



**HYDROPOWER
REFORM
COALITION**

*Putting water, wildlife,
and people back in rivers.*

**CITIZEN GUIDE FOR EFFECTIVE PARTICIPATION
IN HYDROPOWER LICENSE IMPLEMENTATION**

June 2019

ACKNOWLEDGEMENTS AND DISCLAIMER

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This Citizen Guide is intended to provide a public benefit. It does not represent the legal opinion of the HRC as a whole or any member thereof on any issue disputed in a licensing or post-licensing proceeding. It is not offered or intended as legal advice to any reader who participates in such a proceeding.

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Definitions and Acronyms

ALP: Alternative Licensing Process

APA: Administrative Procedures Act

BLM: Bureau of Land Management

CEQ: Council on Environmental Quality

Clean Water Act (CWA): the federal law, 33 U.S.C. 1251 et seq., that requires the restoration and maintenance of the chemical, physical, and biological integrity of the Nation's waters.

Coastal Zone Management Act (CZMA): the federal law, 16 U.S.C. § 1451 et seq., that provides for the management of the nation's coastal resources.

DHAC: Division of Hydropower Administration and Compliance, part of FERC's Office of Energy Projects.

Endangered Species Act (ESA): the federal law, 16 U.S.C. §§ 1531-1544, that provides for protection and recovery of endangered or threatened species of fish, wildlife, or plants.

FERC: Federal Energy Regulatory Commission.

Federal Power Act (FPA): 16 U.S.C. §§ 791-823 (Part I) and 16 U.S.C. §§ 824-824n (Part II).

FWS: U.S. Fish and Wildlife Service, an agency within the U.S. Department of Interior.

ILP: Integrated Licensing Process.

NMFS (formerly NOAA Fisheries): National Marine Fisheries Service, fisheries branch of the U.S. Department of Commerce.

Notice of Intent (NOI): document that the licensee files, at least five years before expiration of a license, to state its intent whether it will seek a new license.

NPS: National Park Service, an agency within the U.S. Department of Interior.

OEP: Office of Energy Projects, the FERC office responsible for licensing non-federal hydropower projects.

TLP: Traditional Licensing Process.

1. Introduction to FERC and Hydropower Licensing & Compliance

1.1. Who is FERC?

The Federal Energy Regulatory Commission (FERC), an independent agency within the U.S. Department of Energy, regulates almost all operating non-federal dams that generate electrical energy in the U.S. FERC consists of five Commissioners (including a Chair) who are appointed by the President for a term of five years. They vote on each licensing decision, including amendments, unless uncontested. FERC's Office of Energy Projects (OEP) is the staff office responsible for the management of each licensing proceeding until the Commissioners vote, and for the supervision of each licensed project thereafter to assure compliance with the license.

OEP's Division of Hydropower Administration and Compliance (DHAC) is responsible for ensuring compliance with the license once issued, as well as with FERC's rules and regulations.¹ It may undertake procedures to investigate and resolve non-compliance on its own initiative or in response to stakeholder complaints.² It seeks to "assist, rather than force, licensees to achieve compliance."³ If a licensee does not achieve compliance in a timely manner, FERC may issue civil penalties.⁴

DHAC also authorizes license amendments, as described in [Section 3.3](#).

1.2. Who Are the Other Regulators?

While FERC has exclusive jurisdiction under the Federal Power Act (FPA) to issue a license, State and other Federal agencies have authority under the FPA and other Federal laws (e.g., Clean Water Act (CWA), Coastal Zone Management Act (CZMA), Federal Land Policy Management Act (FLPMA)) to prescribe or recommend environmental conditions for licenses. Their authority may extend to a specific role in license implementation, or to independent enforcement of their prescriptive license conditions. We briefly describe the resource agencies that are most likely to participate in licensing and license implementation. Please see the Hydropower Reform Coalition's [Citizen Guide for Effective Participation in Hydropower Licensing](#) (Citizen Guide to Licensing) section 2.2 for a more complete description of these agencies and their respective authorities.

¹ See DHAC, *Compliance Handbook* (2015), https://www.ferc.gov/industries/hydropower/gen-info/handbooks/compliance_handbook.pdf, p. 1.

² *See id.*

³ *Id.* at 2.

⁴ See 16 U.S.C. § 823b(c).
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1.2.1. U.S. Department of Interior

The Department of Interior⁵ protects and provides access to the nation's natural and cultural resources and administers the United States' trust responsibilities to the Indian Tribes.⁶ It includes several agencies that routinely participate in licensing proceedings.

a. Fish and Wildlife Service⁷

The Fish and Wildlife Service (FWS) conserves, protects, and enhances fish, wildlife, and plant resources which do not use marine habitat or are not otherwise under the National Marine Fisheries Service's (NMFS) jurisdiction.⁸ FWS may submit a mandatory fishway prescription for riverine fish under FPA section 18; adopt Reasonable and Prudent Alternatives⁹ or Measures¹⁰ for non-marine species listed under the Endangered Species Act (ESA); during the (re)licensing proceeding, FWS may recommend other conditions under FPA sections 10(j) and 10(a) and the Fish and Wildlife Coordination Act. FWS may also reserve its authorities under these sections until after the license is issued.

b. National Park Service¹¹

The National Park Service (NPS) is responsible for preserving unimpaired natural and cultural resources, and implementing technical assistance provisions of the Wild and Scenic Rivers Act of 1968 and the Outdoor Recreation Act of 1963. The NPS is actively involved in hydropower regulation on both park and non-park lands. Where non-park lands are involved, the

⁵ See the DOI website, available at www.doi.gov.

⁶ See the Act of March 3, 1849, 43 U.S.C. §1451.

⁷ See the FWS website, available at www.fws.gov.

⁸ See Reorganization Plan No. 2 of 1939, section 401, codified at 5 U.S.C. app. 1; Reorganization Plan NO. 3 of 1940, section 3, codified at 5 U.S.C. app. 1.

⁹ "Reasonable and prudent alternatives refer to alternative actions identified during formal consultation that can be implemented in a manner consistent with the intended purpose of the action, that can be implemented consistent with the scope of the Federal agency's legal authority and jurisdiction, that is economically and technologically feasible, and that the Director [of FWS] believes would avoid the likelihood of jeopardizing the continued existence of listed species or resulting in the destruction or adverse modification of critical habitat." 50 C.F.R. § 402.02.

¹⁰ "Reasonable and prudent measures refer to those actions the Director [of FWS] believes necessary or appropriate to minimize the impacts, i.e., amount or extent, of incidental take." 50 C.F.R. § 402.02.

¹¹ See the NPS website, available at www.nps.gov.

NPS' primary function is to advise FERC under FPA section 10(a)¹² and represent public interests in recreational and river conservation opportunities. In proceedings where hydropower operations directly affect a National Park, the NPS also advocates for protection and enhancement of park resources.

c. Bureau of Land Management

The Bureau of Land Management (BLM) administers federal lands not included in National Parks, National Wildlife Refuges, or National Forests.¹³ BLM has authority under the Federal Land Policy and Management Act (FLPMA) to issue land use authorizations, or right-of-way grants, for a licensee's use of federal lands under its administration.¹⁴ Under FPA section 4(e), it may prescribe mandatory conditions for any lands set aside as a federal reservation. Under FPA section 10(a), BLM may also recommend conditions for a project's use of other lands and associated waters.

1.2.2. National Marine Fisheries Service

NMFS¹⁵ manages, conserves, and protects living marine resources that spend at least part of their life cycle within the U.S. Exclusive Economic Zone.¹⁶ NMFS administers several statutes that bear on licensing and license implementation. Under the ESA, NMFS may establish Reasonable and Prudent Alternatives or Measures to prevent project take of marine animals or diadromous fish¹⁷ listed under the ESA. Under FPA section 18,¹⁸ NMFS may prescribe a fishway as a mandatory license condition to protect diadromous fish. It may also reserve this authority until after the license is issued. Under the CZMA,¹⁹ a license for a project in the coastal zone may be issued only if the State certifies the license as consistent with the CZMA Program as approved by the U.S. Department of Commerce. Under the Fish and Wildlife Coordination Act and FPA sections 10(a) and 10(j), NMFS recommends conditions to protect,

¹² Section 10(a)(1) provides that any new license shall be, in FERC's judgment, best adapted to a comprehensive plan of development for a waterway. FERC will consider conditions recommended by resource agencies and other stakeholders that are intended to achieve the "best adapted" standard.

¹³ See Reorganization Plan No. 3 of 1946, section 403, *codified at* 5 U.S.C. app. 1.

¹⁴ See 43 U.S.C. §1761 et seq.; 43 C.F.R. Part 2800.

¹⁵ NMFS is an agency within the National Oceanic and Atmospheric Administration of the U.S. Department of Commerce.

¹⁶ See Reorganization Plan No. 4 of 1970, section I, *codified at* 5 U.S.C. app. 1.

¹⁷ A general category for fish that migrate between saltwater and freshwater (e.g., salmon, shad).

¹⁸ 16 U.S.C. § 811.

¹⁹ 16 U.S.C. § 1451 et seq.

mitigate damages to, and enhance fish and wildlife, including related spawning grounds and habitat.

1.2.3. U.S. Forest Service

The Forest Service²⁰ manages National Forests and Grasslands. Under FPA section 4(e), the Forest Service may require that a license for a project occupying lands or waters of a National Forest include those conditions necessary to assure the protection and use of the affected resources. Such conditions assure the high productivity of renewable resources as provided by the Multiple Use-Sustained Yield Act and National Forest Management Act.²¹ Under FPA section 10(a), it may recommend environmental conditions for a project that affects a National Forest without occupying it.

1.2.4. U.S. Army Corps of Engineers

The Army Corps of Engineers²² (Corps) has built and operates 75 dams and other facilities that, in addition to their primary purposes of flood control and navigation,²³ provide 24% of the nation's hydroelectric capacity.²⁴ These federal dams are not regulated by FERC, whose jurisdiction is limited to non-federal facilities. However, a license may require that a project coordinate operation with any Corps' dam located in the same watershed. Finally, the Corps may establish protocols for the flood control operations of any licensed project²⁵ and may require any measure necessary for commercial navigation.²⁶

1.3. What is a FERC License?

A license is a regulatory document that permits a dam owner to use public waters for energy generation. It specifies the conditions for construction, operation, and maintenance of facilities used and useful for power generation. When final, a license is enforceable by FERC or

²⁰ See the Forest Service website, available at www.fs.fed.us. The Forest Service is an agency within the U.S. Department of Agriculture.

²¹ 16 U.S.C. §§ 472a, 521b, 1600, 1611-1614.

²² See the Corps' website, available at www.usace.army.mil.

²³ The Corps was established by the Act of March 16, 1802, "An Act fixing the military peace establishment of the United States." See 2 Stat. 132 (1845).

²⁴ See <http://www.nww.usace.army.mil/Missions/Hydropower/>

²⁵ See Flood Control Act of 1936, ch. 688, Sec. 1, 49 Stat. 1570 (June 22, 1936).

²⁶ See 33 U.S.C. § 1.

the U.S. District Court through fines or injunction.²⁷ FERC may revoke a license in the event of systematic non-compliance by the licensee.

