

# Hydro Licensing Reform: A Comprehensive Look at the Proposals

*The Federal Energy Regulatory Commission has begun a stakeholder-wide effort to reform the hydropower licensing process, incorporating proposals from government and industry groups, regulatory agencies, non-governmental organizations, and the public. This article outlines the various proposals FERC is considering, and offers insight about when action might be taken.*

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On September 18, 2002, the Federal Energy Regulatory Commission (FERC or commission) published a "Notice Requesting Comments and Establishing Public Forums and Procedures and Schedule," setting in motion the long-awaited process of reforming FERC's hydroelectric licensing procedures. Licensees and stakeholders facing relicensing are looking to the proposed reforms with the hope and expectation that the process will become more streamlined and efficient.

Many projects could benefit from such changes. For example, from 2003 through 2009, approximately 126 FERC-licensed hydropower projects will require new licenses (relicenses). Another estimated 55 project licenses will expire between 2010 and 2015. Under the current relicensing procedures, it takes an average of 8.5 years from the filing of

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the notice of intent to apply for a new license until the new license is issued.<sup>1</sup>

In addition to providing interested entities an opportunity to present their ideas about reform, FERC asked for comments on two specific proposals. The first proposal was developed by the Interagency Hydropower Committee (IHC), consisting of staff from FERC and the U.S. departments of Agriculture, Commerce, and Interior. The second proposal was developed by the National Review Group (NRG), a coalition of industry and non-governmental organizations.

FERC conducted workshops and stakeholder forums on the September 18 notice throughout the fall of 2002, and accepted initial public comments until December 2002. According to the notice, FERC may issue a "Notice of Proposed Rulemaking" on the issue in late February 2003 for additional public comment. If the schedule is maintained, it is possible that a final rule could be published as early as the fall of 2003, and take effect early in 2004.

## Background on the Reform Effort

According to FERC, the reform effort is the culmination of several years of discussion, and widespread agreement that the hydropower licensing process is in need of reform. The existing "traditional" licensing process provides that

the formal proceeding before FERC does not begin until the application is filed, and FERC staff generally do not participate in pre-filing consultation. Then, after the application is filed, the federal agencies with responsibilities under the Federal Power Act and other statutes, the states, Indian tribes, and other participants have opportunities to request additional studies and provide comments and recommendations.

In 1997, FERC's rules were changed to provide an "alternative" licensing process to this traditional process. The alternative process allows pre-filing consultation and environmental review procedures to proceed concurrently. An applicant may use the alternative process if it can demonstrate that a consensus exists among the applicant, resource agencies, Indian tribes, and citizen groups that the alternative procedures are appropriate under the circumstances.

While the alternative process arguably provided a more efficient alternative in some circumstances to the traditional licensing process, the ongoing need for reform is acknowledged by FERC, the industry, and other stakeholders. As a result, FERC is undertaking this rulemaking.

## Details of the IHC, NRG Proposals

As stated earlier, as part of the rulemaking, FERC asked for comments on two specific proposals: one by the Interagency Hydropower Committee (IHC) and one by the National Review Group (NRG). In general, these proposals support the existing alternative licensing process goals of ensuring stakeholder and agency cooperation and combining pre-filing consultation with requirements under the National Environmental Policy Act (NEPA). (A NEPA analysis is a public disclosure process of the environmental consequences if a project were implemented.) While the two proposals vary in structure and

detail, both are intended to improve on the current alternative process by reducing the time and cost of the licensing process, improving the quality of decision-making, and enabling early resolution of disputes. Hence, both proposals contain specific deadlines for all stages of the process, vehicles for efficient dispute resolution, and an integration of the pre-filing consultation and FERC scoping under NEPA.

The following sections provide a comparison of the Interagency Hydropower Committee and National Review Group proposals, organized by various stages of the licensing process. Table 1 provides a comparison of the IHC and NRG proposals with current FERC processes.

