1101 14th Street N.W. • Suite 1400
Washington, DC 20005
www.hydroreform.org

T: 202.347.7550
F: 202.347.9240
coordinator@hydroreform.org

February 4, 2010

Ann Miles
Director, Division of Hydropower Licensing
Office of Energy Projects
Federal Energy Regulatory Commission
888 First Street, NE
Washington, DC 20426

Re: Request to develop policy guidance on Study Plan Phase under ILP

Dear Ann:

We are writing to request that the Office of Energy Projects (OEP) develop specific written policy guidance for the Study Plan Development and Study Plan Determination phases of the Integrated Licensing Process (ILP) that are set forth in the Commission's regulations at 18 C.F.R §§ 5.9 – 5.14.

Across many hydropower licensing proceedings since 2005, we have observed certain approaches to the development of study plans under the ILP that we respectfully submit do not advance the purpose of gathering information sufficient to building a robust project record, preventing study plan disputes, or resolving such disputes in a timely fashion.

In the interest of separating this request from the particular facts of any given proceeding – completed or ongoing – we do not provide citations to specific projects. We are willing to do so at your request (and with the understanding that some of our strongest examples include recent proceedings where the Commission's *ex parte* regulations would make sharing those examples difficult). In the meantime, we propose a way forward.

We request that OEP prepare a guidance document regarding the resolution of study disputes under the ILP. This could be an amendment to *Understanding the Study Criteria – Integrated Licensing Process* that OEP issued as guidance in 2005. Whatever the form, we request that you provide guidance on the specific issues addressed in this letter. That would improve consistency across licensings, enhance the clarity of individual Study Plan Determination documents, provide an opportunity to facilitate technical discussion among licensees, Commission staff, and stakeholders during individual study plan development processes, and reduce misunderstandings that could lead to or exacerbate study disputes.

In order to develop our recommendation, we have organized this letter into four sections. Section 1 deals with the organization of FERC's Study Plan Determination Documents, and makes specific recommendations for how those documents could be standardized and improved. Section 2 specifically addresses OEP Staff's interpretation of the ILP's Study Criterion 5. Section 3 addresses our recommendations for a serial or "phased" approach to studies. Section 4 addresses the need for improved interagency cooperation in developing a robust decisional record in light of the 2005 amendments to the Federal Power Act.

We request that you clarify the issues identified in each of these sections in your specific written policy guidance. In the alternative, we request a written response clarifying OEP's interpretation of each of those points we raise in this letter.

1 Organization of FERC's Study Plan Determination Documents

In our experience, the format of FERC's Study Plan Determinations and the manner in which they analyze and discuss requested studies varies from proceeding to proceeding. This may be because the Commission's regulations at 18 CFR § 5.13(c) do not specify any particular format for a Study Plan Determination, and our discussions with FERC staff suggest that there is no consistent policy dealing with the appropriate form for these documents. The Commission's preparation of a Study Plan Determination often requires Staff to choose from several competing views of what information is needed to prepare a complete decisional record. FERC staff must evaluate studies proposed by the license applicant alongside studies requested by state and federal resource agencies, tribes, NGOs, and other stakeholders. Staff evaluates each applicant-proposed or stakeholder-requested study or proposed modification to a study based on the ILP's seven study criteria to determine which studies are needed and which are not. However, when the final determination is published, parties that have requested studies often are left unaware of a) how a given study was analyzed by FERC staff and b) on what policy grounds that study was accepted or rejected.

For example, in one proceeding, multiple studies requested by state and federal resource agencies and members of the public were rejected in a few paragraphs with almost no substantive discussion other than a vague assertion (repeatedly invoked throughout the Study Plan Determination) that the requested studies did not address direct project effects and therefore fail to meet FERC's "nexus" criteria. In this case, the studies were not addressed individually, but rather in a few groups with little differentiation among the individual studies or substantive discussion of either the components of those studies or the information needs that they are intended to address. Furthermore, the specific evidence and rationale underlying FERC's decision to reject these studies were not clearly articulated. This is not an isolated incident. While some Study Plan Determinations do a significantly better job than the one described in this example, the structure and format of even those documents can make it very difficult for the requestor of a study to determine where their studies were addressed, why they were rejected, or how they were modified.