1.4. What is the Licensing Process?

FERC’s “Order Issuing License” will determine the licensee’s duties for construction, operation, and maintenance of the project. It will also dedicate the lands and waters occupied by the project to a particular use. The licensing proceeding that precedes that decision is adjudicatory. It determines private and public rights in the affected lands and waters. A license is issued (or denied) only after a public hearing on the application, as required by the FPA Part I as well as the Administrative Procedures Act. In short, the licensing decision must be based on (A) proof that the licensee is ready, willing, and able to comply with a new license, if granted; (B) a record of evidence regarding the project’s impacts on the public interest, including the licensee’s field studies and an environmental document prepared by FERC Staff, and (C) consideration of comments and pleadings filed by agencies and other participants.

FERC can follow one of three processes – the Traditional (TLP), Alternative (ALP), or Integrated Licensing Process (ILP) – to issue a license. The ILP became the default in 2005.²⁸ While the specific steps for the ILP, TLP, and ALP differ somewhat in substance, time, and sequence, all incorporate the same fundamental elements.²⁹

1.4.1. Notice of Intent

A licensee must file a Notice of Intent (NOI) to seek a new license not less than five years before the expiration of the original license.³⁰

1.4.2. Licensing Record

A license must be supported by “substantial evidence” in the record of the licensing

²⁷ 16 U.S.C. § 823b.

²⁸ See 104 FERC ¶ 61,109 (2003). The Integrated Licensing Process (ILP) integrates the development of license application and environmental review, and it coordinates FERC and other regulatory agencies that undertake such environmental review.

²⁹ A licensee who proposes to use the TLP or ALP instead must request authorization in its Notice of Intent. See 18 C.F.R. § 5.3(a)-(b). The TLP and ALP are described in the Hydropower Licensing Toolkit.

³⁰ In the alternative, the licensee can notify FERC that it does not intend to seek a new license. In that circumstance, the Commission may publish a notice soliciting applications from potential applicants other than the existing licensee. Any new applicant must comply with the procedures for submitting an application at 18 C.F.R. Parts 5 and 16. If no applications are filed, FERC will require the licensee to file a decommissioning plan which describes how it proposes to discontinue project operations and dispose of project facilities in an orderly manner that protects the public interest.

proceeding.³¹ The evidence describes the potential impacts of the project (and any alternatives for facility design or operation) on the electricity system, environmental quality, recreation, and other beneficial uses of the lands and waters. The record must support a decision that the project is best adapted to a comprehensive plan of development of the waterway for the 30- to 50-year license term.

The record in a licensing proceeding consists of several parts. These are: (A) Pre-Application Document (PAD),³² (B) Study Plan,³³ (C) Application,³⁴ (D) Evidence Developed by other Participants,³⁵ and (E) Environmental Document prepared under NEPA.³⁶

1.4.3. Consultation, Intervention, Filings, and Hearing

FERC will issue a license only after public notice and hearing. The NOI and all other notices issued by FERC in a proceeding are published in eLibrary³⁷ and served on the service list of interested parties. The hearing takes two forms: distribution of pleadings and other documents to the service list or a hearing on disputed issues before an Administrative Law Judge (ALJ). The latter form of hearing includes live testimony and cross-examination of witnesses. With few exceptions, FERC only offers the paper hearing as the basis for a licensing decision because of the substantial costs associated with a hearing before an ALJ.

³¹ 16 U.S.C. § 825*l*. “Substantial evidence “means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *Pub. Utilities Comm'n of State of Cal. v. F.E.R.C.*, 462 F.3d 1027, 1045 (9th Cir. 2006).

³² Before preparing the application, the licensee must gather existing information in the PAD.

³³ The licensee prepares the study plan in consultation with agencies and other participants. FERC Staff must approve the study plan under the ILP.

³⁴ After the licensee implements the study plan, collects the study results, and reports the results to the participants for comment, it will publish a draft license application for comment. It will file the final license application not less than 2 years before the expiration of the existing license for review. The application will synthesize relevant information (including study results) into lettered exhibits, which display and analyze the information to describe project design, operation (including capacity, generation, and revenues), and environmental impacts of the proposed new license. *See* Citizen Guide to Licensing, § 3.2.2.

³⁵ Any participant may submit written evidence into the record. If there is conflicting evidence, FERC will give weight to the evidence that it considers most reliable. Evidence is generally submitted in response to the study plan, license application, or environmental document. However, participants may submit evidence at any time after the NOI.

³⁶ *See* 18 C.F.R. §§ 380.4, 380.5 for FERC’s regulations regarding preparation of an Environmental Assessment or Environmental Impact Statement under NEPA. Regardless of the type of document FERC prepares, the applicant for license or major amendment is responsible for providing all information “necessary or relevant” to FERC’s environmental analysis. 18 C.F.R. § 380.3.

³⁷ eLibrary is FERC’s online database of all documents filed in each of its dockets. *See* Appendix 5.3 for instructions to use the eLibrary.

The licensee is a necessary party in every licensing proceeding. In addition, any other entity or person who shows a direct interest in the outcome of the licensing may file a motion to intervene to become a party.³⁸ See Citizen Guide to Licensing § 3.2.4(C) for information on the form and process for filing a motion to intervene. While anyone may file comments in a licensing proceeding without becoming a party, an intervener has two fundamental rights that do not extend to a non-party: (1) it will be served with all of the documents that are filed in the proceeding, and (2) it may file a motion or, on final decision, seek rehearing and judicial review.

1.4.4. Decision

FERC will issue a final decision granting or denying license after it has received all other necessary federal authorizations. Under the Administrative Procedures Act, the final decision is a part of the record and must include a statement of “findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record.”³⁹

The license will become effective once accepted by the licensee. A request for administrative review, or “rehearing,” does not stay the effectiveness of a license.⁴⁰ A licensee may begin implementing the license even if there is a pending rehearing request unless FERC or the U.S. Court of Appeals grants a stay.

Under FPA section 6,⁴¹ each license must have a stated term of years. Starting on license issuance, the term runs 30 to 50 years.⁴²

1.5. Legal Responsibilities of Licensee

The license establishes the legal responsibilities of a licensee for construction, operation, and maintenance of the project. While the license may specify a role for third parties in license implementation, FERC only has jurisdiction and enforcement authority over the licensee. Thus, the licensee is ultimately responsible for complying with all license requirements.

Generally, for any unconstructed project, the license specifies the plan (including schedule) for design and construction. Once constructed, license articles relate to operation typically specifying a range of reservoir levels, a schedule (varying by year-type or season) for flow release from the dam or powerhouse, and a ramping rate that may limit the rate of change in

³⁸ See 18 C.F.R. § 385.214(a).

³⁹ 5 U.S.C. § 557(c)(3).

⁴⁰ 18 C.F.R. § 385.713(e).

⁴¹ 16 U.S.C. § 799.

⁴² See *id.*; see also 16 U.S.C. § 808(e). As stated above, five years prior to the stated term, the licensee must initiate the relicensing process if it intends to continue operating the project. 16 U.S.C. § 808(b)(1).

the powerhouse discharge or other release. The licensee has discretion how to operate the project after compliance with the license articles. Thus, if a license requires a minimum flow release of X cubic feet per second (cfs), the licensee may release more than X cfs at any given time (unless it conflicts with another license article). A licensee may not modify project operations or works prescribed by the license without FERC's prior approval.⁴³ It also cannot sell interests in land included in the license without FERC's prior approval.

A typical license also requires that the licensee provide recreational facilities on any reservoir or river reach within the project boundary, such as boat launches and picnicking areas.⁴⁴ It specifies measures for fish passage and meeting water quality standards, as well as monitoring methods and schedules for measures such as the minimum flow schedule to assure compliance and (in some recent licenses) to evaluate whether the measures have the intended results. Finally, it requires periodic reports of the monitoring results and also standard reports of recreational use and safety as specified in FERC's general rules (Citizen Licensing Guide, Section 2.3.4).⁴⁵

2. License as a Tool for River Restoration

2.1. Role of Hydro in River Restoration/Watershed Management

2.1.1. Structure of a License

Although each license is site-specific, all are similarly organized and have the same basic components.

a. Standard Articles

A license consists of Standard Articles that are generally applicable.⁴⁶ Several standard articles are particularly relevant to post-licensing implementation:

- Standard Article 8 requires flow monitoring, gauging, and reporting;⁴⁷

⁴³ See 16 U.S.C. § 803(b).

⁴⁴ Under the Commission's recreation policy, "[t]he Commission will evaluate the recreational resources of all projects under Federal license or applications therefor and seek, within its authority, the ultimate development of these resources, consistent with the needs of the area to the extent that such development is not inconsistent with the primary purpose of the project." 18 C.F.R. § 2.7.

⁴⁵ See 18 C.F.R. § 8.11.

⁴⁶ See, e.g., "Form L-3: Terms and Conditions of License for Constructed Major Project Affecting Navigable Waters of the United States" (Oct. 1975), available at <https://www.ferc.gov/industries/hydropower/gen-info/comp-admin/l-forms/l-03.pdf>.

⁴⁷ See *id.* (the licensee is required to install and maintain gages and stream-gaging stations "for the purpose of determining the stage and flow of the stream or streams on which the project is located....").

- Standard Article 15 provides for “reopening” the license for the benefit of fish and wildlife;⁴⁸
- Standard Article 17 provides an opportunity for a reopener for the benefit of recreation;⁴⁹ and
- Standard Article 26 describes circumstances that might lead to license surrender.⁵⁰

b. Project-specific Articles

In addition to the Standard Articles, FERC adopts license articles that establish conditions for construction, operation, and maintenance of the specific project. These are specific to the project circumstances and specify how, when, and where a given measure (such as release of a minimum flow or a recreational facility) will be implemented.

A license incorporates those articles or conditions submitted by agencies other than FERC pursuant to various authorities, including FPA section 4(e) or 18, ESA section 7, CWA section 401(a), and CZMA. When timely submitted in the course of a licensing proceeding, FERC incorporates these conditions verbatim into the license.⁵¹ As described below, those agencies may have authority independent of FERC’s to enforce or amend those articles.

c. Specific Role for Third Parties in Implementation of Certain Articles

In some cases, FERC may give other licensing parties a role in implementing a given license article. The party must have demonstrated knowledge and expertise in the resource

⁴⁸ *See id.* (“[t]he Licensee shall, ‘for the conservation and development of fish and wildlife resources, construct, maintain, and operate, ... such reasonable facilities, and comply with such reasonable modifications of the project structures and operation, as may be ordered by the Commission upon its own motion or upon the recommendation of the Secretary of the Interior or the fish and wildlife agency or agencies of any State in which the project or a part thereof is located, after notice and opportunity for hearing.’”).

⁴⁹ *See id.* (“Licensee shall construct, maintain, and operate ... such reasonable recreational facilities, including modifications thereto, such as access roads, wharves, launching ramps, beaches, picnic and camping areas, sanitary facilities, and utilities, giving consideration to the needs of the physically handicapped, and shall comply with such reasonable modifications of the project, as may be prescribed hereafter by the Commission during the term of this license upon its own motion or upon the recommendation of the Secretary of the Interior or other interested Federal or State agencies, after notice and opportunity for hearing.”).

⁵⁰ *See id.* (“[i]f the Licensee shall cause or suffer essential project property to be removed or destroyed or to become unfit for use, without adequate replacement, or shall abandon or discontinue good faith operation of the project or refuse or neglect to comply with the terms of the license and the lawful orders of the Commission In addition, the Commission in its discretion, after notice and opportunity for hearing, may also agree to the surrender of the license when the Commission, for the reasons recited herein, deems it to be the intent of the Licensee to surrender the license.”).

