Interagency Task Force Report on

Improving the Studies Process in FERC Licensing

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

Before FERC can make an informed decision as to whether to issue a new hydropower license, it must obtain adequate information on all aspects of the project, including effects on fish and wildlife and natural, cultural, recreational and tribal resources. In order to obtain this information, it is typically necessary for the applicant to conduct studies to assess those environmental effects and to determine the resource protection, mitigation and enhancement measures needed at the project.

These studies constitute a critical element of the licensing process in a number of ways. Studies, and the resulting information, provide the foundation for analyzing the proposed project and alternatives, assessing effects, and determining appropriate protection, mitigation and enhancement measures. Studies also provide much of the basis for resource agencies to develop proposed license conditions to protect resources for which they have statutory responsibilities. The Bangor decision, which requires that conditions be supported by substantial evidence, highlights the importance of the information resulting from studies.[1] Finally, FERC needs the information generated by studies to perform its NEPA environmental analysis and other regulatory responsibilities, to make an informed decision as to the appropriate level and type of resource measures to attach to licenses, and to ensure that its decisions are supported by substantial evidence.

Because of differing views over studies, including those regarding their adequacy, relevance and quality, studies are often a source of disagreement among participants, which can result in increased expense and delay in the licensing process. Some contend that resolving key problems associated with studies would make a substantial contribution toward avoiding disputes and litigation and significantly speeding up the overall licensing process.

The purpose of this document is to identify some of the salient issues associated with identifying and conducting studies in the traditional licensing process and to recommend some specific steps to address these issues. While this report assumes the traditional licensing process, many of the solutions could also be useful in an Alternative Licensing Process. With the exception of dispute resolution, FERC normally has a limited role in the pre-filing phase of the traditional licensing process. Therefore, while this document provides some basic guidelines on how to identify resource issues and conduct studies during the pre-filing stage, it is primarily focused on dispute resolution and post-filing studies.

Pre-filing Studies

Issues: There are a number of issues that come up during pre-filing with respect to selecting and

[1] Bangor Hydro-Electric Company v. FERC, 78 F.3d 659 (D.C. Cir. 1996).

implementing studies. Any one of these issues, if unresolved, can lengthen the time before studies are completed, thus lengthening the overall licensing application process. If FERC determines, after reviewing the license application and additional study requests, that information related to resource effects is needed for its licensing decision, it will request the applicant to submit additional information before proceeding with the application process. Such additional information requests may lead to delays in the overall licensing process.

Significant issues associated with pre-filing studies that were identified by the working group are listed below.

1. During initial stages of consultation, license applicants must identify the affected environment, significant resources affected by the project, and their proposed studies and study methodologies. License applicants may not always provide sufficient information in these areas to enable resource agencies to identify necessary studies, comment on proposed studies, or recommend additional studies.

2. Conflicts can occur if study requests made by resource agencies are not sufficiently clear about their resource management goals and the nexus between the project and potential resource effects.

3. Disagreements may arise as to which resource issues require studies and what kind of studies are necessary.

4. Differences over the necessity of conducting studies sometimes occur because there is a lack of recognition that agencies need study information to develop their recommendations and conditions.

5. Once the general studies are agreed upon, problems can arise in trying to agree on study goals, methodologies, and data collection.

6. Even when the study plan is acceptable to all participants, there may be problems with the timing of study initiation and completion as well as the quality of the studies performed.

7. Even if the quality of the completed studies is adequate, disagreements can arise over the interpretation of the results.

8. Completed studies or proposed changes to project design can reveal new issues that require further study which complicates the licensing schedule.

9. During the overall studies process, there may not be sufficient communication between applicants and agencies with regard to sharing information on the study plan, design, and methodologies and the monitoring of study execution and progress.

10. Participants may disagree about the need for studies when they have agreed on mitigation measures

and are working toward settlement.

Proposed Solutions:

The following are suggestions for applicants, resource agencies, and other participants on how to improve the process by which studies are selected, designed, and implemented and thereby ensure a more expeditious overall licensing process:

1. To gain insight into the type of information necessary for a complete application, applicants should consult FERC's "Hydroelectric Project Licensing Handbook" (December 1991) or "Hydroelectric Relicensing Project Handbook" (April 1990). FERC is in the process of consolidating these two documents into one revised and updated handbook that will cover both licensing and relicensing. In addition, applicants may also consult agencies for relevant guidance and publications.

2. Applicants should initiate the process for conducting studies sufficiently early so as to ensure that all necessary studies are completed before the application is filed. In identifying necessary studies, it would be helpful for the resource agencies to have specific information regarding the project description, resources, operations and effects.

3. As early in the process as possible, resource agencies should provide the applicant with an explanation of resource management goals, study objectives, suggested methodologies, data collection and analysis techniques. The resource agencies should also demonstrate a clear nexus between project operations and the resources being studied as well as between information needs and statutory responsibilities.

4. In making study requests, the resource agencies should identify studies needed to assess project effects for the purpose of developing recommendations and conditions. The information generated by the studies may be part of the administrative record used to support recommendations or conditions.

5. When possible, participants will provide and make use of existing studies and other applicable information.

6. Starting early in the consultation process, participants should cooperate in developing study objectives, time lines and methodologies. In addition, consulting resource agencies on the selection of contractors to conduct studies may help avoid surprises and delays.

7. All participants should consider cost and practicality when developing the study plan.

8. Participants should also establish protocols for sharing information on all aspects of the study plan and its execution (e.g., evaluation of study plan, monitoring of study implementation, review and discussion of interim and final results and possible need for modified or additional studies).

