

Creating a New FERC Licensing Process

Using a stakeholder-based effort to reform the approach to hydropower licensing, the Federal Energy Regulatory Commission created a new licensing process known as the ILP.

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The Federal Energy Regulatory Commission's (FERC's) new process for licensing a hydroelectric project — the Integrated Licensing Process, or ILP — is intended to improve process efficiency, predictability, and timeliness; balance stakeholder interests; and improve the quality of decision-making on hydropower licenses.

In addition to creating a new licensing process, FERC's recent licensing reform efforts included making notable changes to the existing "traditional" and "alternative" licensing processes.

These reform efforts featured a number of stakeholder forums attended by a wide range of individuals involved in the hydro licensing process, including project owners, state and federal natural resource agencies, and environmental groups. Many of the suggestions offered at these forums were incorporated into both the new licensing process and the changes to the existing processes.

Now there are three

Prior to FERC's action in 2003, there were two licensing procedures available: the traditional licensing process and the alternative licensing process.¹ The traditional process, as its name

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implies, came first and was the default licensing process. The traditional 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.

Although emphasizing extensive pre-filing consultation, the traditional process has come to be viewed as adversarial and applicant-driven. Moreover, the initiation of National Environmental Policy Act (NEPA) scoping often provides a "second bite" opportunity for resource agencies to raise new issues and expand the record.

The alternative process, on the other hand, approaches licensing from a collaborative standpoint. 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.

An applicant who has not yet filed its statutory Notification of Intent to seek a license has the option of choosing the existing traditional process, alternative process, or the new ILP. In 2005, the ILP will become the default licensing process, and FERC approval, based on a "good cause" standard, will be required to use the traditional process. The alter-

native process has always been and will remain subject to FERC approval.

The ILP, according to FERC, "merges pre-filing consultation and the NEPA process, brings finality to pre-filing study disputes, and maximizes the opportunity for the federal and state agencies to coordinate their respective processes."² The new process provides for:

- Increased public participation in pre-filing consultation;
- Development by the applicant of a commission-approved study plan;
- Better coordination between the commission's processes, including NEPA document preparation, and those of federal and state agencies with authority to require conditions for commission-issued licenses;
- Encouragement of informal resolution of study disagreements, followed by dispute resolution; and
- Schedules and deadlines.

The practical benefit of the ILP for applicants appears to be the substantial shortening of the time between filing an application for a license and a FERC decision on the license application. This is primarily due to the fact that under the new ILP, NEPA scoping and the applicant's preparation of a draft NEPA document will now be conducted as part of the pre-filing process. (See Table 1 on page 2.) Also, study disputes will not be as likely to carry over into the post-filing period.

However, the quicker decision after the application is filed comes at the expense of a heavily front-loaded procedure that will require an applicant to invest substantial resources in preparing the application even before filing the Notification of Intent. In this regard, an applicant will have to begin preparation for licensing much earlier than under the previous regulations to fulfill the comprehensive requirements of the Pre-Application Document, which is filed concurrently with the Notification of Intent, 5 to 5 ½ years prior to license expiration.

Table 1: Steps in FERC's New ILP Licensing Processes

<i>Licensing Stage</i>	<i>Integrated Licensing Process</i>
Pre-Notice of Intent	FERC provides notice approximately 1.5 years prior to Notice of Intent deadline Applicant prepares Pre-Application Document, contacts agencies and Indian tribes, reviews relevant federal and state comprehensive plans
Notice of Intent (Filed 5-5½ years prior to license expiration)	Applicant files Pre-Application Document with Notice of Intent Initiates formal FERC proceeding Includes resource information and study needs Pre-Application Document subject to due diligence standard
Pre-Application	FERC issues Scoping Document 1 (SD1), then holds scoping meeting and site visit; comments on Pre-Application Document and SD1; receives study requests Applicant files proposed study plan; FERC issues SD2, if necessary; informally resolves study issues; comments on proposed study plan Applicant files revised study plan for FERC approval; FERC issues study plan determination; mandatory conditioning agencies may invoke formal study dispute resolution process Applicant conducts studies; issues initial study report and holds study meeting; receives requests for study plan modifications Applicant files Preliminary Licensing Proposal; receives comments, additional information requests
Application	Application filed with NEPA-like document as Exhibit E no later than 2 years before expiration; procedural notice by FERC FERC decides any outstanding pre-filing additional information requests; Applicant responds to any application deficiencies FERC issues Ready for Environmental Analysis notice Applicant files application for water quality certification Comments, interventions, preliminary terms and conditions received; reply comments filed FERC issues non-draft EA, draft EA, or EIA; comments received; modified items and conditions received FERC issues final NEPA document License issued

