

MEMORANDUM OF UNDERSTANDING
BETWEEN THE
FEDERAL ENERGY REGULATORY COMMISSION
AND THE DEPARTMENT OF THE ARMY
REGARDING
NON-FEDERAL HYDROPOWER DEVELOPMENT

In the interest of mutual cooperation for expediting non-Federal hydropower development, the Federal Energy Regulatory Commission, hereinafter referred to as the Commission, pursuant to the authority contained in the Federal Power Act, as amended; 16 U.S.C. Sec 791 a et seq; and the Department of the Army hereinafter referred to as the Army, pursuant to the interdepartmental work provision of 47 Stat. 417 (31 U.S.C. Section 686), enter into this Memorandum of Understanding (MOU);

WHEREAS, the Commission is responsible for issuing preliminary permits and licenses to non-Federal entities for the development of hydroelectric power plants under its jurisdiction, including power plants utilizing Federal dams where Congress has not authorized power development as a project purpose.

WHEREAS, the U.S. Army Corps of Engineers, hereinafter referred to as the Corps has constructed water resources projects throughout the nation where a potential exists for the development of hydroelectric energy and is agreeable to the development of hydropower by non-Federal entities, provided that in any license issued by the Commission, hydroelectric development is found by the Commission to be compatible with the purposes for which Congress authorized the project, and provided Federal hydroelectric facilities have not been authorized by Congress for construction;

WHEREAS, the Army has certain regulatory responsibilities and the Army and the Commission wish to take all possible steps to reduce regulatory burdens and minimize duplication of Federal review;

WHEREAS, both the Commission and the Army wish to encourage non-Federal hydropower development;

PART I

NOW THEREFORE, in consideration of mutual cooperation and the encouragement of developing renewable resources by the promotion of hydroelectric energy at existing and future Corps' facilities, the Commission and the Army agree to the following:

1. Feasibility Study of Hydropower Potential

a. The Commission will require, in its preliminary permits authorizing feasibility studies of a facility at a Corps of Engineers' dam that the Permittee coordinate those studies for a proposed project with the appropriate Corps' District Engineer. This is to ensure that the feasibility

studies will result in a plan of development consistent with the authorized purposes including operations, of the Federal project.

b. At the initial meeting between the Corps and the Permittee, which shall be requested by the Permittee, the Corps will provide to the Permittee all pertinent general information as is available on: status and content of District's studies relating to hydropower; physical constraints at the Corps facilities relating to hydropower development; requirements for design, construction, and hydraulic model studies, if necessary; requirements to avoid adverse impact on other project purposes; and other items or conditions that may affect the Permittee's studies for the proposed power plant. The Permittee shall be responsible for conducting, at its own expense, all necessary technical studies and documentations, including reports, drawings, etc. in such scope and detail that are needed to confirm technical and operational feasibility of a proposed power plant at a Corps' site.

2. Design, Construction and Operation

a. The licensed hydropower facilities that will be an integral part of or that could affect the structural integrity or operation of the Corps' project shall be designed and constructed in consultation with and subject to the review and approval of the appropriate Corps' District Engineer.

b. The Corps' approval of the final design with regard to impact on navigation will be exercised under Section 4(e) of the Federal Power Act for all proposed non-Federal hydropower facilities at the Federal site.

c. The Commission will require Licensees to reimburse the Corps directly for all reasonable costs associated with the Corps' review and approval of the design and construction, plans and specifications, and the inspection of construction, cited in paragraph 2a and 2b above, for power development at Corps' projects, provided that charges shall not be assessed for information, services, or relationships that would normally be provided to the public. The Corps will bill the Licensee for costs directly related to the review of design and construction of those licensed facilities that affect the integrity or operation of the existing project structure. Disagreement by either the Licensee or the Corps regarding reimbursement will be referred to the Director, Office of Electric Power Regulation or successor office, hereinafter (OEPR) for resolution. Such reimbursable costs shall be limited to those associated with design approval and construction, and shall not include those costs related to commenting on permit and license applications pursuant to Section 4(e) of the Federal Power Act. Licensee shall comply with 16 U.S.C. Sec. 804 and all such other provisions of the Federal Power Act as may be appropriate.

d. Copies of all correspondence between the Licensee and the Corps regarding the schedule and progress of the design review and approval will be provided to the Commission's appropriate Regional Engineer. The Regional Engineer will not authorize construction of the facility to start until the Corps' District Engineer's written approval of the construction plans and specifications has been received by Regional Engineer or his designee.

