

Interagency Task Force Report on
Improving Coordination of
ESA Section 7 Consultation with the FERC Licensing Process

Prepared by the Work Group on the Coordination of Federal Mandates:

Federal Energy Regulatory Commission
U.S. Department of the Interior
U.S. Department of Commerce
U.S. Department of Agriculture
Environmental Protection Agency
Advisory Council on Historic Preservation

Introduction

Under Section 7(a)(2) of the Endangered Species Act (ESA), federal agencies are required to consult with the U.S. Fish and Wildlife Service (FWS) and/or the National Marine Fisheries Service (NMFS), as appropriate, to ensure that any federal action is not likely to jeopardize the continued existence of any threatened or endangered species, or adversely modify critical habitat designated for those species. For hydroelectric licensing proceedings under the Federal Power Act (FPA), ESA consultation is often required in connection with the issuance of original and new licenses. ESA consultation may also be required, in some cases, after a license is issued. Throughout this document, the term "Service" refers generically to FWS and/or NMFS.

This document describes procedures to coordinate and integrate the ESA consultation process with the FPA licensing process, and provides a means of addressing post-licensing consideration of ESA issues. These procedures are intended as general guidance for applicants, FERC staff, and resource agency staff who are engaged in either the traditional or alternative licensing process, subject to any modifications that may be required to address the particular circumstances of each proceeding. This document also addresses issues related to the adequacy of information, off-the record communications, economic feasibility, settlement agreements, information from the Service, and scope of effects of the proposed action. The solutions developed to address these issues are contained both in the main body of the document and in the accompanying appendices. In order to provide the reader with an overview of the new procedures, flow charts are also included with the appendices to this Report. This document is not intended as a modification or restatement of the applicable procedural regulations under the FPA and ESA section 7, respectively, and it is assumed that the reader has basic familiarity with these regulations. Therefore, the reader should refer to the applicable regulations for more detail regarding the procedures addressed in this document. This document does not address substantive issues related to FERC's and the Service's or other resource agencies' responsibilities under Sections 4(e), 10(j), and 18 of the FPA; these issues are considered in a later report.

Coordinating the ESA Section 7 and FPA Licensing Processes

Issues: If a proposed agency action may affect a listed species or critical habitat, consultation with the Service is required under Section 7 of the ESA. If formal consultation is required, this process culminates with the Service's issuance of a Biological Opinion (BO). In formulating its BO, the Service must use the best scientific and commercial information available. The ESA Section 7 regulations and FPA licensing regulations establish processes which require certain actions to be completed within specific time frames before a BO or new license can be issued. While the licensing process may take several years, Section 7 consultations typically do not require this amount of time. Often, however, the same issues are raised in

both processes and require the same or similar information for resolution. There is a common concern that, at times, the ESA Section 7 consultation and FPA licensing processes have not been well integrated, resulting in inefficiencies, inconsistencies, and delays in the application process. Examples of issues raised include:

- When should informal consultation be initiated?
- When should the Biological Assessment (BA) be prepared? (A BA, prepared by the action agency, or the applicant as FERC's designated non-federal representative, aids the action agency in determining if formal consultation is needed.)
- At what point in the licensing process should the formal consultation process begin and end to ensure the BO: Considers an accurate formulation of the proposed action; is based on the best information available; and, is coordinated with a licensing decision?
- How should the ESA Section 7 process be coordinated and integrated with the FERC NEPA process?
- To what extent can FERC's draft EA or draft EIS be used as a BA to initiate formal consultation?
- Where consultations with both NMFS and FWS are required, to what extent should a joint BO be prepared?
- How should the ESA Section 7 process be coordinated and integrated with the FPA Section 10(j) process?
- What is the role of FERC, and/or the applicant as its designated non-federal representative, in this process?

Proposed Solutions:

In Appendix I to this document, FERC and the Service have outlined a means of integrating and coordinating the procedural steps of the FPA licensing process and the ESA Section 7 consultation process. The coordination of the two processes is largely keyed to FERC's traditional licensing process, but Appendix I may be applied to the alternative licensing process as well. In order to expedite both ESA consultation and the overall licensing process, the streamlined process set out in the Appendix aims to ensure that ESA issues are considered early in the process and evaluated alongside other issues.

Specific solutions to the issues posed can be found throughout Appendix I. In summary, they include:

- FERC will designate the license applicant, whenever possible, to act as a non-federal representative for purposes of informal ESA consultation during the FPA pre-application consultation process. FERC will furnish guidance and supervision as needed and will independently review the biological assessment. FERC retains the ultimate responsibility for section 7 compliance during the licensing process.
- Parties are strongly encouraged to discuss, and resolve where possible, ESA issues before a license application is filed.
- Applicants are strongly encouraged to prepare and file a draft biological assessment with the license

application.

