United States Department of the Interior

OFFICE OF THE SECRETARY
Washington, D.C. 20240

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PEP - ENVIRONMENTAL REVIEW MEMORANDUM NO. ERM 10-2

To: Heads of Bureaus and Offices

From: Willie R. Taylor, Director
Office of Environmental Policy and Compliance

Subject: Departmental Participation in Hydroelectric Power Licensing by the Federal Energy Regulatory Commission (FERC)

1. BACKGROUND AND PURPOSE

This memorandum supplements 516 DM 4. The Office of Environmental Policy and Compliance (OEPC) provides oversight, guidance, and process management for the Department's review of FERC applications and associated exhibits, studies, and environmental documents for hydroelectric projects covered by the Federal Power Act (FPA), as amended. The purpose of this memorandum is to provide additional information, policies, and procedures resulting from recent reforms and revised FERC rules (published July 23, 2003) to be used by all Bureaus and Offices in the review of FERC applications.

This memorandum is not intended to replace any other Bureau guidance on the subject. Handbooks and other less formal guidance may be prepared, published, and used by Bureaus so long as they are consistent with this memorandum. OEPC will periodically review this memorandum to evaluate the effectiveness of its application on actual projects.

The Office of the Solicitor (SOL) provides legal review of hydroelectric projects throughout the licensing process and settlement negotiations. Additional discussion of the SOL role is found in section 5.G, below.

2. REISSUE

This memorandum has been revised and reissued as ERM 10-2. ERM 10-2 replaces ERM 06-2 which is no longer applicable to Interior's hydropower review activity.

3. TYPES OF APPLICATIONS

This section outlines the types of applications commonly received from FERC or an applicant while determining a permitting, licensing or re-licensing action. Bureaus should carefully track projects and comment at all appropriate times during the permitting and licensing processes. In

general, OEPC will distribute FERC notices and documents to alert Bureaus of pending FERC actions; however, Bureaus and Offices are encouraged to maintain information on development of all hydroelectric projects at their field and regional offices so that they are aware of additional requirements and responsibilities of the permitting and licensing actions in the region.

A. Preliminary Permit

(1) An application for a preliminary permit is a voluntary action and is not a prerequisite to filing a license application. The preliminary permit grants a priority over other competing interests in applying for a project license during the permit period. The preliminary permit period may be up to three years. Preliminary permits are generally sought to study new projects or proposals to add power to existing non-power projects (18 C.F.R. 4.80-4.84). (Bureaus should note the change to 18 C.F.R. 4.81(b)(5) resulting from the July 23, 2003, revised FERC rules.) Preliminary permits do not permit construction or operation of project works.

(2) Because of the voluntary nature of the permit, any comments made by Department of the Interior or its Bureaus on a preliminary permit do not automatically carry over to the licensing process.

(3) Preliminary permits carry standard consultation conditions set by FERC. FERC does not include any special conditions. Therefore, Bureaus do not need to itemize conditions for the preliminary permit but should be ready to provide consultative advice regarding their programs, facilities, and missions.

(4) A preliminary permit does not grant the permittee unrestricted access to Federal lands and facilities or occupancy rights to disturb existing landscapes and natural resources. A Bureau may independently contact a permittee to advise that permission to enter Federal lands or facilities may be prohibited or restricted and require a special use permit issued by the Bureau and subject to the requirements of the National Environmental Policy Act (NEPA).

(5) Failure by the Department or its Bureaus to participate in a preliminary permit process, or to assist a permitee to perform its feasibility analysis, does not affect the right of the Department to participate in any subsequent licensing proceeding.

B. License

(1) A license application is a request to construct, operate, and maintain a new hydroelectric project (original license), to continue to operate a previously constructed hydroelectric project (new license or relicense), or to install and operate hydroelectric power facilities at an existing Federal or non-Federal dam or canal, including any directly associated transmission facilities. The type of license application depends on the size of the power installation in that a major project license is issued to any project with an installed capacity of more than 1.5 megawatts and a minor license is issued for projects with installed capacity of 1.5 megawatts or less. FERC's licensing program also involves a number of other actions proposed by an applicant. These include: amendments to a project license, termination, surrender, transfer,

or Federal takeover of a project license and apply both to major and minor projects (18 C.F.R. 4.40-4.71, 4.200-4.202, and 16.1-16.26). (Bureaus should note the changes to 18 C.F.R. 4.40, 4.41, 4.51, 4.61, 4.70, 4.200, 16.1, 16.6, 16.7, 16.8, 16.9, 16.10, 16.11, 16.19, and 16.20 resulting from the July 23, 2003, revised FERC rules.)