By adopting a set of straightforward protocols for its Study Plan Determinations, the Commission would solve this problem and improve both the documents and the study development process. We recommend that the Commission issue a guidance document requiring that each Study Plan Determination include the following elements:

1. A description of each of the applicant's proposed studies, including each major study element and the information gaps that the study proposes to fill.
2. For each of the applicant's proposed studies, a list of comments or proposed modifications received along with citations to the specific filings in which those comments were received.
3. A description of each study requested pursuant to 18 CFR 5.9(b) 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.
4. For each applicant-proposed or stakeholder-requested study or proposed modification of a study, 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.
5. 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.
6. 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. We will address this point in more detail in the following section of this letter.

2 The ILP's Study Criteria do not require a study requestor to prove that a project is having an impact on the resource to be studied.

2.1 The ILP envisions a reasonableness standard for its "nexus" requirement

FERC's Study Plan Determinations frequently cite to Criterion 5 (18 CFR § 5.9(b)(5): the "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") in lieu of a more complete discussion of the seven criteria as a whole.

The Commission's ILP regulations describe the nexus between project operations and effects on a resource as a threshold requirement that allows the Commission to bar the door to "study

requests having nothing to do with project impacts."[1] We agree that this is sensible and necessary. However, the relationship between project operations and a given effect is often a matter of conflicting opinion. License applicants (who have an obvious interest in limiting their regulatory exposure to potential mitigation measures) often have a different – and significantly more narrow – 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 [….][2]

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. Rather, the rule suggests a standard based on reasonableness, specifically noting the professional judgment of agency and tribal staff as providing assurance of this reasonableness:

> "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."[3]

In other words, if is reasonably possible that a project is having a direct, indirect, or cumulative impact on a resource, FERC should not use the "nexus" litmus test to reject a study. Rather, it should consider the study carefully in light of all of the criteria. And, particularly where the requestor of the study is a resource agency with considerable expertise and a clear responsibility to serve the public interest, FERC should give considerable weight to the study request and to the professional judgment of the qualified agency or tribal staff requesting the study. FERC's practice of rejecting studies under an overly restrictive application of study criterion 5 conflicts with the text of the ILP regulations, and does not reflect the careful consideration and respect for the professional judgment of the staff of FERC's sister agencies that the ILP clearly envisions.

---

[1] Order 2002-A - Final Rule re Hydroelectric Licensing under the Federal Power Act under RM02-16 (FERC Issuance # 20040123-0286). (Hereafter: "Final Rule") p. A-37.
[2] Final Rule pp. A-40-41 (emphasis added).
[3] Final Rule, pp. A-37-38 (emphasis added).

2.2 NEPA requires that FERC study reasonably possible project effects.

In cases where there is a legitimate disagreement over the existence of a nexus, the Commission's determination as to whether or not this threshold has been met is of critical importance to the ability of licensing parties to develop appropriate recommendations for the protection, mitigation and enhancement of project-affected resources. If FERC staff defines the "reasonable" application of this criterion so narrowly that a study requestor is required to prove with absolute certainty that a project is having an impact on a resource in order to demonstrate a nexus, then many effects will likely go unmitigated. Doing so also creates a dynamic where a license applicant can keep an entire set of resource issues out of the record – and out of FERC's NEPA analysis – by simply questioning the study requestor's conclusion that the project is having an effect on those resources.

It is established under NEPA that uncertainty regarding a project's impacts, at the outset of a proceeding, requires the agency to investigate the nature and scale of those potential impacts in order to evaluate significance, and for any which may be significant, develop appropriate alternatives and mitigation measures. See *National Parks & Cons. Assn. v. Babbitt*, 241 F.3d 722, 733 (9th Cir. 2001) (an agency's lack of knowledge about a potential impact "does not excuse the preparation of an EIS; rather it requires the [agency] to do the necessary work to obtain it"). The notion that an applicant would be required to study a project effect only where the effect is precisely and conclusively known turns the statute on its head.