#### *Pre-Notice of Intent*

Both the Interagency Hydropower Committee and National Review Group proposals “encourage” the licensee to enter into discussions with FERC, resource agencies, and stakeholders. No formal consultation requirement or consultation timelines are included, but both proposals appear to rely heavily on early consultation in order to maintain tighter timelines.

#### *Notice of Intent*

Both proposals require that a notice of intent to seek a new license be filed five to five and a half years before license expiration. The filing of the notice of intent initiates the formal FERC proceeding.

#### *Initial Information Package/ Initial Consultation Document*

The Interagency Hydropower Committee and National Review Group proposals replace or modify the “Initial Information Package” required under current FERC regulations. The purpose is to more effectively integrate early scoping of studies under NEPA. The Interagency Hydropower Committee’s proposal calls for a “pre-scoping document” that mirrors current NEPA scoping documents and includes a draft study plan. The pre-scoping document would be filed at the time the notice of intent to seek a new license is filed—five to five and a half years before license expiration. The National Review Group’s proposal requires an expanded

**Table 1: Comparison of Provisions of the Federal Energy Regulatory Commission’s Traditional and Alternative Licensing Processes for Hydroelectric Projects with Changes Proposed by the Interagency Hydropower Committee (IHC) and the National Review Group (NRG)**

<i>Licensing Stage</i>	<i>Traditional Process</i>	<i>Alternative Process</i>	<i>IHC Proposal</i>	<i>NRG Proposal</i>
Pre-Notice of Intent	None	Stakeholder support FERC approval Communications protocol	Stakeholder consultation Advance FERC notice to licensee 8-8 1/2 years before license expiration	Stakeholder consultation FERC MOU with agencies defines NEPA rules
Notice of Intent (Filed 5-5 1/2 years prior to license expiration)	Provides basic information about existing project	Provides basic information about existing project	Formal proceedings begin Licensee Pre-Scoping Document (PSD) discusses resources, studies	Formal proceedings begin Licensee Initial Information Package (IIP) discusses resources, studies
Pre-Application	Prepare and issue Initial Consultation Document Consult with stakeholders Plan and conduct studies Develop PM&Es based on study results Draft application Conduct additional studies	Prepare and issue Initial Information Package (IIP); includes NEPA scoping Consult stakeholders Plan and conduct studies, distribute results Conduct additional studies Develop PM&Es in collaboration with stakeholders, based on study results Receive preliminary agency conditions Finalize settlement, license application, and NEPA document	Issue final PSD with study plan FERC issues Scoping Document 1 (SD1) for comment Study dispute resolution Final study plan FERC issues SD2 Conduct studies Stakeholder/FERC study review Conduct additional studies Prepare draft application with NEPA-like document Finalize application	FERC signs MOA with agencies Licensee issues scoping document Licensee develops study plan Stakeholder input Final study plan Conduct studies, distribute results, conduct additional studies Licensee issues Preliminary Draft Environmental Document (PDED) based on agency and public input Preliminary agency terms and conditions
Application (Filed 2 years prior to license application)	Address deficiencies and additional data needs Respond to interventions FERC scoping process Agency comments Draft NEPA document 10(j) issues addressed Final NEPA document Final license	Address deficiencies and additional data needs Limits on additional studies Respond to interventions and agency comments Draft NEPA document 10(j) issues addressed Final NEPA document Final license	Address deficiencies and additional data needs No additional studies Respond to interventions and agency comments EA or EIS selected Include NEPA-like document with application Draft NEPA document if required Final agency conditions Final NEPA document Final license	Address deficiencies and additional data needs No additional studies Respond to interventions and agency comments Include PDED, study data, and PM&Es with application Draft NEPA document, license articles, and terms and conditions Dispute resolution with agencies, if required Final NEPA document Final license



PacifiCorp's relicensing effort for its eight-dam, 185-MW North Umpqua project in Oregon—which includes the 11-MW Soda Springs Dam project shown here—is one of the U.S.'s longest running, most expensive relicensing efforts. Reform by the Federal Energy Regulatory Commission intends to make relicensings such as this one more streamlined and efficient. (Photo courtesy PacifiCorp)

“Initial Information Package/Initial Consultation Document” that mirrors the current draft application and includes modified exhibits, study proposals, and a “draft scoping document.” This expanded Initial Information Package/Initial Consultation Document is to be filed between five and five and a half years before license expiration.