- In requesting studies and additional information, resource agencies will consider ESA issues and draft their requests accordingly.
- FERC will make sure that ESA issues are integrated into the scoping process.
- If the effort to consider and integrate ESA issues early in the process is successful, FERC will integrate and coordinate ESA formal consultation with the NEPA and Section 10(j) processes, at least for routine cases. If applied flexibly, this approach may also provide useful guidance for more complex cases. (This approach assumes that the Service and FERC agree that the information base is sufficient to initiate consultation.)
- In such cases, FERC will request initiation of formal consultation when the draft NEPA document is issued. If the Service agrees that the information is sufficient, consultation will proceed expeditiously, and can be completed simultaneously with completion of the Section 10(j) process. The Service will then issue its BO which FERC will include in its final NEPA analysis document.

FERC's Rules Regarding Off-the-Record Communications

Issues: FERC's rules prohibit off-the-record communications between FERC and persons outside FERC in contested on-the-record proceedings (those in which there is an opportunity to intervene and an intervenor disputes any material issue). 18 CFR 2201. As a result, FERC has required that, when consultation under Section 7 of the ESA occurs in a contested case, it must be conducted on-the-record. Generally, only FERC and the Service are consulting parties, with the license applicant usually invited to participate. In some cases, an applicant may be designated to act as a non-federal representative for purposes of informal ESA consultation. If informal ESA consultation occurs early, before a license application is filed, the rule prohibiting off-the-record communications does not apply. However, if ESA consultation (whether informal or formal) occurs post-filing and involves FERC staff in the context of a contested proceeding, FERC requires that other parties be given notice of meetings or other substantive discussions of the matters at issue, as well as an opportunity to be present and observe the consultation. Section 7 consultations are usually most effective when done informally, early, and openly with the action agency and applicant, which allows for early resolution of ESA-related problems. Therefore, FERC's need for on-the-record communications may have the effect of deterring informal discussion of ESA issues.

Proposed Solutions:

FERC recently issued a final rule that would allow for certain limited exceptions to the rule prohibiting off-the-record communications, coupled with a disclosure requirement (64 Federal Register 51222, September 22, 1999). On November 21, 2000, FERC issued its decision on rehearing of the final rule. 93 FERC ¶ 61,181. On rehearing, the Commission declined to include a specific exemption for ESA consultation, and determined that the NEPA exemption regarding off-the-record communications should not be used for ESA consultation that occurs as part of the NEPA process. As a result, post-filing ESA consultation

in contested cases will continue to be conducted on the record. We note, however, that the rule includes an exemption permitting off-the-record consultations in certain circumstances with non-party agencies under the ESA and other statutes.

The Work Group addressed this issue in the previous section on coordination by providing for early, informal consultation before a license application is filed, when an on-the-record proceeding has not yet begun and the rule prohibiting off-the-record communications does not apply.

Adequacy of Information

Issues: The ESA requires the Service to base its biological opinion on the best scientific and commercial data available. In the consultation context, the following issues may arise:

- What happens if the Service and FERC disagree about what constitutes the best available data for: (a) the purposes of initiating consultation or (b) providing the basis upon which the Service issues a BO?
- What constitutes the "best scientific and commercial data available" and to what lengths must the action agency go to obtain it?
- If the Service believes that additional data would provide a better information base upon which to formulate its biological opinion, how should the consultation proceed?
- When consultation is completed without additional data, to what extent is there a continuing responsibility to obtain that data?
- How should the consultation time line be coordinated with FERC's time line for the project in the event there is a need to obtain additional data?

Proposed Solutions:

1. If FERC and the Service are able to agree on what information is needed for the purpose of initiating consultation, FERC will provide the necessary information or request it from the license applicant.
2. If the Service and FERC disagree about what constitutes the best scientific and commercial data available for the purpose of initiating consultation, FERC, the Service, and the applicant will schedule a meeting (or teleconference)¹ to discuss what information is available and needed to initiate consultation, and what additional information can be obtained during the consultation to ensure that the Service's biological

¹ This should be discussed at the NEPA clarification meeting, if held.

opinion is based upon the best scientific and commercial data available.

