

**Forest Service Handbook  
National Headquarters - Washington Office  
Washington, DC**

**Forest Service Handbook 2709.15 - Hydroelectric Handbook  
Chapter 10 - Federal Energy Regulatory Commission Procedures**

**Amendment Number:** 2709.15-2024-1

**Effective date:** September 25, 2024

**Duration:** This amendment is effective until superseded or removed.

**Approved by:** Christopher B. French, Deputy Chief, National Forest System

**Date approved:** September 19, 2024

**Responsible Staff:** Lands, Minerals, and Geology (LMG)

**Last Change:** 2709.15-2009-4 to Contents

**Superseded Document(s):** 2709.15\_10, 2709.15-Amendment 1, February 1, 1987

**Digest:** Following is an explanation of the changes throughout the directive by section.

**Chapter 10:** Updated and additional content has been added throughout the chapter to provide a more effective and complete information resource.

**Section 10.5:** Section was revised to define Federal Energy Regulatory Commission (FERC) specific terms used in the chapter. The revised section also includes an introductory paragraph describing the content of the chapter.

**Sections 10.51 and 10.52:** Rescind sections as content has minimal value for staff engaged in FERC proceedings.

**Sections 10.53 through 10.55:** Rescind sections as updated information has been included in other sections.

**Section 10.6:** New section was added to describe the FERC and their role in authorizing and regulating non-federal hydropower projects.

**Section 10.61:** New section provides a brief history of the Federal Power Act.

**Section 11:** Section content was expanded and updated to better describe the purpose and scope of a preliminary permit.

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**Section 11.1:** Section was added to describe FERC’s process for obtaining a preliminary permit and provides updated information on preliminary permit terms and extensions.

**Section 12:** Information on exemptions was moved to Section 13, and the information on Licenses has been moved to this section. In addition to a new introductory paragraph, revised license types previously listed under Section 10.55, have been moved to this section and updated. FERC licensing processes have been expanded and updated to address changes that have occurred since 1987. The 3-stage consultation process previously addressed in Section 14 has been incorporated into this section as it is the underlying structure for all of FERC’s licensing processes. Significantly more information has been added to this section to improve staff understanding.

**Sections 12.1 to 12.3:** Information about exemptions in these sections was replaced with information about the three FERC licensing processes. Information on Exemptions has been moved to Section 13. Additional subsections have been added to describe the steps in each licensing process.

**Section 13:** Exemptions from licensing, previously described in Section 12, have been moved to this section. Information about exemptions has been expanded to include an introductory paragraph that describes the purpose of an exemption and the process for obtaining an exemption. This section was updated to include the different types of exemptions issued by FERC. Some of the Forest Service specific response in these proceedings has been removed because it is better addressed in Chapter 20.

**Section 14:** This section previously described the Three-Stage Consultation process, but that information has been incorporated into Section 12. License Amendments which were not addressed in the previous version are now addressed in this section. Amendments of applications, licenses, and exemptions are described in this section. This section also describes capacity and non-capacity amendments and the criteria that apply to each.

**Section 15: Other Filings and Procedures** - This is a new section that addresses other filings and procedures that affect National Forest System Lands.

**Section 16: Federal Energy Regulatory Commission Responsibility Under Federal Statutes** - This is a new section that describes the primary statutes that FERC must address in a FERC proceeding. FERC is the lead agency in these proceedings, and this section clarifies their responsibilities.

**Section 17: License Implementation** - This is a new section that describes FERC responsibilities after a license or exemption is issued, including administration, compliance, and dam safety.

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## 10.5 - Definitions

This chapter provides an overview of Federal Energy Regulatory Commission (FERC) hydropower procedures. Understanding FERC's role is necessary to understanding the Forest Service-FERC relationship during project planning, licensing, construction, and operation of non-Federal hydropower projects. The overall goal is to encourage hydropower production where it is compatible with National Forest purposes and ensure that the planning, construction, and operation of non-Federal hydropower projects protect and effectively utilize National Forest System lands and resources. Terminology used in this chapter is specific to FERC processes and regulations unless otherwise noted. An attempt has been made to define FERC terms that may have different meanings than those used in Forest Service program areas.

**Exhibit E:** The environmental report required as part of a license application submitted to FERC.

**Intervention:** Participants in FERC proceedings have the option to intervene. Intervenors become parties in the proceeding and have the right to request rehearing of FERC orders and seek relief of final agency actions in the U.S. Circuit Courts of Appeal.

**Mandatory Conditioning Authority:** Under Section 4(e) of the Federal Power Act (FPA), licenses issued by FERC within reservations of the United States, must include such conditions as the Secretary of the department responsible for the supervision of the reservation considers necessary for the adequate protection and utilization of the reservation. Section 3(2) of the FPA defines "reservations." The FPA does not grant authority to the appropriate Secretary to expressly veto FERC's issuance of the license. Section 18 of the FPA gives the Secretaries of Commerce and Interior the authority to prescribe such fishways as considered necessary. When a resource agency submits a condition pursuant to Section 4(e) and/or a prescription pursuant to Section 18, the Commission is required to include the condition and/or prescription as a condition of any license issued, subject only to judicial review. One additional source of mandatory authority is under Section 401 of the Clean Water Act and applies to the State agency responsible for issuing the water quality certification.

**Notice of Acceptance (NOA):** Notice issued by FERC indicating acceptance of an application for a preliminary permit, a final license application, an application for an exemption, and an application for an amendment of a license or an exemption.

**Notice of Intent (NOI):** Notice filed by the applicant or licensee that states their intent to file a license application.

**Pre-Application Document (PAD):** the pre-application document brings together all existing, relevant, and reasonably available information about the project and its effects on resources; and the PAD also includes a well-defined process plan that sets the schedule for developing the license application and a list of preliminary studies and issues.

**Ready for Environmental Analysis (REA):** notice filed by FERC indicating it is ready to begin environmental analysis on the Final License Application filed by the applicant.

**Rehearing:** A party may request rehearing of any final license order in a licensing proceeding, including issuance or denial of an original or new license. Rehearing is an administrative appeal and a final opportunity to persuade FERC to decide a disputed issue in a particular way. It is also a precondition to judicial review.

## 10.6 - Federal Energy Regulatory Commission Overview

The Federal Energy Regulatory Commission (FERC) is responsible under the Federal Power Act (16 U.S.C. 791 et seq.) for regulating non-Federal hydropower development in the United States. Unless a project has a valid pre-1920 Federal permit, FERC has regulatory jurisdiction over non-Federal hydropower projects that affect navigable waters of the United States, occupy any part of public lands or reservations of the United States, use water or waterpower at a government dam, or affect the interests of interstate commerce (for example, interstate power line) (16 U.S.C. 817). FERC authorizes non-Federal hydropower projects through issuance of a license, it can also exempt projects from licensing under certain conditions (18 CFR, Part 4, subparts J and K). FERC also regulates the interstate transmission and wholesale sale of electricity and natural gas and regulates the transportation of oil by pipeline in interstate commerce.

FERC issues three primary types of authorizations for non-Federal hydropower projects in the United States: (1) preliminary permits, (2) project or transmission line licenses, and (3) exemptions from licensing. The initial preliminary permit is issued for 4 years, licenses are issued for a term of between 30 to 50 years, and exemptions are granted in perpetuity. FERC has approved several sets of standard terms and conditions that are included in these authorizations. The sets of articles are designated as “Forms.” Those for preliminary permits are published in Form P-1, those for licenses are published in Form Ls, and those for exemptions from licensing are published in Form E-1 or E-2. There are several Form Ls because there are different license categories (for example, existing versus unconstructed status or minor versus major generation capacity). Articles establish general terms and conditions for the protection of the public interest, including coordination of water regulation in a river basin. The applicable forms can be found on the FERC website ([FERC Home Page](#)).

FERC statutes also include ensuring dam safety at FERC authorized projects; performing project compliance activities; investigating and assessing payments for headwater benefits. The requirements and guidelines for the dam safety program come from FERC regulations at 18 CFR Part 12 - Safety of Water Power Projects and Project Works. Headwater benefits are additional generation at a downstream project that result from regulation of flows with an upstream storage reservoir. FERC costs are offset by annual charges collected from license and exemption holders. FERC also determines charges for a licensee's use of Federal lands, Federal dams, and Native American reservations.

## **10.61 - Background**

Prior to 1920, Congress or the responsible Departments granted authorizations for hydropower projects. The resulting authorizations varied considerably in duration and scope. The Federal Water Power Act was passed in 1920 to eliminate these differences, specifically to encourage hydropower development, to grant developers investment security through a license, and to allow future generations to affect changes in the project by limiting the term of the license to 50 years or less. The Federal Water Power Act created the Federal Power Commission (FPC) to authorize and regulate hydropower development. The FPC, comprised of the Secretaries of Agriculture, Interior, and War, was also responsible for determining project consistency with the purpose of a Federal reservation. The Federal Water Power Act of 1930 reorganized the FPC into an independent bipartisan Commission comprised of five Presidential appointees approved by the Senate.

In 1935, the Federal Water Power Act became Part I of the Federal Power Act (16 U.S.C. 791, et seq.). Passage of the Federal Power Act, and the change in the FPC's composition added greater significance to Section 4(e) of the Federal Power Act as the section retained the Secretaries' authority to condition licenses to ensure adequate protection and use of the reserved lands under their jurisdiction. In 1977, Congress reorganized the Federal Power Commission into the Federal Energy Regulatory Commission (FERC).

A few of the subsequent statutes under which the commission regulates non-Federal hydroelectric power includes the Public Utility Regulatory Policies Act (PURPA) of 1978, the Electric Consumers Protection Act of 1986, and the Energy Policy Acts of 1992 and 2005. The Electric Consumers Protection Act of 1986 was significant because it required the Commission to determine the extent to which a project was consistent with a comprehensive plan, if one existed; and amended the Federal Power Act requiring the Commission to give "equal consideration" to fish and wildlife and other environmental values. A complete history of the Federal Energy Regulatory Commission can be found on their website ([FERC Home Page](#)).