⁵¹ *See* Citizen Guide to Licensing section 2.3.4 for a discussion of different types of standard and specific licensing articles.

addressed by that license article. The role is generally one of consultation because FERC does not have enforcement authority over third parties.⁵² For example, local governments and NGOs can be named to recreational management committee responsible for advising the licensee on how to implement mitigation measures required under the license.⁵³

2.2. Settlement Agreements

As a matter of policy, FERC encourages settlement as the basis for a license whenever the licensee and a critical mass of other participants believe there is a reasonable prospect for timely success. A settlement is a legal document binding between the signatories to settle disputed legal and factual issues. FERC's Practice and Procedure Rule 601 establishes settlement as an accepted method to resolve disputed issues in any proceeding before FERC.⁵⁴ On September 21, 2006, FERC also issued a "Policy Statement on Hydropower Licensing Settlements" (FERC Settlement Policy) that encourages settlement and provides guidance regarding how to frame potential settlement terms.⁵⁵

2.2.1. Structure of Settlement Agreements

A typical settlement in a licensing proceeding has three parts. Boilerplate terms establish the contract whereby all signatories commit to file the Offer of Settlement and thereafter support it as the basis for a license. Proposed license articles describe measures that will be implemented by the licensee to protect, mitigate, and enhance natural resources impacted by the project. Non-jurisdictional measures are actions that non-licensees will take, either solely or in coordination with the licensee, to complement what the licensee will be obliged to do.

FERC will approve the proposed license articles if supported by substantial evidence and otherwise consistent with the statutory requirements for a licensing decision. FERC may acknowledge or accept the boilerplate terms and the non-jurisdictional measures, but it will not approve or enforce them.⁵⁶ That is because its enforcement jurisdiction under FPA Part I only runs to licensees and their licenses.⁵⁷ Thus, a license may establish duties for the licensee's

⁵² See, e.g., *Duke Energy Progress, Inc.*, 151 FERC ¶ 62,004, 64044 (Apr. 1, 2015) ("The Recreation Plan must be developed after consultation with the U.S. Fish and Wildlife Service, North Carolina Wildlife Resources Commission, North Carolina Division of Parks and Recreation, the City of Rockingham, North Carolina, and Anson, Montgomery, and Stanly Counties, North Carolina.").

⁵³ See *id.* at 64,043.

⁵⁴ See 18 C.F.R. § 385.601 *et seq.*

⁵⁵ Available at <https://www.ferc.gov/whats-new/comm-meet/092106/H-1.pdf>.

⁵⁶ See *Erie Boulevard Hydropower*, 88 FERC ¶ 61,176 (1999) (Black River Project); *Curtis Palmer Hydroelectric Company/International Paper Company*, 91 FERC ¶ 61,112 (2000) (Curtis-Palmer Project); *Avista Corp.*, 90 FERC ¶ 61,167 (2000); 93 FERC ¶ 61,116 (2000) (Clarks Fork Project).

⁵⁷ See *id.*

performance of environmental measures, and FERC will enforce such duties. A license may not include any duties of non-licensees (whether agencies, tribes, or other participants) because FERC lacks authority to enforce such duties.⁵⁸ However, third-party obligations generally are enforceable as matters of contract.

2.3. Opportunities for River Restoration and Enhancement

Under FPA section 10(a)(1),⁵⁹ FERC must ensure that the project as licensed “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 water-power 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”

FPA section 4(e) further provides that FERC shall, in addition to the power and development purposes for which licenses are issued, give equal consideration to the purposes of energy conservation, protection, *mitigation*⁶⁰ of damages to, and *enhancement of*, fish and wildlife (including related spawning grounds and habitat), the protection of recreational opportunities, and the preservation of other aspects of environmental quality.⁶¹

A proponent of a proposed license condition must articulate a nexus between the condition and the project, and describe how the proposed condition will achieve the desired result. This assists FERC in complying with CEQ guidance, which states: “[a]gencies should clearly identify commitments to mitigation measures designed to achieve environmentally preferable outcomes in their decision documents ... mitigation commitments should be carefully

⁵⁸ See *id.*

⁵⁹ 16 U.S.C. § 803(a)(1).

⁶⁰ The Council on Environmental Quality (CEQ), see 40 C.F.R. § 1508.20, describes “mitigation” as:

“(a) Avoiding the impact altogether by not taking a certain action or parts of an action.

(b) Minimizing impacts by limiting the degree or magnitude of the action and its implementation.

(c) Rectifying the impact by repairing, rehabilitating, or restoring the affected environment.

(d) Reducing or eliminating the impact over time by preservation and maintenance operations during the life of the action.

(e) Compensating for the impact by replacing or providing substitute resources or environments.”

⁶¹ 16 U.S.C. §797(e) (emphasis added).

specified in terms of measurable performance standards or expected results, so as to establish clear performance expectations.”⁶²

2.3.1. Mitigation Funds

Licenses may require the licensee to set aside funds to be used to mitigate project impacts on a given resource. FERC’s policy is to closely scrutinize proposals for mitigation funds to ensure that they have a nexus to the project.⁶³

“For example, where the record shows that a project has an impact on certain aquatic species or could enhance such species, it may be possible to obtain Commission approval of a fund that is designated for the purpose of enhancing and mitigating impacts on those species within the project vicinity, such as a fund to pay for a set of specified fishery habitat enhancements within the project boundary, provided that the licensee retains sufficient control over the fund that the Commission can ensure compliance with the related license article and ensure satisfaction of the underlying project purposes supporting the fund. As the ties between the proposed fund and record evidence and project effects and purposes become more tenuous, as with a fund to undertake unspecified fishery measures within the basin where the project is located, the propriety of the fund may increasingly come into question. Thus, if the record does not show that the project has an adverse effect on fishery resources or does not demonstrate that effective enhancement measures can be undertaken in the project vicinity, it may be more difficult to justify inclusion of a fishery fund in a license. Similarly, a fund that may be used anywhere in a state or in a broad geographic area may be less likely to be recommended than one more closely tied to the project. To the extent that parties feel measures should be undertaken beyond the project vicinity, they should explain in detail why those measures are related to project purposes, why they cannot be carried out at the project site, and why their proposals would satisfy the comprehensive development standard.”⁶⁴

A licensee may enter into an off-license general funding agreement with a third party. However, FERC will not consider an off-license funding agreement in its evaluation of whether the license is best adapted to a comprehensive plan of development under FPA section 10(a).

⁶² CEQ, “Memorandum on Mitigation and Monitoring” (2011), p. 8. When a NEPA document specifically relies on proposed mitigation measures to find that the adverse impacts of a project will be lessened, NEPA requires more detail regarding how the mitigation measures will work and why such mitigation measures are likely to be effective. *See, e.g., Stein v. Barton*, 740 F. Supp. 743, 754 (1990) (“where an agency’s decision to proceed with a project is based on unconsidered, irrational, or inadequately explained assumptions about the efficacy of mitigation measures, the decision must be set aside as arbitrary and capricious.”). *See also S. Fork Band Council of W. Shoshone of Nevada v. U.S. Dep’t of Interior*, 588 F.3d 718, 727 (9th Cir. 2009); *Pac. Coast Fed’n of Fishermen’s Associations v. Blank*, 693 F.3d 1084, 1103 (9th Cir. 2012).

⁶³ FERC Settlement Policy, p. 8 (citing *US Gen New England*, 99 FERC ¶ 62,025 at 64,060-61 (2002) (partially rejecting proposal for enhancement fund, to extent fund would cover activities outside project boundary, with no nexus to project, or, in case of mitigation for tax revenue impacts, beyond Commission’s jurisdiction)).

⁶⁴ FERC Settlement Policy, p. 12.

2.3.2. Resource Management Plans

A resource management plan can help the licensee meet its responsibilities over the term of the license. For example, a license may require the licensee to develop and implement a recreational management plan that articulates the licensee’s responsibilities to build and maintain recreational facilities or operate the project in a specific way to provide opportunities for certain types of recreation.⁶⁵ In another example, many licenses include a shoreline management plan that describes how the licensee will manage development and use of the project’s shorelines in accordance with license requirements. FERC generally requires the licensee to develop resource management plans in consultation with agencies and interested parties.

2.4. Post-License NEPA Compliance

Under the National Environmental Policy Act (NEPA), FERC has a duty to consider the environmental impacts of a proposed license. It complies with this duty by preparing an Environmental Assessment or Environmental Impact Statement prior to issuing a license. In addition, if there are changes to the project, or new circumstances or information that affect FERC’s environmental analysis, FERC may have a duty to prepare a new or supplemental NEPA document. Procedures for supplemental environmental analysis under NEPA may result in substantive changes to the license to avoid or lessen impacts not adequately considered during licensing.

CEQ regulations, *see* 40 C.F.R. section 1502.9, provides that federal agencies

“Shall prepare supplements to either draft or final environmental impact statements if: (i) The agency makes substantial changes in the proposed action that are relevant to environmental concerns and bearing on the proposed action or its impacts; or (ii) There are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts.”

Compliance with NEPA can be expensive and time-consuming. FERC staff has cited the potential need to comply with NEPA as a reason for limiting mid-license amendments. The benefit of preparing a thorough NEPA document during the licensing proceeding, one that fully evaluates cumulative effects (especially reasonably foreseeable future events), may reduce the need for a supplemental NEPA document soon after license issuance, and can make modifying the license easier.

⁶⁵ *See, e.g., Duke Energy Progress, Inc.*, 151 FERC ¶ 62004, 64044 (Apr. 1, 2015) (“Within nine months of license issuance, the licensee must file with the Commission for approval, a Recreation Plan for the Yadkin-Pee Dee Hydroelectric Project that includes the following: (1) Provisions for the operation and maintenance (O&M) of the following existing project recreation sites ...”).

We provide examples of NEPA analyses for post-license changes at specific projects below.

2.4.1. Substantial Changes to the Project

In 2007, the Corps prepared an EIS for the Folsom Dam Safety and Flood Reduction project. The 2007 EIS indicated that spillway enhancements to Folsom Dam would be needed for flood control purposes but did not contain detailed proposals or environmental analysis of anticipated spillway enhancements. Following certification of the 2007 EIS and approval of the Folsom Dam project, the Corps developed more detailed plans for spillway enhancements. The Corps determined that a supplemental EIS was necessary under NEPA because the spillway constituted a substantial change to the project as approved.⁶⁶

Following this example, post-license structural or operational modifications that are not discussed in the original EIS may constitute a “substantial change” to the project as approved, triggering FERC’s obligation to prepare a supplemental EIS.

2.4.2. New Information

In *Warm Springs Dam Task Force v. Gribble*,⁶⁷ the U.S. Court of Appeals for the Ninth Circuit considered seismic safety information related to the Corps’ Warm Springs Dam on Dry Creek located in California. The Corps had evaluated seismic hazards associated with the Maacama Fault which passes within several miles of the dam site. The original EIS assumed that the Maacama Fault extended no more than 26 miles and was thus incapable of generating an earthquake greater than 6.6 on the Richter Scale. Subsequent to the Corps’ approval of the project, the U.S. Geological Survey determined that the Maacama Fault extended between 68 and 148 miles, and thus could generate an earthquake of greater magnitude than previously considered.

