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Effectiveness Evaluation 2010)

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HYDROPOWER REFORM COALITION COMMENTS ON FERC'S
ILP EFFECTIVENESS EVALUATION 2010

Introduction

The Hydropower Reform Coalition (Coalition or HRC) wishes to thank the Federal Energy Regulatory Commission (FERC, or Commission) and its staff for undertaking an effectiveness review of the Integrated Licensing Process (ILP). Our Coalition invested significant time and resources in the development of the ILP. Our members have participated in a number of ILP proceedings, and we are committed to its success. We believe that the ILP is an improvement over the Commission's older licensing processes, and that the Commission and its staff have for the most part done a solid job of implementing these new regulations. For instance, the licensing of Mystic Lake project in Montana – one of the very first ILPs – was completed ahead of schedule. We have also used the ILP to reach a number of other successful settlement agreements, including the Henry M. Jackson Project on the Sultan River and the Boundary Dam Project on the Pend Oreille River. In cases where a license applicant is inclined to cooperate with stakeholders, our experience has shown that the ILP, with its early and ample opportunities for meaningful public participation, provides an excellent structure for a collaborative process.

While our overall experience with the ILP has been positive, we believe that there are also areas where it could be improved. Our comments here will largely focus on these areas, and they follow our February 2010 letter expressing concern with the Commission's implementation of the ILP's rules regarding studies. We were concerned specifically that the Commission consistently

apply the criteria for study plan development given that the study plan is key to the adequacy of the Commission's environmental document and relicensing record. The Commission responded by initiating a public effectiveness review of the ILP, committing to address our concerns and those of other stakeholders during that process.

We appreciate the Commission's willingness to initiate a public review of its rules and practices to determine how they are performing seven years after enactment. Our members have participated in several of the regional workshops, as well as at the November 2010 technical conference in Washington, D.C. We submit these follow-up comments to clarify previous oral and written comments, and to provide more detail regarding our recommended solutions to challenges identified during the effectiveness review.

1 Purpose and Goals of the ILP

The hydropower licensing process involves multiple decision points at multiple federal and state agencies, all based on a single project record that includes significant public input. The Commission has the sole authority to issue hydropower licenses, but it shares its authority to condition hydropower licenses with other federal and state agencies. As the lead agency in hydropower licensing, the Commission has two distinct procedural responsibilities: it must issue licenses, and it must coordinate its own decision-making authority and processes with those of other agencies that have conditioning authority.

FERC's July 23, 2003 Final Rule describes the Integrated Licensing Process as:

"a new licensing process in which a potential license applicant's pre-filing consultation and the Commission's scoping pursuant to the National Environmental Policy Act (NEPA) are conducted concurrently, rather than sequentially. The revised rules also provide for increased public participation in pre-filing consultation; development by the potential applicant of a Commission-approved study plan; better coordination between the Commission's processes, including NEPA document preparation, and those of Federal and state agencies with authority to require

conditions for Commission-issued licenses; encouragement of informal resolution of study disagreements, followed by dispute resolution, and schedules and deadlines."

This description captures an important point about the ILP: it was created in part to respond to a common criticism that the hydropower licensing process took too long. Each of these revised procedures targets a common source of delays in a licensing. A tight schedule with deadlines keeps the process moving forward. Shifting FERC's NEPA scoping to the pre-filing phase and coupling it to an approved study plan can allow for more productive information gathering so FERC Staff can begin to analyze a license application and proposed alternatives soon after the application is filed. Increased opportunities for public participation and informal resolution of study disputes can reduce the likelihood that FERC's licensing decision will be challenged. Most critically, the ILP was designed to improve coordination between FERC's licensing process and the ancillary permitting proceedings conducted by other federal and state agencies with consultation responsibilities and conditioning authority.

The ILP shows promise for reducing barriers to timely license issuance, but it by no means ensures it. In some cases, it may actually be a source of new delay, especially where early missteps in the licensing process force participants into an adversarial role that leads to challenged license orders. There are, however, several steps that the Commission could take to ensure that the ILP leads to higher quality licenses that are issued with less delay.

2 FERC staff's role in the ILP

One of the most promising – but not yet fully realized – facets of the ILP is the more active role for FERC Staff in the pre-filing process. In our experience, an active and well-informed FERC project manager can set a positive and collaborative tone at the beginning of the process that carries through to the entire ILP. The ILP's new role for FERC licensing staff allows them to be more

effective representatives of the public interest. See *Scenic Hudson Preservation Conference v.*

Federal Power Commission, 354 F. 2d 608 (2d Cir. 1965):

The Commission has claimed to be the representative of the public interest. This role does not permit it to act as an umpire blandly calling balls and strikes for adversaries appearing before it; the right of the public must receive active and affirmative protection at the hands of the Commission. . . . The Commission must see to it that the record is complete. The Commission has an affirmative duty to inquire into and consider all relevant facts.