3. If, after meeting, FERC and the Service still cannot agree on whether the information provided by FERC for the purpose of initiating consultation is adequate, the Service will identify, in writing, the specific information needed to initiate consultation. The Service also may specify what, if any, information can be obtained during the consultation to ensure that the Service's biological opinion is based upon the best scientific and commercial data available. FERC will provide this information or demonstrate in writing why some or all of the information requested is unavailable or is not appropriate. In the latter case, the Service will take a hard look at the information provided to determine whether it is adequate to initiate formal consultation. The Service will inform FERC in writing of its determination and the reasons for it. If FERC and the Service are unable to agree, they will seek to resolve the issue at a higher level within their respective agencies. If the Service still determines that the information is not adequate to initiate consultation, FERC will decide what course of action may be appropriate with respect to the request and the pending license application, and if possible, notify the Service of its decision prior to taking action.

4. If the Service determines that sufficient information has been presented to initiate consultation, but additional data would provide a better information base upon which to formulate a biological opinion, the Service may request an extension of formal consultation and request that FERC obtain the additional data. The Service will provide FERC and the applicant with its reasons for concluding that additional data are needed.

5. If FERC and the Service agree that the additional data are needed, FERC will agree to the extension and obtain, to the extent practicable, the data that can be developed during the extension. An extension greater than 60 days shall require the consent of the applicant. (See 50 CFR 402.14(e))

6. If FERC and the Service are unable to agree on the need for additional information, the Service will proceed with consultation based on the data already provided and otherwise available to the Service. The Service will prepare a biological opinion that: (a) documents what information was not provided and why such information would have been helpful in improving the information base for consultation; and (b) resolves uncertainties in favor of the conservative protection of the listed species – including any uncertainties that arise from differences between the Service's and FERC's views of what constitutes the best scientific and commercial data available.

Economic Feasibility

Issues: To be considered a reasonable and prudent alternative (RPA), ESA regulations require that an action be both economically feasible and capable of avoiding jeopardy and destruction or adverse modification of critical habitat. To assess economic feasibility, information regarding how the proposed modifications will affect costs is needed. FERC provides information on the cost of environmental measures in its environmental documents and compares the cost of project power to the cost of replacement power.

However, FERC's policy is to allow the license applicant to determine whether to accept the license, including conditions requiring any reasonable and prudent alternatives, and all costs associated with such conditions. This approach can make it difficult for the Service to determine whether RPAs are economically feasible.

Proposed Solutions:

1. The Service, the Commission, and the applicant will develop information on economic feasibility during informal consultation. If this information is not provided, the Service will inform FERC. If FERC agrees that such information is available or can be obtained during consultation, FERC will request the license applicant to provide this information, and will be responsible for ensuring that the applicant supplies such information to the Service, as appropriate.
2. FERC will include information on the cost of environmental measures to protect listed species and their habitat in its draft NEPA document, consistent with FERC's guidelines for conducting its economic analysis.
3. If the Service prepares a draft biological opinion with reasonable and prudent alternatives that differ from the environmental measures for threatened and endangered species included in FERC's draft NEPA document, FERC will provide the Service with a revised economic analysis of those measures upon request.

Settlement Agreements

Issues: Under both the traditional and the alternative licensing process, the Service may be involved in resource issues work groups and subsequent settlement negotiations. The Service may also be involved in settlements after license applications have been filed or after a license has been issued. Often these settlements address endangered species issues or include measures that could affect endangered species (e.g., minimum flow releases). Section 7 consultation, if needed, typically follows development of the settlement.

When parties reach a settlement agreement in a case that includes ESA issues, concerns may arise about how best to accommodate both the settlement process and the need for consultation under Section 7 of the ESA. If the Service participates in settlement negotiations and agrees to a settlement, parties may be concerned about the possibility of Section 7 consultation yielding results that are inconsistent with the settlement agreement. Parties may also be uncertain about the need for consultation on the provisions of the settlement. If a settlement is reached after consultation has been completed, the applicability of that consultation may be in question. These issues are related to the general issue of coordinating ESA consultation and the licensing process, and include both the timing and the substance of consultation in relation to settlement agreements.

Proposed Solution:

1. Service T&E staff, as well as Service hydropower staff, will participate in settlement discussions and anticipate the consequences of the settlement on listed or proposed species, on the applicability of any completed consultations, and on the future need for Section 7 consultation. This will help ensure that, to the degree practicable, the protective measures recommended in the settlement process will encompass those measures found necessary during the Section 7 process. However, the Service will reserve its right to develop additional or different measures necessary to meet its responsibilities under Section 7.