In evaluating whether this new information triggered the need to prepare a Supplemental EIS, the Ninth Circuit started “with the premise that a federal agency has a continuing duty to gather and evaluate new information relevant to the environmental impact of its actions.”⁶⁸ It went on to find that the U.S. Geological Survey study “raised sufficient environmental concerns to require the Corps to take another hard look at the issue.... Neither the EIS or the S-EIS [dealt with the fact that the Maacama fault might be the controlling earthquake for design purposes. On the basis of the information then available, the Corps’ decision not to file a further supplement to the S-EIS was not reasonable.”⁶⁹

⁶⁶ Final Supplemental Environmental Impact Statement for Folsom Dam Modification Project Approach Channel (Lead Agency United States Army Corps of Engineers, December 2012); *see also* 40 C.F.R. § 1502.9(c).

⁶⁷ *Warm Springs Dam Task Force v. Gribble*, 621 F.2d 1017 (9th Cir. 1980).

⁶⁸ *Id.* at 1023.

⁶⁹ *Id.* at 1025.

FERC may be required to prepare a supplemental EIS if post-license information demonstrates that assumptions fundamental to its analysis in the original EIS are no longer valid.

The U.S. Court of Appeals for the D.C. Circuit reached a different result in *Friends of the River v. FERC*.⁷⁰ There the court reviewed FERC's decision not to prepare a supplemental EIS following license issuance for the Calaveras Project on the Stanislaus River in California. The primary project impacts stemmed from the expansion of the project reservoir to inundate an additional 1,780 acres of forest, meadow, and riparian habitat. The original EIS included cursory analysis of whether the licensee could meet its power needs through purchases from other utilities absent expansion of the reservoir. The EIS simply noted the uncertainty regarding the licensee's power supply contracts. The California Energy Commission ("CEC") issued forecasts indicating that other utilities would have ample supply to meet demand without the Calaveras Project.

The D.C. Circuit explained that NEPA regulations⁷¹ do not require an agency to "release and circulate a formal supplemental EIS, or a formal document explaining why the agency believes a supplemental EIS is unnecessary, every time some new information comes to light. Rather, a reasonableness standard governs."⁷² It found that plaintiffs'

"new information ... appears to be of questionable value. Even if the information were more weighty, however, we would hesitate to command FERC to attend to it. CEC, as part of its continuing task of surveying California's energy picture, issues new forecasts and predictions every few months, each soon to be superseded by the next. Were we to order the Commission to reassess its decisions every time new forecasts were released, we would risk immobilizing the agency."⁷³

Thus, incremental new information, especially if related to project need, may not trigger the obligation to supplement an EIS so long as the original EIS included some discussion of the issue.

Taken together, the *Warm Springs Dam* and *Friends of the River* decisions suggest that in evaluating whether FERC has an obligation to prepare a post-license supplemental EIS, courts will distinguish between new information that upends a core assumption in the original EIS, and new information that merely bears on the likelihood of events occurring post-license. The former may require a supplemental EIS, but the latter likely will not.

2.4.3. Supplemental EIS Requirements and Climate Change

⁷⁰ *Friends of the River v. FERC*, 720 F.2d 93 (D.C. Cir. 1983).

⁷¹ 40 C.F.R. § 1502.9.

⁷² *Id.* at 109.

⁷³ *Id.*

The effects of climate change on project operations may also trigger the need for a Supplemental EIS under NEPA. FERC’s current practice is not to study the impacts of climate change over the term of a proposed license because it does not believe those impacts can reliably be predicted.⁷⁴ FERC’s approach to climate change differs from those of the Corps and the BOR, each of which has adopted guidance requiring consideration of climate change in water resource planning decisions.⁷⁵

FERC’s refusal to evaluate the effects of climate change on instream conditions in an EIS prepared for licensing could increase the likelihood that the EIS will be challenged and a supplemental EIS required if information gathered post-license show climate change is affecting project operations. For example, if FERC evaluated a project’s effects on instream temperatures based on baseline temperatures, and post-license information shows assumptions regarding the continuation of baseline temperatures are no longer accurate due to climate change, this may constitute significant new information requiring a supplemental EIS.

As another example, if FERC staff evaluated a project’s reservoir release schedule based on historical snowpack and runoff patterns, and post-license information shows that historical snowpack levels are reduced due to more frequent droughts or snowpack melt is accelerated due to higher ambient temperatures as a result of climate change, this may constitute significant new information requiring a Supplemental EIS.

3. License Implementation and Compliance

3.1. Adaptive Management

Modern licenses, particularly those based on settlement agreements, “often contemplate that adjustments to measures required during the license term will be based on information gleaned from ongoing monitoring or other post-license studies. This is sometimes called adaptive management.”⁷⁶ Adaptive management is defined as “a systematic approach for improving resource management by learning from management outcomes.”⁷⁷ It “involves exploring alternative ways to meet management objectives, predicting the outcomes of alternatives based on the current state of knowledge, implementing one or more of these

⁷⁴ “Study Plan Determination for the Susitna-Watana Hydroelectric Project under P-14241,” FERC eLibrary no. 20130201-3041 (Feb. 1, 2013), p. B-8.

⁷⁵ See Corps, “Climate Preparedness and Reliance,” available at https://www.usace.army.mil/corpsclimate/Climate_Preparedness_and_Resilience/; U.S. Bureau of Reclamation, “Climate Change,” available at <https://www.usbr.gov/climate/>.

⁷⁶ FERC Settlement Policy, p. 17.

⁷⁷ U.S. Department of Interior, Adaptive Management Technical Guide (2009), available at <https://www2.usgs.gov/sdc/doc/DOI-%20Adaptive%20ManagementTechGuide.pdf>, p. 1.

alternatives, monitoring to learn about the impacts of management actions, and then using the results to update knowledge and adjust management actions.”⁷⁸

Adaptive management can be a useful tool for protecting resources where there is lingering uncertainty as to how specific resources will respond to proposed license conditions over the course of a 30 to 50-year license term, during which circumstances and conditions are almost certain to change. For example, the licenses for the Rock Creek Cresta and Roanoke Rapids Projects each included a program to adaptively manage the minimum flow schedule to ensure it was adequate to achieve measurable objectives for specific resources. *See* Appendix 4.1 for discussions of the licenses for Rock Creek Cresta and Roanoke Rapids Projects, where adaptive management has been used successfully to mitigate the project’s impacts on certain resources, and of the original license for the Don Pedro Project, which included an early form of adaptive management.

Adaptive management allows for flexibility as best-practice scientific methods develop and understanding of project impacts evolve.⁷⁹

⁷⁸ *Id.* at 1. It is important to recognize that adaptive management is not just trial and error. Rather, it is a rigorous process that includes

“stated management objectives to guide decisions about what to try, and explicit assumptions about expected outcomes to compare against actual outcomes. It is important to know what the available management options and alternative assumptions are, in case the action that is tried does not work as expected. The linkages among management objectives, learning about the system, and adjusting direction based on what is learned distinguish adaptive management from a simple trial and error process.”

DOI Adaptive Management Guidance, p. 7. Because it is a resource-intensive, long-term process, the agencies, license, and other stakeholders should make a realistic assessment of the organizational resources that will be required to implement the program long-term and ensure there is a commitment to sustained funding for monitoring and assessment before they agree to such a program. *Id.* at 15.

⁷⁹ *See, e.g.*, PUD 1, “Public Utility District No. 1 of Snohomish County, Washington Settlement Agreement for the Relicensing of the Henry M. Jackson Hydroelectric Project under P-2157,” FERC eLibrary no. 20091014-5044 (submitted October 14, 2009), p. 1. The Henry Jackson Project’s 2011 license requires a dynamic, science-based flow regime that is adaptively managed by the Aquatic Resource Committee.

A good adaptive management program should anticipate the need for modifications and try to limit the need for additional approvals. However, implementation of the adaptive management program may show that measures not contemplated in the license are necessary to achieve the measurable objectives. In that circumstance, a license amendment may be necessary. It is FERC’s “role and responsibility to give prior approval, through appropriate license amendments, for all material amendments to the project and the license.”⁸⁰ For example, in the Rock Creek Cresta Project case study, the license set out a range of minimum flow releases designed to maintain instream water temperature below a certain threshold. The licensee released the maximum flow permitted under the range but was still unable to comply with the temperature objective. The licensee had to seek amendment of the license to raise the ceiling on the allowable minimum flow releases so that it could meet the temperature objective. The process for license amendment is described in [Section 3.3](#).

Tom O’Keefe’s (American Whitewater) Advice for Citizens

Adaptive management is a resource intensive process. The following are important to making adaptive management successful.

Show up. Plenty of people come to the first public meeting, but attendance eventually dwindles. Being persistent and continuing to raise issues is critical to affecting change through the adaptive management process.

Build relationships with other groups. Seek to coordinate and collaborate with other parties that share your interests. This can avoid duplication of effort. The HRC has many member groups who are interested in sharing technical expertise and strategy and are willing to train local groups on developing a robust adaptive management program during (re)licensing.

Build relationships with agencies. After determining the agency jurisdiction in the project area, reach out to relevant staff. Seek to coordinate with them regarding development of the record. You may have access to information that they are lacking, or vice versa.

3.1.1. Consultation and Ecological Committees

Settlement agreements often include license articles creating stakeholder groups to oversee environmental aspects of license implementation. These Committees meet regularly as part of adaptive management programs to evaluate and modify license monitoring conditions. Usually made up of signatories to a settlement agreement (including NGOs, government agencies, and the licensee), the committees keep stakeholders engaged over the decades-long license implementation process.

⁸⁰ FERC’s Settlement Policy, p. 18.

Consultation/Ecological Committees serve to keep stakeholders formally involved and informed, facilitating transparency and accountability. Also, government agencies often have high staff turnover combined with lack of adequate funding; committees can provide institutional memory to keep license implementation on track.

Membership in a Consultation/Ecological Committees required by the license can confer standing to participate in post-licensing proceedings related to the committee's purpose.

For examples of Consultation and Ecological Committees, see [Section 3.1](#) (Adaptive Management) and the Case Studies Appendix Section 1.4 (Mokelumne).

3.2. Variances

Not all changes to project operations or facilities require an amendment to the license. FERC routinely grants temporary changes, or variances, from operating requirements. For example, a licensee may need to temporarily reduce releases from a project reservoir during times of drought in order to maintain carryover storage to protect other project uses.⁸¹ Conversely, a licensee may need to temporarily increase reservoir releases during times of flooding to prevent unregulated spill from a dam that could pose risk to downstream resources or public safety.

Generally, a licensee “must seek specific Commission approval before implementing any temporary variance.”⁸² It may also need to seek approval from other resource agencies if it is seeking a variance from conditions they prescribed, or the variance may adversely affect resources over which they have jurisdiction.