The National Review Group also calls for FERC to request that each resource agency become an official “Cooperating Agency” by entering into a Memorandum of Agreement for a specific relicensing proceeding. This Memorandum of Agreement is intended to identify principal contacts available to resolve issues, to delineate clearly the relative responsibilities of each agency with respect to NEPA analysis, and to define a process for enhanced collaboration. The Memorandum of Agreement will be entered into after the Initial Information Package/Initial Consultation Document is filed, but prior to FERC’s issuance of the scoping document.

#### *NEPA Scoping and Study Plan*

In both the Interagency Hydropower Committee and National Review Group proposals, NEPA scoping begins immediately after the filing of the notice of intent to seek a new license and after FERC takes a leadership role. The Interagency Hydropower Committee’s proposal provides that FERC will use the pre-scoping document to develop Scop-

ing Document 1 within 45 days of the filing of the notice of intent. The National Review Group’s proposal provides that FERC and the cooperating agencies are to issue Scoping Document 1 within 90 days of the issuance of the Initial Information Package/Initial Consultation Document.

Both proposals provide for public scoping meetings and comments on the initial scoping documents. The proposals call for FERC and the resource agencies to consider study outlines and alternative study requests, and to agree on a final study plan in a revised scoping document. The National Review Group also requires FERC and the cooperating agencies to issue an advisory opinion outlining all studies necessary for their respective NEPA decisions. Once the study plan is approved, the National Review Group’s proposal provides a very limited opportunity for additional studies. Both of the proposals provide approximately two years for studies, with an option to extend certain studies beyond the license application deadline.

#### *Dispute Resolution*

Both the Interagency Hydropower Committee and National Review Group define formal processes with limited timeframes for resolving study plan disputes between FERC and the resource agencies. Both proposals also call for three-member panels (consisting of representatives of FERC, the disputing agency,

and a neutral party) to review the dispute and propose a solution.

National Review Group’s proposal includes a somewhat open-ended procedure when a dispute cannot be resolved at the staff level or through the panel procedure. In those cases, the dispute is elevated to a meeting at the level of the disputing agencies’ chairman or secretary. The Interagency Hydropower Committee’s proposal, on the other hand, maintains FERC’s ultimate authority to determine which studies are required.

#### *Application and Draft NEPA Documents*

Both proposals call for development of a draft NEPA document for submission with the application. The National Review Group requires a preliminary draft environmental document to be filed at least one year before the application deadline. This document would include preliminary terms and conditions from the resource agencies and would replace the environmental sections of the application.

#### *Terms and Conditions*

The Interagency Hydropower Committee’s proposal provides for concurrent filing of agency license conditions prior to completion of the final NEPA document. The National Review Group’s proposal includes having each of the resource agencies provide preliminary draft terms and conditions during the 60-day comment period on the preliminary draft environmental document. Each resource agency may then submit either final (or final draft) terms and conditions after close of the public comment period on the draft NEPA document. This proposal also allows a resource agency to require publication of a final NEPA document before issuance of final terms and conditions, or to issue final terms and conditions subject to reopener if the final NEPA document contains new information not contained in the draft.

#### *Post-Filing NEPA Analysis*

Both proposals include an option for FERC to issue a draft Environmental Assessment/Environmental Impact Statement for public comment within 180 to 240 days of the filing of the application. The National Review Group’s draft Environmental Assessment/Environmental Impact Statement would be informational (rather than decisional), and FERC and the resource agencies could file separate Records of Decision outlining pre-

ferred alternatives. The Interagency Hydropower Committee provides a second track under which FERC would issue a final Environmental Assessment within 90 to 120 days.