This description captures neatly the responsibilities of an ideal ILP project manager: an independent investigator who is an advocate for the public interest. Because so many different facets of the public interest are represented in a hydropower licensing (at times competing with each other), FERC Staff are in the best position to serve the public interest by 1) acting as an advocate for a fair, open, and transparent process that leads to timely and uncontested license issuance, and 2) pursuing a solid decisional record that will permit a robust analysis of a diverse set of reasonable alternatives to the proposed action.

A FERC Staffer's first role in an ILP is to ensure that the licensing process is fair and progresses smoothly. A number of stakeholders have stressed the importance of collaboration during this ILP effectiveness review, and we encourage FERC Staff to foster collaboration among the parties. However, not all applicants or stakeholders are inclined to collaborate, and some blatantly attempt to manipulate the process to determine the outcome. In these cases, FERC Staff must work actively and deliberately to ensure that the public interest is being met through a balanced and fair hearing. If, for example, an applicant makes false representations to other participants about their rights to participate in the licensing process or misrepresents participants' views in official meeting notes submitted into the record for a project, FERC Staff must ensure that the process is conducted fairly and insist that the applicant correct the record. Likewise, if an individual or organization participating in a given licensing process is behaving in a clearly

disruptive fashion, the FERC project manager should step in to restore order. In our experience, active but neutral meeting facilitation is absolutely critical to an efficient licensing, regardless of which process is used. Such facilitation is critical in pre-filing meetings, especially those that involve the development of the study plan. It is therefore critical that FERC Staff be present during all of the critical meetings during the early stages of an ILP. We offer the following specific recommendations:

1. **FERC project managers should attend all relevant pre-filing licensing meetings, including informal study dispute resolution meetings.** Where FERC Staff are unable to physically attend critical meetings, we recommend that they participate via videoconference. There are a number of low-cost videoconferencing options available (both Google Chat and Skype are free and can be run on any laptop with a camera and an internet connection).
2. We recommend that **FERC provide all of its project managers with facilitation training** so that they are able to step in and keep licensing meetings on track when necessary.
3. For larger, more complex licensings (where participants have indicated that it would be helpful), we recommend that **FERC encourage licensees to provide dedicated, neutral meeting facilitators.** Too often, the consultant who serves as the project manager is thrust into the role of facilitator, a role that can be problematic given his or her responsibility to represent the license applicant's interests.
4. Alternately, in the interest of process efficiency, **FERC could explore the possibility of providing its own trained facilitators** (either non-decisional FERC Staff or external contractors). It may be worth exploring funding for FERC's Office of Public Participation to provide this resource.

The second – and perhaps most critical – role for FERC Staff in an ILP involves the development of a strong decisional record. In this role, FERC Staffers are called on to act as a technical resource and make independent decisions about the information that will be used to inform the content of that record. As the representative of the lead agency in a licensing, FERC Staff should work closely with other agency staff to identify and resolve the Commission's information needs and the needs of other agencies subject to different legal and regulatory requirements. Once these needs have been identified, FERC Staff should then act as an advocate for the development of this record. Staff should be neutral as far as the license applicant and other

parties to the licensing are concerned, but should never be neutral to the record evidence; rather, Staff should encourage all parties to uncover relevant information and report it accurately.

Staff cannot play this role competently unless they are engaged fully. A modern hydropower licensing is full of extraordinarily complex technical issues that can take years to understand, let alone resolve. FERC Staff's knowledge of a project's operations should be deep and detailed, with a timely grasp of the issues that is equal to that of any of the other parties to the proceeding.

3 NEPA scoping and study plan development

Studies are necessary to fully explore a full range of reasonable alternatives in a NEPA analysis and are thus the key to ensuring that the Commission's decisions are based on a solid evidentiary record. Studies can close information gaps and allow applicants, agencies, and other stakeholders to understand how existing project operations – and alternatives to those operations – might affect beneficial uses of the waterway and overall environmental quality. Studies provide FERC with information necessary to develop appropriate and defensible license conditions, allow stakeholders to develop recommendations and propose reasonable alternatives that are supported by substantial evidence, and are necessary for other agencies to meet the requirements of other regulatory processes that occur alongside FERC's licensing process. The information-gathering phase of any licensing should be broad enough to ensure a full and fair analysis of reasonable alternatives to the proposed action.

Unlike the TLP and ALP, the Integrated Licensing Process is a heavily front-loaded process. The effects of decisions made at the beginning of the process will carry through to the entire process. The approval of the study plan is the most critical decision point that will take place before the application is filed, and arguably the most critical decision point in a licensing. Ideally, the process leading to approval of the study plan would be conducted with the goal of ensuring

effective integration of FERC's responsibilities under the Federal Power Act (FPA) and NEPA with the responsibilities and procedures of other state and federal agencies with independent authorities to condition licenses issued by the Commission.