(2) Close attention must be given to licensing actions to ensure that the Department seeks the inclusion of terms and conditions in the license that will protect its program areas of interest. We may oppose the issuance of a project license when the proposal would cause a serious and significant impact on our programs or projects, would conflict with an authorized project, or would conflict with a specific jurisdictional concern of the Department. If the license expires before a new license is issued and the United States does not exercise the right of take over, FERC issues annual licenses to the licensee under the terms and conditions of the existing license until the property is taken over or a new license is issued (18 C.F.R. 16.18).

(3) A license, like a preliminary permit, does not grant the licensee unrestricted access to Federal lands and facilities or occupancy rights to disturb existing landscapes and natural resources. A Bureau may independently contact a licensee for the purpose of advising that permission to enter Federal lands or facilities may be restricted or prohibited and may require a special use permit issued by the Bureau and subject to the requirements of NEPA.

(4) Please refer to section 5 below for further consultation and review procedures.

C. Exemptions from Licensing - The exemption process is still considered a form of licensing and has strict fish and wildlife protection provisions. There are two types of exemption, both of which provide the Department with an opportunity to submit comments and recommendations as well as mandatory terms and conditions to protect fish and wildlife resources. Exemptions do not have expiration dates, and Bureaus should be aware that the opportunity to revisit projects at relicensing will not occur with an exemption. The exemption process is less time consuming than the licensing process and leads to the construction and operation of the following types of projects which may be conditioned by FERC and the resource agencies.

(1) Small conduit hydroelectric facilities are projects with a total installed capacity of 15 megawatts or less on conduits located entirely on non-Federal lands (although it appears that the conduit itself may be federally owned) and not an integral part of a dam. FPA amendments raised this limit to 40 megawatts in the case of a facility constructed, operated, and maintained by an agency or instrumentality of a State or local government solely for municipal water supply. A standard article requires compliance with any terms and conditions determined appropriate to protect fish and wildlife resources by Federal or State fish and wildlife agencies identified within the comment period (18 C.F.R. 4.90-4.96). (Bureaus should note the changes to 18 C.F.R. 4.90, 4.92, and 4.96 resulting from the July 23, 2003, revised FERC rules.)

(2) Small hydroelectric projects are projects with a total installed capacity of 5 megawatts or less at existing, non-Federal dams or using a natural water feature without the need for a dam or man-made impoundment. FPA amendments allow exemptions at new dams and diversions only if they do not have substantial adverse effects on the environment, are not

located on protected river segments, and meet any mandatory terms and conditions set by Federal and State fish and wildlife agencies under the FPA. Standard articles require (a) compliance with any terms and conditions determined appropriate to protect fish and wildlife resources by Federal or State fish and wildlife agencies within the comment period, and (b) any rights to use or occupy any Federal lands be obtained from the relevant land management agencies (18 C.F.R. 4.101-4.108). (Bureaus should note the changes to 18 C.F.R. 4.101 and 4.107 resulting from the July 23, 2003, revised FERC rules.)

4. PROHIBITIONS, PRESCRIPTIONS, TERMS AND CONDITIONS, AND AGREEMENTS

The Department supports environmentally responsible hydropower generation, and recognizes its important contributions to the nation's energy supply. The Department is also responsible for ensuring the protection of key resources under its jurisdiction. The Department's responsibilities are set forth in the FPA as well as in other applicable laws, regulations, and policies.