While approval is generally necessary, a license may permit very short deviation from license requirements without FERC approval:

“Some articles in a license or exemption contain language that allows the licensee or exemptee to temporarily deviate from the relevant condition ‘for short periods of time’ upon mutual agreement between the licensee and the resource agencies, usually the U.S. Fish and Wildlife Service (FWS), National Marine Fisheries Service (NMFS), and/or state fish and game agency. A short period of time is generally considered to be 2 to 3 weeks. If the license condition contains this language, and the resource agencies agree to the temporary variance, and the change would only last 2 to 3 weeks, then the licensee does not need Commission approval but must notify the Commission of the change as per

⁸¹ “Order Granting Temporary Variance of Minimum Pool Requirement Under Article 44 re Merced Irrigation District’s Merced River Project under P-2179,” eLibrary no. 20150624-3016 (June 24, 2015), p. 7 (“Merced Irrigation District’s (licensee) is hereby granted a temporary variance of the reservoir elevation requirements of license Article 44 for the Merced River Project No. 2179 through December 31, 2015, in order to allow continuation of a water withdraw from Lake McClure for the Lake Don Pedro Community Services District.”).

⁸² DHAC Compliance Handbook, p. 18.

the license article requirements (generally within 10 days of the operational modification).”⁸³

See Appendix 4.1 for a discussion of how FERC relied on variances to suspend boating flows otherwise required by the license for the Pit River 1 Project.

3.3. Amendments

A licensee must construct, operate, and maintain the project in conformity with the license.⁸⁴ Any proposed amendment to that plan must be approved by FERC before implementation.⁸⁵ According to DHAC, amendments can “range from simple to the complex,” depending on the changes being proposed:

“For example, environmental protection or enhancement measures filed with the Commission pursuant to license articles ... may constitute amendments to licenses. Amendments may also result from resolution of environmental conflicts that were not addressed during the licensing process. DHAC also processes amendments to licenses ... that result from proposed changes in project operations, modifications to project structures, or changes in project boundary.”⁸⁶

Generally, the licensee must submit an application for license amendment to change any facility (such as the height of the dam or the capacity of the powerhouse), operation (such as the minimum flow release), or schedule for construction or operation, as prescribed in the license.⁸⁷ However, as described below, temporary deviation is permitted without formal amendment, if necessary for protection of life and property or if caused by an event beyond the licensee’s control.⁸⁸

DHAC describes two categories of amendments: capacity related and non-capacity related. FERC “defines a capacity-related amendment as an amendment that would increase the project’s actual or proposed total installed capacity by 2 megawatts or more, and increase the project’s maximum hydraulic capacity by 15 percent or more.”⁸⁹ Project modifications that do

⁸³ *Id.* at 17-18.

⁸⁴ *See id.*

⁸⁵ *See* 16 U.S.C. §§ 799, 803(b).

⁸⁶ *Id.*

⁸⁷ *See* 18 C.F.R. § 385.204.

⁸⁸ *See* 16 U.S.C. § 803(b).

⁸⁹ DHAC Compliance Handbook, p. 20.

not meet those thresholds are considered non-capacity amendments.⁹⁰ The application for license amendment varies by category of amendment, with capacity related amendments requiring more comprehensive supporting documentation and pre-filing consultation.⁹¹

As a rule, an application must contain: a description of the proposed change in facility, operation, or schedule and supporting exhibits, which document the environmental and other impacts of the amendment to the extent they differ from the impacts of the underlying license.⁹²

FERC will publish notice and take comment if the application proposes a material change in the plan of development.⁹³ In that circumstance, the federal agencies with mandatory authorities may also change their prescriptions as appropriate to address the potential impacts of the amendment, and other persons may intervene and comment.⁹⁴ Further, an amendment that involves a new or materially changed flow discharge may be subject to a new or amended water quality certification.⁹⁵

⁹⁰ *Id.*

⁹¹ 18 C.F.R. § 4.201(b). A licensee's proposing a capacity related amendment, or a major non-capacity amendment, must comply with the three-stage consultation process, which consists of "(1) reaching out to relevant agencies, Indian tribes, and members of the public; holding a public meeting; and requesting studies; (2) conducting any studies requested by interested parties and providing a draft of the application to relevant resource agencies, tribes, and other interested entities for review and comment; and (3) filing the final application with the Commission." DHAC Compliance Handbook, p. 23.

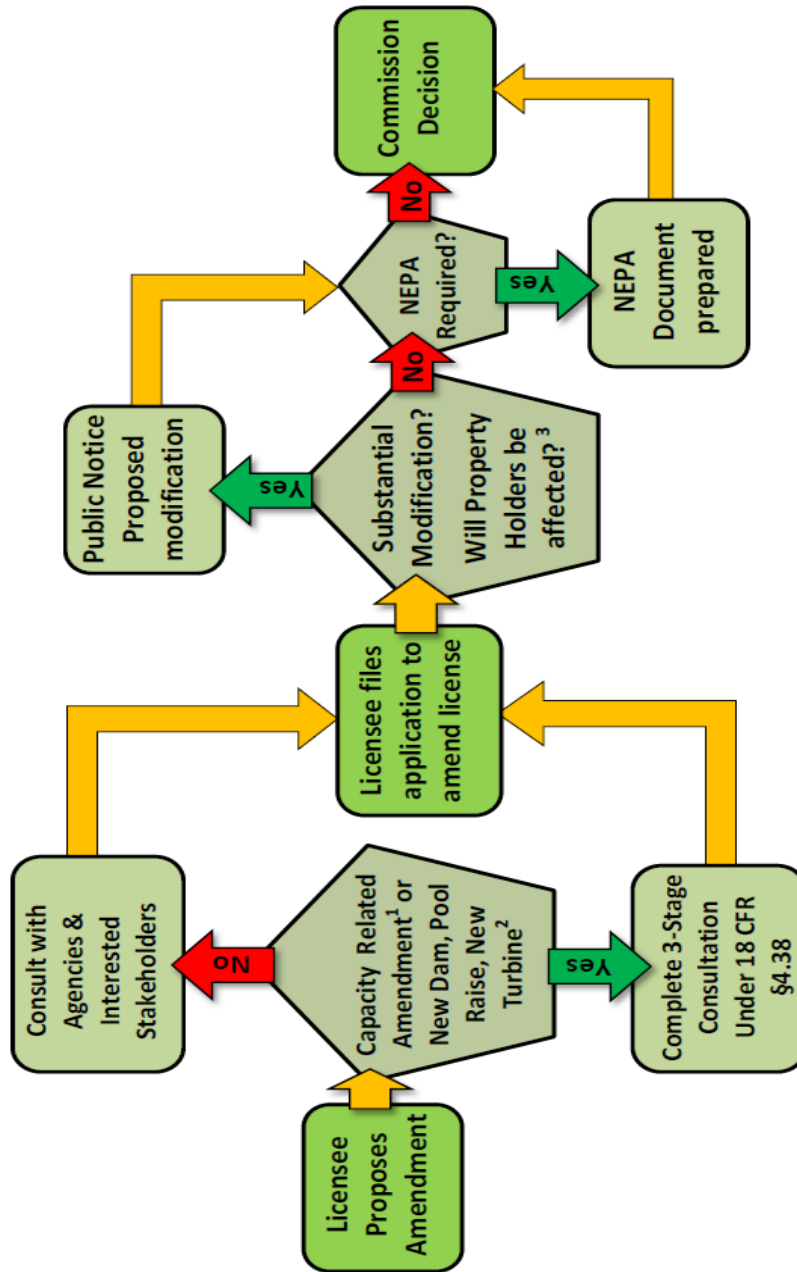
⁹² *See* 16 U.S.C. § 802; 18 C.F.R. §§ 4.41, 4.51, 5.18.

⁹³ *See* 18 C.F.R. § 4.202.

⁹⁴ *See* 16 U.S.C. §§ 797(e), 803; 18 C.F.R. §§ 4.38(a)(6), 380.10.

⁹⁵ *See Alabama River Alliance v. FERC*, 325 F.3d 290, 300 (2003) (Alabama Rivers). However, FERC's rules limit the requirement for certification to a license amendment which would have a "material adverse impact on water quality." 18 C.F.R. § 4.38(a)(6)(iii). Although it did not reach the issue, the U.S. Court of Appeals (D.C. Circuit) has expressed "serious reservations concerning FERC's attempt to redefine the statutory phrase 'any discharge,' 33 U.S.C. 1341(a)(1), to mean only those discharges that are 'material.'" *See North Carolina v. FERC*, 112 F.3d 1175, 1186 (D.C. Cir. 1997). FERC's interpretation of CWA section 401 is not entitled to the usual judicial deference because EPA, not FERC, administers the CWA. *See Alabama Rivers*, 325 F.3d at 297; *Professional Reactor Operator Society v. U.S. Nuclear Regulatory Commission*, 939 F.2d 1047, 1051 (D.C. Cir. 1991) ("reviewing courts do not owe deference to an agency's interpretation of statutes that ... are outside the agency's particular expertise and special charge to administer").

Figure 1: License Amendment Process⁹⁶



⁹⁶ FERC Department of Hydropower Administration and Compliance, Compliance Handbook (2015) available at https://www.ferc.gov/industries/hydropower/gen-info/handbooks/compliance_handbook.pdf.

3.4. FERC's Reserved Authority to Reopen a License

As discussed above, Standard Articles reserve FERC's authority to reopen the license on its own initiative or on the motion of a regulatory agency or other interested person.⁹⁷ This reserved authority permits FERC to compel the licensee to amend the license following opportunity for hearing. FERC sparingly uses this authority, which it considers to unsettle the licensee's expectation that the license will remain fixed for its term. However, as indicated above, FERC may amend an environmental condition if the project impact is substantially worse than predicted when the license was issued or if the required level of protection for an affected resource has substantially changed. For example, FWS or NMFS may request that FERC initiate formal consultation, and thus an amendment proceeding, if: (A) a fish or wildlife species in the project vicinity is listed as threatened or endangered under the federal Endangered Species Act post-licensing, and (B) there is a risk that the project will take (kill or harm) members of that species in the absence of an amendment.⁹⁸ FERC will give the licensee notice that it intends to use its reservation of authority and provide an opportunity for hearing prior to amending the license.⁹⁹

FERC generally "sets a high bar for the use of its reserved authority contained in licenses.... Reopening proceedings are relatively rare and are generally used when there have been significant changes to environmental conditions at the project and the licensee ... is unwilling to address those changes via a voluntary amendment application"¹⁰⁰

See Appendix 5.1 for a case study on the reopener for the Lower Mokelumne Project.

⁹⁷ *See also* 18 C.F.R. §§ 2.23, 385.716.

⁹⁸ *See* 16 U.S.C. § 1536. *See, e.g.,* "[National Marine Fisheries Service request that FERC initiate consultation under Section 7\(a\)\(2\) of the Endangered Species Act for Federally licensed operations of the New Don Pedro Project etc. under P-2299,](#)" eLibrary no. 20030220-0293 (Nov. 19, 2002).

⁹⁹ DHAC Compliance Handbook, p. 34.

¹⁰⁰ *Id.*

3.5. Project Transfer

A licensee may voluntarily apply to transfer a license to a third party.¹⁰¹ If FERC approves the transfer, the third party will step into the licensee’s shoes.¹⁰² This may occur during relicensing¹⁰³ or during license implementation.¹⁰⁴

An application for voluntary transfer¹⁰⁵ of license must be filed jointly by the licensee and potential transferee.¹⁰⁶ The content of an application includes, but is not limited to, a description of the qualifications of the transferee to hold the license, a statement providing evidence that the transferee has complied or will comply with all applicable state laws.¹⁰⁷ DHAC will publicly notice a transfer application before making a final decision on the request.¹⁰⁸

DHAC scrutinizes transfer applications “to ensure that a transferor with a poor compliance record is not trying to escape that record and give a transferee an advantage in relicensing, or handing off an increasingly marginal project to a new licensee that lacks the financial resources to maintain the project.”

