

**FERC'S NEW INTEGRATED LICENSING PROCESS:
WHAT'S DIFFERENT?**

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While the Federal Energy Regulatory Commission's new Integrated Licensing Process - the ILP - incorporates many features of traditional licensing approaches, it also introduces important changes. Understanding how this new process differs helps project owners identify both opportunities and concerns with using the ILP.

The Federal Energy Regulatory Commission's (FERC's) Integrated Licensing Process (ILP), adopted in 2003, features several elements that differ from traditional licensing approaches. The most significant changes are:

- Pre-application document
- Initial tribal consultation meeting
- FERC approval of the applicant's study plan
- Study dispute resolution process
- Preliminary licensing proposal

Understanding these new elements and how they are likely to affect license applicants is important when considering whether to use this new process.

PRE-APPLICATION DOCUMENT

Hydroelectric project owners using the new ILP are required to prepare and submit to FERC and stakeholders a detailed "Pre-Application Document" (PAD) at the same time they file their notice of intent to relicense. Both the PAD and the notice must be filed at least five years but not more than five and one-half years before the existing license expires.

Requirements for the PAD are very specific and detailed. In addition to specific information about the project and its operation, the PAD must contain a detailed

description of all known environmental resources and potential effects associated with the project — based on all existing, reasonably available information. The intent is to make as much information as possible available to participants in the beginning of the process, organized in a format to mirror a National Environmental Policy Act (NEPA) document, to assist in NEPA scoping and developing study requests.

What does the PAD mean to applicants?

Though FERC has repeatedly stated that it does not want to force applicants to start the process earlier, assembling and producing the PAD will be a time-consuming activity and will need to be started well before the window for filing the PAD and notice of intent (i.e., five years before the license expires).

Because so much will be decided at the outset of the relicensing under the ILP, it will be in an applicant's best interest to put serious effort into identifying all existing information to put into the PAD. This work will help avoid "reinventing the wheel" by perhaps repeating baseline types of studies that have been done earlier or elsewhere.

FERC has made it clear that applicants are not expected to conduct environmental studies specifically for PAD development, but many applicants may want to do just that so that baseline resources can be characterized and identified in the PAD. Resource areas that have not been identified or inventoried (e.g., wetlands or fish populations) are likely to generate study requests by agencies and others once the process starts anyway.

On the positive side, a detailed PAD should help focus licensing participants on issues at hand early in the process and ideally, will help lead to timely resolution of key issues. Because the environmental information in the PAD is designed to evolve directly into Exhibit E of the license application, which will be a NEPA-like document under the ILP there should be some overall process efficiency by starting with a well-developed PAD.

INITIAL TRIBAL CONSULTATION MEETING



Within 30 days of issuing the notice of intent, a meeting will need to be held between each Indian tribe likely to be affected by the potential licensing/relicensing of the project and the FERC staff, if the affected tribe agrees to the meeting. This initial tribal consultation meeting is designed to avoid addressing tribal issues late in the process or outside of the process.

What does the meeting mean to applicants?

The initial tribal consultation likely will be a very positive change in that tribal issues hopefully will be identified early and can be addressed concurrently with issues raised by resource agencies, members of the public and non-governmental organization (NGOs). The tribal consultation meeting also should clarify the respective roles of FERC and the applicant in consultation with the tribes. Many tribes likely will continue to have conflicting interests with some of these other entities, but identifying these at the outset and trying to develop a mutual understanding of the project and each other's interests early in the process should help to resolve many of these conflicts.

APPLICANT'S STUDY PLAN

About six months after the PAD is issued, applicants will need to develop a study plan covering all resource issues, and to file the plan with FERC for approval. The proposed plan will identify all studies the applicant proposes to conduct in response to study requests received after public review of the PAD.