Both proposals allow all resource agencies to submit final terms and conditions concurrently (rather than at different times) and as early as possible.

### **Effect of IHC and NRG Proposals**

As evidenced primarily by the attempt of both groups to force early study dispute resolution and to coordinate the submissions by the resource agencies, the proposals present an opportunity for meaningful administrative reform, particularly with respect to a more streamlined process. On December 6, 2002, initial comments on the proposals were filed at FERC in Docket No. RM02-16. Additional proposals were submitted by the Hydropower Reform Coalition, National Hydropower Association, Pacific Gas & Electric, and California Resource Agencies and California Interagency Hydro Team. These proposals vary in their details, but all support early FERC involvement in NEPA scoping.

However, licensees and others have raised a number of additional substantive and procedural issues that could be considered in the rulemaking or in parallel rulemaking proceedings. Some of the other licensing reform recommendations that have been proposed over the past year include: fishways, decommissioning, mandatory conditioning appeals process, and the Endangered Species Act.

### **Other Hydro Licensing Reform Recommendations**

A task force comprised of members from the American Public Power Association, the Edison Electric Institute, and the National Hydropower Association sent a letter to FERC on March 22, 2002, outlining several suggestions to improve the hydroelectric relicensing process. Also, the American Public Power Association, in conjunction with some of its large public power members, proposed reforms in response to a request from the Council on Environmental Quality for specific proposals regarding how permitting and other regulatory decision-making processes may be improved or streamlined. The suggestions made to the Council on Environmental Quality focused on the roles that the departments of Interior, Commerce, and Agriculture play in the relicensing process.

These suggestions made to FERC and the Council on Environmental Quality are consistent in their recommendations, particularly regarding fishways, mandatory conditioning review, and integration of the Endangered Species Act. In addition to the reforms discussed below, these groups recommended:

- Providing for early FERC involvement in study selection and design;
- Establishing and enforcing clear guidelines and deadlines for early submission of resource agency mandatory conditions and study requests; and
- Recognizing Interior, Commerce, and Agriculture's cooperative and co-decision making status with FERC, rather than acting as adverse parties in licensing proceedings.

### *Rebalancing of License Conditions*

The task force urges the commission to modify licensing rules to provide that the commission, on its own motion or at the request of an applicant, shall "rebalance" a license after all final conditions and recommendations are received. This is to assure that the license is reasonable and meets the public interest standard of Section 10(a)(1) of the Federal Power Act and the Section 15(a)(1) requirement that a new license be issued "upon reasonable terms."

The task force acknowledges that FERC has little or no discretion to reject mandatory conditions proposed under Sections 4(e) and 18, but notes that FERC does have the authority to accept, modify, or deny conditions considered under Sections 10(j) and 10(a). To the extent FERC determines that the combination of mandatory and non-mandatory conditions would produce an unreasonable relicensing result, the task force states that the commission is free to revisit the non-mandatory conditions.

The task force argues that adoption of a rebalancing requirement or policy would add little or no additional time or cost to the licensing process and would produce substantial benefits by increasing the likelihood that licenses issued by the commission are consistent with the commission's Section 10(a) public interest mandate.

### *Fishways*

In the waning days of the Clinton Administration, the U.S. Fish and Wildlife Service and National Marine Fisheries Service issued a proposed policy on fishway prescriptions under Section 18 of the Federal Power Act. The proposal

was heavily criticized by FERC and the hydropower industry. Among other problems, critics believed the proposed policy would greatly overreach the agencies' prescriptive authority under Section 18 of the Federal Power Act by defining "fish" to include virtually every form of water-related animal life (insects, mollusks, amphibians, etc.) other than mammals and birds, and by defining "fishway" to include all aspects of a hydro project and its operations. (See "Industry Calls for Federal Agencies to Re-scind Proposed Fishway Policy," *Hydro Review*, May 2001, pages 18-19.)