Any approval is contingent upon:

- (1) Transfer of title to the properties under the license;
- (2) Written acceptance by the transferee within 60 days of the order approving transfer;
- (3) Delivery of all license instruments within 60 days of the order approving transfer; and

¹⁰¹ 16 U.S.C. § 801.

¹⁰² *See id.*

¹⁰³ Relicensing may result in involuntary transfer. A third party may file a Notice of Intent to compete for a new license for a project. *See* 18 C.F.R. § 4.31. It must do so within the 5 to 5.5-year period before the existing license expires. 18 C.F.R. § 5.5(d). “Any citizen, association of citizens, domestic corporation, municipality, or state may submit for filing an initial application or a competing application for a preliminary permit or a license for a water power project under Part I of the Federal Power Act.” *See* 18 C.F.R. § 4.31.

¹⁰⁴ *See, e.g.,* First Energy Generation & Allegheny Energy Supply Co., “Application for Approval of Transfer of Licenses,” eLibrary no. 20130904-5095 (Sept. 3, 2013) (filed during a relicensing proceeding in which there was a competing license application).

¹⁰⁵ License transfer may also be involuntary if a third party files a Notice of Intent to compete for a new license for a project and demonstrates its proposal better serves the public interest than the licensee’s.

¹⁰⁶ DHAC Compliance Handbook, p. 35 (*citing* 18 C.F.R. 9.1).

¹⁰⁷ *See id.* (*citing* 18 C.F.R. § 9.2).

¹⁰⁸ *See id.*

- (4) A showing that the transfer is in the public interest.

As stated above, the transferee will step into the licensee’s shoes if the transfer is approved. “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....”¹⁰⁹

3.6. Project Surrender

A licensee may voluntarily surrender a project at any time for any number of reasons. For example, the project may become uneconomical or non-operational due to natural disaster or other change in circumstances. However, a licensee cannot simply walk away from a project. “[S]urrenders must be approved by the Commission in order to ensure public safety and any needed environmental protection.”¹¹⁰ DHAC staff has discretion to determine the “complexity of the surrender process” based on “site-specific conditions” and the implications of ending FERC’s jurisdiction.¹¹¹

FERC will require the licensee to file an application for surrender that includes:

“a decommissioning plan describing the planned disposition of project facilities; an environmental report that describes the existing environment in the project area, environmental effects that are expected to occur upon surrender, and any measures that would be taken to mitigate those effects; a schedule for implementing any proposed measures; and copies of consultation with relevant federal and state agencies. The application must include plans to restore any federal lands occupied by the project to a condition acceptable to the land management agency.”¹¹²

As a matter of general policy, decommissioning may take many forms. FERC is willing to consider options as diverse as complete removal of all licensed facilities, removal of some facilities, or retention in place with physical measures to protect public safety.¹¹³ FERC considers many factors in evaluating these options, “including (but not limited to) the costs of removal, the burdens on the State of continued supervision, what alternative approaches are available, and the environmental consequences of removal.”¹¹⁴

¹⁰⁹ DHAC Compliance Handbook, p. 36.

¹¹⁰ *Id.* at 34.

¹¹¹ *Id.* at 34.

¹¹² *Id.* at 34-35.

¹¹³ FERC, “Project Decommissioning at Relicensing; Policy Statement,” 60 Fed. Reg. 339-01, 334 (Jan. 4, 1995) (internal citations omitted).

¹¹⁴ *Id.* at 345.

“For example, there can be very great environmental consequences to tearing out a dam that is part of a licensed hydropower project. Over the life of the project huge amounts of silt may accumulate, and if the dam is removed, that silt may sweep downstream, causing major damage to other properties or resources. The situation is even more serious where PCBs or other hazardous materials are embedded in the sediment. Equally significant, even if the project is no longer to produce power, the dam and related project works may serve other, nonpower functions worth preserving.

In some instances, power production is a very secondary element. The primary function of a project may be to supply water for irrigation or domestic needs, but power production facilities were included to help with the costs of the project. Certainly, under those circumstances, tearing out a dam would be unwarranted. Another example of significant nonpower functions associated with a project occurs when property owners have built homes around the project's reservoir.”¹¹⁵

Consistent with its Settlement Policy for licensing, DHAC has stated that, while it will work with resource agencies and interested stakeholders to arrange a “comprehensive solution,” it prefers when interested parties reach agreement among themselves: “Experience suggests that in nearly all instances the interested parties should be able to reach a resolution of the decommissioning approach among themselves. Where this is not possible, the Commission will impose reasonable terms appropriate to the situation, but this is not the approach the Commission favors.”¹¹⁶

Once a surrender application is complete, DHAC will issue a 30-day public notice soliciting motions to intervene, comments, and protests. It will prepare an Environmental Assessment for purposes of satisfying NEPA.¹¹⁷ It will “issue an order on the surrender application, which takes into account comments by federal and state agencies and other parties filed in the proceeding, and the analysis performed in the Environmental Assessment.”¹¹⁸ The license surrender order will contain specific conditions to protect public safety and mitigate the adverse impacts of decommissioning.¹¹⁹ The order will be effective – the license terminates – only upon the licensee’s demonstration that it has complied with those conditions.

¹¹⁵ *Id.* at 344.

¹¹⁶ *Id.*

¹¹⁷ 18 C.F.R. § 380.5(b)(13).

¹¹⁸ DHAC Compliance Handbook, p. 35.

¹¹⁹ For example, the Commission’s order approving Oreille PUD’s license surrender and removal of Mill Pond dam on several conditions relevant to dam removal, including:

- Compliance with the conditions submitted by Washington Ecology under CWA section 401;
- Compliance with the incidental take terms and conditions of the Biological Opinion submitted by the FWS under ESA section 7;
- Compliance with the decommissioning plan submitted by the Forest Service;

A surrender order will be a final decision subject to administrative rehearing and potentially judicial review.¹²⁰ Final permitting decisions made by other state and federal agencies will also be subject to administrative and judicial review.¹²¹

See Appendix 4.1 for a discussion of the Sullivan Creek Hydroelectric Project (P-2225), which provides a recent example of a surrender proceeding.

3.7. Compliance and Enforcement

A licensee must comply with the duties for construction, operation, and maintenance established by the license articles.¹²² Under FERC’s general rules, it must submit periodic reports on recreational use and safety.¹²³ It must also comply with monitoring and reporting

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- *Removal Plans and Specifications* ... (1) a detailed description containing the sequence of activities and schedule for removing all project features and for restoring project lands; (2) final contract plans and specifications; (3) a spill prevention control and countermeasures plan; (4) a blasting plan, if necessary; (5) a public safety plan for the period during which removal activities would occur; (6) a disposal plan; and (7) a detailed erosion and sediment control plan.
 - *Removal Progress Reports*. During removal activities, the licensee must submit monthly progress reports.
 - *Revegetation Plan*. By October 1, 2017, the licensee must file, for Commission approval, a detailed revegetation plan describing site stabilization measures and riparian and upland plantings to restore Sullivan Creek following the removal of Mill Pond dam....
 - *Quality Control and Inspection Program*. At least 90 days before starting removal activities the licensee must submit a Quality Control and Inspection Program (QCIP) for Commission approval.
 - *Temporary Construction Emergency Action Plan*. At least 90 days before starting removal activities, the licensee must submit a Temporary Emergency Action Plan (TEAP) for Commission approval.
 - *Filing of Reports with the Commission*.... These reports document compliance with the requirements of this order and may have a bearing on future actions.
 - *Approved Plans*. The following plans filed by the licensee are approved: the Vegetation and Aquatic Habitat Restoration and Monitoring Plan, Sediment Aggradation Monitoring Plan, and the Water Quality Monitoring Plan ...; and the Sediment Assessment, Stabilization and Management Plan
 - *Historical Resources Memorandum of Agreement*.
 - *Final Report*. Within 90 days of completing the activities required by this order the licensee must file a final report with the Commission that demonstrates all the conditions of this order have been filled.

FERC, “Order Amending Approved Surrender of License and Authorizing Disposition of Project Facilities,” 160 FERC ¶ 62,055, Ordering ¶s A – K, R, T.

¹²⁰ 16 U.S.C. § 825l.

¹²¹ See, e.g., Revised WA Code § 43.21B.230 (Appeals of Agency Actions).

¹²² See 16 U.S.C. §§ 799, 823b.

¹²³ See 18 C.F.R. §§ 8.11, 12.10, 12.11.

requirements as established by the non-standard license articles. For example, it must use a gage or other reliable device to measure the release of any minimum flow. It must report non-compliance with any license article, including a temporary deviation caused by an event outside of its control. With some exceptions related to public safety, such reports are public documents. FERC periodically inspects each project to assure the adequacy of compliance.¹²⁴

It is impossible to operate a project in perfect compliance with a license over a term of 30 to 50 years given the physical realities of weather, flood, land movement, and even human error. Typical examples of non-compliance include: “minimum flow deviations, reservoir elevation deviations, water quality deviations, and deviations of required fish passage facility operations.”¹²⁵ Failure to comply with filing requirements set forth in license articles (e.g., not filing plans and reports by the deadline) may also constitute non-compliance. DHAC has discretion to determine whether non-compliance constitutes a violation of the license. Deviations that do not have significant consequences and are proactively addressed by the licensee generally will not be considered a violation of the license.¹²⁶

3.8. Complaints

Any person may file a complaint alleging non-compliance with a license.¹²⁷ A complaint must comply with the form and proof requirements established in the Commission’s Rules of Practice and Procedure, *see* 18 C.F.R. § 385.206. Essentially, the complainant must describe and, to the extent feasible, document the nature and frequency of the non-compliance.¹²⁸ As long as the complaint meets these minimum requirements, DHAC will open an investigation.

DHAC will direct the licensee to answer the complaint and any additional questions asked by DHAC staff.¹²⁹ Unless persuaded on the basis of these initial pleadings, DHAC may then undertake an independent investigation – such as a field inspection.¹³⁰ It will contact other

¹²⁴ *See* 16 U.S.C. § 823b; 18 C.F.R. Part 1.b *et seq.* *See also* Division of Dam Safety and Inspections Operating Manual, available at www.ferc.gov/industries/hydropower/safety/ops-manual.pdf.

¹²⁵ DHAC Compliance Handbook, p. 9.

¹²⁶ *See, e.g.*, letter from Thomas J. LoVullo (DHAC) to James F. Crew (Alabama Power Company), “Re: Temporary Modification of Minimum Flow at Smith Development,” eLibrary no. 20190626-3008 (June 26, 2019) (minimum flow deviation for maintenance not considered a violation; letter from Thomas J. Lovullo (DHAC) to Jeff Lineberger (Duke Energy Carolinas, LLC), “Re: Response to June 18, 2019 Minimum Flow Deviation,” eLibrary no. 20190626-3009 (minimum flow deviation will not be considered violation of license).

¹²⁷ *See* 18 C.F.R. § 385.206.

¹²⁸ *See id.*

¹²⁹ *See* 18 C.F.R. § 385.213.