## **11 - Preliminary Permits**

A preliminary permit grants an applicant priority over other potential applicants for a particular site while the permit holder evaluates the feasibility of the proposed hydropower project and completes studies to support development of an application for a hydropower license or an exemption from licensing (Exhibit 01; 18 CFR 4.80). The permit holder may also conduct pre-filing consultations with other stakeholders. A preliminary permit is not a prerequisite to filing an application for a license or an exemption from licensing, but it precludes another party from filing an application during the term of the permit. A preliminary permit is subject to FERC terms and conditions. The standard terms and conditions are found on FERC Form P-1, but FERC may impose additional conditions if the circumstances warrant them.

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A preliminary permit does not authorize construction or entry onto National Forest System (NFS) lands or commit FERC to the issuance of a license or an exemption from licensing. There are only a few NFS land designations that preclude issuance of a preliminary permit, including designated Wilderness and potentially designated Wild and Scenic River segments. A preliminary permit holder may need to obtain a special use authorization from the Forest Service for entry or to conduct investigative studies on NFS lands (FSH 2709.15 ch. 20 and ch. 60).

**11 - Exhibit 01: FERC Authorizations and Actions**

<b>FERC Authorization/Action</b>	<b>Purpose</b>	<b>Type of Project(s)</b>
Preliminary Permit	Issued for up to 4 years, maintains priority of application for a license (i.e., guaranteed first-to-file status) while the permittee studies the site and prepares to apply for a license. A preliminary permit does not authorize construction or access to NFS lands.	Any proposed hydropower project under FERC’s jurisdiction.
License	Authorizes a licensee to construct and operate a hydroelectric project (original license) or continue to operate an existing project (new license). A license is issued for a period of 30 to 50 years (default 40 years).	<ul style="list-style-type: none"> <li>• Major (varies by category)</li> <li>• Minor (1.5 Megawatts or less)</li> </ul>
Transmission Line License	Authorizes a primary transmission line not licensed by the project it serves.	Transmission line connecting the generation point to the service point or interconnection point.
Exemption	Small projects with limited environmental impacts that must meet certain criteria to qualify. Exempt from the licensing requirements of Part 1 of the FPA. Exemptions are issued in perpetuity.	<p><b>Conduit Exemption</b></p> <ul style="list-style-type: none"> <li>• uses existing conduit</li> <li>• 40 Megawatts or less</li> <li>• entirely on non-Federal land</li> <li>• conduit built for non-power purposes and may be on Federal lands</li> </ul> <p><b>Small Hydropower</b></p> <ul style="list-style-type: none"> <li>• 10 Megawatts or less</li> <li>• built at existing non-Federal dam or natural water feature</li> </ul>

**11 - Exhibit 01: FERC Authorizations and Actions - Continued**

FERC Authorization/Action	Purpose	Type of Project(s)
FERC Exempt 18 CFR 4.3(b)(26)	Small conduit projects using the hydroelectric potential of an existing non-Federally owned conduit. If a project meets certain criteria, they are not required to be licensed or exempted by FERC.	<b>Qualifying Conduit Hydropower Facility</b> <ul style="list-style-type: none"> <li>• 40 Megawatts or less</li> <li>• project was not licensed or exempted prior to August 9, 2013</li> </ul>
Amendment of License (18 CFR 4.200) or Exemption [(18 CFR 4.104(b))]	Authorizes changes made to the project including additional capacity or non-capacity related modifications (design changes, operational changes, land status changes, compliance filings, and time extensions).	<b>Capacity-related</b> <ul style="list-style-type: none"> <li>• increase hydraulic capacity ≥15%</li> <li>• increase generating capacity ≥2 Megawatts</li> <li>• increase installed capacity</li> </ul> <b>Non-capacity related</b> Any amendment that does not meet the criteria for capacity related amendment

**11.1 - Preliminary Permit Process**

Any citizen, domestic corporation, municipality, or State may file an initial application or a competing application for a preliminary permit. After an applicant files the application for a preliminary permit, FERC will determine whether the application is adequate, deficient, or rejected. If the application is found to be adequate, FERC will notify the applicant that the application has been accepted for filing and assign a project number; and will issue public notice of the application as required in the Federal Power Act.

If the preliminary permit application is the first application filed for a particular site, the public notice will set a deadline for filing protests and motions to intervene, comments, competing applications, and notices of intent. Intervenor become parties to the proceeding and have the right to request rehearing of FERC orders and seek relief of final agency actions in the U.S. Circuit Courts of Appeal. Unless otherwise specified in the notice, the deadline is typically a 60-day period that starts when the notice accepting the preliminary permit application is issued. If the project affects Federal lands, FERC must also notify the responsible Federal agency. In addition, on the date the application for a preliminary permit is filed, any Federal lands associated with the project proposal are withdrawn from entry, location, or other disposal under the public land laws until otherwise directed by FERC or by Congress (withdrawal for power purposes; 16 U.S.C. 818; FSM 2760).

As mentioned previously, other parties can file competing applications to develop the same water resource. The competing application can be for a preliminary permit or a development application for a license or exemption from licensing (18 CFR 4.30(b)(1)(i)). Competing applications must conform to all requirements for filing an initial application.

The initial preliminary permit is issued for up to four years, but FERC may extend the period of the preliminary permit once for not more than four additional years if the permit holder has carried out activities under the permit and shows progress toward development of an application (16 U.S.C. 798). At the end of the four-year extension, FERC can issue an additional preliminary permit if it determines that there are extraordinary circumstances that warrant the issuance of the additional permit. A permit holder may voluntarily surrender a preliminary permit, but it cannot be transferred to another entity. FERC may cancel a preliminary permit if the permit holder does not comply with the terms and conditions of the permit or for other good cause (18 CFR 4.83).

## 12 - Licenses

A hydropower license authorizes a licensee to construct and operate a new hydroelectric project or authorizes a licensee to continue to operate an existing project (Exhibit 01). In deciding whether to issue a license, FERC must give equal consideration to developmental and environmental values. Developmental values include power generation, irrigation, flood control, and water supply. Environmental values include fish and wildlife resources and habitat, visual resources, cultural resources, recreational opportunities, and other aspects of environmental quality. In 2017, FERC adopted a default 40-year license term for both new and existing hydropower projects that are undergoing relicensing (82 Fed. Reg. 49501). The policy allows for the issuance of a license for a term of 30 to 50 years. The amount of redevelopment, new construction, new capacity, or environmental mitigation are factors FERC considers in determining the license term.

FERC issues four types of licenses:

1. **Original license:** Authorizes a licensee to construct and operate a new hydroelectric project. In addition, when an existing hydropower project has not been previously licensed by FERC, the first license issued for that project is also an original license.
2. **New license:** Any license for a hydroelectric project that is issued under the FPA after the original license was issued for that project. A new license is issued after an existing project undergoes relicensing.
3. **Subsequent license:** Hydroelectric projects whose licenses are issued under Part 1 of the FPA, but that are not subject to Sections 14 and 15 of the Federal Power Act are issued a subsequent license. The provisions of Section 7(a) of the Federal Power Act also do not apply to licensing proceedings involving a subsequent license.

4. **Non-power license:** FERC has the authority to issue a temporary nonpower license for winding down generation operations, and for purpose of transferring regulatory authority to state and federal authorities.

FERC can also issue original and new licenses for transmission lines that transmit power from a licensed hydropower project to the point of junction with the distribution system or with the interconnected primary transmission system (18 CFR 4.70). An application for a license solely for a transmission line uses the same licensing processes as for other license applications.

Hydropower licenses contain FERC terms and conditions (known as L-Form Articles) that require environmental measures to protect, mitigate, or enhance environmental resources; engineering measures to ensure safe construction and operation of the project; and certain administrative requirements. Standard L-Form Articles included in licenses can be found on the FERC website. Mandatory terms and conditions or prescriptions may also be required by certain State and Federal agencies and FERC must incorporate them into the license.

There are three licensing processes: the Integrated, Traditional, and Alternative licensing processes. Effective July 23, 2005, the Integrated Licensing Process (ILP) became the default process for filing an application for an original, new, or subsequent license. A licensee or applicant must request FERC approval to use either the Traditional Licensing Process (TLP) or Alternative Licensing Process (ALP) (18 CFR 5.3(a)). All licensing processes are based on consultation procedures designed to develop a record on which FERC bases its licensing decision, and to fulfill its responsibilities under the FPA, National Environmental Policy Act (NEPA), Fish and Wildlife Coordination Act, and other statutes. Each licensing process has two distinct periods: a pre-filing period which takes place before the license application is filed, and a post-filing period which takes place after the license application has been filed with FERC. The pre-filing period consists of presenting the project to stakeholders; consulting with stakeholders; identifying issues; and conducting studies or gathering information. The post-filing period includes, reviewing the license package for adequacy; soliciting formal comments from stakeholders; and preparing an environmental document. Flow charts diagramming the steps for each licensing process can be found on the FERC website.

### **12.1 - Integrated Licensing Process**

The Integrated Licensing Process (ILP) combines FERC, applicant, and agency licensing actions into a single process, and provides a predictable, efficient, and timely licensing process that ensures adequate resource protections. FERC considers this licensing process most appropriate for projects with complex issues and study needs. The ILP is the default licensing process.

The ILP licensing process has two periods of activity: pre-filing activity and post-filing activity. These two periods of activity can be further divided into seven steps. The pre-filing period includes steps one through three, and the post-filing period begins when the application is filed in step four and ends with the issuance of a license order in step seven.

### **12.11 - Step 1: Decision to File and Initial Actions**

The ILP begins when an applicant files a Notice of Intent (NOI) and a Pre-Application Document (PAD) for a license. In the case of relicensing, the licensee must begin the pre-filing activity at least five years prior to license expiration, but no sooner than five-and-a-half years. If appropriate, FERC encourages applicants at this time to request to be designated the non-Federal representative for purposes of conducting consultation under Section 7 of the Endangered Species Act (ESA), Section 305(b) of the Magnuson-Stevens Fishery Conservation and Management Act, and Section 106 of the National Historic Preservation Act (18 CFR 5.5(e)). An applicant seeking an original license for a new project can be more flexible in deciding when to file the NOI. FERC encourages the applicant to consult with the applicable State and Federal agencies early in the process, especially if project complexity requires multiple years of study to address resource issues.