Under Section 1701 of the Energy Policy Act of 1992, FERC retains primary responsibility for developing a regulatory definition of the term "fishway," but must obtain the concurrence of Fish and Wildlife and National Marine Fisheries on the definition. The statute also provides Congress with guidance on what constitutes a fishway. The task force states that there is a need for clarity in this area, and in the absence of regulations, Fish and Wildlife and National Marine Fisheries may apply the overly broad definitions in the proposed policy on an ad hoc basis, in contravention of the statute. The industry task force suggests that FERC seriously consider—in consultation with Fish and Wildlife and National Marine Fisheries—initiating a rulemaking on the scope of the Section 18 fishway authority pursuant to the procedures and substantive guidelines set forth in the Energy Policy Act.

### *Revoke or Reform the Current Decommissioning Policy*

The industry task force also urges FERC to consider repeal of its current policy of asserting the authority to order decommissioning at the time of relicensing. According to the task force, the current policy encourages parties and intervenors to demand studies regarding pre-project conditions, regardless of whether the project at issue meets FERC's criteria for decommissioning. The task force further states that the decommissioning policy distorts FERC's analysis of project economics, and that FERC uses the high cost of decommissioning as a benchmark against which to compare the cost of accepting and implementing the license. Given the often prohibitive cost of decommissioning, the task force claims FERC considers the frequently high cost of implementing mandatory conditions and prescriptions imposed by



In the early 1990s, the U.S. Fish and Wildlife Service and National Marine Fisheries Service proposed defining fishways to include all aspects of a hydroelectric project and its operations. Critics say the policy overreaches the agencies' authority under the Federal Power Act.

resource agencies to be, by comparison, quite reasonable.

The task force suggests that if FERC is not interested in repealing its current policy, then FERC could consider modifying that policy to affirmatively state that it will no longer compare the costs of decommissioning to the costs of environmental conditions imposed on a license. Doing so would, in effect, make the licensee choose between the “lesser of two evils.” In this regard, the task force notes that FERC should reconsider and revoke its policy that it has no obligation to balance power and non-power interests in a way that preserves the economic viability of a project at relicensing. At least where FERC has discretion (i.e., where mandatory conditions imposed by other agencies do not by themselves make a project uneconomic), the task force suggests that FERC could exercise that discretion to refrain from imposing its own environmental conditions that would accomplish a similar undesirable result.

#### *Evaluation of Mandatory Conditions*

The task force notes that FERC is re-

quired to adopt mandatory conditions and prescriptions. The determination of whether the mandatory conditions and prescriptions imposed by the resource agencies are reasonable, within the scope of their authority, and supported by substantial evidence in the record is left to the courts of appeal. However, the U.S. Supreme Court has held that FERC is entitled to make findings and recommendations regarding whether the mandatory conditions and prescriptions are reasonable and supported by substantial evidence in the record, and that such findings may be considered by the courts of appeals on review.

Thus, the task force recommends that when an applicant seeks rehearing of a license order challenging mandatory conditions and prescriptions sub-

mitted pursuant to sections 4(e) and 18 of the Federal Power Act, FERC should—consistent with the suggestion that FERC “rebalance” the license—evaluate those conditions or prescriptions and make findings and recommendations regarding their authority, reasonableness, and evidentiary basis. According to the task force, in the absence of such findings by FERC, a reviewing court is likely to simply defer to the resource agencies' views, thus hampering FERC's ability to issue a license that appropriately balances energy and environmental concerns pursuant to Federal Power Act section 10(a)(1). The task force also suggests that this is an area where independent peer review could be useful.

#### *Implementation of an Appeals Process*

The task force further suggests that the commission provide an opportunity for an expedited trial-type mini-hearing on disputed issues of material fact related to a proposed mandatory condition or other proposed license condition. Specifically, the task force urges the commission to revise policy and prac-

tices to allow expedited and limited hearings, upon the request of a party, on issues of disputed material fact related to the imposition of a license condition. Mini-hearings would be conducted only when FERC itself determined that such a process would add value to the licensing process. The task force's rationale behind this suggestion is that by forcing parties to disclose their evidence, trial-type procedures could foster settlements. In addition, in cases where a mini-hearing is actually held, it is argued that the quality and probative value of the record would be substantially improved, enhancing the review of these issues by the commission and, if necessary, the courts of appeal.