Post-licensing & ESA Section 7 Consultation

Issues: After a license is issued, FERC and the Service agree that ESA consultation may be triggered by a license amendment or other action requiring FERC approval. However, new species may be listed or new information may become available indicating a potential project effect on listed species or critical habitat. FERC and the resource agencies differ regarding FERC's Section 7 responsibility absent a license amendment or other federal action requiring Commission approval after a license is issued. In FERC's view, a definitive federal action, such as Commission approval of a license amendment, is needed to trigger consultation. In the Service's view, either new listings or new information, together with FERC's continued oversight and discretionary authority over licenses, are sufficient to trigger Section 7 consultation for an ongoing license. In addition, the Service believes that the transfer of a license is a federal process meeting the definition of an "action" in 50 CFR 402.02, whereas FERC regards a license transfer as not meeting this definition, because it involves merely a substitution of licensees without any substantive changes in the license.

Proposed Solution:

In Appendix II to this document, FERC and the Service have outlined a means of addressing ESA issues in the post-licensing context. The Appendix provides a procedural framework for identifying issues; consulting among FERC, the applicant and the Service; and determining the need for measures to protect listed species and critical habitat.

Information from the Service

Issues: In both licensing and post-licensing proceedings, FERC and licensees often consult with resource agencies with respect to environmental issues. In some cases, the agencies have separate technical staffs that consult exclusively on either hydropower or ESA issues. In addition, there are cases in which ESA and hydropower staffs from both Services are participants. Given the various types of agency staff which might be involved, there is potential for conflicting agency guidance, processes, and understandings to develop.

Proposed Solution:

1. As outlined in Appendix I to this document, Service ESA staff, as well as Service hydropower staff, will become involved early in the process (i.e., during pre-filing consultation with prospective license applicants) to ensure that ESA issues are considered together with other issues. During licensing proceedings, Service ESA staff and Service hydropower staff will continue to consult and coordinate with one another to assure a consistent approach to licensing issues. Service participation in post-licensing proceedings and settlement negotiations will be similarly coordinated.

"Scope of Effects" of Proposed Action

Issues: The regulations on Section 7 consultation list examples of "action" as actions directly or indirectly causing modifications to the land, water, or air. Indirect effects are delayed effects caused by the proposed action which are reasonably certain to occur. The Service and FERC sometimes differ on the "scope of effects" of a proposed action. These differences concern whether the effects in question are reasonably related to the proposed action, and whether there is a "reasonable" likelihood that indirect effects may result from the proposed action.

Proposed Solutions:

1. Participants are encouraged to identify the scope of effects early in the FPA process thereby allowing sufficient time to adequately resolve concerns while avoiding delays that may otherwise result.
2. In its cover letter transmitting its NEPA document or Biological Assessment, FERC will explain how it considered direct and indirect effects of the proposed action, any cumulative effects, and the effects of any interrelated or interdependent actions, as well as the basis for its findings.
3. In assessing the adequacy of information provided, the Service will be as specific as possible about what effects or actions it believes FERC should have considered, or did not consider in sufficient detail.

APPENDIX I
COORDINATING ENDANGERED SPECIES ACT CONSULTATION
WITH THE FERC HYDROPOWER LICENSING PROCESS

This Appendix outlines a means of streamlining the hydropower licensing process by coordinating and integrating Endangered Species Act (ESA) consultation with the Federal Power Act (FPA) licensing process. Coordination of the two processes is largely keyed to FERC's traditional licensing process, but it may be applied to the alternative process as well. The Appendix is keyed to the existing steps of the FERC licensing process, both before and after the application is filed, and explains how consideration of ESA issues can be integrated and coordinated at various stages of the process.

If a proposed FERC action, such as granting a license, may affect a listed species or designated critical habitat, ESA section 7 consultation is required. This consultation can have two phases: "informal consultation" and "formal consultation." The following streamlined process is specifically designed to use the informal consultation process to identify and avoid potential conflicts with the needs of federally listed species early in the licensing process, as well as to provide an opportunity for early coordination among involved parties. The goal is either to reduce potential effects to listed species and designated critical habitat to the point where adverse effects are not likely, thus eliminating the need to complete formal consultation, or to develop a project design and effects analysis that can undergo formal consultation more efficiently.

For this process to be fully effective, a prospective applicant should engage the Fish and Wildlife Service and/or the National Marine Fisheries Service (henceforth collectively referred to as the "Service"), as appropriate, early in the pre-filing stage, as the project design is developed. At the time an applicant chooses to use this streamlined process, the first step is to request that FERC designate it as a non-Federal representative for purposes of beginning informal consultation with the Service, with FERC retaining the ultimate responsibility for completing formal consultation during the licensing process. If, however, early involvement is not achieved, the following document may still be used in guiding all parties through the ESA consultation process in FPA proceedings.