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e. The Commission's Regional Engineer will be responsible for surveillance of the construction activities within the licensed project boundary. The Licensee's proposed construction inspection program will be furnished to the Corps for review and comment prior to approval by the Regional Engineer. The construction of the facilities will be inspected by the Regional Engineer's staff during construction of the project, generally at monthly intervals. Copies of the reports of these inspections will be furnished to the Corps. The Corps shall perform periodic or continuous inspections at critical stages of the construction of those portions of the licensed project works that, in the judgment of the Corps, may affect the integrity or operation of existing project structures. A schedule of Corps' proposed inspections will be furnished to the Regional Engineer. The Regional Engineer and the Corps shall take all necessary steps in coordination to avoid duplication of inspections. Copies of the Corps' inspection reports will be furnished to the Regional Engineer within 30 days of the date of inspection. However, the Corps reserves the right to enter the construction site at any time to perform an inspection. Any construction deficiencies or difficulties detected by the Corps' inspections will be immediately reported to the Regional Engineer. Upon review, the Regional Engineer will refer the matter to the Licensee for appropriate action. The Corps' inspector will report to the Regional Engineer or his representative regarding the need to stop construction while awaiting resolution of construction deficiencies or difficulties if such deficiency or difficulty would affect the integrity of existing project structures. In cases when construction practice or deficiency may result in an imminent danger to the integrity and safety of the existing project, the Corps inspector has the authority to stop construction while awaiting the resolution of the problem.

f. The completed licensed facilities will be inspected periodically by the Regional Engineer's staff to determine that the facility is being properly operated, maintained, and administered in conformance with license conditions. Copies of the reports of these inspections will be furnished to the Corps within 30 days of the date of inspection.

g. Portions of the licensed project works that may affect the integrity and operation of the Corps' project will be inspected and evaluated by the District Engineer as a separate item under the Corps' Periodic Inspection and Continuing Evaluation of Completed Civil Works Structures Program. Copies of the reports of these inspections will be furnished to the Regional Engineer within 30 days of the date of inspection. The Corps and the Commission will take all necessary steps in coordination to avoid duplication of inspections.

h. The Commission will require that the Licensee will assist the Corps District office by integrating the operation of the licensed hydroelectric facility into the Corps' emergency action plan.

i. In the interest of hydropower operation compatible with other authorized functions of the Federal project, the Commission, upon recommendation by the Corps, will require the Licensee to enter into a memorandum of agreement with the Corps describing the mode of hydropower operation acceptable to the Corps. The Regional Engineer shall be a party to these

decisions. This memorandum of agreement shall be subject to revision by mutual consent of the Corps and Licensee as experience is gained by actual project operation. Should the Corps fail to reach an agreement with the Licensee, the matter will be referred to the OEPR for resolution. Copies of the signed memorandum between the Corps and the Licensee and any revision thereof shall be furnished to the OEPR and the Regional Engineer.

3. Access to the Project

The Commission will require the Permittee or Licensee to coordinate the development of its plans for access to the site during site investigation, construction, and operation with the Corps.

4. Annual Charge for the Use of Government Facilities

a. Pursuant to Section 10(e) of the Federal Power Act, the Commission is required to assess a reasonable annual charge for the use of the Corps' facilities.

b. The Commission is considering the issuance of a rulemaking to establish a methodology for determining annual charges for use of government facilities. The Commission will seek the comments and recommendations of the Corps in the selection of the methodology for determination of the annual charges.

5. Coordination with the Commission on Corps' Regulatory Requirements Under Section 10 of the River and Harbor Act of 1899

a. The Corps' Section 10 requirements for power related activities are met through the Commission's licensing procedure including insertion of terms and conditions in the license in the interest of navigation. Section 4(e) of the Federal Power Act requires approval of plans by the Secretary of the Army from the standpoint of interests of navigation. This authority was delegated by the Chief of Engineers to respective Corps' Division Engineers on September 5, 1980.

PART II

NOW THEREFORE, to the extent that the Corps has responsibility under the provisions of Section 404 of the Clean Water Act, for projects under the Commission's jurisdiction, and with respect to the Commission's responsibility under the Federal Power Act, the Commission and the Army further agree to the following:

1. Lead Agency for Environmental Processes

a. If a Commission action involving an application for hydropower license or amendment thereto requires the review and approval by both the Corps and the Commission, the Commission will be the lead agency for environmental documentation pursuant to the procedures set forth below.

b. As soon as practicable within the licensing process involving the need for a Department of the Army permit, the Commission staff will advise the Corps of its environmental analysis. The evaluation by the Commission of impacts upon the environment of all reasonable alternatives will to the maximum extent legally possible satisfy the requirements of both the Commission and the Corps. The Corps will to the maximum extent legally possible accept Commission resolution of issues raised during the environmental processing in order to eliminate further review of such issues during the Corps' permit process.

c. The Commission will be responsible for environmental documentation which will demonstrate, where applicable and required by law, compliance with Federal environmental statutes.

d. As the lead agency, the Commission staff will:

(1) Determine whether a proposed license action is a major Federal action significantly affecting the quality of the environment, or is "categorically excluded" from environmental documentation or is otherwise excluded from environmental requirements.