When FERC uses a Study Plan Determination to attempt to resolve such an evidentiary dispute before a complete record has been developed, it should provide a strong rationale for its decision, based on a thorough review of the project record. It should analyze and discuss the arguments presented by both sides, and base its ultimate determination on citations to supporting evidence in the record. Given the risks that a legitimate issue could be prematurely eliminated from discussion at this early stage in a relicensing proceeding, the burden of proof in such a dispute should fall firmly on the applicant to conclusively demonstrate that no nexus exists.

2.3 The ILP's Study Criteria are not limited to direct project effects.

FERC's ILP Study Criterion 5 directs requestors to "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."[4] However, we have seen a number of studies requested by agencies and stakeholders rejected in a Staff Study Plan Determination on the basis that direct project effects have not been established, and therefore Criterion 5 has not been met. This is not the appropriate standard defined in Study Criterion 5, which requires only that the requestor "explain ***any*** nexus" (emphasis added). The plain language of the regulations indicates that any direct, indirect, or cumulative effect of project operations on a given resource is sufficient for a showing of nexus.

Other Study Determination documents issued by OEP Staff in ILP proceedings have interpreted Criterion 5 to mean that FERC need not require studies that are intended to address indirect or

[4] 18 CFR § 5.9(b)(5). (Emphasis Added)

cumulative effects unless the requested study (or the study request itself) can isolate the project effect from other potential contributors to those effects. This is also an incorrect standard that is not envisioned in the Federal Power Act, NEPA, or other applicable law or regulation. FERC's authority to condition licenses under the comprehensive development standard of FPA Section 10(a)(1) is not limited to those license conditions that address direct project effects or effects which can be isolated and attributed directly to project operations. FERC's authority encompasses license requirements for the "protection, mitigation, ***and enhancement***" of fish and wildlife[5]. Such license requirements can and often do address a project's indirect and cumulative impacts, and FERC need not quantify and isolate those impacts in order to develop such license conditions. Therefore, a nexus with ***direct*** project effects or effects that can be "isolated" ***before any study is done*** is not the correct standard for determining how the results of a proposed study could or would inform the development of license requirements. Indeed, study is often helpful precisely for the purpose of isolating a project's contribution to an indirect or cumulative effect. If a study requestor is able to demonstrate that the results of a study could inform the development of conditions that FERC has the authority to require, then this portion of Criterion 5 has been met.

It is certainly within FERC's discretion to elect ***not*** to impose a given license condition after performing its 10(a) balancing responsibilities. However, we respectfully submit that OEP should not limit proposed studies to those that will address only those conditions that staff know, at the outset of the proceeding, will ***ultimately be required*** in a license. FERC's 10(a) balancing takes place much later in the licensing process, after the study period is complete. That balancing must be ***based on substantial evidence***. By rejecting studies that are intended to supply FERC staff with this substantial evidence, staff effectively prejudges the outcome of FERC's NEPA document and license order before the first study has even begun.

Indeed, the ILP regulations do not require that a requested study must necessarily inform the development of license conditions. Criterion 5 requires that the requestor "explain […] how the study results ***would*** inform the development of license requirements." (emphasis added). It does not require that the requestor explain how the study ***will*** inform the development of license requirements.

Finally, we are concerned that FERC staff is relying too heavily on Study Criterion 5 as a means for rejecting studies requested by stakeholders or agencies. The ILP rule also stresses that its seven study criteria are "not a check list; rather they need to be considered as a whole, with each criterion addressed, and […] ***no single criterion is determinative***."[6] The second half of Study Criterion 5 (18 CFR § 5.9(b)(5), "how study results would inform the development of license conditions") is, unlike project nexus, not a threshold requirement for a study request, but one of many factors to be considered. The Commission's Final Rule for the ILP refers to the nexus between project operations and effects as a "litmus test" or threshold requirement for study requests:

[5] 16 USC § 803(a)(1) (Emphasis Added)
[6] Final Rule, p. A-34. (Emphasis added).

> As noted elsewhere, with the exception of the establishment of a nexus between the study request and operation of the project, no one criteria establishes a "litmus test" for study requests.[7]

Note that the reference here is to ***project nexus***, not to Criterion 5. It is clear from these two statements that the Commission intended that project nexus, ***not*** study criterion 5 as a whole, be the threshold requirement for a study request. A requestor's difficulty or uncertainty in demonstrating how a study will (or would) inform license conditions should not be, by itself, a sufficient reason to reject a study request.