Highlights of FERC's reforms

Some of the licensing reforms apply to all three processes, not just the ILP. For example, one feature of the commission's rule reforming hydro licensing is that the formal proceeding before the commission now begins when FERC notices the applicant's filing of the Notification of Intent and Pre-Application Document. Previously, the formal proceeding did not begin until the license application was filed. This triggers the commission's rules on *ex parte* communications much earlier in the process.

Another example is the requirement that the applicant file a Pre-Application Document, designed to provide all available engineering, economic, and environmental information relevant to licensing the project, with the Notifica-

tion of Intent. This requirement applies to the traditional and alternative processes as well, but does not take effect until 2005. FERC provides for the incorporation of ILP procedures in an ongoing traditional licensing process if the request is made during first-stage consultation and a consensus exists to incorporate the specific elements of the ILP.

FERC also extended the deadline for filing an application for water quality certification until after the Ready for Environmental Analysis notice is issued. Previously, the application for water quality certification was required to be filed no later than the date the license application was submitted to FERC. FERC also will now allow an applicant in the traditional licensing process to submit an applicant-prepared draft NEPA

document with its application in lieu of the Exhibit E currently required.

FERC was urged to amend its *ex parte* rules to permit federal resource agencies with mandatory conditioning authority to be both cooperating agencies under NEPA and intervenors for purposes of challenging a FERC license. FERC included this change in its Notice of Proposed Rulemaking. After considering many comments challenging this change, particularly with respect to its legality, FERC reversed course and ultimately concluded that "precedent indicates that allowing federal agencies to serve both as cooperators and intervenors in the same case would violate the [Administrative Procedures Act]."³

Some stakeholders also urged FERC to use evidentiary hearings to resolve hydroelectric licensing matters, instead of relying solely on the notice and comment procedures currently employed. In response, FERC included a provision providing for such hearings. Although FERC did not expressly address whether it would liberalize its current practice of granting a hearing only when the credibility of a key witness is at stake, FERC affirmed that "[r]esolving factual issues before an [Administrative Law Judge] is a time-tested means of decision making; factual records developed in such hearings are useful to courts which may be called upon to review the final decision on the license."⁴

Highlights of the ILP

Notable features of FERC's final rule applicable to the ILP include the specific study criteria against which the commission will weigh study requests in both approving the study plan and resolving any disputes. The most prominent criterion is a threshold determination that there is a nexus between project operations and effects on the resource in question.

Another significant criterion is the consideration of level of effort and cost, and why proposed alternative studies would not be sufficient to meet the stated information needs. Under the new process, any study requests made following the initial study report are subject to a good cause standard, and requests made following the updated study report are subject to an extraordinary circumstances standard. Although specifically applied to the ILP, these criteria appear to reflect FERC's thinking about appropriate study criteria and thus provide guidance to parties engaged in the

traditional and alternative licensing processes as well.

FERC provides in the ILP for study dispute resolution that includes the convening of an advisory panel aided by a technical conference of the parties. The binding study dispute resolution applies only in the ILP. FERC acquiesced to commenters and decided not to apply binding dispute resolution in the traditional process.

FERC's final rule regarding the ILP took effect October 23, 2003. However, the commission made some clarifications in its Order No. 2002-A, issued January 23, 2004, in response to two requests for rehearing. The requests for rehearing raised various issues, including:

— The binding nature of the study plan order on applicants, but not other parties, without a clear right to rehearing and judicial review of such orders;

— Lack of stakeholder recourse if an applicant files an inadequate Pre-Application Document;

— Allowing all interested parties, not just the applicant, to submit written comments to the technical conference; and

— Lack of explicit ability to request additional information after the filing of an application.

