifiCorp
- Portland General Electric
- Reliant Energy
- Southern California Edison

- Southern Company
- Troutman Sanders

Agency Advisors:

- US Department of the Interior/Bureau of Indian Affairs/US Fish and Wildlife Service
- Energy Information Administration
- US Environmental Protection Agency
- Federal Energy Regulatory Commission
- National Marine Fisheries Service/US Department of Commerce
- USDA Forest Service

National Review Group

Detailed Proposal for Coordinated Environmental Review and Application Development in the Relicensing Process

1. DEFINITIONS

1.1. "Cooperating Agency" means: a federal, interstate, state, local, or tribal agency that cooperates with FERC in the NEPA review in a proceeding.

1.2. "Tribal agency" means: a tribal entity which (A) is recognized by the federal government, and (B) performs a governmental function, such as the Tribal Historic Preservation Officer or an agency that has been delegated the authority to develop and administer a water quality standards program, including Clean Water Act section 401 certifications.

1.3 "License Applicant" means: an applicant for a license, whether or not the existing licensee.

1.4. "License Articles" means: articles adopted by FERC in a license.

1.5. "Licensee" means: the existing licensee.

1.6. "Resource Agencies" means: a federal, interstate, state, local, or tribal agency exercising administration over the areas of flood control, navigation, irrigation, recreation, fish and wildlife, water resource management, or cultural or other relevant resources of the area affected by a project.

1.7. "Stakeholder" means: a person or entity interested in a project, including an agency, non-governmental or other organization, or individual.

1.8. "Terms and Conditions" means: conditions submitted by a Resource Agency for inclusion in the License under any claim of authority, including FPA sections 4(e), 18, 10(a), and 10(j) and Clean Water Act section 401(a).

2. OPTIONAL PRE-NOI/PRE-APPLICATION INITIAL MEETINGS AND CONSULTATION. This step provides an informal opportunity to identify available and needed information and begin identification of issues, before the formal licensing proceeding commences on the filing of the Notice of Intent ("NOI") for a new license.

2.1. Licensee is encouraged to meet with FERC and Resource Agencies before the filing of the NOI, as appropriate, to begin identification of issues and collection of data to compose a record necessary for the licensing proceeding. In any such meeting, each agency will describe relevant existing information, procedures for Licensee's access to it, current expectations for study plans, known and relevant agency goals and objectives, and published plans relevant to the project. Licensee will provide a description of the existing project and supporting information. Licensee and Resource Agencies will attempt to define potential issues that may arise in the study plan or otherwise in the licensing proceeding.

2.2. Licensee is encouraged to informally consult with Stakeholders including FERC using a Project Report or Project Description, which in summary form describes the existing project, environmental information, and Licensee plans for any upgrades and changes. The purpose of such consultation will be to obtain information for the IIP/ICD as described in paragraph 3.

3. NOTICE OF INTENT AND INITIAL INFORMATION PACKAGE/INITIAL CONSULTATION DOCUMENT ("IIP/ICD")

3.1. The FERC proceeding will begin with the filing by the Licensee of the NOI with the FERC.

3.2. IIP/ICD will be issued by the Licensee no less than 5 years and no more than 5.5 years before license expiration for existing licensees and 4.5 years for competitors. Expanded contents (roughly mirroring the current draft application) will include the following:

A. Exhibits A and B, modified Exhibits D and E (sections on existing environment), existing Exhibits F and G, and modified exhibit H;

B. Record of consultations to date, including information developed under paragraph 2 above.

C. Issues identified in any preliminary consultation and a preliminary list of information needed to address those issues, and any other issues identified by the Licensee as relevant;

D. Licensee's opening study proposals including scope, method, and schedule in outline format;

E. List and description of any study requests made to date; and

F. A draft Scoping Document ("SD") to be in the IIP/ICD (including the Licensee's preferred alternative).

3.3. IIP/ICD will be sent out by the Licensee for a 60-Day comment period to Resource Agencies, FERC, and other Stakeholders.

4. DEVELOPMENT OF COOPERATING AGENCY AGREEMENTS OR RELATIONSHIP

4.1. A general MOU (which provides the framework for subsequent project-specific agreements) will be developed between FERC and each Resource Agency which participates in licensing proceedings on a regular basis. The general MOU will be consistent with and reflect the process laid out here.

4.2. Following the issuance of the IIP/ICD by the Licensee and before FERC issues the Scoping Document ("SD"), FERC will request that each Resource Agency participate as a Cooperating Agency, pursuant to a written agreement specific to that proceeding ("MOA").

4.3. The MOA in a given proceeding will provide for maximum cooperation consistent with FERC's responsibility as lead agency under NEPA. It will establish procedures for cooperation, including preparation of NEPA documents [*i.e.*, draft and final Environmental Assessment ("EA")/Environmental Impact Statement ("EIS")], dispute resolution, and decision-making.