Finally, 18 CFR 5.9(b)(5) does not require that studies intended to address a project's indirect or cumulative effects must identify and isolate project effects. Indeed, such a policy appears to be little more than another way of saying that the Commission does not intend to address indirect or cumulative effects. Indirect and cumulative effects are, by their very nature, not isolated; they are inherently subject to multiple and sometimes confounding influences. Yet this does not release FERC from its obligation to examine and address those effects, especially when the study in question is intended to provide information that will further isolate and quantify either the project's contribution to those effects or how a change in project operations might protect, mitigate, or enhance the affected resource. FERC is required by NEPA to analyze a project's direct, indirect and cumulative impacts over the course of the proposed new license, and to identify and consider reasonable alternatives that would lessen such impacts.[8] The purpose of NEPA is to assure that agencies will be fully aware of the impact of their decisions when they make them.[9] To this end, FERC's NEPA analysis must include analysis of the cumulative impacts of a proposed action in conjunction with all past, present, and reasonably foreseeable future actions.[10]

3 FERC should expand and clarify its policy for a "phased approach" to studies.

In some recent proceedings, the Commission has considered a phased approach to requiring and implementing certain requested studies. Such a flexible approach is often reasonable: it can ensure that necessary information and evidence is gathered without subjecting licensees to the burden of irrevocably committing resources to a study that may turn out to not be necessary. However, it is often not clear how this approach can be applied in practice. The ILP does not directly anticipate a phased approach to studies, and does not contain any procedural variances that anticipate postponed study decisions.

A phased approach to study plans is a reasonable way to provide licensees with some assurance that the commission will not require unnecessary studies. FERC should likewise provide study

---

[7] Final Rule, p. A-32
[8] *See* 40 C.F.R. §§1500.1; 1502.14, 1502.15.
[9] *See* Lathan v. Brinegar, 506 F.2d 677, 693 (9th Cir. 1974).
[10] *See* 40 C.F.R. §§ 1508.7, 1508.27(b)(7); Kern v. U.S. Bureau of Land Management, 284 F.3d at 1075-76; Idaho Sporting Congress v. Rittenhouse, 305 F.3d 957, 973 (9th Cir. 2002).

requestors with some assurance that their study requests will not be at a procedural disadvantage if a decision about proposed studies is delayed to a subsequent "phase." We therefore recommend that FERC clarify how a phased approach to studies can dovetail with the ILP's requirements for new and modified studies at 18 CFR § 5.15(d)-(f). These regulations require the requestor of updated or new studies to show good cause why those studies should be approved. By "phasing" studies without a clear decision tree that anticipates what level of information or study results would be necessary to trigger a subsequent study phase, FERC places an increased burden on study requestors, who may be required to request their studies again and demonstrate good cause – or, for study phases that take place after the updated study report, "extraordinary circumstances" – in order to justify a phased study.

We recommend that OEP, in the policy guidance we have requested, clarify that Staff should do the following when adopting such an approach:

1. Describe the specific information that Staff anticipates will be collected in each phase.
2. Define, to the extent feasible, the methodology and scope that staff anticipates will be used in each study phase.
3. Explain how and when the results of one phase will be used to trigger a subsequent phase.
4. Wherever possible, define specific, quantitative triggers for each phase (e.g. "if the result of water quality sampling at study point A demonstrate dissolved oxygen concentrations in the range of X to Y, then the applicant shall perform phase 2 of the water quality study") instead of requiring participants to request a future phase.
5. Explain how the decision to postpone some studies into a future season may affect the timing of the licensing proceeding should the time necessary that is necessary to perform studies in future phases not fit into the window anticipated by the proceeding's Process Plan and Schedule.
6. 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 the alternative, Staff should clarify at the outset what level or range of results from any given study phase would constitute such a showing for the purposes of future "phased" study requests.