Because NEPA scoping now takes place at the beginning of the licensing process (before information has been gathered), the FERC-approved study plan sets the table for FERC's NEPA analysis. Study results should help FERC Staff and other participants to decide whether or not a proposed alternative is in fact reasonable and worthy of detailed consideration. If agency staff or other stakeholders identify information gaps in an applicant's Pre-Application Document that are critical to developing or supporting an alternative recommendation, they can request studies aimed at filling those gaps. If FERC does not require the applicant to conduct those studies, FERC will be unable to fully consider the alternative recommendation in its NEPA analysis. A denied study request can therefore limit the range of reasonable alternatives that FERC may consider in its NEPA document. Like NEPA scoping, study planning should be based on an expansive view of potential alternatives to ensure that reasonable alternatives are not overlooked during NEPA analysis because of a lack of supporting information in the record.

When the study requestor is another agency, a denied study request has additional consequences. As the lead agency in a multi-agency process, the Commission bears the ultimate responsibility for timely license issuance. When the information needs of other agencies with regulatory mandates of their own are not met early in the process, the process is no longer fully integrated, leading to a delayed and contentious licensing proceeding. For example, FERC Staff may reject a state agency's request for a particular water quality study because Staff deems the study unnecessary for purposes of compliance with the FPA. However, the state agency may maintain the study is necessary for purposes of compliance with the Clean Water Act, and may require the applicant to conduct it in the context of the water quality certification proceeding. This

staggered approach to conducting studies may result in some duplication of effort and delays in the issuance of the license. It also may undermine the working relationship between FERC Staff and the staff of the state agency. Such a lack of coordination places added burdens on both FERC Staff and agency staff and forces limited resources to be stretched further. Because individual agency staffers are often assigned to multiple proceedings, a lack of cooperation in one ILP can lead to delays in more than one proceeding. Thus, **when FERC fails to fully cooperate with agencies to help them meet their information needs, it bears significant responsibility for any resulting delays.**

3.1 General Recommendations

We recommend that the Commission accept and require reasonable requests, made by any party to a licensing proceeding, for studies that are reasonably likely to inform an in-depth analysis of a full range of reasonable alternatives to the proposed action. Because information gathered during studies is often necessary to evaluate proposed alternatives and determine if they are reasonable, a failure to conduct a study could result in a reasonable alternative not being fully considered, or worse, discarded as unreasonable based on insufficient information.

When confronted with study requests that are designed to facilitate this alternatives analysis, FERC Staff should give the benefit of the doubt to study requestors so that those parties' interests and management concepts are fully vetted in its analysis. A failure to do so alienates parties from the process, creates immediate conflicts that result in delay and other future conflicts, and reduces the FERC's NEPA analysis will include a full range of reasonable alternatives. Where there is doubt, the Commission should always err on the side of collecting more information than is needed to perform a full analysis of all reasonable alternatives. The public interest is not served by decisions and analysis that are informed by the minimum possible amount of information.

Studies are particularly important for FERC's sister agencies to fulfill their own responsibilities under the FPA and other applicable laws. FERC may not be able to force other agencies to act in a timely manner, but it can *help* them to do so, and it must adjust its ILP practices to minimize delays caused by a lack of information. We understand the Commission's position that neither the ILP nor the Federal Power Act *requires* the Commission to include studies requested by sister agencies in Commission-approved study plans. However, there is clearly nothing *preventing* FERC from including agency-requested studies that are reasonable and likely to inform the licensing. Indeed, the strong public interest in the timely issuance of improved hydropower licenses argues for doing so. **We recommend that FERC Staff support to the maximum extent possible other agencies' information needs in order to keep the process on track.** Studies requested by federal agencies with authorities under section 4(e) or 18 of the Federal Power Act ought to be included unless they are clearly unreasonable requests. Studies requested by agencies pursuant to their ESA authorities should be rejected only in extraordinary circumstances. If FERC determines that such a study is not necessary, it should give the licensee the option of performing the study and advise the licensee that the agency with additional authority has requested the information and that a failure to perform the study would likely result in a delay of ESA consultation.

Likewise, in the case of studies requested pursuant to a state's authority under section 401 of the Clean Water Act, if FERC Staff do not feel that they have the authority to request a given study, **they should advise the license applicant in their study plan determination** that a) FERC's regulations do not prohibit the applicant from conducting the study on their own volition, b) the state agency with water quality certification authority has identified the study as necessary for the development of a water quality certification, c) that states have the authority to deny water quality certifications because they do not have sufficient information to certify, d) states can and often do request that applicants withdraw and refile applications for water quality certification when they

lack requested information, e) FERC does not have the authority to issue a new license unless the state agency has granted or waived certification, and f) a failure to conduct the requested study could therefore potentially result in a significant delay in the processing of their license application or a denial of water quality certification that would prevent the Commission from issuing a new license.