A. As provided in such agreement, such cooperating agency procedures will require time and resources by those involved. Each Cooperating Agency will be responsible for collecting and compiling information in its possession relevant to the NEPA review, and for substantive drafting in the agreed-to area of NEPA drafting responsibility. As a general matter, such responsibility will be roughly proportionate to the Cooperating Agency's regulatory responsibilities in assessing a given resource impact.

B. As lead agency, FERC will retain the final responsibility for the content of the jointly prepared NEPA documents. FERC and the Cooperating Agencies will attempt to resolve any conflicts regarding an alternative or impact in findings prior to issuance of NEPA documents through the dispute resolution procedure in section 6 hereof. However, if all disputes are not so resolved, the NEPA document will state any unresolved dispute between FERC and a Cooperating Agency regarding an alternative or impact, including the separate findings of each agency, except as limited in this paragraph 4.3.

C. NEPA documents in licensing proceedings will be factual and analytical, not decisional. The EA/EIS (whether draft or final) will include the project description, project alternatives, the impacts (beneficial and adverse, environmental and economic) of such alternatives, and protection, mitigation, and enhancement measures ("PM&E"). Each document will conform to this scope.

D. The EA/EIS will not include a decision on License Articles or Terms and Conditions. Instead, in a given proceeding, FERC will, and each Cooperating Agency (or non-cooperating Resource Agency) may, publish a record of decision separate from the informational final NEPA document which so states that

agency's preferred alternative, the basis thereof (which should expressly reference the portions of the final NEPA document described in the above paragraph).

E. To encourage resolution of issues informally and to reduce time should an advisory panel need to be convened pursuant to paragraph 6.3 below, FERC and Cooperating Agencies, and, if possible, involved Resource Agencies will attempt to identify at the onset of the licensing proceeding senior policy staff in each respective organization. These designated staff members will be available to advise and resolve issues informally throughout the licensing process. They also will serve as the members of the dispute resolution panel if convened under paragraph 6. The neutral third party panelist(s) described in paragraph 6.3.A. will not be identified and enlisted until it is determined that a panel is necessary.

4.4. A Cooperating Agency will not be considered a party to the relicensing proceeding for the term of its cooperating relationship. Any communication between FERC and a Cooperating Agency that involves the cooperating relationship and relates to the NEPA documents will be exempt from disclosure consistent with the FERC *ex parte* regulations in 18 CFR Section 385.2201(e); except that any communication necessary for the completeness of the record, including any communication necessary to preserve a Cooperating Agency's right pursuant to paragraph 4.5 hereof, will be on the record. Any communication between FERC and a Cooperating Agency that relates to the merits of the decision on the License Articles or Terms and Conditions will be on the record.

4.5. Regardless of whether or not it is a Cooperating Agency in a given proceeding, a Resource Agency has the same rights and duties to participate in the development of the public record in that proceeding as provided in 18 CFR Parts 4 and 16.

4.6. A Cooperating Agency may elect to terminate its cooperating status as a non-party and become a party at any time prior to the deadline for rehearing of the final licensing decision by filing an intervention with FERC. However, a Cooperating Agency which terminates its status may seek rehearing or judicial review on the ground that the document is inadequate only as follows:

A. The document omits an alternative or finding of impact timely proposed by the Cooperating Agency pursuant to paragraph 4.3;

B. It does not conform to the scope stated in paragraph 4.3.C and 4.3.D; or

C. The Cooperating Agency disagrees with the ultimate finding of FERC as lead agency regarding an alternative or impact; provided that the Cooperating Agency had previously stated its specific objection to that finding on the record, including detailed basis both in law and fact, and had proposed an alternative finding in an appropriate form, in a timely communication consistent with paragraph 4.3; and provided further that the Cooperating Agency had diligently pursued a remedy for that objection, including the dispute resolution procedure stated in paragraph 6.

5. SCOPING AND ISSUANCE OF SCOPING DOCUMENT

5.1. FERC and Cooperating Agencies, with input from the Licensee and Stakeholders, will issue Scoping Document 1 ("SD1") 90 days following IIP/ICD issuance. SD1 will include:

A. Identification of resource goals and objectives, issues and information needed (basic methodology, geographic and temporal scope), including consideration of the need by FERC and Resource Agencies to compile a complete administrative record.

B. Preliminary alternatives, including the No Action alternative, the Licensee's alternative, and others as appropriate.

C. A schedule (conforming to applicable rules, as amended by this proposal) for all subsequent actions by the Licensee, FERC, Cooperating Agencies, and others leading to timely licensing decision. The schedule will be kept current and periodically revised as necessary based on developments.

D. A description of unresolved disagreements between FERC and Cooperating Agencies on each of the above. The description will state each side of the dispute.