### **12.12 - Step 2: Consultation, Scoping, and Study Plan Development**

Pre-filing consultation begins when the NOI and PAD are filed and is conducted concurrently with FERC's NEPA scoping and tribal consultation efforts (18 CFR 5.5; 18 CFR 5.6). The PAD provides FERC and stakeholders with information relevant to the project proposal. The NOI and PAD must be distributed to Federal and State agencies, tribes, and members of the public likely to be interested in the proceeding (18 CFR 5.6(a)). Within 60 days after the applicant files the NOI and PAD, FERC will issue a notice of commencement of proceeding. The contents of this notice can be found at 18 CFR 5.8.

Concurrent with the commencement notice, FERC will issue its scoping document 1 (SD1) which identifies preliminary issues to be addressed in the NEPA analysis, the level of analysis required, qualifying Federal, State, and tribal comprehensive waterway plans that would be considered in the analysis, and a process plan and schedule for processing the application.

#### **12.12a - Comments and Study Requests**

Within 60 days after FERC issues the notice of commencement, interested State and Federal agencies, Indian tribes, and members of the public may provide FERC written comments on the PAD and SD1 (18 CFR 5.9). Comments should be accompanied by information needs and study requests, if applicable. Within 45 days after the deadline for comments on the SD1, FERC shall, if necessary, issue a revised scoping document (SD2) that addresses comments on the scope of issues and analysis (18 CFR 5.10).

#### **12.12b - Study Plan Development**

Based on the scope of the issues and study requests identified during scoping, the applicant must prepare and file a proposed study plan within 45 days after the deadline for comments on the PAD (18 CFR 5.11). The applicant's proposed study plan must provide for study plan

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meetings to discuss the proposed studies and resolve outstanding issues. The study plan meeting must be held within 30 days after the filing deadline for the proposed study plan (18 CFR 5.11(e)). Interested agencies, tribes, and members of the public have 90 days to file comments on the applicant's proposed study plan (18 CFR 5.12).

Within 30 days after the proposed study plan comment period, the applicant must file a revised study plan that addresses comments on the proposed study plan. Interested stakeholders will then have 15 days to file comments on the revised study plan (18 CFR 5.13).

### **12.12c - Study Plan Determination**

Within 30 days following the date the applicant files its revised study plan, FERC will issue a study plan determination addressing the applicant's revised study plan, including any modifications it determines to be necessary in light of the project record (18 CFR 5.13).

Within 20 days after FERC issues their study plan determination, any State or Federal agency or tribe with mandatory conditioning authority (for example, Forest Service Section 4(e)s) may file a notice of study dispute with respect to studies pertaining directly to the exercise of their authorities under Sections 4(e) and 18 of the FPA or Section 401 of the Clean Water Act (CWA)(18 CFR 5.14). If no notice of study dispute is filed, the study plan is considered approved, and the applicant can proceed with the approved studies. For specific information on study dispute resolution procedures, see 18 CFR 5.14.

### **12.13 - Step 3: Studies and Preliminary Licensing Proposal Preparation**

The applicant should proceed with the studies identified and approved by FERC in the final study plan and provide the results to participants seeking progress reports in accordance with the approved process plan and schedule. In addition, no later than one year from FERC's approval of the revised study plan, the applicant must prepare and file an initial study report with FERC.

Within 15 days following the filing of the initial study report, the applicant must hold a meeting with the participants and FERC staff to discuss the results and the applicant's and other participants' proposals, if any; and to modify the study plan considering the progress of the study plan and data collected. Any proposal to modify an ongoing study, or any proposal for new information or new studies, must show good cause why it should be approved. Specific criteria for modifying an approved study or proposing new studies or information requests can be found at 18 CFR 5.15(d) and (e).

Not later than two years after FERC's approval of the study plan and schedule, the applicant must prepare and file with FERC an updated study report describing its overall progress in implementing the study plan and schedule and the data collected, including an explanation of

any variances from the study plan and schedule. The report must also include any modifications to ongoing studies or new studies proposed by the applicant (18 CFR 5.15(f)).

Once the studies are near completion, but no later than 150 days prior to the deadline for filing a license application, an applicant must file a preliminary licensing proposal. A draft license application may be filed instead of the preliminary licensing proposal; however, the intent to do so must be included in the updated study report. Within 90 days of filing the preliminary licensing proposal or a draft license application, stakeholders and FERC staff may file comments, including recommendations on whether FERC should prepare an EA or an EIS. A waiver of the requirement to file the preliminary licensing proposal or draft license application may be requested by the applicant (18 CFR 5.16(f)).

#### **12.14 - Step 4: Application Filing**

Filing the complete application initiates the post-filing period of the ILP. An application for a new or subsequent license must be filed no later than 24 months before the existing license expires or the applicant will be precluded from filing an application for a relicense. Concurrent with filing the application, the applicant must provide copies of the application to State and Federal agencies, tribes, and members of the public consulted during the licensing process (18 CFR 5.17).

Within 14 days of the filing date of any application for a license, FERC will issue a public notice of the application. The notice will include a preliminary schedule for processing of the application. Additional contents of that notice can be found at 18 CFR 5.19.

FERC staff will review the license application for adequacy with two possible outcomes:

1. If FERC considers the application deficient, the applicant will be given additional time to correct the deficiencies, not to exceed 90 days from the date of notification. Any notification will specify the deficiencies to be corrected (18 CFR 5.20(a)). If all deficiencies are corrected, FERC will issue the applicant a letter of acceptance (18 CFR 5.22(a)).
2. If, within 30 days of its filing date, FERC determines that an application patently fails to substantially comply with the pre-filing consultation and filing requirements or is for a project that is precluded by law, the application will be rejected as patently deficient. Any notification will specify the deficiencies that render the application patently deficient (18 CFR 5.20(b)).

Any application for an original license that is rejected may be resubmitted if the deficiencies are corrected and the resubmittal occurs within 90 days. The date the rejected application is resubmitted will be considered the new filing date for the purposes of determining its timelines. In the case of relicensing, the application cannot be refiled after the 24-month

deadline. The decision can be appealed, but regardless of the outcome the existing licensee is obligated to continue operating the project until FERC disposes of the proceeding. FERC may request additional information or documents beyond what is required to address deficiencies if it considers the information relevant for an informed decision on the application.

### **12.15 - Step 5: Application Processing and NEPA Compliance**

Once FERC has determined that the application meets the filing requirements, the studies have been completed, any deficiencies have been resolved, and no additional information is required, it will issue a public notice as required in the FPA:

1. accepting the application for filing and specifying the date the application was accepted;
2. finding that the application is ready for environmental analysis (REA);
3. requesting comments, protests, and interventions;
4. requesting FPA recommendations, preliminary terms and conditions, and preliminary fishway prescriptions, including all supporting documentation;
5. establishing the date for final amendments to applications for new or subsequent licenses; and
6. updating the schedule issued with the tendering notice for processing the application (18 CFR 5.22).

Individuals have the option to intervene in FERC proceedings. Intervenor become parties in a proceeding and have the right to request rehearing of FERC orders and seek relief of final agency actions in the U.S. Circuit Courts of Appeal. Comments, protests, and requests to intervene; and preliminary FPA recommendations, terms and conditions, and fishway prescriptions, including all supporting documentation must be filed no later than 60 days after the notice of acceptance and ready for environmental analysis is issued by FERC. In addition, the applicant must also file a copy of the water quality certification under Section 401 of the CWA; a copy of the request for certification, including proof of the date on which the certifying agency received the water quality certification request; or evidence of waiver of water quality certification (18 CFR 5.23). FERC cannot issue a license without a water quality certification or a waiver.

### **12.15a - Applications Not Requiring a Draft NEPA Document**

Under the ILP, FERC regulations specify how long it has to complete the NEPA process. If FERC determines that a license application will be processed with an EA rather than an EIS and that a draft EA is not required, FERC will issue the EA for comment no later than 120 days from the

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date responses are due to the Notice of Acceptance and Ready for Environmental Analysis. The EA will include:

1. draft license articles;
2. a preliminary determination of consistency of each fish and wildlife agency recommendation made in accordance with FPA Section 10(j) with purposes and requirements of the FPA and other applicable laws; and
3. any preliminary FPA mandatory terms and conditions and fishway prescriptions.

Comments on a draft or single EA, including the preliminary determination with respect to fish and wildlife agency recommendations and preliminary mandatory terms and conditions or fishway prescriptions, must typically be filed with FERC no later than 30 days after the EA is issued, or as specified in the notice (18 CFR 5.24(c)). If the draft or single EA is addressing inconsistencies in 10j recommendations the comment period may be extended to 45 days. Modified mandatory FPA prescriptions or terms and conditions must be filed no later than 60 days following the date for filing of comments or as specified in the notice (18 CFR 5.24(d)).

#### **12.15b - Applications Requiring a Draft NEPA Document**

If FERC determines that a license application will be processed with an EIS, or a draft and final EA, FERC will issue the draft EIS or EA for comment no later than 180 days from the date responses are due to the notice of acceptance and Ready for Environmental Analysis.

Although the contents of the NEPA document and the period and procedures for providing mandatory prescriptions or terms and conditions would be the same for a single or draft EA, the time for filing comments on a draft EIS is 45 days. The timeframe may be extended up to 60 days for complex projects (18 CFR 5.25). FERC will issue a final environmental document (EA or EIS) within 90 days following the date for filing of modified mandatory prescriptions or terms and conditions.

#### **12.16 - Step 6 and 7: Completion of the Section 10(j) Process and License Issuance and Monitoring**

FERC is required under Section 10(j) of the FPA to include in any license fish and wildlife measures for the protection, mitigation, and enhancement of fish and wildlife resources potentially affected by the project based on recommendations from the National Marine Fisheries Service (NMFS), the U.S. Fish and Wildlife Service (FWS), and State fish and wildlife agencies, unless it finds the measures to be inconsistent with the FPA or other applicable laws (18 CFR 4.34(e)(1)).

The licensing process concludes with the issuance of a licensing order by FERC. License issuance and monitoring is the same for all licensing processes. In the case of an existing license, the

target date for issuance of a relicensing decision is the expiration date of the original license. If processing extends beyond this date, annual licenses will be issued until action on the new license is taken. A license order typically contains the following:

1. a description of the project works licensed and project operations;
2. a discussion and findings of the issues raised in the proceeding;
3. term of the license;
4. environmental and engineering conditions; and
5. administrative compliance conditions.