9. Participants involved in settlement agreements should acknowledge the need for basic information to meet the substantial evidence standard which, in some cases, might require the execution of studies.

10. Various dispute resolution processes are available should disagreements over study issues persist.

Options for Resolving Disputes

Issue: Study issues can sometimes be the source of disagreements among the various participants involved in a given licensing. Participants can often avoid such disagreements by working together early in the licensing process to identify their resource goals and develop a study plan. Yet, in those cases where study disputes cannot be avoided, there are a variety of ways that participants can seek resolution.

Proposed Solutions:

1. Early in the pre-filing licensing process, resource agencies should identify their resource management goals. In addition, this is a good opportunity for other participants to identify their resource goals. With resource goals identified, participants should work together to develop a study plan appropriate to the range, impact and scope of resource issues affected by the project. If disagreements arise between participants as to the study plan, participants are encouraged to attempt to resolve these disagreements early.

2. If early attempts to resolve disagreements regarding studies fail, participants have a variety of options available to them to help resolve the dispute:

a) Participants may use alternative means of dispute resolution, including but not limited to settlement negotiations, conciliation, facilitation, mediation, fact finding, mini trials and panels, or any combination thereof. If alternative dispute resolution is considered, participants must agree to a process appropriate and acceptable to the group.[2]

b) FERC regulations provide that if a dispute arises between a potential applicant and a resource agency or Indian Tribe regarding the need to conduct a study or gather information, or regarding any other matter arising during the first stage of consultation, any of these participants may refer the dispute, in writing,

[2] See 18 C.F.R. Section 385.604. Note that FERC regulations allow for the use of these alternative processes, though there are certain instances where that use may be limited. In addition, FERC's Office of Dispute Resolution Services can provide advice and information to participants regarding the use of alternative means of dispute resolution.

to the Director of the Office of Energy Projects (Director) for resolution.[3] In addition, the resource agencies may have alternative dispute resolution processes which may be used by applicants. The determination of the appropriate forum for dispute resolution should be made by the participants to the dispute and be based upon the subject matter of the dispute.

If resource agencies choose to use FERC's dispute resolution procedure and believe that further discussion would be useful, they may request, either in the referral or the response, that FERC also hold a technical conference. In appropriate cases, FERC will schedule a technical conference to clarify and attempt to resolve the issue before the Director issues a decision. Whenever possible, FERC will issue its letter resolving the dispute within 30 days of the technical conference.

Post-filing Studies

Issues: After an application is filed, FERC staff reviews the application for completeness, including whether there is adequate information about environmental effects of the project. FERC may require, on its own accord, or on recommendation of a resource agency, that the applicant perform certain post-filing studies necessary to provide any missing information.

As with pre-filing studies, agencies may request post-filing studies be performed to provide information to assist in the development of recommendations and conditions to protect resources under their jurisdiction; similarly, agencies may view some study results as failing to provide such necessary information. However, disagreements may arise as to the need for these studies, or as to who has responsibility for providing certain information.

The time needed for post-filing studies may delay FERC's final action on an application. Therefore, to keep this delay to a minimum, it is important that the status and progress of these post-filing studies be monitored. During study execution, circumstances may arise that require modification of study design and scheduling to obtain desired study conditions and useful results. Current procedures do not promote or easily allow for the review of study progress or study execution. In addition, resource agencies, applicants, and FERC may disagree on how to interpret study results. Even when studies (both pre-filing and post-filing) are well executed, new issues may emerge, which may necessitate additional studies. Finally, studies may not present a clear picture as to what resource measures may be needed or how effective they may be.

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[3] See 18 C.F.R Sections 4.38(b)(5) and 16.8(b)(5) for more detail. Note: Normally, applicants, agencies, and tribes have made limited use of the process. There is some concern that FERC may not be prepared to resolve the dispute because they haven't been involved in the pre-filing consultation process. In addition, resource agencies are concerned that their participation in FERC's dispute resolution process to resolve study issues could undermine their ability to obtain the information needed to develop mandatory conditions.

Proposed Solutions:

1. When making requests for post-filing studies, resource agencies should identify which studies are being proposed for the purpose of providing information needed to develop recommendations and conditions.

2. Use the scoping meeting to discuss the study requests and review and document the progress of post-filing studies.

3. FERC and the resource agencies should encourage applicants to institute check points in study plans as a way to update FERC and the agencies on the status of studies.

4. Full agreement on study results is not always possible, but it is important that the resource agencies, FERC and other participants fully understand their respective views. Possible forums for discussion include scoping meetings, and status teleconferences before and clarification meetings after FERC issues a notice that an application is ready for environmental analysis.

5. Even in cases where the most comprehensive and cooperative studies have been conducted, some information may be unattainable at the time of licensing. When uncertainty prevents appropriate environmental measures from being identified for the term of the license, adaptive management may be appropriate. An adaptive management plan proposed for inclusion in a new license may allow FERC to expedite license issuance as long as the plan includes provisions for completing adaptive management studies or monitoring in the post-licensing period. A license which adopts an agreed upon adaptive management plan should include: (1) measurable objectives; (2) interim resource measures; (3) an effective monitoring program or studies designed to evaluate whether objectives are being met; (4) procedures for revising interim resource measures to incorporate new measures in light of new information; (5) provision for licensees to consult with resource agencies (and other participants, as appropriate) in developing, implementing and adjusting the plan; and (6) a structure that takes into consideration enforceability by FERC.

Adaptive management may not be appropriate in all situations and should not be considered a substitute for studies needed prior to license issuance. In developing adaptive management plans, participants should be aware that FERC's enforcement authority under the FPA extends only to licensees.