5.2. FERC and Cooperating Agencies in cooperation with the Licensee will hold a Scoping Meeting within 30 days of the issuance of SD1 and a Site Visit. The site visit may occur prior to the issuance of SD1 or soon after the comment period to accommodate weather or seasonal needs.

5.3. Comments to SD1, which may include requests for studies, will be due 30 days after the Scoping Meeting.

5.4. Licensee will develop a study plan outline and send it to FERC and Resource Agencies within 30 days after the public comment period under section 5.3 ends.

6. DISPUTE RESOLUTION

6.1. This dispute resolution process can be used to resolve disputes between FERC, Cooperating Agencies and other Resource Agencies.

6.2. FERC and Cooperating Agencies will issue an advisory opinion 60 days after the Licensee issues its study plans on the extent to which the data to be provided and the study plan outline as developed by the Applicant is sufficient. That advisory opinion will also discuss and determine study topics to be addressed, methodology to be used, geographic and temporal scope of the analysis, and the foreseeable project-related impacts on target resources that the study plan is to address consistent with previously established resource goals and objectives. The advisory opinion will be joint, including a statement of any unresolved dispute between FERC and a Cooperating Agency related to the advisory opinion and will be distributed to both the Licensee and the Stakeholders.

6.3. FERC and a disputing Cooperating Agency will make best efforts to resolve disputes prior to issuance of the joint advisory opinion. However, if the dispute between FERC and a Cooperating Agency is not resolved pursuant to paragraph 6.2, then an advisory panel will be convened as stated below. Studies discussed in the advisory opinion which are not subject to a dispute between FERC and a Cooperating Agency shall proceed while the dispute resolution process is conducted on the specific disputed studies.

A. The panel will be comprised of a senior policy staff member from FERC and from the disputing agency, and such neutral third parties (as necessary to ensure that there is an odd number in total). FERC and the disputing agency will choose (with disclosure of any potential conflict of interest) the neutrals, after consultation with the Licensee and participating Stakeholders.

B. At the time of issuance of the advisory opinion under paragraph 6.2, FERC will notify Licensee and other Stakeholders that the panel will be convened (specifying a date more than 30 days but no more than 60 days after issuance of the advisory opinion), and Licensee and other Stakeholders will have 30 days to submit information for the panel's consideration.

C. The panel will issue a recommendation within 90 days after being convened, subject to adjustment in extraordinary circumstances.

D. FERC and Cooperating Agencies will issue a revised advisory opinion 30 days following the panel recommendation, which incorporates and responds to the recommendations of the advisory panel.

6.4. A Resource Agency which declines to become a Cooperating Agency will use the procedure established in paragraph 6.3 to resolve an otherwise unresolved dispute related to study requests in the NEPA review.

6.5. If a dispute regarding a matter addressed by the advisory opinion issued under paragraph 6.2 has not been timely resolved at the staff level or through the panel procedure in paragraph 6.3, the dispute will be elevated to a meeting at the level of the disputing agencies' Chairman or Secretary within 60 days after the deadline of 120 days represented by steps 6.3 (B) and 6.3 (C) above.

6.6. FERC will inform the Licensee and Stakeholders of the outcomes of the dispute resolution procedure within 15 days of the decision(s) reached pursuant to paragraphs 6.3 through 6.5.

6.7. In addition, or as an alternative, to the dispute resolution procedure provided in paragraphs 6.2-6.6 above, Licensee and Stakeholders may develop an alternative procedure to resolve disputes on the content of the advisory opinion. Such an alternative procedure will be developed prior to the due date for the advisory opinion as stated in paragraph 6.2 above.

7. STUDY DEVELOPMENT

7.1. After consideration of Stakeholders' comments and the advisory opinions (as revised pursuant to paragraphs 6.2 through 6.7), Licensee will adopt a study plan within

60 days after notice from FERC of the advisory opinion (as revised) which plan will provide for conducting studies and collecting data.

7.2. Any Stakeholder will follow 18 C.F.R. Section 16.8(b)(4), (c)(2), or (d)(2), and the schedule established in paragraph 5.3 to make any Additional Information/Study Requests ("AI/SR").

7.3. The Licensee will be deemed to have discharged its responsibility to conduct studies or gather information if its study plan is executed in a manner consistent with the advisory opinion issued pursuant to paragraphs 6.2 to 6.7. This presumption may be rebutted by the objecting stakeholder only if (A) an unexpected study result is found, (B) there is a change in applicable law, or (C) there is a dispute regarding implementation of the study plan, relative to the AI/SR that the Licensee did not undertake.

A. "Unexpected study result" means that there is a potentially significant impact that was previously not foreseen to occur, or that the intensity of a significant impact is so different than foreseen that additional study is appropriate for the development of protection, mitigation, or enhancement measures. This contemplates a clear demonstration of an anomalous result[23].