Our final recommendation addresses the increasingly common practice of “tiered” study plans. In some cases, FERC Staff requires a simple study as a first step to determine whether a subsequent study that is more complex and/or expensive is necessary. We support this sensible approach, which can help to balance stakeholders’ concerns over the adequacy of existing information and/or applicant-proposed studies with applicant’s concerns about the costs of performing additional studies. However, we remain concerned that the Commission’s implementation of tiered study plans does not give participants confidence that their information needs will be met. Some additional guidance could improve outcomes significantly.

We recommend that tiered studies be based on clearly defined triggers. A tiered study should not be left up to some vague future discretion. Rather, it should clearly explain each step of the process: participants should be able to read the study plan determination and understand under what circumstances a given study will be performed. **A tiered study plan should also:**

1. Describe the specific information that Staff anticipates will be collected in each phase.
2. Define, to the extent feasible, the specific methodology and scope that staff anticipates will be used in each phase of the study.
3. Explain how and when the results of one phase will be used to trigger a subsequent phase. This explanation should include specific, quantitative triggers for each phase (e.g. “if the result of phase one water quality sampling at study point A demonstrate dissolved oxygen concentrations in the range of X to Y, then the applicant shall perform phase two of the water quality study”) instead of requiring participants to submit a future request for subsequent phases.
4. Explain how the decision to postpone some studies into a future season may affect the timing of the licensing proceeding should the time that is necessary to perform studies in

future phases not fit into the window anticipated by the proceeding's Process Plan and Schedule.

5. Clarify that, in the case of studies that are requested but postponed to a later study phase, Staff's anticipation of this subsequent phase is sufficient for a showing of "good cause" or "extraordinary circumstances" in the case that the phased approach requires participants to affirmatively request the studies in future phases. In other words, parties who request studies should not have those requests placed at a disadvantage (i.e. the higher bar that accompanies requests for studies made later in a process) because of FERC Staff's procedural decision to defer decisions about those studies to a point later in the process. In the alternative, Staff should clarify at the outset when adopting a tiered study plan the level or range of results from any given study phase that would constitute such a showing for the purposes of future "phased" study requests.

4 The ILP's Study Criteria

In theory, the seven study criteria (*see* 18 C.F.R. § 5.9(b)) can help focus participants' efforts on identifying the right studies. In practice, however, those criteria are not clearly applied. In our experience, study criteria are interpreted differently from proceeding to proceeding, and as a result the success of many study requests appears to be determined solely by whether or not they are consistent with the applicant's proposed studies. FERC's ILP regulations alone do not appear to provide enough clarity to allow staff to administer these study criteria consistently or to allow parties aside from the license applicant to develop successful study requests.

Presently, FERC Staff's application of the study criteria is a variable rather than a controlled factor in the study plan development process. We respectfully submit that this is wrong. While we appreciate that many study disputes can be resolved informally during the ILP process, this outcome is highly specific to the willingness of all of the parties, particularly the applicant, to collaborate. The Commission cannot rely on informal dispute resolution to resolve contentious study issues in every case, and such informal resolution is not an appropriate substitute for clear regulations that are applied consistently to ensure that all parties' issues are addressed fairly. Additionally, while individual study plans and study plan determinations will necessarily be informed by the facts of

each individual case, the application of the criteria should be the same across all proceedings. In order to ensure that they are being applied fairly, their application must be clear, specific, predictable, and consistent regardless of the facts of the individual case.

Additional written guidance is necessary to achieve this result. The guidance should articulate the logic path FERC Staff should follow between the specific facts and the application of the criteria. It should also require staff to articulate how it followed the path, or why deviations were necessary, in determining whether specific facts satisfy the thresholds for further study. Review of written guidance and prior staff explanations should allow stakeholders to predict accurately how Staff will apply the criteria to different facts.

4.1 General recommendations

We recommend that FERC take two separate but complimentary approaches. First, **FERC should prepare a guidance document that addresses the criteria globally and provides clear, detailed guidelines for how it will interpret them going forward.** The Commission has published other documents with a similar purpose, and they have been invaluable. For instance, FERC's recent policy statement on settlements has been an enormous help for licensing parties as they craft settlement agreements. We recommend that OEP prepare a guidance document on study criteria that would help to clarify FERC's regulations to Staff and ILP participants alike, offering examples, defining thresholds, and explaining how the criteria will be applied. Such a guidance document would improve consistency from proceeding to proceeding.