Study requests submitted to the applicant must meet the following criteria:

- Describe the goals and objectives of each study proposal and the information to be obtained;
- If applicable, explain the relevant resource management goals of the agencies or Indian tribes with jurisdiction over the resource to be studied;
- If the requester is not a resource agency, explain any relevant public interest considerations in regard to the proposed study;
- Describe existing information concerning the subject of the proposal and the need for additional information;
- Explain any nexus between project operations and effects (direct, indirect, and/or cumulative) on the resource to be studied, and how the study results would inform the development of license requirements;
- Explain how any proposed study methodology (including any preferred data collection and analysis techniques, or objectively quantified information, and a schedule including appropriate field season[s] and the duration) is consistent with generally accepted practice in the scientific community or, as appropriate, considers relevant tribal values and knowledge; and
- Describe considerations of level of effort and cost as applicable, and why any proposed alternative studies would not be sufficient to meet the stated information needs.

The applicant's proposed study plan must include a description of each study, a schedule for conducting the study, and provisions for periodic progress reports. The plan also must reference the criteria above in any explanation of why study requests were not adopted by the applicant, as well as how each proposed study meets essentially identical criteria. License applicants also must provide a proposal for a study plan meeting(s) within 30 days of filing to clarify the proposed plan and to resolve any outstanding issues.

Comments on the proposed study plan must be filed with FERC within 90 days after the applicant files the plan. The applicant then has 30 days to revise the study plan based on input received and to submit the plan to FERC for approval. FERC then has 30 days to issue and order approving the study plan, presumably with any appropriate modifications.

What does this study protocol mean to applicants?



This new protocol means that all studies that will be conducted during the process need to be identified and scoped in a short time frame at the outset of the process. It also means study plans will need to be flexible where uncertainties exist and styled in such a way that compliance with FERC's approval of the plan is workable. If many studies need to be done, trying to develop reasonable and comprehensive scopes and schedules in the time allotted will be difficult, if not impossible for some applicants. Consequently, applicants will need to be sure they have sufficient resources to adhere to the required time frames.

Because studies are one of the largest costs that applicants face in relicensing, a great deal of potential relicensing costs will be contingent on the final study plan document. This process may not allow as much opportunity to address some issues through consensus decisions, as frequently occurs under the Alternative Licensing Process (ALP). Instead, applicants may need to design more studies to address the potential issues, increasing study costs. Agencies and others seeing this step in the process as their primary opportunity to request studies — could submit extensive lists of baseline and impact studies. It is important to note that the study request criteria (discussed above) places the burden on requesters to justify a study. Theoretically, this situation will reduce the number of generic or unnecessary requests that an applicant sees. One thing is clear: the new process places a responsibility on the applicant and stakeholders to think ahead about the information needs for the entire pre-filing period.

Effective implementation of this approach to study planning requires FERC to make important decisions quickly, an action for which it has not developed a reputation. How FERC implements and enforces the established criteria will be to the ultimate success of the ILP. However, applicants also need to be prepared and have adequate

resources available to examine the study requests, develop responsive plans in a short time frame, and accomplish overall strategic planning for the licensing.

Developing the study plan early, as required by the ILP, also could allow for better budgeting certainty and control of costs during the study process. The ILP is designed to make it more difficult for study requests to be made later in the process which should help avoid some of the costs and delays that typically occur under existing processes.

STUDY DISPUTE RESOLUTION PROCESS

The new regulations provide for a formal study dispute resolution process that can be requested by agencies with mandatory conditioning authority (e.g., under Sections 4(e) and 18 of the Federal Power Act and Section 401 of the Clean Water Act). The process is triggered if these agencies disagree with FERC's study plan determination as it pertains directly to the exercise of their authority. If such an agency files a notice of dispute within 20 days of FERC's study plan determination FERC will convene one or more three-person dispute resolution panels. These panels consist of: a FERC representative, a representative from the disputing agency, and a third person Selected by the other two from a pre-established FERC list. The applicant would not have a seat on the dispute resolution panel, but would provide comments and information for the panel to consider. The applicant (and others as needed) also would participate in a technical conference before panel deliberation to clarify matters in dispute. The panel would then make recommendation to FERC, who would issue a written determination on the study in dispute, presumably in the form of an order amending the earlier study plan approval. FERC has said applicants could seek rehearing of study plan orders, though it does not expect these to be frequent.

What does this process mean to applicants?