The license becomes final 30 days after the order for the license is issued unless requests for rehearing and subsequent appeals are filed. If the new license is issued prior to expiration of the current license, the new license is typically not effective until the expiration date of the current license. A party may request rehearing of any final license order in a licensing or relicensing proceeding, including issuance or denial of an original or new license. Rehearing is an administrative appeal and a final opportunity to persuade FERC to decide a disputed issue in a particular way. It is also a precondition to judicial review. After licensing or relicensing, FERC administers the license through its ongoing monitoring of the licensee's compliance with the terms and conditions of the license.

## **12.2 - Traditional Licensing Process**

The Traditional Licensing Process (TLP) is a three-stage process designed for the applicant to develop an application for an original or new hydropower license, for an amendment of a license, or for an exemption from licensing. The first two stages cover the pre-filing period of the licensing process. The filing of the final license application with FERC initiates the third stage, or post-filing period, of the licensing process. FERC considers this licensing process to be most applicable to projects with less complex issues and study needs. In addition, licensees must demonstrate that licensing/relicensing can be processed less expensively under the TLP than the Integrated Licensing Process (ILP). Unlike the ILP, there is no FERC oversight in the pre-filing consultation period for the TLP.

### **12.21 - First-Stage Consultation**

The first stage is a series of interactions among the applicant, State and Federal agencies, affected tribes, and the public during which information is shared and interested parties are notified about the project. Regulations directing consultation requirements for original and new (relicense) licenses can be found at 18 CFR 4.38 and 18 CFR 16.8, respectively. This stage begins when an applicant or licensee files a Notice of Intent (NOI) and pre-application document (PAD) with FERC. At this time, the applicant or licensee must request FERC approval to use the TLP.

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Stakeholder comments on the applicant's request to use the TLP must be filed within 30 days after the NOI and PAD are filed with FERC.

The PAD describes the proposed or existing project, known project effects, and proposed studies. It must address the likelihood of timely license issuance, complexity of the resource issues, level of anticipated controversy, relative cost of the TLP compared to the ILP, the amount of available information and potential for study disputes. The required contents of the PAD can be found at 18 CFR 5.6.

Any license request must be provided to State and Federal agencies, tribes, and members of the public with an interest in the project. If requested, FERC will provide a list of appropriate agencies, tribes, and local, regional or national non-governmental organizations likely to be interested in the proceeding. The applicant must file a notice of filing in a daily or weekly newspaper in the county where the project is located. The notice must solicit comments to be filed with FERC within 30 days of the filing date of the notice (18 CFR 5.3). Within 60 days after the applicant has filed its NOI, PAD, and request to use the TLP, FERC will issue a decision, which will be included in the notice of commencement of the proceeding filed in the project docket.

In consultation with State and Federal agencies, tribes, and interested public, the applicant will schedule a joint meeting within 30 days, but no later than 60 days, after FERC approves use of the TLP. The purpose of the meeting is to develop a common understanding of the proposed project, discuss current and potential resource needs and management objectives for the project area, decide what information is needed and what studies will be done, and agree on a time frame and format for discussion of study results.

Not later than 60 days after the joint meeting, each interested State or Federal agency, tribe, and member of the public must provide the applicant or licensee with written comments and study requests. A 60-day extension may be requested within the 60 days following the joint meeting. Failure of an agency, tribe, or member of the public to submit comments or study requests within the required timeframe does not prevent the applicant from moving to the next step in the process, but also does not preclude that agency, tribe, or member of the public's participation in subsequent consultation steps.

If an applicant and an agency or tribe disagrees on the need to do a study or gather information, the disputing entity may refer the dispute in writing to FERC for resolution. The entity initiating the dispute must serve a copy of its written request for resolution to FERC, the disagreeing party, and any affected State or Federal agency or tribe. FERC will resolve disputes by letter provided to the applicant and all affected agencies and Indian tribes. The decision will be made based on two criteria: (1) whether the requested study is reasonable and necessary in relation to the resource goals and management objectives of resource agencies; and (2) whether it is generally accepted practice to use the study method requested by the agency or tribe.

First-stage consultation ends when a set of study plans, and detailed documentation of the stakeholder consultation process have been completed. This typically occurs within 60 days after the joint meeting, unless a 60-day extension was granted by FERC.

## **12.22 - Second-Stage Consultation**

During the second stage of consultation, unless determined otherwise by FERC, the applicant must complete all reasonable and necessary studies and obtain all reasonable and necessary information requested by State and Federal agencies, tribes, and members of the public that is needed for FERC to make an informed decision. Studies are typically completed before filing the final license application, but FERC regulations allow for studies in certain situations to continue until license issuance. Some studies must be performed after the license is issued (for example, after construction of new project facilities or change in operation of the proposed project) or to monitor license conditions. For an original license, these studies must be completed, and the information obtained before filing the application if they would:

1. influence the financial or technical feasibility of the project;
2. determine the design or location of project features;
3. determine reasonable alternatives to the project;
4. determine the impact of the project on important natural or cultural resources, or
5. determine suitable mitigation and enhancement measures.

A draft license application is the primary document developed during second-stage consultation. It must indicate the type of application the applicant intends to file, respond to any comments and recommendations made by any State or Federal agency and tribes during the first stage of consultation, contain the results of studies requested by the agencies and tribes, and include a discussion of study results and any proposed protection, mitigation, and enhancement measures. The applicant distributes the draft license application to agencies, tribes, and other interested parties with a written request for review and comment. State and Federal agencies, tribes, and the public have 90 days to provide written comments. If there is substantial disagreement with the applicant's conclusions on resource impacts or proposed protection, mitigation, or enhancement measures, the applicant must hold a joint meeting with the disagreeing resource agency or tribe and other agencies with similar or related areas of interest, expertise, or responsibility not later than 60 days from the date of the written comments. The intent of the meeting is to discuss and attempt to reach agreement on its plan for environmental protection, mitigation, or enhancement measures. The applicant should document second-stage consultation in the form of a written summary of agreements reached with the resource agencies, as well as remaining disagreements.

### **12.23 - Third-Stage Consultation**

Filing the complete license application with FERC initiates the third-stage consultation (post-filing period). In the case of relicensing, the application must be filed no later than 24 months before the existing license expires. Concurrent with filing the application, the applicant provides copies to all State and Federal agencies, tribes, and members of the public previously consulted. Within 14 days, FERC will issue a notice soliciting requests for additional scientific studies and initiate consultation with the State Historic Preservation Officer under Section 106 of the National Historic Preservation Act.

FERC staff will review the application for adequacy and decide whether to: accept the application, reject the application as patently deficient, or issue a deficiency letter. If accepted, or when all deficiencies are corrected, FERC will issue a letter accepting the application.

Upon acceptance of an application, FERC provides public notice of the application in the Federal Register, local newspapers, and directly to resource agencies and tribes. The notice identifies dates for comments, intervention, and protests. FERC may conduct scoping meetings or simply solicit written comments. Where appropriate, this is also the time for agencies to formulate preliminary recommendations, terms and conditions, and prescriptions under Sections 4(e), 10(a) and 10(j), and 18 of the FPA.

Based on additional study requests and comments received during scoping, FERC may request additional information it considers relevant for an informed decision on the application. The information or documents must be in the required format, and must be submitted within the time, that FERC prescribes (18 CFR 4.32(g)). When the information is considered adequate, FERC will issue the Ready for Environmental Analysis notice soliciting final comments, FPA recommendations, terms and conditions, and prescriptions. Agencies, tribes, and the public must file within 60 days.

Within 60 days following the Ready for Environmental Analysis Notice, the applicant must also file a copy of the water quality certification under Section 401 of the CWA, a copy of the request for certification, including proof of the date on which the certifying agency received the water quality certification request, or evidence of waiver of water quality certification pursuant to 18 CFR 4.34(b)(5)(i). FERC cannot issue a license without a water quality certification or a waiver.

FERC prepares its environmental and engineering analysis of the applicant's proposal and alternatives to that proposal. Depending on the scope of issues, or resources affected, FERC may issue a single EA or a draft and final EA. Depending on the comments and responses received in response to the Ready for Environmental Analysis notice and during scoping, FERC may prepare an EIS.

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FERC is required under Section 10(j) of the FPA to consider in any license recommendations from the NMFS, the USFWS, and State fish and wildlife agencies for the protection, mitigation, and enhancement of fish and wildlife resources potentially affected by the project. FERC will consider those recommended conditions unless it finds them inconsistent with the FPA or other applicable laws.

The licensing process concludes with the issuance of a licensing order by FERC. License issuance and monitoring is the same for all license processes (see the ILP for additional information).

### **12.3 - Alternative Licensing Process**

An applicant must request and receive approval from FERC to use alternative procedures for filing and processing of an application for an original, new, or subsequent hydropower license that is subject to 18 CFR 4.38 or 18 CFR 16.8; or for the amendment of a license that is subject to the provisions of 18 CFR 4.38. The goals of the Alternative Licensing Process (ALP) are to:

1. combine into a single process the pre-filing consultation process, the environmental review process under NEPA, and administrative processes associated with the Clean Water Act (CWA) and other statutes;
2. facilitate greater participation among the applicant, State and Federal agencies, tribes, the public, and FERC staff in a flexible pre-filing consultation process tailored to a specific project;
3. allow for the preparation of a draft EA by the applicant or of a preliminary draft EIS by a third-party contractor chosen by FERC;
4. promote cooperative efforts by the applicant and interested stakeholders and encourage them to share information about resource impacts and protection, mitigation and enhancement proposals, and to narrow any areas of disagreement and reach agreement or settlement of the issues raised by the proposed project or operation; and
5. facilitate an orderly and expeditious review of an agreement or offer of settlement of an application for a hydropower license, exemption from licensing, or amendment to a license.

The ALP uses a more collaborative approach than required in the pre-filing consultation process under the TLP. FERC considers this licensing process to be most applicable to smaller projects that effectively promote a self-driven, collaborative pre-filing process. The ALP also allows for a more flexible timeframe. The collaborative process affords all participants an opportunity to reconcile different interests and concerns. The process also encourages participants to be flexible and creative in attaining their objectives. FERC staff may participate in the pre-filing

consultation and assist in integrating the environmental review and pre-filing consultation (18 CFR 4.34(1)(8)). The alternative procedures are described at 18 CFR 4.34(i).

### **12.31 - Step 1: Decision to File and Formation of Stakeholder Work Group and Communications Protocol**

The initial actions taken by an applicant under the ALP are the formation of a stakeholder work group to determine whether consensus exists to use an alternative process and the development of a communications protocol.