Second, **FERC Staff should more clearly address the criteria and explain how they are being interpreted when evaluating individual study requests.** When preparing a study plan determination, we recommend that FERC Staff clearly address whether or not each criteria has been met, and why or why not. Doing so would help participants to better understand the real-world

application of FERC's regulations and learn how to formulate requests for studies or study modifications that will be accepted.

We recommend that each study plan determination contain the following elements:

1. A description of each of the applicant's proposed studies submitted pursuant to 18 CFR 5.11 or 18 CFR 5.13, including each major study element and the information gaps that the study proposes to fill;
2. A description of each new study requested pursuant to 18 CFR 5.9 or revised study requested pursuant to 18 CFR 5.12 that includes each major study element and the information gaps that the study proposes to fill, identifies which party (or parties, if multiple parties submitted identical requests) requested the study, and references the filing(s) in which the request was made;
3. A description of any proposed modifications under 18 CFR 5.12 to any of the applicant's proposed studies that includes each major study element and the information gaps that the modified study proposes to fill, identifies which party (or parties, if multiple parties submitted identical requests) proposed the modification, and references the filing(s) in which the request was made;
4. A discussion of additional comments received from stakeholders pursuant to 18 CFR 5.9 or 18 CFR 5.12 that clearly identifies the nature each of comment and the party that submitted it.
5. For each study or modified study proposed by an applicant under 18 CFR 5.11 or 18 CFR 5.13 or for each proposed or stakeholder-requested study or proposed modification of a study submitted under 18 CFR 5.9 or 18 CFR 5.12, an analysis that discusses how the seven study criteria apply to that study, including discussion of comments received from the applicant or stakeholders that address specific criteria.
6. A specific determination on each study (accepted, rejected, or modified by the Commission) based on this analysis that provides a clear explanation for why a study was accepted, rejected, or modified. It is reasonable to use cross-references to address identical study requests submitted by multiple parties.
7. If the Study Plan Determination resolves an outstanding disagreement over a technical or substantive issue (e.g. a disagreement over whether a given impact is occurring or whether there is a connection between project operations and given impact), the Study Plan Determination should include a discussion of the nature of the disagreement, the viewpoints of all parties to the disagreement, the evidence (record or otherwise) that informed the Commission's determination, and an explanation for how any outstanding information gaps in the decisional record will be filled.

This information will be particularly helpful when Staff believe that a given criteria has not been met, especially with the more complex criteria that seem to consistently pose difficulty for

requestors. **With the nexus and cost / level of effort criteria at 5.9(b)(5) and (7) respectively, we recommend that FERC Staff provide a detailed explanation in every case,** regardless of whether or not the criteria has been met, so that participants in other processes can better understand how FERC interprets these criteria.

Finally, **we recommend that the Commission adopt a more active role in the information gathering process.** The Commission has an affirmative responsibility to “inquire into and consider all relevant facts” to ensure that “the record is complete.” *Scenic Hudson Preservation Conference v. Federal Power Commission*, 354 F. 2d 608 (2d Cir. 1965). The study determination process should therefore not be used to “blandly [call] balls and strikes” by simply rejecting or accepting studies requests based on their strict compliance with 5.9(b) study criteria. Rather, FERC staff should independently evaluate each proposed study to determine if the information would inform the licensing proceeding. If a study request contains deficiencies but proposes to gather information that will meet important information needs, staff should not reflexively reject the study but rather work with parties to the licensing to develop a study plan that will meet those needs. Alternatively, Staff should, on their own initiative, develop and propose an appropriate study that will meet the requested information needs.

4.2 Study Criterion 5: “Explain any nexus between project operations and effects (direct, indirect, and/or cumulative) on the resource to be studied, and how study results would inform the development of license requirements.”

This criterion is the one that is most often cited when denying a study request. In our experience, there are several issues that seem to generate the most confusion for participants; in the following section, we recommend ways to eliminate this confusion. **We recommend that FERC’s written guidance address all of these issues,** using examples and describing several cases (either hypothetical or based on past decisions) where staff would determine that criterion 5 has or has not

been met. We also recommend that FERC discuss these issues in individual licensing proceedings when making a determination that criterion 5 has not been met.

4.2.1 Scope

Studies can deal with direct, indirect, or cumulative effects. In some cases, FERC Staff has required a showing of direct effects in order to demonstrate a nexus to project operations; in others, they have not. A plain reading of Study Criterion 5, with its reference to “direct, indirect, and/or cumulative” effects makes clear that there is no requirement that a study requestor demonstrate a direct effect in order to explain a nexus between project operations and effects. **We recommend that FERC’s written guidance affirm that there is no such requirement.**

4.2.2 Multiple Causes of Resource Impacts

It is FERC’s responsibility to investigate a project’s contribution towards the sum total of an impact in cases where there may be multiple causes. This is particularly true when the project itself has multiple uses in addition to hydroelectric generation, such as flood control, irrigation, or water supply. By disallowing studies simply because the license applicant asserts that the project (or, in multi-use projects, the power generation portion of the project) is not the sole or even the “essential” cause of a resource impact, the Commission essentially forecloses on the possibility of any serious consideration of such impacts during a licensing proceeding.