Pre-filing Consultation (i.e., before a license application is filed)

The steps described below are intended to occur at the stages represented by each box on the attached flow chart, labeled "Figure 1, Coordination of FERC Pre-Filing Consultation Process and Endangered Species Consultation."

BOX 1

Upon request of the applicant, and if the Federal Energy Regulatory Commission (FERC) determines that the following process is appropriate, FERC will provide the Service and the applicant with a letter

designating the applicant as a non-Federal representative to respond to ESA Section 7 consultation matters on behalf of FERC. This letter will describe the roles and responsibilities of the non-Federal representative, which include conducting studies, developing and supplying information, attending meetings, ensuring that pertinent ESA information is maintained in a project file, developing a draft Biological Assessment (BA), participating in informal consultation with the Service, and keeping FERC apprised of its actions. Additionally, the letter will establish a point of contact within FERC who will guide the non-Federal representative and review and evaluate information prepared by the non-Federal representative, as appropriate.

If appropriate, the Service should establish a FERC Team – including staff who work on the FERC hydropower project and staff who address endangered and threatened species and ESA compliance – to coordinate activities throughout the pre-filing and post-filing licensing process.

The non-Federal representative should contact the Service to schedule a coordination meeting to identify the expectations of each party and coordinate the information needed for the hydro licensing and ESA consultation processes. At this stage (or earlier), the non-Federal representative should request from the Service a list of any listed or proposed species, or designated or proposed critical habitat that may be in the area affected by the proposed project, as well as any candidate species that are likely to become listed during the licensing process. Modifications to this list (delisting/added species, etc.) may be made, as needed, throughout the licensing proceedings.

If a coordination meeting is warranted it should be held as early as possible. During this meeting, participants also will begin identifying information that will be needed for Section 7 consultation which may include, among other things: (a) a description of the project, including location maps and project drawings; (b) a description of listed species that may be affected in the project's action area; (c) information related to the ESA baseline; (d) a list of existing scientific information/studies; (e) identification of needed scientific information/studies; (f) identification of activities that may be interrelated or interdependent with the proposed project; (g) identification of effects of the project on listed and proposed species, including direct and indirect effects of the project, any interrelated or interdependent actions, as well as any cumulative effects; (h) potential conservation actions and operational criteria that can be incorporated into the project to avoid or minimize effects on listed and proposed species; and (i) information on the legal, economic, and technical feasibility of such actions and criteria. Because there are sometimes disagreements about what information is needed, parties are encouraged to initiate a dialogue on these issues early in the consultation process.

BOX 1A

In its FPA initial consultation package [18 CFR 4.38(b)(1) or 16.8(b)(1)], a prospective license applicant (hereafter referred to as the “non-federal representative”) should include, as appropriate, information on threatened, endangered, proposed, and candidate species and any designated, or proposed critical habitat (“T&E species”), potential effects of the project on T&E species, and proposed resource measures for

T&E species. Although not required, applicants are encouraged to include consideration of proposed species and proposed critical habitat, as well as any candidate species that are likely to become listed during the licensing process, together with listed species and designated critical habitat.

BOX 1B

At the joint meeting during the first stage of pre-filing FPA consultation, the non-Federal representative should request the Service, tribes, non-governmental organizations, and others to identify any concerns about studies, project effects, and proposed resource measures related to T&E species.

In addition, applicants are encouraged to coordinate with agencies and other stakeholders involved in other federal and non-federal activities – including FERC licensing activities – within the same watershed.

BOX 1C

After reviewing the non-Federal representative's initial consultation package and after the joint meeting, the Service should provide the non-federal representative with any pertinent information it has on T&E species in the action area, or where to get it. The Service also shall: (a) discuss its understanding of the resource issues related to T&E species; (b) identify potential project effects, including direct, indirect or cumulative effects; (c) recommend studies necessary to comply with the ESA; (d) provide technical assistance on needed study plans, checkpoints, and appropriate methodologies; and (e) provide guidance on ways to improve treatment of those issues in the package as appropriate.

BOX 1D

If the non-Federal representative elects not to conduct studies that were recommended by the Service, it should meet with the Service to attempt to resolve any dispute.

BOX 1E

As the studies are completed, the non-Federal representative should provide and discuss the information obtained by the studies with the Service. FERC also should be supplied with this information and provided the opportunity to participate in any discussions.

BOX 1F

When the non-Federal representative submits its draft license application to the resource agencies and FERC, the non-Federal representative may include its draft Biological Assessment prepared during informal consultation. All study results gathered to date should be included in the draft application and/or draft BA, along with any proposed conservation, protection, or enhancement measures.