In Order No. 2002-A, FERC denied the requests for rehearing, but made some notable clarifications. For example, the commission reiterated that the study plans are binding, but clarified that "once the Director makes a study plan determination pursuant to the authority delegated to the Director by the Commission . . . that determination may then be appealed to the Commission in a request for rehearing . . ." ⁵ The commission added that "[w]hether judicial review of the Commission's decision on rehearing is appropriate is a matter to be determined by the court from which judicial review is sought." ⁵

The commission refused to add sanctions for an inadequate Pre-Application Document, noting that the due diligence standard is sufficient. Furthermore, it is not in the applicant's best interests to prepare a poor quality Pre-Application Document.

The commission also explained that it is unnecessary to provide an explicit ability to request additional information after the filing of an application because the commission would continue to exer-

cise its authority to require additional information in appropriate cases, on its own initiative or in response to the request of a party.

The commission further declined to allow all interested parties to submit written comments to the technical conference, noting that although other participants in the process may be interested in the outcome of the dispute, the applicant has much more at stake because the applicant bears the expense of implementing the study plan.

Which process to choose?

Each of the three licensing processes presents different issues as to licensee or applicant control, stakeholder involvement, and coordination of environmental reviews. It is also worth noting that FERC is pushing applicants toward the ILP process, making it the default process within two years. If the ILP works well, the other processes may fall away.

As to the alternative process, some applicants may prefer the option of designing their own process over the deadline-driven ILP. This may be especially true if the applicant believes a settlement will be easily reached.

Applicants of small projects, or those where it is not clear that a big, front-loaded effort makes sense may prefer the traditional process. It is unknown how flexible FERC will be in granting approval to use the traditional process. In the final rule, FERC adopted five factors that are most likely to bear on whether use of the traditional process is appropriate:

- 1) Likelihood of timely license issuance;
- 2) Complexity of the resource issues;
- 3) Level of anticipated controversy;
- 4) The amount of available information and potential for significant disputes over studies; and
- 5) The relative cost of the traditional process compared to the integrated process.

FERC stated in its final rule that "the more likely it appears from the participants' filing that an application will have relatively few issues, little controversy, can be expeditiously processed, and can be processed less expensively under the traditional process, the more likely the Commission is to approve such a request." ⁶

Conclusions

FERC completed a massive reform of its hydroelectric licensing process in a short period of time in a rulemaking largely heralded as successful by applicants and the many other stakeholders who participated in the rewriting process. Whether the new ILP process will, in fact, produce more expeditious and balanced relicensing outcomes is a story that will unfold over the next several years as many of the U.S.'s hydropower projects come up for relicensing.

However, there is much optimism that the new process is a step in the right direction of maximizing licensing efficiency without sacrificing consideration of the key issues in hydropower licensing decision-making.

Some of the initial concerns regarding the ILP involve the amount of effort required early on in the process, and the tight time frames required. Indeed, some applicants may experience difficulty meeting all of the requirements in the 5- to 5 ½-year period between the Notification of Intent and the expiration of an existing license. Practical experience may dictate some future adjustments to the process. ■

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Notes

¹Swiger, Michael A., and Steven A. Burns, "Cost-Effective Relicensing: Choosing the Right Process" *Hydro Review*, Volume 17, Number 4, August 1998, pages 52-61.

²Hydroelectric Licensing Under the Federal Power Act, 104 FERC ¶ 61,109, Order No. 2002 (July 23, 2003) at P 39.

³Order No. 2002 at P 300. Indeed, FERC recently ordered a limited evidentiary hearing in *City of Tacoma*, Washington, 104 FERC ¶ 61,324, (September 24, 2003).

⁴Order No. 2002 at P 212.

⁵Hydroelectric Licensing Under the Federal Power Act, Order on Rehearing of Final Rule, 106 FERC ¶ 61,037, Order No. 2002-A (January 23, 2004) at P 17.

⁶Order No. 2002 at P 48.