¹³⁰ *See* 18 C.F.R. § 1b.3.

agencies, experts, and individuals “as appropriate” in the course of its investigation.¹³¹ A party with information relevant to allegations raised in a complaint may file that information with FERC on its own initiative; it is not required to wait for DHAC staff to solicit additional information. *See* Section 3.10 for discussion of public participation in compliance proceedings.

At the conclusion of its investigation, DHAC may issue a compliance order or dismiss the complaint.¹³² If the licensee and DHAC disagree whether non-compliance occurred or what the remedy should be, FERC may conduct a hearing before issuing a compliance order.¹³³ A compliance order will direct the licensee to undertake corrective steps by a date certain to regain compliance. DHAC does not consider a violation resolved until the licensee is back in compliance “and has adopted preventative measures to minimize the likelihood that the violation will recur.”¹³⁴

If it finds that non-compliance is deliberate or systematic, FERC may assess an administrative penalty (up to \$10,000) or even revoke the license or exemption, although the latter remedy has only been used a few times in the history of the FPA.¹³⁵ It may also request that the U.S. Department of Justice file a complaint against the licensee in U.S. District Court, which has jurisdiction to issue an injunction or restraining order to enjoin such non-compliance or to issue writs of mandamus commanding any person to comply with the provisions of the FPA or any rule or order of FERC.¹³⁶

DHAC will maintain a record of the violation and may use it “to determine the licensee’s compliance history as part of a relicensing proceeding.”¹³⁷ The record may also be used to determine DHAC’s response to subsequent violations.¹³⁸

See Appendix 4.1 for a discussion of the complaint process related to alleged non-compliance at the Kern 3 River Project (P-2290) and Smith Mountain Lake Project (P-2210).

¹³¹ *Id.*

¹³² *See* 18 C.F.R. § 385.206(g).

¹³³ *See* 16 U.S.C. § 823b.

¹³⁴ DHAC Compliance Handbook, p. 10.

¹³⁵ *See id.* DHAC staff “considers the extent of the violation when determining the amount of any penalties proposed to be assessed.” *Id.* at 11.

¹³⁶ *See* 16 U.S.C. § 825p.

¹³⁷ *Id.* at 10.

¹³⁸ *Id.*

3.9. Licensee-Reported Non-Compliance

According to DHAC, licensees usually report and correct non-compliance on their own initiative. Specific license articles may require the licensee to report any deviations from license requirements within a certain amount of time.¹³⁹ DHAC will investigate self-reported violations similarly to third-party complaints.¹⁴⁰ DHAC will “issue a response letter to the licensee indicating whether or not the deviation is considered a violation of the license and if any further actions are warranted.”¹⁴¹

3.10. Public Involvement in Compliance Proceedings

Intervention and party status in the relicensing proceeding does not carry over into any compliance proceedings. An entity must intervene again, usually in response to a notice issued by FERC announcing the compliance proceeding and soliciting intervention. If FERC does not solicit motions to intervene, an entity may file a motion on its own initiative. It should do so when it can show it has a protectable interest¹⁴² that may be affected by the outcome of the compliance action.

DHAC does not publicly notice all compliance proceedings. Generally, it will only notice compliance proceedings that it believes are likely to result in a “material” change to the license.¹⁴³ DHAC has explained:

With regard to post-licensing proceedings, the Commission only entertains motions to intervene where the filing entails a material change in the plan of project development or in the terms and conditions of the license, or could adversely affect the rights of a property holder in a manner not contemplated by the license, or is being appealed by an agency or entity specifically given a consultation role with the respect to the filing.¹⁴⁴

¹³⁹ See DHAC Compliance Handbook, p. 11. See, e.g., *Pacific Gas & Electric Co.*, 97 FERC ¶ 61031, 61109 (Oct. 11, 2001), Art. 410.

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² A protectable interest is generally one that is derived from law, like a property right.

¹⁴³ “In determining whether to issue public notice of an application, DHAC staff evaluates the scope of the filing and/or whether the filing is proposing a material change to the project. For example, if the filing memorializes items that were authorized as part of the relicensing proceeding, staff will generally not public notice this filing. If the filing proposes material changes to the project or its operation or includes provisions that were not considered during the licensing/relicensing process, the staff would issue a public notice providing a set time period for interested entities to file comments, motions to intervene, or protests.” *Id.* at 5.

¹⁴⁴ *Merimil Ltd. Partn.*, 115 FERC ¶¶ 61087, 61295 (2006).

In a complaint about non-compliance with a license article, you should request specific procedures going forward, once the licensee answers as required by 18 C.F.R. § 385.206(f). At a minimum, you should request that FERC include you in any investigation or negotiation it undertakes with the licensee. FERC takes the view that the complainant is not a formal party in the complaint proceeding and thus may negotiate without notice to you. You should also bear in mind that a court will probably not overturn FERC's decision on the complaint, given the doctrine that an agency has generally unreviewable discretion to determine an enforcement remedy.¹⁴⁵

You may wish to negotiate directly with the licensee. Unless it completely disagrees with the merits of your complaint, it likely will be interested in avoiding the cost and risk of litigation or in demonstrating its responsiveness to legitimate concerns. American Rivers and South Carolina Coastal Conservation League settled a complaint regarding a licensee's non-compliance with water quality certification.¹⁴⁶

3.11. Administrative Review

Under FPA section 313(a), only a party to a license amendment or enforcement proceeding may seek rehearing of a final decision before FERC. A request for rehearing must be filed within 30 days of the final order. This deadline is established by statute and cannot be waived by FERC. The request must:

1. Provide a clear and concise statement of the alleged error in the final order;
2. Follow the form of pleadings specified in FERC's Rules of Practice and Procedure, *see* 18 C.F.R. §385.203(a);
3. Include a "Statement of Issues" listing each issue "in a separately enumerated paragraph that includes representative FERC and court precedent on which the party is relying" (any issue not listed will be deemed waived);
4. State the factual or legal bases for the party's arguments; and
5. Provide any information relied upon by the party that was not available at the time of FERC's final decision.¹⁴⁷

Generally, FERC does not permit answers to rehearing requests.¹⁴⁸ However, it has done so where it "clarifies the arguments and enhances [FERC's] understanding of the facts."¹⁴⁹

¹⁴⁵ *See Friends of Cowlitz v. FERC*, 253 F.3d 1161, 1162 (9th Cir. 2001).

¹⁴⁶ *See South Carolina Electric & Gas Company*, 108 FERC ¶ 61,064 (July 15, 2004).

¹⁴⁷ 18 C.F.R. § 385.713.

¹⁴⁸ 18 C.F.R. § 385.713(d).

¹⁴⁹ *Duke Energy Corp.*, 94 FERC ¶ 61,080 (Jan. 25, 2001).

Under the statute, FERC must “act” on a rehearing request within 30 days.¹⁵⁰ FERC is rarely able to resolve the merits of a request within 30 days. Instead, its practice is to issue an “Order Granting Rehearing for Further Consideration,” which tolls the 30-day deadline. After issuing the tolling order, FERC may take several months to rule on the merits of a rehearing request.

Rehearing before FERC is a precondition to seeking judicial review before the U.S. Courts of Appeal.¹⁵¹

3.12. Judicial Review

If FERC denies the rehearing request, a party may petition for judicial review in the U.S. Court of Appeals for the circuit where the licensee is located or has its principal place of business, or the U.S. Court of Appeals for the D.C. Circuit.¹⁵² A petition for review must be filed within 60 days of FERC’s order denying rehearing.¹⁵³

The petition itself is straightforward, and while specific requirements may vary slightly by circuit, generally includes the following information: (1) description and copy of the administrative order being challenged; (2) identification of the petitioner, defendant(s), and other potential parties in interest; and (3) statement as to whether there are any related actions pending in court. Most courts provide a standard form that can be completed electronically.¹⁵⁴ A filing fee is typically due at the time of filing.

On appeal, a petitioner is limited to the issues that were raised on rehearing.¹⁵⁵ In other words, a petitioner must first ask FERC to rule on a dispute issue before it elevates the dispute to the court. The factual record on appeal is the same as the record available to FERC at the time of

¹⁵⁰ 16 U.S.C. §825l(a).

¹⁵¹ *Id.* “No proceeding to review any order of the Commission shall be brought by any entity unless such entity shall have made application to the Commission for a rehearing thereon.” *Id.*

¹⁵² 16 U.S.C. § 825l(b).

¹⁵³ *Id.*

¹⁵⁴ *See, e.g.,* [https://www.cadc.uscourts.gov/internet/home.nsf/content/VL+-+Forms+-+Petition+for+Review/\\$FILE/Petition%20for%20Review%20Form.pdf](https://www.cadc.uscourts.gov/internet/home.nsf/content/VL+-+Forms+-+Petition+for+Review/$FILE/Petition%20for%20Review%20Form.pdf).

¹⁵⁵ *See id.* FPA section 313(b) provides: “[n]o objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do.” *Id.* The exception to the rule is if FERC offers a new or different basis for its decision in the order on rehearing.

its final decision, unless the court allows the petitioner to present additional evidence upon a showing that there are reasonable grounds for the petitioner not filing the evidence sooner.¹⁵⁶

The standards of review for the Commission’s orders are stated in FPA section 313(b) and Administrative Procedures Act section 706(2).¹⁵⁷ The Court “shall hold unlawful and set aside agency action, findings, and conclusions found to be— (A) arbitrary, capricious, abuse of discretion, or otherwise not in accordance with the law; ... (D) without observance of procedure required by law; [or] (E) unsupported by substantial evidence”¹⁵⁸

3.13. Enforcement Actions Before Other Jurisdictional Agencies

3.13.1 Citizen Suit under the Clean Water Act

a. Water Quality Certification under Clean Water Act Section 401

Under CWA section 401(a), the applicant for a FERC license must obtain a water quality certification from the state water quality agency that the project as licensed will comply with all state water quality standards. If timely submitted and properly noticed, FERC will incorporate any conditions of water quality certification into the FERC license without modification.¹⁵⁹

Under CWA section 401(d), a water quality certification must “set forth any effluent limitations and other limitations, and monitoring requirements necessary to assure that any applicant for a Federal license or permit will comply with applicable effluent limitations and other limitations ..., standard of performance ..., or prohibition, effluent standard, or pretreatment standard..., and with any other appropriate requirement of State law set forth in such certification, and shall become a condition on any Federal license or permit subject to the provisions of this section.”¹⁶⁰ For example, a water quality certification can be conditioned on minimum instream flows necessary to protect the designated beneficial uses of fisheries. It can also be conditioned on public access necessary to protect the designated beneficial uses of contact and non-contact recreation.

Once incorporated into the new license, FERC has authority under the FPA to enforce any of the water quality certification conditions. However, as described below, the state water quality agency also has authority under the CWA to enforce the water quality certification conditions.

¹⁵⁶ *Id.*

¹⁵⁷ *Wisconsin Pub. Power v. FERC*, 493 F.3d 239, 256 (D.C. Cir. 2007). FPA section 313(b) states, “[t]he finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive.”

¹⁵⁸ 5 U.S.C. § 706.

¹⁵⁹ *American Rivers v. Federal Energy Regulatory Commission*, 129 F.3d 99 (2d Cir. 1997).