BOX 1G

If a draft BA is included with the draft license application, the Service will provide its comments on whether the draft BA satisfies requirements of the ESA and ESA regulations. FERC will provide comments as appropriate. The non-Federal representative is encouraged to consider the Service's and FERC's comments when revising the draft BA.

BOX 1H

If the non-Federal representative holds a meeting to discuss the draft license application, the non-Federal representative will include discussion of ESA issues, as appropriate. If needed, the Service will offer additional informal ESA consultation assistance at this time.

Post-filing Process (i.e., after a license application is filed) - see Figure 2, “Coordination of FERC Post-Filing Process and Endangered Species Consultation.”

If a draft BA is filed with the license application and FERC and the Service conclude that the draft BA is satisfactory, it ordinarily should not be necessary to address ESA issues in Boxes 2 through 13 below although they will be addressed in subsequent stages of FPA and NEPA analysis. However, if the pre-filing ESA consultation process is not used, or if additional information is needed, Boxes 2 through 13 should be used.

BOX 2: APPLICANT FILES APPLICATION WITH FERC

The license application filed with FERC and served on the agencies may be accompanied by a revised draft Biological Assessment of the preferred alternative, including all relevant components of the applicant's proposal and any associated settlement agreement. This revised draft Biological Assessment will include the results of studies and information gathered during the pre-filing process.

BOX 3: TENDERING NOTICE ISSUED (ADDITIONAL STUDIES REQUESTED)

In response to FERC's tendering notice, the Service may provide FERC formal written comments on the studies completed and may request any additional studies they believe are needed for Section 7 consultation, including an explanation of why the information is presently needed, why the available information does not satisfy that need, and why any additional studies were not requested earlier.

BOX 4: ADEQUACY REVIEW COMPLETED

BOX 5: ACCEPTANCE LETTER AND NOTICE ISSUED (Interventions due)

BOX 6: NOTICE OF SCOPING AND SCOPING DOCUMENT 1 ISSUED

In NEPA Scoping Document 1, FERC will identify what T&E species may be present and what the issues are regarding those species.

BOX 7: ADDITIONAL INFORMATION REQUEST (AIR) AND RESPONSE TO ADDITIONAL STUDY REQUESTS ISSUED

In response to any additional information or studies requested by the Service, FERC will review such requests and solicit additional information from the non-federal representative, as appropriate. (See Adequacy of Information section of this Report.) FERC response may be deferred to BOX 10, as appropriate.

BOX 8: SCOPING MEETING HELD

At the agency scoping meeting, FERC and the Service will discuss whether the species list is accurate and whether there is sufficient information to analyze project effects on T&E species. FERC and the Service will also discuss any additional information that may be needed and any recommended measures for T&E species. To assist FERC in meeting its ESA responsibilities, the Service will bring to FERC's attention any information it has regarding the scope of effects of the proposed action, including any direct, indirect, and cumulative effects that it believes should be analyzed, as well as any interrelated or interdependent actions that it believes should be considered. (See Adequacy of Information section of this Report.)

BOX 9: SCOPING COMMENTS DUE

In response to the FERC scoping notice, the Service will provide comments on, among other topics: (a) information gathered to date and any remaining information and/or additional studies that still may be required to satisfy Section 7 consultation requirements; (b) alternatives to be considered in the biological assessment/evaluation; (c) impacts to be evaluated; (d) any conservation measures to be evaluated, and, (e) the accuracy of species list. In providing these comments, the Service will be as specific as possible, particularly when identifying potential impacts (i.e., direct, indirect or cumulative effects).

BOX 10: SCOPING DOCUMENT 2 AND ADDITIONAL INFORMATION REQUEST (IF NEEDED)

FERC will review Service comments and obtain information requested by the Service, as appropriate. (See Adequacy of Information section of this Report.)

In Scoping Document 2, FERC will update the issues section of the document, as appropriate, to reflect any comments on T&E species. If the second Scoping Document and/or the draft BA (if prepared) do not satisfy the Service's concerns regarding Section 7 consultation or information gathering, the Service will provide FERC with a letter clearly, and as specifically as possible, explaining its ESA-related concerns and recommending ways to address these concerns.

BOX 11: ADDITIONAL INFORMATION FILED

The applicant will provide the Service with copies of any additional information filed with FERC pertaining to listed species, as required by 18 C.F.R. Section 4.34(b).