### **12.32 - Step 2: Applicant Requests Permission to Use the Alternative Process**

An applicant for a new (relicense) or subsequent license (relicense), must file a NOI and PAD and request to use the ALP. FERC will follow the notification procedures defined in 18 CFR 5.3. The request to use the alternative licensing process must:

1. demonstrate that a reasonable effort has been made to contact all resource agencies, tribes, and others affected by the applicant's request, and that a consensus exists that the use of alternative procedures is appropriate under the circumstances;
2. submit a communications protocol, supported by interested entities, governing how the applicant and other participants in the pre-filing consultation process, including FERC staff, may communicate with each other regarding the merits of the applicant's proposal and proposals and recommendations of interested entities;
3. provide a copy of the request to all affected resource agencies, tribes, and entities contacted by the applicant that have expressed an interest in the alternative pre-filing consultation process; and
4. state that comments on the request to use alternative procedures must be filed with FERC within 30 days of the filing date of the request.

If FERC accepts the use of an ALP, the following provisions apply (18 CFR 4.34(i)(6)):

1. To the extent feasible under the circumstances, FERC will give notice in the Federal Register, and the applicant will give notice in a local newspaper of general circulation where the project is located, of the initial information meeting and the scoping of environmental issues. The applicant will also send notice of these stages to a mailing list approved by FERC.
2. The applicant must file a progress report with FERC every six months summarizing the progress made in the pre-filing consultation process and referencing the applicant's public file. The applicant must also file a copy of its PAD, each scoping document, and the preliminary draft EA or preliminary draft EIS prepared by a third-party contractor.

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3. The applicant must maintain a public file of all relevant documents in a location accessible to all parties. FERC will maintain a public file of the applicants PAD, scoping documents, periodic reports on the pre-filing consultation process, and the preliminary draft NEPA document.
4. The applicant may substitute a preliminary draft EA or EIS prepared by a third-party contractor and additional material specified by FERC instead of an Exhibit E (environmental report) to its application and need not supply additional documentation of the pre-filing consultation process. The applicant will file the results of any studies conducted or other documentation as directed by FERC, either on its own motion or in response to a motion by a party to the licensing or exemption proceeding.
5. Participants will set reasonable deadlines requiring all State and Federal agencies, tribes, and other interested parties to submit to the applicant requests for scientific studies during the pre-filing consultation process. Additional requests for studies may be made to FERC after the filing of the application only if good cause is shown.
6. During the pre-filing process, FERC may require filing of preliminary fish and wildlife FPA recommendations, prescriptions, mandatory conditions (for example, Section 4(e) conditions), and comments to be submitted in final form after the filing of the application; no notice that the application is ready for environmental analysis need be given by FERC after the filing of an application under these procedures.
7. Any of the stakeholders participating in the alternative pre-filing consultation process may file a request with FERC to resolve a dispute concerning the ALP (including a dispute over required studies), but only after reasonable efforts have been made to resolve the dispute with other participants in the process. No such request shall be accepted for filing unless the entity submitting it certifies that it has been provided to all other participants. The request must document an effort has been made to resolve the dispute.

### **12.33 - Step 3: Pre-Filing Consultation Process and Scoping of Environmental Issues**

Under the ALP, the potential applicant would distribute the PAD, publish notice of an information meeting open to the public, and conduct scoping for the environmental review required to comply with NEPA. Depending on the circumstances of a specific proceeding, FERC will also give notice in the Federal Register and local newspaper of the initial information and scoping meeting. The goal of the ALP is to maintain a flexible pre-filing consultation process tailored to the circumstances of each case.

The PAD could be the focus of the initial information meeting, and in this case, the applicant should solicit agency, tribe, and other interested parties' comments on resource values and

their relative importance in the region and in the project's immediate locale, resource goals and management objectives, and the project's plan for satisfying those goals and objectives.

During the scoping process, the applicant and stakeholders identify the need for scientific studies. Factors that could be considered in determining the need for studies would be the same as in the Integrated and Traditional Licensing Processes.

FERC may participate in the pre-filing consultation process and assist in the integration of this process and the environmental review process. This includes cases where the applicant, contractor, or consultant funded by the applicant is not preparing a preliminary draft EA or EIS, but where FERC staff assistance is available and could expedite the process.

#### **12.34 - Step 4: Studies and Preparation of Draft License Application**

Once any necessary studies are completed, the applicant proceeds with the preparation of a preliminary draft EA or EIS prepared by a third-party contractor, and its draft license application. Specific requirements for information to be included in the draft license application are found at 18 CFR 4.41, 18 CFR 4.51, 18 CFR 4.61, and 18 CFR 16.9.

The draft EA or EIS incorporates comments, recommendations, FPA Section 4(e) terms and conditions, and prescriptions filed by fish and wildlife agencies. The application should contain complete protection, mitigation, and enhancement proposals; evidence of completion of pre-filing consultation; Coastal Zone Management Act (CZMA) compliance; and documentation satisfying Section 401 of the Clean Water Act certification requirements.

If any participant in the ALP can show that it has cooperated in the process but a consensus supporting the use of the alternative process no longer exists, and that the continued use of the ALP will not be productive, the participant may petition FERC for an order directing the use by the potential applicant of appropriate procedures to complete its application. The request must be provided to all other participants and must recommend specific procedures that are appropriate under the circumstances.

#### **12.35 - Step 5: NEPA Document and Filing of Application**

Filing the draft license application, including the preliminary draft EA or EIS prepared by a third-party contractor, completes the pre-filing consultation of the ALP. The original draft license application is filed with FERC. The applicant must provide copies of the filed application and the NEPA document to all resource agencies, tribes, and other entities involved in the consultation process.

FERC will review the preliminary draft EA or EIS to ensure that it is consistent with the FERC requirements. FERC is not required to provide notice that an application is ready for environmental analysis after filing an application under the ALP.

### **12.36 - Step 6: Application Processing**

FERC staff conducts an adequacy review of the draft NEPA document and final license application. If deemed acceptable, FERC issues the applicant a letter of acceptance. If the revised preliminary draft EA or EIS and final license application are inadequate, the procedures to address deficiencies are the same as those outlined for the Traditional Licensing Process.

Upon acceptance of the application, FERC provides public notice in the Federal Register, local newspapers, and directly to resource agencies and Indian tribes. Application processing milestones are established by FERC's procedural notice. Typically, FERC provides the same 60-day timeframe for comments, intervention and protests. It also requests final fish and wildlife 10(j) recommendations and prescriptions, and mandatory Section 4(e) terms and conditions and Section 10(a) recommendations from the resource agencies and tribes as in the traditional licensing process (TLP).

FERC will review the preliminary draft EA or EIS to ensure that it is consistent with FERC requirements. FERC may not issue a notice that the application is ready for environmental analysis under the ALP. At this stage, FERC begins preparing its environmental and engineering analysis of the applicant's proposal and alternatives to that proposal. An EA is typically prepared for a license application. Depending on the scope of issues, or resources affected, FERC may issue a single EA, a draft and final EA, or an EIS.

FERC staff modifies the draft EA to reflect final agency and participants' comments. FERC continues with its NEPA process and makes a licensing decision in the same manner as in the TLP.

### **12.37 - Step 7: Completion of the Section 10(j) Process and License Issuance and Monitoring**

Under Section 10(j) of the FPA, FERC receives recommendations from the NMFS, USFWS, and State fish and wildlife agencies on measures for the protection, mitigation of damages to, and enhancement of fish and wildlife resources affected by the project. FERC will include these measures unless it finds them inconsistent with the FPA or other applicable law. The licensing process concludes with the issuance of a licensing order by FERC. License issuance and monitoring is the same for all licensing processes (see the ILP for additional information).

### **12.4 - Expedited Licensing Processes**

Prior legislative and executive actions have resulted in expedited timelines and other changes to the existing licensing processes for projects that meet specific criteria (for example, America's Water Infrastructure Act of 2018). The most current expedited licensing processes can be found on FERC's website [www.ferc.gov](http://www.ferc.gov). Regional Forest Service hydropower staff will be able to help with projects that meet the criteria for the expedited licensing processes, or in

cases where the Forest Service has been requested by FERC to become a cooperating agency for compliance with NEPA.

### **12.41 - America's Water Infrastructure Act of 2018**

The expedited licensing process required by the American Water Infrastructure Act of 2018 applies to non-Federal hydropower development at non-powered dams and closed-loop pump storage projects. Proposed projects must meet specific criteria. The expedited licensing process will ensure that FERC makes a final decision on a license application no later than two years after receipt of the completed license application.

### **13 - Exemption from FERC Licensing**

Exemptions from licensing are exemptions from the licensing provisions of Part I of FPA and are subject only to the terms and conditions attached to the exemption (**Exhibit 01**). This means that the exemption is not subject to the comprehensive development standard of FPA Section 10(a)(1); mandatory conditions under FPA Sections 4(e) and 18; eminent domain authority of FPA Section 21. The Forest Service cannot submit mandatory terms and conditions for an exemption from licensing. Proposed projects occupying National Forest System (NFS) lands would be required to obtain a special use authorization, which would include conditions necessary to adequately protect and use NFS lands and resources (FSH 2709.15 ch. 20 and ch. 60). An exemption from FERC licensing authorizes a licensee to construct and operate a project. An exemption is issued in perpetuity with no expiration date.

In granting an exemption from licensing, FERC is required to consult with Federal and State fish and wildlife agencies responsible for the resources of the State in which the facility is or will be located, as required by the Fish and Wildlife Coordination Act (16 U.S.C. 661, et seq.), and is required to include in any exemption:

1. terms and conditions the USFWS, NMFS, and the State agency each determine are appropriate to prevent loss of, or damage to, fish and wildlife resources and to otherwise carry out the purposes of the Fish and Wildlife Coordination Act, and
2. terms and conditions FERC determines are appropriate to ensure that the facility continues to comply with the provisions of Section 30(c) of the FPA and terms and conditions included in the exemption.

FERC also includes an article reserving its authority to modify terms and conditions based on recommendations by resource agencies or rescind the exemption in the public interest. FERC's standard E-Form articles for exemptions from licensing can be found on the FERC website.