We understand that the Commission cannot necessarily hold licensees accountable for all impacts on a waterway, but the Commission clearly has the authority to require that the licensee mitigate its share of those impacts, whether those impacts are direct or cumulative. The Commission also has clear authority to require a licensee to make modifications to its project that will *enhance* a given resource, regardless of whether or not the license is the sole or even partial cause of a given impact on that resource.

The Commission's written guidance should affirm that studies may be required in cases where there are multiple causes of impacts, in order to: a) gather complete data about the scope and extent of a given impact *in its totality* if such information is not available, b) determine what share of a given impact can reasonably be attributed to a given project, and/or c) examine the extent to which reasonable proposed changes to project operations can potentially protect, mitigate, or enhance non-power resources in such situations.

4.2.3 Threshold and Certainty of Effect

Where studies dealing with project effects are intended to determine or quantify the scope or magnitude of a project's contribution towards a given impact on a resource, FERC Staff in some proceedings have interpreted criterion 5 to require that the requestor presumptively demonstrate or quantify the significance of that effect in order to show that a nexus exists. The relationship between project operations and a given effect is often a matter of conflicting opinion, and studies are often proposed to resolve these disputes. License applicants (who have an obvious interest in limiting their financial exposure to study costs as well as their regulatory exposure to potential mitigation measures) often have a different – and significantly narrower – interpretation of this nexus than do resource agency staff and other parties that represent the public's interest in non-power resources. FERC's ILP Final Rule anticipated this issue:

A principal feature of hydroelectric licensing in recent decades has been disagreements between license applicants and others concerning the extent to which proposed or existing projects have negative effects on natural and other resources. ***Whether an identified impact is or is not a problem, and the extent of the problem, are often matters of perspective. Moreover, the finding of a "problem" is not a required predicate for Commission action*** under the comprehensive development standard of FPA Section 10(a)(1). Rather, that standard contemplates license conditions for the "protection, mitigation, ***and enhancement***" of fish and wildlife . . . and for other beneficial public uses [....]¹

¹ Final Rule pp. A-40-41 (emphasis added).

The ILP final rule clearly did not envision a bar that is set so high that a study requestor must demonstrate with certainty (or even probability) that a project is having a negative impact on an affected resource. Indeed, the text quoted above from ILP's final rules was in the context of the Commission rejecting an additional industry-proposed study criterion that would require a requestor to demonstrate "that a resource problem has been identified." The Commission has the authority and responsibility to evaluate license conditions where changes to project operations may *enhance* a given resource regardless of whether or not the project is currently having a negative impact on the resource or will under proposed future operations. Likewise, the ILP does not require that the requestor be able to quantify an effect with certainty in order to justify a study which is being requested precisely because the effect needs to be quantified. Such a requirement would defy logic and common sense.

Rather, the Commission's ILP regulations (and the discussion that accompanies the ILP final rule) envision a standard for criterion 5 that is based on reasonableness, specifically noting the professional judgment of agency and tribal staff as providing assurance of this reasonableness. *See* ILP Final Rule, p. A-37-8:

"We think a ***common sense approach*** to demonstrating a nexus between project operations and resource impacts, informed by the ***professional judgment of qualified agency, Commission, and tribal staff***, should ensure that this criterion is ***reasonably*** applied."²

Similarly, ILP Final Rule, p. A-35, provides:

"The study criteria should be applied in the same manner regardless of whether an impact from project operations on a resource is characterized as ongoing or otherwise. The requesting party would have to ***reasonably*** demonstrate the nexus between project operations and resource impacts, and in the context of addressing the other criteria, show how the proposed study ***reasonably*** relates to the development of potential mitigation or enhancement measures." [emphasis added].

² Final Rule, pp. A-37-38 (emphasis added).

This discussion does not envision a strict interpretation of study criterion 5 being used to reject study requests. And, particularly where the requestor of the study is a resource agency with considerable expertise and clear jurisdiction over a public resource, FERC should give considerable weight to the study request and to the professional judgment of the qualified agency or tribal staff requesting the study. When weighing a difference of opinion between an applicant's paid consultant and an agency staffer, the Commission should give careful consideration and weight to the public interest mission and professional judgment of each party.

We recommend that FERC's guidance document clarify that study criterion 5 (18 CFR § 5.9(b)(5)) does not require that a study requestor demonstrate the certainty of a given impact on a resource or quantify a project's contribution towards an impact on a given resource in order to demonstrate a nexus between project effects and the resource to be studied. In the alternative, we recommend that FERC's guidance document clearly explain – using examples – the required level of certainty or contribution towards an impact that is required to demonstrate a showing of nexus, and what is meant by “reasonable” in this context.