BOX 12: READY FOR ENVIRONMENTAL ANALYSIS NOTICE ISSUED

BOX 13: COMMENTS, TERMS, AND CONDITIONS DUE

In response to FERC's Ready for Environmental Analysis Notice, the Service will provide its recommendations, comments, prescriptions, and terms and conditions pursuant to sections 4(e), 10(a), 10(j), and 18 of the FPA. Section 7 consultation may result in additional or different measures.

BOX 13a: NEPA CLARIFICATION MEETING

If a NEPA clarification meeting is held (as described in the Interagency Task Force NEPA Report), FERC and the Service will use this meeting to discuss the information needed to initiate consultation and the appropriateness of initiating formal ESA consultation at that time. Among other things, FERC and the Service will discuss whether there are any outstanding issues regarding the specific geographic area that may be affected or the scope of effects of the proposed action on listed species and their critical habitat. Such issues could also include, where applicable, direct and indirect effects of the proposed action, cumulative effects, and the effects of any interrelated or independent actions.

BOX 14: DEA/DEIS AND NOTICE OF AVAILABILITY OF DEA/DEIS ISSUED; 10(J) LETTER ISSUED (IF NEEDED)

If formal consultation is appropriate, FERC will request initiation of formal consultation with the Service at the time it issues its notice of availability of the draft EA/EIS. In most cases, FERC will use the draft EA/EIS as its BA, as specified below. If the draft EA/EIS does not include a discussion of ESA issues (e.g., because of a new ESA listing), FERC will prepare a separate Biological Assessment.

Section 7 regulations distinguish the information required to initiate formal consultation under 50 CFR Section 402.14(c) (the "initiation package") from the Biological Assessment. FERC prefers to combine these two items in its draft EA/EIS. Therefore, to assist the Service in evaluating the completeness of FERC's initiation package, FERC will provide a cover letter summarizing its findings and providing specific page references to the chapters, sections, or pages of the draft EA/EIS that contain the information required to initiate formal consultation. The intent of this letter is to streamline the section 7 formal consultation by providing Service staff with the exact location and precise page numbers within the NEPA documents where the specific information required for consultation may be found. It is important that these references provide the Service an accurate location of elements relevant to ESA compliance to help ensure that the Service and Commission can complete formal consultation within the time frames provided by the ESA

regulations. With this in mind, the cover letter should cite pages that contain information regarding the following: (1) the action to be considered (generally, this will be the preferred alternative); (2) the specific area that may be affected by the action; (3) any listed species or critical habitat that may be affected by the action; (4) the manner in which the action may affect listed species or critical habitat, including any direct, indirect, or cumulative effects; (5) relevant reports, including any EA, EIS, or biological assessment (generally, this will be a list, because the reports will either be publicly available or will already be part of the administrative record of the proceeding); and (6) any other relevant available information on the action, affected species, or critical habitat.

If a draft EIS is prepared, FERC will include a separate section on ESA issues in Chapter 3 (“Affected Environment”) and Chapter 4 (“Environmental Consequences”), so that a discrete analysis of ESA issues can be found in those sections. If a draft EA is prepared, FERC will include a separate ESA section in the draft EA.

The Service will review FERC's initiation package and will inform FERC, within 30 days, whether it contains sufficient information to initiate consultation. If the Service determines that sufficient information is available or can be obtained during consultation, FERC and the Service will use the ESA/10(j) integration process (see next section below) for consideration of ESA issues concurrently with the FPA Section 10(j) process. (See attached ESA/Section 10(j) flow chart.) If the Service determines that the Section 7 initiation package is not sufficient to initiate consultation, it will provide FERC with a written explanation, including a description of the specific information lacking and make recommendations regarding the manner by which such information might be obtained and presented. Upon mutual agreement of the adequacy of the initiation package, the Service shall confirm immediate initiation of formal consultation. If FERC and the Service are unable to agree, they will seek to resolve the issue at a higher level within their respective agencies.

BOXES 14 THROUGH 16: “The ESA/10(j) Integration Process” - see Figure 3.

If use of the ESA/10(j) integration process is appropriate, FERC and the Service will coordinate the Section 10(j) process with the ESA formal consultation process. If a Section 10(j) meeting is held, FERC and the Service will discuss ESA issues together with Section 10(j) issues and FERC staff will issue a summary of the meeting. If a Section 10(j) meeting is not held, FERC and the Service will determine whether to hold an ESA consultation meeting. If an extension of time to complete formal ESA consultation is needed, the Service will request an extension as provided by ESA regulations.