The procedural steps for exemption applications are similar to those for licenses, with both pre-filing and post-filing processes. The pre-filing consultation process for exemptions from

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licensing follows 18 CFR 4.38, which is the same pre-filing consultation process required under the traditional licensing process. The post-filing process generally follows the post-filing process for licenses with a few exceptions:

1. An applicant has less time (up to 45 days instead of 90) to correct any deficiencies in the application.
2. Exemption orders for five megawatts or less are typically supported by an EA and seldom require an EIS.
3. Procedures for post-filing consultation among FERC, fish and wildlife agencies, and tribes are distinct for exemption applications.
4. All timely fish and wildlife recommendations under Section 30(c) of FPA are mandatory.

If the exemption application is dismissed, the process is terminated. There is no opportunity to convert the exemption application to an application for a license.

There are two types of hydroelectric projects that are eligible for exemptions from licensing, a small conduit hydroelectric facility up to 40 megawatts, and a small hydroelectric project 10 megawatts or less. Only facilities that meet specific criteria can qualify for an exemption from licensing. In addition, the Hydropower Efficiency Act of 2013 created the “Qualifying Conduit Facility.” A Qualifying Conduit does not require any FERC authorization and must be 40 megawatts or less.

### **13.1 - Small Conduit Hydroelectric Facility Exemption**

A conduit hydroelectric facility is defined as an existing or proposed hydroelectric facility that is or will be constructed on an existing conduit that was constructed primarily for purposes other than power production (agricultural, municipal, or industrial consumption). Except for the conduit on which the facility is or will be located and the transmission lines, a conduit hydroelectric facility includes all structures, fixtures, equipment, and lands used and useful in the operation or maintenance of the facility. To qualify for an exemption, a conduit hydroelectric facility must meet the following criteria, and additional criteria found at 18 CFR 4.30(b)(30):

1. installed generating capacity does not exceed 40 megawatts;
2. is not an integral part of a dam and does not rely upon construction of a dam;
3. the applicant must have all the real property interests necessary to develop and operate the project, or the option to obtain the interests including ownership in fee, rights-of-way, easements, or leaseholds;

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4. projects on National Forest System lands must have an agreement with the Forest Service that they will obtain a special use authorization.

Applications for exemptions of small conduit hydroelectric facilities are categorically excluded from preparing an environmental document under FERC regulations for implementing the NEPA (18 CFR 380.4(a)(14)) but can be required at the discretion of FERC. The Forest Service cannot condition a FERC exemption; therefore, additional environmental analysis under NEPA may be required to authorize the use and occupancy of NFS lands by the project. To ensure that the planning, construction, and operation of a hydropower project protects and effectively uses NFS lands and resources, terms and conditions for occupancy and use would be included in a Forest Service special use authorization.

### **13.2 - Case-Specific (10 MW) Exemption**

FERC defines case-specific hydroelectric projects as those located at an existing non-Federal dam that was built prior to 1977 or located at a natural water feature (such as a waterfall) that would not require construction of a dam and would have an installed generating capacity of 10 megawatts or less. The powerhouse is located no further than 500 feet from the existing project dam and would derive a significant portion of head from the dam (at least 36 percent). If located on private lands, the applicant must have all real property rights necessary to develop and operate the project or an option to obtain such interests. The project boundary would include all associated lands and facilities, such as the powerhouse, dam, impoundment, transmission line, and any lands that fulfill the project purpose, such as recreation and resource protection. If the proposed project would be located on Federal lands, the applicant must have an agreement with the Federal land management agency to construct and operate the project.

An applicant that files for an exemption from licensing for a currently licensed project must propose to install or add capacity to the current project up to 10 megawatts. If some Federal lands are involved, any applicant who has all the real property interests in the non-Federal lands necessary to develop and operate the project or an option to obtain the interests is eligible (18 CFR 4.31(c)(2)).

### **13.3 - Qualifying Conduit Hydropower Facility**

The Hydropower Efficiency Act of 2013 created the “Qualifying Conduit Hydropower Facility” (18 CFR 4.30(b)(26)). A Qualifying Conduit Hydropower Facility does not require any FERC authorization and applies to all conduit projects with an installed generating capacity of 40MW or less. FERC only determines whether the proposed facility meets the definition and, if it does, the project is no longer under FERC jurisdiction. This type of facility has essentially replaced the conduit exemption. However, a project with an existing conduit exemption or license cannot apply to become a Qualifying Conduit Hydropower Facility and will continue to be regulated by FERC. The conduit for a Qualifying Conduit Hydropower Facility cannot be owned by the Federal

government and no conditions can be applied under the FPA. The Forest Service would condition this type of project with a Special Use Authorization.

## **14 - License Amendments**

### **14.1 - Amendment of Application for a Preliminary Permit, License, and Exemption from Licensing**

Occasionally, a filed application must be amended during application processing. An application may be amended to change the status or identity of the applicant, to materially amend the proposed plans of development, or to change its statement of intent of whether or not it will seek benefits under Section 210 of the Public Utility Regulatory Policies Act of 1978 (PURPA). Exceptions to these rules can be found at 18 CFR 4.35(e). The type of amendment and application may affect the date of acceptance of the application (18 CFR 4.35). What qualifies as a material amendment varies for a preliminary permit, license, and exemption from licensing application. Information specific to each type of application can be found at 18 CFR 4.35(f). If an application is amended, FERC will rescind any acceptance letter already issued for the application. For a material amendment, the applicant must comply with the pre-filing consultation process requirements of the three-stage consultation process. (18 CFR 4.38(a)(6))

### **14.2 - Amendment to a Licensed Project**

License amendments are typically required when there is a proposed change to a licensed project. During the term of a license, the licensee may apply for a capacity or non-capacity related license amendment to modify a project (Exhibit 01; 18 CFR 4.200-4.202). Any amendment that does not meet the criteria for a capacity related amendment will be considered a non-capacity related amendment. Both capacity and non-capacity related amendments that require consultation may be evaluated using the three-stage consultation process. (18 CFR 4.38(a)(6))

#### **14.21 - Capacity Related Amendment**

A capacity related amendment is a project modification for additional capacity not previously authorized and that would increase the project's actual or proposed total installed capacity, increase the project's maximum hydraulic capacity by 15 percent or more, and would increase the installed capacity two megawatts or more (18 CFR 4.201(b)). Amendments that do not meet these three criteria would be considered non-capacity related amendments (18 CFR 4.201(c)).

The capacity related amendment process has six steps:

1. First-stage consultation, or alternative pre-filing consultation if using the Alternative Licensing Process (ALP);

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2. Studies and draft application preparation, or preliminary draft environmental assessment if using the ALP;
3. Completion of second-stage consultation or pre-filing consultation process of ALP;
4. Application filing and acceptance by FERC;
5. Filing of comments, FPA terms and conditions, prescriptions, and NEPA compliance activities; and
6. Completion of the FPA Section 10(j) process and granting or denying a license amendment.

The procedural steps governing these six steps, including pre-filing consultation (18 CFR 4.38) and the FPA Section 10(j) process (18 CFR 4.34), are the same as those that govern applications for a license using the three-stage consultation process.

#### **14.22 - Non-Capacity Related Amendment**

A non-capacity related amendment is a project modification involving (Exhibit 01):

1. design changes in the physical features of the project, such as new structures, relocation of transmission lines, or alterations of existing structures;
2. operational changes, such as modifications to operating levels, minimum instream flows, revised ramping rates, or other changes affecting environmental resources;
3. land status changes including altered use of Federal lands, changes in land rights, non-project use of project lands, or changes in the recreational use of the site;
4. compliance filings (filings under license articles or other FERC orders), such as filing of study results, mitigation plans, study plans, or schedules ordered in the license articles, and
5. time extensions.

The three-stage or alternative consultation process does not apply to non-capacity related amendments, except for:

1. the construction of a new dam or diversion in a location where there is no existing dam or diversion;

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2. any repair, modification, or reconstruction of an existing dam that would result in a significant change in the normal maximum surface area or elevation of an existing impoundment; or
3. the addition of new turbines other than to replace existing turbines.

Whether the three-stage or alternative consultation process applies to a non-capacity related amendment, the licensee must consult with appropriate resource agencies and tribes to the extent that the proposed amendment would affect the interests of the agencies or tribes. When consultation is necessary, the applicant must, at a minimum, provide the agencies and tribes with copies of the draft amendment application and allow them 60 days to comment on the proposed amendment. The amendment must summarize the consultation with the agencies and tribes on the proposed amendment; propose reasonable protection, mitigation, or enhancement measures to respond to impacts identified as being caused by the proposed amendment; and respond to any objections, recommendations, or conditions submitted by the agencies or tribes (18 CFR 4.38 (a)(7)).

Non-capacity related amendments must be filed with FERC, and the filing must provide reasons for the amendment and include relevant resource agency letters of comment, exhibits, applicable drawings, and, in some cases, evidence of a new request for water quality certification. The nature of the proposed change, the type of project (based on proposed capacity), and the construction status of the project determine which exhibits to include in the amendment application. All exhibits that require revision because of the nature of the proposed amendments must be filed with FERC.

### **14.3 - Amendment to a Project Exempt from Licensing**

If an exemption holder wishes to change the design, location, method of construction, or operation of its project, it must first notify the appropriate Federal and State fish and wildlife agencies and inform them in writing of the changes it intends to implement (Exhibit 01; 18 CFR 4.96(b)). If these agencies determine that the changes would not cause the project to violate the exemption terms and conditions imposed by the agencies, and if the changes would not materially alter the design, location, method of construction, or operation of the project, the exemption holder may implement the changes without receiving authorization from FERC. The requirement to contact fish and wildlife agencies is a requirement of a FERC exemption. The effects of any proposed changes on NFS lands authorized under a Forest Service special use authorization are addressed in FSH 2709.15, chapters 20 and 60.

If any of the agencies consulted determines that the changes would cause the project to violate the terms and conditions imposed by the agencies, or if the changes would materially alter the design, location, method of construction, or operation of the project works, the exemption holder may not implement the changes without first receiving authorization from FERC to amend its exemption, or acquiring a license that authorizes the project, as changed (see 18 CFR

4.96 for small conduit facilities and 18 CFR 4.104 for small hydroelectric power projects of 10 megawatts or less).