(2) When the Commission staff determines that the preparation of an EIS or an environmental assessment is necessary, it will coordinate with the Corps to ensure that such environmental documentation adequately covers the portion of the work requiring a Department of Army permit.

(3) Provide a copy of draft environmental documentation to the Corps for its information/comment.

(4) Attempt to resolve environmental issues raised in the draft environmental documentation prior to the approval of the final environmental documentation, or, if issues are not resolved, the lead agency position will to the maximum extent legally possible be accepted by the Corps.

(5) Provide the Corps with a copy of the final environmental documentation at the time the document is issued.

(6) To the maximum extent permitted by law and applicable regulations, the Corps will accept FERC's findings on all environmental and regulatory matters on activities requiring a Department of the Army permit.

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2. Cooperating Agency

a. When an application requires both a FERC license and a Department of Army permit and the Commission determines that the project will require an EIS, the Corps will be provided an opportunity for input as a cooperating agency to ensure consideration of and compliance with its responsibilities in connection with the Clean Water Act.

b. To the maximum extent permitted by law and applicable regulations, the Department of the Army officials conducting their review will accept the Commission's determination regarding the public interest.

3. Public Hearings

Where public hearings are required by the Commission and the Corps, such hearings shall be conducted jointly unless such joint hearings are not feasible.

4. Department of the Army Permit

a. When review by the Corps is required by law, it will be limited to the geographic vicinity of the specific activity requiring a Department of Army permit. Unless required by law and applicable regulations, such review will not duplicate activities of any other Federal or State agency having jurisdiction on certain matters which otherwise might be reviewed by the Corps.

b. The Commission will inform the Corps at the time it receives an application for a FERC permit or license so that the Corps may evaluate whether or not a Department of the Army permit is required. If such an Army permit is required, the Corps will immediately notify the applicant.

c. Substantive comments relative to the Corps' public interest review will be furnished to the Commission and the applicant at the earliest possible date.

d. Unless precluded as a matter of law or procedures required by law, the Corps will issue any required public notice not later than fifteen days after receipt of all information required to complete the application for the preferred action.

e. Unless required by law and applicable regulation, the Corps will not insert special conditions in its permits without first consulting with the Commission concerning its conditions and will not duplicate effects of the Commission nor duplicate Federal, state, or local law or programs.

f. To the maximum extent practicable, the Corps will take action on its permit application not later than 90 days after public notice is issued. The duration of the Department of the Army permit will be commensurate with the expected completion date of the proposed activity

and the Corps will consult with the Commission prior to establishing necessary dates.

5. General Permits

The Corps has found the practice of issuing general permits on both a regional and nationwide basis to be an effective way to reduce duplication, paperwork, and delays. The Commission and the Corps agree to cooperate with this program to the extent that a Corps permit is required. To assist the Corps in its general permit program, the Commission staff will advise the Corps of potential cumulative impacts that may occur as a result of activities authorized by the Commission. The Commission staff will also assist the Corps in its program to develop additional general permits for the Commission's authorized activities.

PART III

NOW THEREFORE, the Commission and the Army further agree to the following:

1. Procedures for Exchange of Information Between the Corps and FERC

The Commission and the Corps will establish procedures as may be necessary to coordinate their activities and to keep each agency fully informed on the activities of the other.

2. Effective Date and Modification

This MOU shall become effective on the last signature date below, and shall remain in effect until it is terminated or renegotiated upon request by either party. If either party finds that its terms need to be modified or amended, the other party shall be notified in writing of the specific change(s) desired, with proposed language, and the reason(s) therefore. A proposed change shall become effective upon written mutual consent of both parties, and shall become a part of this MOU.

3. This MOU extends only to the specific issues enumerated herein and does not apply to other program responsibilities of the Corps of Engineers, the Department of the Army, or the Commission.

The above conditions are approved.

C. M. Butler III
Chairman, Federal Energy
Regulatory Commission

William R. Gianelli
Assistant Secretary of the Army
(Civil Works)

2 Nov 81

(Date)

November 2, 1981

(Date)