The ESA/10(j) integration process is intended for simple cases not requiring the Service to develop a draft Biological Opinion (BO). If FERC's initiation package contains sufficient information to initiate consultation using the ESA/10(j) integration process, but after initiation the Service preliminarily determines that the proposed action is likely to jeopardize listed species or adversely modify critical habitat, the Service will inform FERC (and the applicant and other parties) that it intends to issue a draft jeopardy BO. The draft BO will include proposed reasonable and prudent alternatives, if available, and proposed reasonable and

prudent measures to minimize the impact of any incidental take. The Service will coordinate with FERC and the applicant in developing these RPAs.

If an extension of time to complete formal ESA consultation is needed to develop a draft BO, the Service will request an extension as provided by ESA regulations.

BOX 16

FEA/FEIS AND NOTICE OF AVAILABILITY OF FEA/FEIS ISSUED

FERC will include its analysis of the results of the Service's Biological Opinion in its final EA/EIS.

BOX 17

ORDER ISSUED

FERC will include its analysis and discussion of ESA issues and any necessary license conditions for the protection of listed species and their critical habitat in its license order. Concern has been raised that, at times, changes are made to projects after the license has been issued without sufficient notice to the Service. (Although the Work Group intended to address this issue, together with other issues related to post-licensing, it was unable to do so because of time constraints.)

BOX 18

(For Post-licensing consideration of ESA issues, see APPENDIX II)

APPENDIX II
COORDINATING ENDANGERED SPECIES ACT CONSULTATION
WITH POST-LICENSING

(Boxes Correlate with *Post-Licensing Flow Chart* – see Figure 4)

POST LICENSING NOTICES (IF NECESSARY)

BOX 1

After a license is issued, new information may surface regarding project effects on listed species or critical habitat. In other instances, new species may be listed or critical habitat may be designated after a project is licensed and operational. FERC may receive information from licensees, non-governmental organizations, or the Service raising concerns about the effects of specific projects on the listed species or critical habitat.

BOX 2

FERC, the licensee, and the Service will consult to identify the information that would be needed to determine potential project effects. This consultation could include, among other things, compilation of existing scientific information/studies and/or identification of needed scientific information/studies. FERC and the licensee, with Service input as appropriate, will use this information to prepare a Biological Evaluation (BE) on the effects of the project on the listed species. FERC, the licensee, and the Service will attempt to reach agreement on a time frame for completing consultation, taking into account the potential effects that may be occurring while consultation proceeds.

BOX 2a

If the BE indicates that protective measures are not needed because project operations have no effect or are not likely to adversely affect the listed species, then FERC will send a letter and the BE to the Service explaining its reasons for the finding. FERC could also determine that, while there may be changes to existing project operations needed to protect listed species, no changes to the license would be needed to facilitate those changes.² The Service will respond to FERC's letter indicating whether or not they agreed with FERC's determination. If FERC and the Service are unable to agree, they will seek to resolve the issue at a higher level within their respective agencies.

BOX 3

² In this case, the licensee, with FERC oversight, could continue its collaboration with the Service to facilitate the necessary changes to project operations.

Based on the information developed in BOX 2 , FERC, the licensee, and the Service will continue consultation to develop conservation actions and operational criteria that could be incorporated into the project to avoid and minimize impacts to the listed species.

BOX 3a

If the results of the-consultation indicate that changes in existing project operations or facilities and license conditions are needed to protect listed species, and the licensee agrees with those changes, the licensee would file a non-capacity amendment application with FERC. The application, among other things, should include the licensee's proposed changes to project operations or facilities, as well as-the comments of the Service, any state fish and wildlife agencies, and any Indian Tribes that may be affected by the proposed change.

BOX 3b

If the results of the consultation indicate that changes in existing project operations or facilities and license conditions are needed to protect listed species, but the licensee does not agree with those changes, FERC would initiate a license reopener proceeding based on a specific or standard license reopener article.³ FERC would issue a public notice of the reopener proceeding, indicating the reason for the reopener, inviting comments from the resource agencies and interveners, and providing notice and opportunity for hearing to the licensee.

BOXES 4 THROUGH 6

The activities identified in BOX 3a and BOX 3b will require formal consultation under Section 7 of the ESA, unless FERC and the Service agree that the actions are not likely to adversely affect listed species. FERC may designate the licensee to act as its non-federal representative for purposes of informal consultation. FERC will initiate formal consultation under the ESA and, with the exception of the FPA 10(j) process, follow procedures as outlined in Boxes 13a - 17 in the post-filing licensing process.

³ All licenses issued since October 31, 1975 contain standard reopener articles for fish and wildlife that can be used to address ESA issues. Some older licenses do not contain provisions to reopen the license for the protection of fish and wildlife. In those cases, FERC and the Service should continue consultation with the licensee to facilitate the necessary changes to project operations or facilities.