A proposal for a material amendment (18 CFR 4.35(f)) to a project exempt from licensing is like an amendment for a licensed project. The three-stage consultation process is also required for an exemption from licensing for a capacity related or material amendment. The holder of an exemption must describe the proposed modifications, contact affected resource agencies, and prepare an environmental report. This environmental report must discuss expected environmental effects from any proposed changes to operation or construction of the project. The holder of an exemption must provide measures to protect and enhance affected environmental resources and values, mitigation measures for adverse environmental effects, and additional information deemed important by the applicant. The level of detail for the environmental report should match the scope of the project and include copies of all correspondence between the applicant, the agencies, and the tribes responding to the proposed amendment.

## **15 - Other Filings and Procedures**

### **15.1 - Surrender, Termination, Transfer, and Decommissioning**

#### **15.11 - Surrender**

Licensees and holders of exemptions may decide to surrender their hydropower authorizations because a project is no longer economical, project facilities were damaged or destroyed by natural catastrophes, or for a variety of other reasons. To protect the environment and public, a license or exemption from licensing may only be surrendered upon agreement between the licensee or exemptee and FERC. The surrender process can be complex because there are environmental implications associated with ending FERC jurisdiction over a project.

When a licensee of an existing project chooses to withdraw their NOI to relicense a project or fails to file a timely license application, this triggers FERC's "orphan project" process. Depending on the circumstances, FERC may file a notice soliciting interest from other entities in seeking a license for the project. If no other entity seeks and obtains a new license for the project, the current licensee is responsible for surrendering the project (18 CFR 16.25).

To surrender a license, the licensee must prepare an application, which includes the reason for surrendering the license (18 CFR 6.1). If construction of the licensed project has begun or is complete, the application must include a decommissioning plan for disposition of all project works. Once the surrender application is complete, FERC will issue a public notice with a minimum 30-day comment period prior to action upon the application. FERC staff will review the application and issue an order approving or denying the request for surrender. If appropriate, a NEPA document is prepared by FERC before the order is issued.

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Licenses may only be surrendered after the licensee has satisfied all conditions that FERC prescribes. If construction of a licensed project has begun or is complete, FERC must consult with the State and Federal agencies that provided the original terms and conditions. It will also seek input from the public to ensure that local environmental issues are considered in the surrender proceeding. If the project works were constructed on Federal land, the licensee is required to restore the lands to a condition satisfactory to the Federal agency with supervision over them and must continue to pay annual charges until the restoration has been completed.

To voluntarily surrender an exemption from licensing, the holder of an exemption for either a small hydroelectric power project or a conduit hydroelectric facility must file a petition with FERC (18 CFR 4.102). If construction has begun the exemption holder must consult with the fish and wildlife agencies prior to filing a petition (18 CFR 4.38). The petition must include the exemption holder's plans with respect to disposition and restoration of the project works and lands (18 CFR 4.102).

Where occupancy of Federal lands or reservations has been permitted by a Federal agency having supervision over such lands, the exemption holder must concurrently notify that agency of the petition to surrender and of the steps that will be taken to restore the affected Federal lands or reservations (18 CFR 4.102(e)).

When an owner of a project has by action or inaction allowed a project to fall into disrepair for a long period of time, FERC may on its own initiative issue an order terminating a license or exemption by implied surrender. Before final FERC action, notice of the proposed implied surrender will be provided to the licensee or exemption holder.

### **15.12 - Termination**

FERC can terminate a license if the licensee fails to begin construction of the project within the prescribed time (18 CFR 6.3) or if the licensee fails to make a good faith effort to maintain and operate the project (implied surrender; 18 CFR 6.4). In both cases, FERC provides a 90-day notice to the licensee before it acts. FERC staff will review the project record and issue an order approving or denying the termination. This may require a FERC prepared NEPA document, depending on the extent of measures required to restore the project site.

A licensee has two years to begin construction of a new project from the time fixed in the license, and the FPA allows FERC to extend the deadline once, for not more than eight additional years. FERC may also extend the deadline for completion of construction if activities are carried on in good faith and with reasonable diligence, and if the extension is compatible with public interest. If the licensee does not begin construction by the deadline, Section 13 of the FPA requires FERC to terminate the license. It is important to note that a licensee cannot begin construction until it has met all the pre-construction requirements in its license.

Because exemptions from licensing are issued in perpetuity, there are no regulations pertaining to termination of an exemption by FERC. However, FERC may terminate an exemption if, during the application process, material discrepancies, inaccuracies, or falsehoods were made by or on behalf of the applicant. FERC may also revoke an exemption if construction of any proposed generating facilities has not begun within two years or has not been completed within four years from the effective date of the exemption. Further, FERC may revoke an exemption if any necessary rights to use or occupy Federal lands for the proposed project purposes have not been obtained within one year from the date the exemption was granted.

If an exemption is revoked, FERC will not accept a subsequent application for an exemption from licensing for the same project from the prior exemption holder within two years of the revocation.

### **15.13 - Transfer**

#### **15.13a - Transfer of a License**

Licensees may transfer a hydropower license to another entity, subject to FERC approval. This transfer typically does not require environmental analysis under NEPA because it is an administrative action not involving any environmental impacts.

An application for a transfer of license must be filed jointly by the existing licensee and the potential transferee. An application for transfer shall include information about the qualifications of the transferee to hold such a license and to operate the property under license (18 CFR 9.1). A transfer requires FERC approval and is contingent upon:

1. the transfer of title to the properties under license;
2. the transferee filing a letter acknowledging that they are accepting the transfer of the license within 60 days of the FERC order;
3. delivery of all license instruments; and
4. a showing that the transfer is in the public interest.

A transferee is subject to all the conditions of the license and to all the provisions and conditions of the FPA as though the transferee was the original licensee. The transfer becomes final within 30 days of FERC acceptance unless an application for rehearing is filed (18 CFR 9.3). See FSH 2709.15, chapter 20, to understand the Forest Service role during a license transfer.

#### **15.13b - Transfer of an Exemption from Licensing**

An exemption holder may transfer any property interests in an exemption for either a small conduit exemption or a small hydroelectric exemption, but first must inform the transferee of

the terms and conditions of the exemption. Within 30 days of transferring the property interests, the exemption holder must inform FERC in writing of the identity and address of the transferee (18 CFR 4.106(i)). If the transferee has the necessary property rights, the transferee is authorized to operate the project. FERC will then issue a public notice of the exemption transfer containing all the information concerning the exemption holder and transferee. The notice does not have a public comment period because exemption transfers do not require prior FERC approval. The purpose of the notice is to advise interested parties that there is a new project owner/exemption holder. The transfer of an exemption is an administrative process, so environmental analysis under NEPA is typically not required. See FSH 2709.15, chapter 20, to determine the Forest Service role in the transfer of an exemption from licensing, including the requirements of the transferee to obtain a special use authorization.

### 15.14 - Decommissioning

FERC has the legal authority to deny a license and decommission a project when the project no longer meets the comprehensive development standard of Section 10(a) of the FPA (18 CFR 2.24):

**That the project adopted, including the maps, plans, and specifications, shall be such as in the judgment of the Commission will be best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement and utilization of waterpower development, for the adequate protection, mitigation, and enhancement of fish and wildlife (including related spawning grounds and habitat), and for other beneficial public uses, including irrigation, flood control, water supply, and recreational and other purposes referred to in section 4(e);...**

FERC may, in rare instances, require removal of the project dam or impose decommissioning fund requirements when supported by the record. FERC rarely exercises this authority and is also not required to consider project decommissioning during relicensing proceedings (*American Rivers v. FERC*, 187 F.3d 1007, 9<sup>th</sup> Circuit 1999).

In practice, most project decommissions occurs after a licensee voluntarily surrenders their license because of damage that renders it inoperable or because it is no longer economical to operate and maintain as described in Section 16.11. See FSH 2709.15, chapters 20 and 60, to understand the Forest Service role in these proceedings, including the procedures necessary to close out a special use authorization.

### 15.2 - Settlements

A settlement agreement is a written agreement between the licensee and the stakeholders about how a project will operate and what environmental measures will be implemented over

the term of the license. FERC cannot automatically accept all settlements or provisions of a settlement but must determine whether settlement agreement proposals meet the comprehensive development/equal consideration standard. FERC provides rules for applicants or licensees to submit written offers of settlement (18 CFR 385.602). This agreement or offer of settlement may be submitted as a part of the license application and may be used in an original or new license, an amendment to a license or in an exemption proceeding. Although not expressly provided in FERC's regulations, interested parties may develop a settlement agreement at any phase in the licensing process to assist in resolving issues.

FERC will only include in a license the parts of a settlement agreement that fall within its jurisdiction. Therefore, FERC may accept or approve a settlement, but not "adopt" those elements of a settlement beyond its jurisdiction. The Forest Service role in Settlement Agreements, and how FPA Section 4(e) conditions should incorporate terms of Settlement Agreements are discussed in FSH 2709.15, chapter 20.

### **15.3 - Using a Third-Party Contractor to Prepare Environmental Documents**

FERC's voluntary third-party contracting program enables applicants seeking licenses for hydropower projects to fund a third-party contractor to assist FERC staff in reviewing the environmental aspects of applications and preparing the environmental documents required to comply with NEPA.

In the context of FERC's program, third-party contracting involves the use of an independent contractor to assist the FERC staff in its environmental analyses and review of a proposal. Under this voluntary program, the independent contractor is:

1. selected by FERC and works solely under its direction;
2. responsible for conducting environmental analyses and preparing environmental documentation; and
3. paid for by the project applicant(s).

## **16 - Federal Energy Regulatory Commission Responsibility Under Federal Statutes**

### **16.1 - National Environmental Policy Act**

FERC is the action agency responsible for compliance with NEPA for all non-Federal hydropower licensing or exemption actions on NFS lands. FERC is required to analyze the environmental effects of a proposed action and reasonable alternatives to the proposed action, recommend whether a project should be licensed or exempted, and recommend appropriate terms and conditions if a license or exemption is recommended. The alternative licensing process allows a license applicant to conduct scoping during the pre-filing consultation process prior to filing the application with FERC. However, FERC is responsible for the final analysis and issuing a decision.

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In limited situations, the Forest Service may become a Cooperating Agency, consistent with Council on Environmental Quality (CEQ) regulations and NEPA.