¹⁶⁰ *City of Tacoma v. Washington Department of Ecology*, 511 U.S. 700 (1994).

b. CWA Section 505

Under CWA section 505, individuals or organizations may file a lawsuit in federal district court against parties whose activities allegedly are adversely affecting water quality in violation of the statute:

“any citizen may commence a civil action on his own behalf ... against any person who is alleged to be in violation of (A) an effluent standard or limitation under this chapter or (B) an order issued by the [Environmental Protection Agency] Administrator or a State with respect to such a standard or limitation.”¹⁶¹

Under section 505(f), “the term ‘effluent standard or limitation under this chapter’ means ... (5) certification under section 401 of this title.”¹⁶²

c. Sixty-day Notice of Intent to Sue

Under Section 505(b), a citizen must provide the EPA Administrator, the State in which the violation occurs, and the alleged violator 60 days’ notice before it may file suit in district court. The Notice must allege specific violations of the CWA. The Notice should also state how the discharge has harmed the citizen proposing to file suit.¹⁶³ A sample Notice of Citizen Suit is provided in Appendix 5.2.

The alleged violator may use this 60-day period to correct any violations or develop a plan to come into compliance with its permit terms.

¹⁶¹ 33 U.S.C. § 1365.

¹⁶² 33 U.S.C. §1365(f). “The plain reading of the citizen suit provision is that it authorizes a citizen to initiate a suit against anyone alleged to be in violation – that is, currently violating – certification under section 401.” *Deschutes River Alliance v. Portland General Electric*, 249 F. Supp. 3d 1182, 1188 (Order and Opinion) (Mar. 27, 2017). “[C]itizens may sue both to require a facility to obtain certification and to enforce conditions in an existing certificate.” *Id.* at 1194.

¹⁶³ Under Article III of the Constitution, a citizen must establish that it has “standing” to bring the action in court:

“A person can’t sue if he/she doesn’t have ‘standing’ – a particular injury that was caused by the violation and that a judicial action could help remedy.

Standing to sue may be a contentious issue, especially if an organization is suing on behalf of one of its members. It is crucial to have documentation and evidence of how the violation or alleged violation will have a specific adverse impact on the person who is going to file the suit – the complaining party.

For example, gather evidence that the complainant has used the water for swimming or that he/she frequently walks near the river and would prefer to enjoy its beauty unpolluted.”

Ohio Environmental Council, “A Citizen’s Guide to Clean Water Act Enforcement” (2012), p. 2.

If the alleged violator does not take corrective action within 60 days, then the citizen may file its action in court. Jurisdiction lies in the federal district court in which the violation occurred. A copy of the complaint must be sent to the alleged violator, the State, and EPA Administrator.

A citizen suit may be foreclosed if the government decides to prosecute the alleged violations itself. More specifically, if the EPA Administrator or State initiate a civil or criminal action in district court to correct the violations alleged in the notice of citizen suit, then the citizen may not initiate a separate action. Instead, the citizen may seek to intervene in the Administrator's or State's action.

d. Court Ordered Compliance Orders, Penalties, and Attorney Fees

Under CWA section 505, a licensee who is found to be in violation of its water quality certification may be subject to civil penalties of up to \$25,000 per day for each violation.¹⁶⁴ However, all penalties assessed in a citizen suit are payable to the government, not the citizen-plaintiff.¹⁶⁵ However, a prevailing citizen-plaintiff may be awarded litigation costs, including reasonable attorney and expert fees.¹⁶⁶

See Appendix 4.1 for a discussion of enforcement actions brought under CWA section 505 at Pelton Round Butte Project (P-2030) and Saluda Project (P-516).

3.13.2. Citizen Suit under the Endangered Species Act

a. Consultation under ESA Section 7

Under ESA Section 7, federal agencies must consult with the FWS or NMFS in order to conserve endangered and threatened species. Section 7(a)(1) imposes a general obligation on federal agencies to consult with FWS/NMFS and “utilize their authorities in furtherance of the purposes of this chapter by carrying out programs for the conservation of” listed species.¹⁶⁷ This is called “informal consultation.” Section 7(a)(2) imposes specific obligations on federal agencies proposing specific projects to consult with FWS/NMFS to “insure that any action

¹⁶⁴ *See* 33 U.S.C. § 1319(d). “In determining the amount of a civil penalty the court shall consider the seriousness of the violation or violations, the economic benefit (if any) resulting from the violation, any history of such violations, any good-faith efforts to comply with the applicable requirements, the economic impact of the penalty on the violator, and such other matters as justice may require.” *Id.*

¹⁶⁵ *See* Ohio Environmental Council, “A Citizen’s Guide to Clean Water Act Enforcement” (2012), p. 4.

¹⁶⁶ 33 U.S.C. § 1365(d).

¹⁶⁷ 16 U.S.C. § 1536(a)(1).

authorized, funded, or carried out by such agency... is not likely to jeopardize¹⁶⁸ the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [designated critical] habitat....”

Early in the licensing proceeding, FERC must determine whether its licensing action may affect listed species or critical habitat. The licensee¹⁶⁹ will prepare a Biological Assessment under FERC’s supervision that describes the action’s potential impacts on listed species and critical habitat.¹⁷⁰

During formal consultation, FWS/NMFS will review the information provided by FERC (including the Biological Assessment), evaluate the status of the affected species, evaluate the possible direct, indirect, and cumulative impacts of the licensing action, and then prepare a Biological Opinion and Incidental Take Statement.¹⁷¹ The opinion must include: (1) supporting documentation, (2) discussion of the impacts of the action on listed species or critical habitat; and (3) NMFS’ opinion as to whether the action is likely to jeopardize the continued existence of a listed species. The Biological Opinion will include Reasonable and Prudent Alternatives and/or Reasonable and Prudent Measures designed to protect listed species and prevent take in excess of the amount specified in the Incidental Take Statement. It may also include conservation recommendations, which are advisory and not intended to carry any binding legal force. FWS/NMFS must use the best scientific and commercial data available in preparing the Biological Opinion and Incidental Take Statement.¹⁷²

If FWS/NMFS finds that the project may cause jeopardy to the listed species or adversely affect critical habitat, then it will include Reasonable and Prudent Alternatives in the Biological Opinion. These are alternatives that avoid jeopardy or adverse modification of critical habitat in a manner consistent with the intended purpose of the project, within the scope of FERC’s legal authority, and are economically and technologically feasible.¹⁷³

If the agency finds that the project will not cause jeopardy or adverse modification to critical habitat, then the Biological Opinion includes Reasonable and Prudent Measures which

¹⁶⁸ To place a listed species in jeopardy is to “engage in an action that reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species.” FWS, *Endangered Species Glossary* (2004), p. 3.

¹⁶⁹ Typically, FERC will designate the licensee as its non-federal representative for consultation.

¹⁷⁰ Under the Integrated Licensing Process, the Biological Assessment is usually submitted along with the license application.

¹⁷¹ See 50 C.F.R. § 402.14(i).

¹⁷² 50 C.F.R. § 402.14.

¹⁷³ See 50 C.F.R. § 402.02. Reasonable and Prudent Alternatives can include extensive changes to project design, e.g., installation of fish passage.

minimize the impact of incidental take but do not modify the basic design, location, scope, duration, or timing of the proposed action.¹⁷⁴

Regardless of whether the Biological Opinion finds jeopardy, the Incidental Take Statement specifies the permissible level of incidental take of the listed species.¹⁷⁵ The Incidental Take Statement states the number of species the project may “take” without violating the prohibition on take under ESA Section 9.¹⁷⁶ In other words, the exception to the take prohibition of Section 9 only covers those actions contemplated by an Incidental Take Statement issued under Section 7, and conducted in compliance with the requirements of the Incidental Take Statement.

While FERC is not required to include Reasonable and Prudent Alternatives and Reasonable and Prudent Measures in the license, FERC and the licensee may be liable for damages if the licensed project results in death, injury, or other harm to the listed species that exceeds the Incidental Take Statement,¹⁷⁷ so as a practical matter, FERC treats Reasonable and Prudent Alternatives and Measures as mandatory conditions.

b. ESA Section 11

ESA section 11 provides that any person may commence a civil suit to stop any person, including a governmental agency, who is alleged to be in violation of any provision of the ESA.¹⁷⁸ Such suits are brought in federal district court in the judicial district where the violation is alleged to have occurred.¹⁷⁹

c. Sixty-day Notice of Intent to Sue

¹⁷⁴ See *id.*

¹⁷⁵ See *id.* “Incidental take is defined as the take of listed fish or wildlife species that results from, but is not the purpose of, carrying out an otherwise lawful activity conducted by a Federal agency or applicant.” *Endangered Species Consultation Handbook*, p. xv (March 1998) (quoting 50 C.F.R. § 402.02).

¹⁷⁶ 16 U.S.C. § 1538. Section 9 of the ESA prohibits the “taking” of any endangered species. 16 U.S.C. §1538(a). The ESA defines the term “take” to include harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect. 16 U.S.C. §1532(19). “Take” includes indirect as well as direct harm and need not be purposeful. 50 C.F.R. §222.102. The term “harm” is defined by the National Marine Fisheries Service regulations as an act which kills or injures fish or wildlife, including significant habitat modification or degradation which actually kills or injures fish or wildlife by significantly impairing essential behavioral patterns, including, breeding, spawning, rearing, migrating, feeding, or sheltering. 16 U.S.C. §1536(a)(2).

¹⁷⁷ See 16 U.S.C. § 1538(a)(1)(B). Any person who knowingly violates ESA Section 9 may be assessed a civil penalty by FWS/NMFS of not more than \$25,000 for each violation. See 16 U.S.C. 1540(a)(1).

¹⁷⁸ 16 U.S.C. § 1540(g); see also Earth Justice, *Citizens’ Guide to the Endangered Species Act* (2003), p. 42.

¹⁷⁹ See 16 U.S.C. § 1540(g).

Similar to citizen suit under the CWA, ESA section 11 requires that a citizen provide the Secretary of Interior or Commerce and the alleged violator 60 days' notice before it may file suit in district court. Also, a citizen may not commence suit if the Secretary or federal government is prosecuting the alleged violation.¹⁸⁰

d. Court-ordered Compliance Orders, Penalties, and Attorney Fees

Under ESA section 11, a licensee who is found to be in violation of the ESA may be subject to civil penalties of up to \$25,000 for each violation.¹⁸¹ However, all penalties assessed in a citizen suit are payable to the government, not the citizen-plaintiff.¹⁸² However, a prevailing citizen-plaintiff may be awarded litigation costs, including reasonable attorney and expert fees.¹⁸³

See Appendix 5.1 for a discussion of citizen suits brought to enforce ESA sections 7 and 9.

4. Conclusion

Licensing provides an important opportunity to improve riverine ecosystems and protect the beneficial uses of rivers. However, it may be necessary to participate in post-licensing proceedings before FERC in order to defend or adaptively manage the improvements and protections approved in a new license. This guide provides an overview for participating in such proceedings. For more information or to solicit expert advice relative to a specific proceeding, please contact the Hydropower Reform Coalition [coordinator@hydroreform.org].

5. Appendices

- 5.1. Case Studies**
- 5.2. Sample Pleadings**
- 5.3. Searching for Documents Filed with FERC**

¹⁸⁰ *See* 16 U.S.C. § 1540(g)(2).

¹⁸¹ *See* 16 U.S.C. § 1540(a). A violator may also be subject to criminal liability for knowingly violating the ESA. *See id.*

¹⁸² *See id.*

¹⁸³ *See* 16 U.S.C. § 1540(g)(4).