4.2.4 Certainty of license requirements

18 CFR 5.9(b)(5) asks that requestors demonstrate how study results “would inform the development of license requirements.” The operative word here is “would,” implying conditionality or probability rather than certainty. Likewise, the phrase “inform the development of license requirements” implies that a given study may help FERC and other agency staff to develop appropriate conditions, not that the study will necessarily form the sole basis of a given requirement. In some proceedings, FERC Staff have interpreted this criteria to require that requestors to demonstrate with certainty that the study will result in a license condition. This approach turns the concept of environmental analysis on its head: NEPA requires FERC to analyze

all reasonable alternatives to the proposed action regardless of whether or not FERC even has the authority to require a given alternative. To prejudge license conditions at this point in the licensing process, before studies have been performed, would be a grave error.

Studies should not be limited to measuring impacts and effects: the Commission has a duty to require reasonable studies that can inform the feasibility of potential license conditions. The Commission cannot perform an appropriate 10(a) balancing if it does not know if a proposed mitigation or enhancement measure is achievable (and, if achievable, what it will cost). On a number of occasions, applicants and other stakeholders have disputed the efficacy of certain proposed mitigation measures. For example, our members have requested studies in several proceedings that concern the potential modification of outlet works to determine if changes to the physical structure could better manage the depletion and release of cold water. In some cases, FERC Staff has been forced to make decisions based not on actual evidence, but rather the applicant's unsupported assertion that a measure is too expensive or infeasible. A study can lend substance to these assertions, determining the true cost or feasibility of such measures.

We recognize that it is incumbent on the study proponent to provide sufficient definition in a study request to allow a particular feasibility study to be developed. However, the threshold for studies that are intended to evaluate the cost or feasibility of potential mitigation measures should be whether or not the mitigation measure would be reasonably likely to occur, based on existing evidence, should the study determine that it is feasible and cost-effective. Applying a standard that requires the requestor of such a study to prove that the facility modifications are *necessary and likely to occur* precludes the examination of the proposed mitigation measures before they have a chance to be vetted to see if they can work. A proposed mitigation measure is highly unlikely to occur or be deemed necessary in the absence of information demonstrating that it is feasible or cost

effective. Such a standard defies logic: it requires the requestor to pre-emptively prove the outcome of the study before the study has taken place.

We recommend that FERC's written guidance explain – using examples if necessary – the level of certainty that a given condition might be required that is sufficient to demonstrate that a study “would inform the development of license requirements.” The guidance document should also clarify *whose* license requirements the study must inform in order to meet the requirements of study criterion 5. A number of state and federal agencies have authorities under the Federal Power Act, the Clean Water Act, and other laws to impose license requirements that the Commission must include in the license without modification. The Commission's guidance document should clarify the circumstances – if any – under which FERC Staff may substitute their own judgment for the reasonable judgment of the staff of sister agencies that a given study would inform license conditions, especially if that agency has the authority to unilaterally impose license requirements that FERC lacks the authority to modify or reject.

4.3 Study Criterion 7: “Describe considerations of cost and practicality, and why any proposed alternatives would not be sufficient to meet the stated information needs.”

The ILP review identified several issues with Study Criterion 7. Our Coalition's members share many of these concerns.

First, it can be difficult for a layperson to obtain accurate cost information. Non-applicant parties may not be able to receive a free cost estimate from the licensee's consultant or from another consulting firm to determine accurate costs or levels of effort. License applicants - and the consultants who work for them - are often the sole source of cost information. This creates a problem: applicants have a clear financial interest in avoiding studies in general, and particular in avoiding studies that are likely to provide inconvenient information that might lead to more costly license requirements. An applicant therefore has a strong incentive to portray studies as expensive.

While resource agencies are also a potential source of cost information, agency personnel are often able to perform studies at much less expense than private consultants might charge license applicants. **We recommend that FERC Staff carefully review cost estimates.** Where cost estimates are disparate, Staff should independently confer with consultants, resource agency staff, or other stakeholders who may be able to provide insight into reasonable expenses for proposed studies. **Staff should also generally describe in the Study Plan Determination the steps that it used to arrive at its conclusion regarding the cost of a proposed study.**

Second, in evaluating a study request, FERC Staff must determine if costs or levels of effort are reasonable relative to the information that would be gained from performing the study. This is an appropriate application of this criterion. Our concern is that there is no explanation of the standards used to make these decisions, which are highly subjective and vary from proceeding to proceeding. While we understand that a certain amount of subjectivity is necessary in making such decisions, the process could benefit from some additional guidance (coupled with clear explanations in individual study plan determinations) for how FERC Staff assigns value to increments of information when determining why costs were found to be reasonable or unreasonable. **We recommend that the Commission provide such guidance and explanation.**

Third, in considering prospective costs, **We recommend that FERC Staff consider the degree of controversy surrounding the affected resource to be studied and the importance ascribed to an affected resource by various stakeholders,** A topic need not be controversial in order to be studied, but if it is, it should get a harder look. Particular deference should be given to studies that involve resources that involve Rare, Threatened, and Endangered Species.