Applications for exemptions of small hydroelectric conduits are categorically excluded from preparing an EA or EIS under FERC regulations implementing NEPA (18 CFR 380.4(a)(14)). FERC staff will independently evaluate the environmental information included in the application to determine if an EA or EIS is necessary. The Forest Service is responsible for implementing the National Environmental Policy Act (NEPA) when issuing a special use authorization. The Forest Service will participate in FERC's NEPA process to ensure that FERC's environmental analysis addresses the impacts of the proposed special-use authorization (FSH 2709.15, ch. 20 and ch. 30).

### **16.2 - Clean Water Act**

The Clean Water Act establishes the basic structure for regulating discharges and pollutants into waters of the United States and regulating water quality standards for surface waters. The State water quality agency has the authority to certify a hydropower project under Section 401 of the Clean Water Act. Under this section, an applicant must obtain certification or waiver from certification from the State or interstate pollution control agency verifying compliance with the State standards. FERC requires an applicant to show evidence of compliance with certification requirements in the license application. The conditions of a water quality certification become mandatory conditions of any license issued.

### **16.3 - Endangered Species Act**

Section 7 of the Endangered Species Act (ESA) requires Federal agencies to ensure that their actions are not likely to jeopardize the continued existence of endangered or threatened species or result in the destruction or adverse modification of the critical habitat of those species. In hydropower project licensing, FERC must consult with the USFWS and NMFS. Often the licensee will request to be the non-Federal representative for purposes of conducting consultation under Section 7 of the ESA. Where endangered or threatened species may be present in the area of a hydropower project proposed for licensing, FERC may be required to prepare a biological assessment (BA) for the purpose of identifying any endangered or threatened species likely to be affected by licensing. The BA may be undertaken as part of NEPA compliance. FERC must enter into formal consultation with the Federal agency responsible for management of that species (USFWS or NMFS) and obtain that agency's Biological Opinion on measures to avoid jeopardy or adverse modification and measures that are required to avoid or minimize "take" of that species.

### **16.4 - Wild and Scenic Rivers Act**

The Wild and Scenic Rivers Act provides for the protection and preservation of certain rivers and their immediate environments through inclusion in the national Wild and Scenic Rivers

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system. Section 7(a) of the Wild and Scenic Rivers Act provides that FERC shall not issue a license or exemption for construction of any dam, water conduit, reservoir, powerhouse, transmission line, or other project works under the Federal Power Act if the project is “on or directly affecting” any river that is designated as a component of the Wild and Scenic Rivers system or which has been authorized by Congress for study as a potential addition. The Forest Service and other Federal river-administering agencies have authority under Section 7 of the Wild and Scenic Rivers Act (16 U.S.C. 1278) to determine whether FERC may issue licenses (or exemptions) under the FPA.

### **16.5 - Wilderness Act**

The Wilderness Act (16 U.S.C. 1131-1136) prohibits any commercial enterprise, structure, or installation within any wilderness area, except as specifically provided for in the act. A new hydropower project may occupy land in a wilderness only if the President authorizes it (16 U.S.C. 1133(d)(4)). FERC is responsible for the EIS needed to evaluate proposed licensing of the project. Such an EIS would be prepared with the cooperation of the Forest Service. If the Forest Service determines that the proposal is in the public interest, the Forest Service submits the EIS, along with its recommendation and proposed regulations, through the Department of Agriculture to the President for a decision (see FSM 2775.1). If the President approves the project and the associated use of wilderness, the Forest Service submits its mandatory conditions to FERC.

### **16.6 - National Historic Preservation Act and Tribal Consultation**

The National Historic Preservation Act (NHPA) of 1966, acknowledges the importance of protecting our nation's heritage from Federal development. The NHPA sets Federal historic preservation policy, establishes partnerships between the Federal government and states and the Federal government and tribes, creates the National Register of Historic Places and National Historic Landmarks programs, mandates the selection of qualified State Historic Preservation Officers, establishes the Advisory Council on Historic Preservation, charges Federal agencies with stewardship, and establishes the role of Certified Local Governments within the states.

Section 106 of NHPA requires Federal agencies, including FERC, to consider the effect of its undertakings on historic properties and to afford the Advisory Council on Historic Preservation (Council) a reasonable opportunity to comment. An undertaking includes any project, activity, or program requiring a Federal permit, license, or approval. Therefore, many FERC actions, such as issuance of new and original licenses, license amendments, surrenders, and terminations, are undertakings that are subject to Section 106 of the NHPA. FERC as the lead agency for non-Federal hydropower proceedings, is responsible for ensuring compliance with Section 106 of NHPA. Section 106 is implemented through the Council’s regulations, “Protection of Historic Properties” (36 CFR Part 800). For hydropower licensing actions, FERC typically completes Section 106 by entering into a Programmatic Agreement (PA) or Memorandum of Agreement (MOA) with the license applicant, the Advisory Council, and the State and/or Tribal Historic

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Preservation Officer (SHPO/THPO). This agreement is then incorporated by reference into the project license when it is issued. If effects are determined to be adverse, resolution of effects usually involves the development of a Historic Properties Management Plan (HPMP) that specifies measures to avoid, reduce, or mitigate these effects.

The Federal Energy Regulatory Commission (FERC or the Commission) first issued its Policy Statement on Consultation with Indian Tribes in Commission Proceedings in 2003 and amended that policy in 2019 to include information on consideration of tribal treaty rights in the National Environmental Policy Act (NEPA) process and with corporations established pursuant to the Alaska Native Claims Settlement Act. The Policy Statement provides that FERC will notify tribes before or at the time a potential license applicant files a notice of intent to file a license application and will consider comprehensive plans prepared by tribes or intertribal organizations. The Commission's updated Tribal Consultation Policy states that "tribal consultation pursuant to our trust responsibility encompasses more than implementation of [National Historic Preservation Act] Section 106. It includes every issue of concern to an Indian tribe related to a treaty, statute, or executive order where the Commission can, through the exercise of its authorities under the FPA, fulfill its trust responsibility." Additionally, the policy states that the "Commission, in keeping with its trust responsibility, will assure that tribal concerns and interests are considered whenever the Commission's actions or decisions have the potential to adversely affect Indian tribes or Indian trust resources." (Docket No. PL20-1-000; Order No. 863; 18 CFR 21.c).

### **16.7 - Coastal Zone Management Act**

The Coastal Zone Management Act (CZMA) prohibits FERC from issuing a license for a project within or affecting a State's coastal zone unless the State CZMA agency concurs with the license applicant's certification of consistency with the State's CZMA program, or the agency's concurrence is conclusively presumed by its failure to act within 180 days of its receipt of the applicant's certification. FERC staff determine a project's consistency with the CZMA during the NEPA process.

### **16.8 - Americans with Disabilities Act (ADA) of 1990 and Architectural Barriers Act (ABA) of 1968**

Under 18 CFR 2.7, FERC expects licensees to develop suitable public recreational facilities upon project lands and waters and to make provisions for adequate public access to those facilities, including considering the needs of persons with disabilities in the design and construction of such project facilities and access. A licensee's obligation to comply with the ADA or ABA exists independent of its project license.

New recreational facilities, reconstruction of existing facilities, and access areas at hydropower projects must comply with the requirements of Americans with Disabilities Act of 1990 (ADA) or the Architectural Barriers Act of 1968 (ABA). Both ADA and ABA may apply at some FERC-

licensed hydropower projects if there are non-Federal and Federal lands within the project boundary.

The accessibility standards of the ADA apply to public facilities owned by or located on State, municipal, and private lands. Title II of the ADA applies specifically to State and municipal government facilities; whereas Title III applies specifically to places of public accommodation (including recreation facilities), as well as commercial facilities (privately owned, non-residential facilities). The accessibility standards of the ABA apply to buildings or facilities that were designed, built, or altered with Federal dollars, at the request of a Federal agency, or at facilities leased by Federal agencies.

### **16.9 - Other Congressionally Designated Areas**

FERC is prohibited from licensing a project within the limits of any national park or national monument without specific authority of Congress (16 U.S.C. 797a). The Federal Power Act also prohibits FERC from issuing a license or exemption for any new hydropower projects within the boundaries of other units of the National Park System if those projects “would have a direct adverse impact to Federal lands within any such unit” 16 U.S.C. 797c. However, National Natural Landmarks are a National Park System Unit where hydropower projects are not explicitly prohibited, and on occasion these units may be administered by the Forest Service.

## **17 - License Implementation**

### **17.1 - Hydropower Administration and Compliance**

Once FERC issues a hydropower authorization (license, exemption, amendment) it is responsible for overseeing compliance with the terms and conditions of the new licenses and exemptions, including but not limited to:

1. administering and tracking license requirements,
2. reviewing and approving amendments, license/exemption surrenders and transfers,
3. environmental inspections to evaluate compliance with environmental and public use requirements of the license,
4. investigating compliance issues and, if necessary, issuing penalties to licensees who fail to comply with license requirements and other violations of Part 1 of the FPA, and
5. monitoring license effectiveness to identify problems common to licensed or exempted projects leading to proactive strategies to help identify and correct common problems.

Each project is assigned a project manager from the applicable FERC regional office. The regional compliance offices are listed on FERC’s website ([FERC Home Page](#)).

## **17.2 - Dam Safety and Inspections**

The requirements and guidelines for the dam safety program come from FERC regulations at 18 CFR Part 12 - Safety of Water Power Projects and Project Works.

## **17.3 - Reopeners**

FERC may re-open a license or exemption based upon a mandatory condition that reserves an agency's ability to modify its conditions (for example, Forest Service Section 4(e) conditions). Hydropower licenses and exemptions may also contain standard articles that reserve FERC's authority to require the licensee to make reasonable modifications to project structures and operations for, among other things, the development and conservation of fish and wildlife resources and the construction, operation, and maintenance of fish passage facilities.

FERC may order these modifications for the protection and enhancement of environmental resources upon its own motion, or upon the recommendation of the Secretary of the Interior, Secretary of Commerce, Secretary of Agriculture, or other interested Federal or State agencies. However, prior to requiring modifications, FERC must give the affected licensee or exemptee notice that it intends to use its reservation of authority and provide an opportunity for hearing.

Re-opening proceedings are relatively rare and are generally used when there have been significant changes to environmental conditions at the project and the licensee or exemptee is unwilling to address those changes with a voluntary amendment application. FERC provides direction for re-opening a license at 18 CFR 385.716.