4 Importance of studies for developing mandatory conditions and prescriptions in light of the 2005 Trial-Type Hearing Amendments to the Federal Power Act

The 2005 Amendments to the Federal Power Act, and subsequent Trial-Type hearings as provided for by those amendments, have given agencies a clear sense of what information they require in order to prepare Section 4(e) conditions and Section 18 prescriptions that are based on a solid factual underpinning. Given that these agencies are now being held to a standard that requires much stronger information, it is unclear why FERC would repeatedly choose to deny them access to the information that they have identified as necessary.

Studies that consider the public interest will inform the development of a license that is in the public interest. FERC may have the authority to determine that a study is "not necessary to evaluate the public interest" under the Federal Power Act, but it should use that authority very judiciously when its sister agencies have indicated that a study would in fact contribute to the record necessary for development of a mandatory condition under FPA section 4(e) or 18. When a license applicant and an agency disagree over the information needed to exercise an agency's responsibilities, FERC should weigh the agency's clear mandate to protect the public interest alongside the license applicant's need to protect only its particular interests. If the results of the study show that a recommended license condition is not in the public interest, FERC retains the authority to reject that recommendation, and can do so secure in knowing that their determination is supported by substantial evidence. But making such a determination before information has even been collected precludes the development of well-reasoned conditions.

Given the extraordinarily high standards for supporting evidence created by the 2005 amendments to the Federal Power Act, the Commission should improve its cooperation with agencies with mandatory conditioning authority under Section 4(e) and prescriptive authority under Section 18 of the Federal Power Act, and give increased weight to the study requests that they believe are necessary in order to develop conditions and prescriptions that are supported by substantial evidence. By refusing to require studies requested by agencies, FERC effectively prevents those agencies from exercising their authority. Congress passed these amendments to in order to ensure that agencies would exercise these mandatory authorities judiciously, and with the support of a solid evidentiary record. It did not pass these amendments so that FERC could effectively circumvent this authority by depriving the agencies of information necessary to exercise their authorities.

5 Conclusion

Our Coalition has invested heavily in the success of the Integrated Licensing Process. We participated in the development of the rule, devoting significant staff time and resources to working with the Commission, its sister agencies, and the industry in developing a licensing process that was intended to result in timely license issuance with better outcomes for Licensees, the affected public, and ultimately the rivers where hydropower projects are sited. We respectfully submit that there is a growing gap between what the ILP rule envisioned and FERC's implementation of that rule. This gap is most apparent in the study plan development phase of the ILP. In our view, this is a cause for great concern, as it directly affects the quality and content of the decisional record for a proceeding, which in turn affects the ultimate outcome of a proceeding. An overly restrictive view of what information can and should be gathered to support a licensing decision will almost always result in licenses that inadequately address project effects and impacts.

We are therefore requesting that OEP review at its current practices and develop specific written policy guidance that addresses this portion of the ILP. We believe that such an exercise would help to close this gap by clarifying FERC practice and policy, and guiding staff and license parties as they work through this critical stage of relicensing.

We look forward to your response. Please do not hesitate to contact us if you would like us to clarify any of our concerns, or if we can be of assistance in resolving the issues we have raised.

Sincerely,

John Seebach
Director, Hydropower Reform Initiative
American Rivers

Kevin Lewis
Conservation Director
Idaho Rivers United

Chris Shutes
FERC Coordinator
California Sportfishing Protection Alliance

Kelly Catlett
Hydropower Reform Policy Advocate
Friends of the River

Brian Johnson
Director, California Water Project
Trout Unlimited

Patrick Moore
Legislative Director
Coastal Conservation League

Richard Roos-Collins
Director of Legal Services
Natural Heritage Institute

Mitch Reid
Program Director
Alabama Rivers Alliance

James Schramm
Coordinator
Michigan Hydro Relicensing Coalition

Keith Nakatani
Director
California Hydropower Reform Coalition

Kenneth D. Kimball
Director of Research
Appalachian Mountain Club

Kevin Colburn
National Stewardship Director
American Whitewater

Tom Christopher
New England FLOW

Cc: Jeff P. Smith, National Marine Fisheries Service
Robert H. Deibel, US Forest Service
Stefanie Damiani Stavrakas, US Fish and Wildlife Service
Joan Harn, National Park Service
Robert Dach, Bureau of Indian Affairs
Shawn K. Alam, Department of the Interior
Linda Church-Ciocci, National Hydropower Association