The American Public Power Association, et al. proposes that the resource agencies establish a meaningful administrative appeals process for mandatory conditions. Previously, Interior and Commerce issued a joint policy on administrative review of mandatory conditions under Sections 4(e) and 18. The American Public Power Association notes that the joint policy rejected proposals for an administrative appeals process, which would have developed a record for mandatory conditions, and, instead, provides only a review of preliminary rather than final conditions. Accordingly, no review is conducted of the conditions that are actually adopted by the agency and included in the license.

#### *The Role of Sound Science*

Consistent with its licensing reform efforts through the task force, the American Public Power Association recommended to the Council on Environmental Quality that the effects on electric generation and reliability be taken into account when setting mandatory conditions and license terms. The American Public Power Association advocates that decisions be based on the best available data and scientific analysis, to ensure that licensee and ratepayer resources are spent in achieving meaningful environmental benefits. In this regard, the American Public Power Association's suggestions to the Council on Environmental Quality includes a recommendation that the Interior, Commerce, and Agriculture departments adopt express policies and rules for consideration of economic effects and for basing decisions on sound science.

The task force also recommends that FERC consider establishing by regulation an option to pursue an independent

scientific peer review of license terms and conditions recommended or required by resource agencies pursuant to Sections 4(e), 10(a), 10(j), and 18 of the Federal Power Act and Section 401 of the Clean Water Act.

#### *Endangered Species Act*

The task force and the American Public Power Association suggest that another area where reform could improve the licensing process is with respect to the integration of the Endangered Species Act Section 7 consultation process. Currently, neither Interior and Commerce rules nor FERC rules specifically address how the Endangered Species Act Section 7 process is to be integrated into the FERC licensing process. For example, FERC's rules do not have deadlines for submission of agency Biological Opinions, as they do for conditions under Sections 4(e) and 18. The task force and the American Public Power Association note that the Departments of Interior and Commerce generally conduct their formal Section 7 reviews in the last stages of the licensing process. This can disrupt and delay licensing, sometimes for years.

In addition, the task force and the American Public Power Association explain that the federal departments are able to use their Endangered Species Act authority to take a "second bite" at imposing more stringent environmental

conditions on licenses. The American Public Power Association also notes that some Fish and Wildlife Service offices (e.g., in California) are now asserting that Section 7 consultation must be done before pre-filing studies are carried out, in addition to the post-filing Section 7 reviews, which further adds to the delay. The task force and the American Public Power Association recommend that Interior and Commerce and FERC cooperate in developing joint rules on integration of the Endangered Species Act Section 7 process with the licensing process.

#### **License Reform: Perspectives from the Authors**

FERC's reform efforts to-date appear to focus on earlier resolution of issues prior to finalizing the application and National Environmental Policy Act (NEPA) documents. However, under the present licensing process requirements, the notice of intent to apply for a new license must be filed five to five and a half years prior to the expiration of the license. Thus, the licensees with licenses that expire between 2007 and 2009 have likely already begun the process under the existing procedures. Even if FERC is successful in implementing reforms in a year, they will likely have greater applicability to the next generation of relicensings (i.e., 2010 to 2015). In any event, early resolution is not always achieved. Some relicensings are bound to become con-

tested; these are the tougher cases that may not be settled. Having rules and policies in place to provide more balanced results also will promote more constructive negotiations and settlements.

Licensing reform efforts will have greater and more immediate effect to the extent that they also improve the quality of the end result. This can be accomplished by focusing on a better balance between power generation, natural and cultural resource protection, recreation, irrigation, flood control, and other public interests. These types of reforms undoubtedly will require the involvement of the other federal and state agencies that play a central role in the relicensing process. ■

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#### **Note:**

<sup>1</sup>"Report 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.

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