B. "Change in applicable law" is a change in statute or rule, that may materially affect the appropriate level of protection, mitigation, or enhancement of resources affected by the project. An example is a new ESA listing applicable to the project reach.

C. "Dispute regarding implementation of study plan" means that an objecting stakeholder has a reasonable basis to dispute that the Licensee followed generally accepted scientific methods in the implementation of the study plan. This excludes the choice of any scientific method specifically identified in the advisory opinion, although it may include a dispute regarding the implementation of the method..

---

[23]This is not intended to repeat studies because the results obtained were unexpected. However, it would apply to new issues identified either through the studies or outside activities.

8. PRELIMINARY DRAFT ENVIRONMENTAL DOCUMENT AND PRELIMINARY CONDITIONS

8.1. Prior to the release of Preliminary Draft Environmental Document ("PDED"), the Licensee will release a summary of which studies have been completed to date and will disclose which additional studies the Licensee intends to conduct.

8.2. Licensee will issue its PDED after consulting with FERC and Cooperating Agencies, and no later than 3 years prior to license expiration. There will be a 60-day comment period on the PDED. The PDED document, which functionally will replace the environmentally related sections of the draft application, will include:

A. Refined issues based on completed studies;

B. Review of comments on study results.

C. A description of additional studies planned.

D. A refined set of alternatives.

8.3. Concurrent with issuance of the PDED, the Licensee will commit to provide the additional information identified as to be done in the PDED, on a schedule acceptable to itself, FERC and Cooperating Agencies.

8.4. Licensee will convene a public meeting within 30 days after PDED publication. FERC and Cooperating Agencies will participate. FERC will issue notice of the publication within ten days of receiving the PDED, at least 15 days prior to the meeting.

8.5. Each Resource Agency will provide preliminary draft Terms and Conditions during the 60-day comment period on the PDED.

9. APPLICATION FILED

9.1. Application will be filed 2 years before license expiration date (same as existing practice). The application will include all results from studies completed, a listing of studies in progress, and proposed protection, mitigation and enhancement measures.

10. FERC TENDER AND PROCEDURAL NOTICE / READY FOR ENVIRONMENTAL DECISION ("RED") NOTICE / REVISED AGENCY DRAFT TERMS AND CONDITIONS

10.1. FERC will issue a tender notice within 14 days of filing and will issue a procedural notice within 60 days of filing of application. On publication of such tender notice, Stakeholders become subject to *ex parte* rules.

10.2. Within 60 days of filing of the application, FERC and Cooperating Agencies will issue notice that the application is ready for environmental decision ("RED"), or if the application is not ready for environmental decision FERC and Cooperating Agencies will identify additional information needed as listed in the joint advisory opinion (as revised to handle resolution of any disputes pursuant to paragraph 6 above) to make it ready.

10.3. Each Resource Agency will issue revised preliminary draft Terms and Conditions within 60 days after RED notice.

11. DRAFT ENVIRONMENTAL ASSESSMENT/ENVIRONMENTAL IMPACT STATEMENT; DRAFT TERMS AND CONDITIONS; AND DRAFT LICENSE ARTICLES

11.1. Within 180 days after the RED notice, FERC and Cooperating Agencies will issue draft EA/EIS (as an informational document, not decisional, as set forth in paragraph 4.3 above) for public review and comment. Also within 180 days after the RED, FERC and any other agency that plans to submit Terms and Conditions to FERC will separately issue draft License Articles and draft Terms and Conditions. The draft EA/EIS will state any dispute between FERC and Cooperating Agencies with respect to environmental impact analysis (consistent with paragraph 4.3 above).

11.2. There will be a 60-day public comment period on the draft EA/EIS, draft License Articles, and draft Terms and Conditions.

11.3. Each Resource Agency will submit final or final draft Terms and Conditions, within 45 days following the close of the public comment period on the draft EA/EIS. A Resource Agency may require publication of a final NEPA document before issuance of final Terms and Conditions, in which case the agency may issue final draft Terms and Conditions at this time. In the alternative the agency may issue final Terms and

Conditions at this time, subject to reopener if the final EA/EIS document contains new information not contained in the draft.

11.4. To encourage resolution of issues informally and to reduce time regarding disputes related to final (and draft) Terms and Conditions, FERC and the Agencies may use the dispute resolution process described in section 6 above.

12. FINAL ENVIRONMENTAL DOCUMENT AND LICENSE ISSUANCE

12.1. The final EA/EIS (as an informational document, consistent with paragraph 4.3 above) will be published separately from the License. The License will be issued by FERC and will include final Terms and Conditions. The final EA/EIS will describe any remaining dispute between FERC and a Cooperating Agency regarding environmental impacts analysis.