Finally, in addressing existing information, the Commission needs to pay particular attention to the level of depth and detail of the existing information relative to the level and depth of information that is required to perform a thorough NEPA analysis and develop appropriate license

conditions. **We recommend that FERC Staff consider whether existing information allows quantification of baseline conditions and quantification of the potential for proposed changes to project operations to either compound or mitigate project effects. If it does not, Staff should consider that information inadequate.** Existing information often tends to be survey information. While this information may be a useful starting point, basic survey information is generally inadequate to inform a Section 10(a) balancing, during which the Commission must quantify variables in order to balance them. Such variables include not only project effects, but also how changes to project operations will be able to improve an affected resource and the level of effort that will be required. When existing resource conditions are substantially degraded, survey information is particularly poor in evaluating potential protection, mitigation, and enhancement measures.

5 Post-Filing Review and Other Issues

A number of stakeholders; including some of our members in oral comments, have made excellent process suggestions for improving the efficiency of post-filing review. We generally support those ideas. Here we reiterate three points:

First, in our experience, post-filing coordination and success is largely a result of success in pre-filing coordination. The previous sections of our comments address these issues more specifically, but it bears repeating that **decisions made early in the process have ramifications that carry over into post-filing**. Likewise, the tone of the proceeding set early in the process is likely to inform the rest of the licensing. Information gaps, conflict, and/or mistrust created early in the process only snowball, leading to conflict and delays after the application has been filed. Our recommendations in the previous sections are intended to reduce these post-filing delays as well.

Second, we generally agree with the Commission that the ILPs deadlines are one of its strong points: they help to keep parties on track and moving forward. However, there are situations

– especially in larger and more complicated proceedings – where some flexibility is warranted. In particular, **we recommend that FERC not issue an REA and begin its NEPA analysis until all studies are actually complete and participants have had sufficient time to digest the information** (e.g. performing model runs that integrate study results). Until required studies are complete, the application is by definition not ready for environmental analysis. FERC cannot begin its NEPA review and other agencies cannot start their parallel review processes until all studies are complete.

Third, **we encourage the Commission to reach out to federal and state agencies (especially those agencies who have responsibilities and requirements that can ultimately affect the timing of license issuance) to see if they can find ways to better coordinate and integrate the ILP with other agencies' concurrent responsibilities.** For instance, FERC and its sister agencies should examine ways to develop procedures (perhaps using non-decisional staff) that would allow those agencies to cooperate in the development of a NEPA document that will meet their needs without sacrificing those agencies' ability to intervene as a party to the licensing. We have no specific recommendations here: the details of how to improve inter-agency cooperation in an ILP should appropriately be left up to the relevant agencies to solve. But we strongly recommend that FERC initiate these conversations soon: it is abundantly clear to us based on our experiences in individual licensing proceedings that interagency cooperation in hydropower licensing desperately needs to be improved. As the lead agency in hydropower licensing, FERC should make a serious effort to see that its licensing procedures are meeting the needs of other agencies.

Finally, we would like to stress the importance of timely access to existing information for license parties, especially information that has been classified as Critical Energy Information Infrastructure. While we understand and respect the need for security, the process for requesting this information is extremely time-consuming and burdensome, and can place license parties at a

disadvantage in a proceeding. **We recommend the Commission take a hard look at information that has been classified CEII to determine if that classification is indeed appropriate,** especially in cases where information that is legitimately CEII is being lumped together with information that is not, making both difficult to access. **We also recommend that the commission create a fast-track procedure that would allow license parties to can gain access to CEII information in a more timely fashion.** For example, FERC could allow license parties to submit a general request and sign a general Non-Disclosure Agreement at the beginning of a licensing process that would enable them to access documents that are subsequently filed as CEII without having to submit an additional request and wait for it to be acted upon.

6 Conclusion

The Integrated Licensing Process has the potential to be a real step forward in hydropower licensing, improving the opportunities for public participation while reducing the cost and effort associated with licensing. It is a good process, but one that could be made much better in implementation with some additional clarification and changes to specific procedures. We commend that Commission for its willingness to undertake this effectiveness review of the ILP and its commitment to continually improving its policies and practices to make them work better for all stakeholders. We thank you for this opportunity to comment, and look forward to working with the Commission and others to ensure that the ILP is ultimately successful.

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Respectfully Submitted,

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