Although the applicants are not participating in the dispute resolution panel, their ability to provide technical information in writing and in a pre-panel technical conference should help make their position well understood. But there is still the potential for lingering disagreements following the panel's decision. Mandatory conditioning agencies bringing the dispute would not be bound by FERC's final determination and it is not clear how those agencies would pursue a study request if denied or significantly modified by FERC. This situation could result in repeated requests for studies throughout the licensing process.

If FERC is vigilant about enforcing study criteria and if applicants are careful to develop sound scientific arguments where needed, this process will help to bring closure to areas of study that might otherwise be in continual dispute throughout a licensing process. Applicants will be challenged to propose studies that FERC will accept; the result should establish an effective framework for considering whether later requests for new or additional studies are well founded.

PRELIMINARY LICENSING PROPOSAL

Instead of preparing a draft license application for public review and comment applicants under the ILP have the option of preparing a preliminary licensing proposal. This proposal would describe the existing and proposed project operation and maintenance plan and proposed protection, mitigation, and enhancement (PM&E) measures as well as include a draft environmental analysis. The proposal must be filed with FERC and provided to stakeholders for comment at least 150 days prior to the final application deadline (which is two years prior to license expiration). Participants and FERC staff have 90 days to submit comments, including recommendations on whether FERC should prep an environmental impact statement (EIS) or an environmental assessment (EA). Any commenters requesting new information or studies at this stage must demonstrate extraordinary circumstances as defined in FERC's regulations.

Applicants also have the option of preparing a full draft license application or requesting a waiver of filing anything at this time if that is supported by a consensus of the participants.

What does this proposal mean to applicants?

Preparing a preliminary licensing proposal should save some time, money, and paper. Many have questioned the usefulness of sending a draft license application to a long list of participants who are not particularly interested in some of the more detailed information that comprises this document. The applicant's project proposals and the expected environmental effects and benefits of those proposals — are of much more interest to most of the participants.

The preliminary licensing proposal format will allow applicants to focus on these aspects; however, many applicants may want to opt for preparing a draft application to avoid having to develop the complete document closer to the filing deadline. Therefore, many preliminary licensing proposals may look like abbreviated final applications, perhaps with a focus on the information traditionally required in Exhibits A, B, and E for major projects. This would still allow reviewers to focus directly on the most important piece of the application instead of wading through a great deal of additional information.

ADDITIONAL REQUIREMENTS

Two additional new requirements featured in the ILP are worth noting.

Study reports and meeting

No later than one year after FERC approval of the study plan, applicants must prepare and file an initial report describing progress and a summary of any data collected. Within 15 days after filing this report, applicants must hold a meeting with participants to

discuss the study results and any proposals to modify studies or conduct new studies. To modify or add a study, requesters must show good cause to FERC and satisfy criteria in addition to those presented above, including a statement explaining why the information was not requested earlier.

An updated study report must be filed no later than two years after FERC approval of the study plan. Though no meeting is expressly required at this stage, the same provisions for requesting modifications or new studies are in force, with the addition that “extraordinary circumstances” must be demonstrated by any entity requesting new information or studies. The additional requirements to meet increasingly stringent criteria under the ILP should help curtail the number of late study requests that an applicant is subjected to.

Different deadline for 401 certification application

FERC moved the deadline for the requirement to apply for a water quality certificate under Section 401 of the Clean Water Act from the time the final application is filed to 60 days following issuance by FERC of its notice requesting license terms and conditions. This change provides more time to apply for the 401 application after the license application has been submitted to FERC. However, it also means that the one-year 401 time clock will now begin later. This change could potentially delay a license order from being issued if FERC is ready to complete its environmental analysis but does not have the 401 requirements.

CONCLUSIONS

The ILP presents several potentially beneficial changes from existing licensing processes. The FERC-approved study plan and dispute resolution process may be the single most significant change, but the true benefits of this change will depend on how FERC handles its responsibilities and how it enforces the study criteria it has established. License applicants will need to understand the new rules and be prepared to implement new strategies and to mobilize internal resources differently in order to follow these rules successfully.

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