A. Prohibitions – The FPA prohibits hydropower projects in national parks and monuments without the specific authority of Congress [16. U.S.C. 796(2), 796a]. The FPA also prohibits the Commission from issuing an original license for any new hydroelectric power project located within the boundaries of any unit within the National Park Service System that would have a direct adverse effect on Federal lands within any such unit [16 U.S.C. 797c]. The FERC is prohibited from issuing licenses for construction of hydroelectric projects, including dams, conduits, reservoirs, powerhouses, transmission lines or other project works, on or directly affecting any component of the National Wild and Scenic Rivers System, or any potential component identified for study in Section 5(a) during such periods as the Wild and Scenic River Act (WSRA) provides. FERC is also prohibited from licensing project works below or above designated WSRs if the project would invade the area or unreasonably diminish the scenic, recreational, or fish and wildlife values present on the date of designation; and for Section 5(a) study rivers, from licensing projects that would invade the area or diminish the scenic, recreational, or fish and wildlife values present on the date of study authorization. For more detailed guidance, contact the Interagency Coordinating Council on Wild and Scenic Rivers at: www.nps.gov/rivers. The FERC is also prohibited from licensing projects in wilderness areas or any area where the development is inconsistent with the purposes of the reservation or under the jurisdiction of the Department of the Interior or in Federal reservations under Interior's supervision where FERC finds that the project will interfere or be inconsistent with the purpose for which the reservation was created or acquired [16 U.S.C. 797(e)].

B. Mandatory Conditions and Prescriptions

(1) Section 4(e) of the FPA requires FERC to accept any license terms and conditions which the Secretary deems necessary for the protection and use of reservations under the Department's supervision. In order for this authority to be triggered, some part of the project or associated reservoir must occupy land within the reservation. FERC will make a determination whether the project is consistent with the purpose(s) for which the reservation was created or acquired. Departmental reservations include such lands as Indian reservations, wildlife refuges, reclamation projects, acquired lands held for public purposes, and public lands withdrawn,

reserved, or withheld from private appropriation and disposal. The Department's comments on the license application must specifically identify any Section 4(e) conditions and these conditions must be supported by substantial evidence in the record, which must be submitted along with the proposed conditions. It should be noted that Section 4(e) conditioning authority pertains to licenses, not preliminary permits. This authority has been recognized and upheld by the Federal courts, including the Supreme Court. *See Escondido Mutual Water Co. v. La Jolla Band of Mission Indians, 466 U.S. 765 (1984); American Rivers v. FERC, 201 F.3d 1186 (9th Cir. 1999); Bangor Hydro-Electric Co. v. FERC, 78 F.3d 659 (D.C. Cir. 1996).*

(2) Section 18 of the FPA requires FERC to include in any license terms and conditions for the construction, maintenance, and operation of such fishways as may be prescribed by the Secretary. Departmental comments on the license application must specifically identify any Section 18 prescriptions and these prescriptions must be supported by appropriate fisheries information and substantial evidence in the record, which must be submitted along with the proposed prescriptions. Further, when the Department cannot establish the need for fishways at the time of licensing, it may exercise its Section 18 authority by reserving the authority to prescribe fishways in the future. In post-licensing situations, either a specific reservation of authority to prescribe or a standard FERC "L-Form" article provides our access for Section 18 prescriptions and can be supplemented by any case-specific, non-standard articles we provide during our review.

(3) Section 30(c) of the FPA pertains to exemptions from licensing and requires FERC to accept such terms and conditions as the FWS determines are appropriate to prevent loss of or damage to fish and wildlife resources and to otherwise carry out the purpose of the Fish and Wildlife Coordination Act. This is interpreted by the Department to include recreational fishing access. Departmental comments will specifically identify any Section 30(c) conditions provided by the FWS and the underlying bases for making them, along with substantial evidence in the record. Terms and conditions need to be timely filed or will not be accepted under Section 30(c), just considered under Section 10(a).

C. Recommended Terms and Conditions

This Section has been expanded and includes much of the language in 4.B. above.

(1) Section 10 of FPA allows FERC to condition any permit or license for a number of reasons. The FERC has established standard articles that are included in all permits and licenses (the L-Forms). In addition, the Department has the right and responsibility under its various authorities to recommend to FERC other non-standard terms and conditions for its consideration. The Department will transmit its recommended terms and conditions to FERC, including the underlying bases for making them, along with substantial evidence in the record. Under Section 10(a), FERC is required to consider recommendations from Federal and state agencies, but may or may not accept them or will accept them with modifications. The FERC uses a number of typical articles which provides uniformity for non-standard terms and conditions recommended by Federal agencies, and the FERC order issuing a license discusses its disposition of any Departmental recommendations.

(2) Section 10 also has a provision for the protection, mitigation, and enhancement of fish and wildlife resources. Under Section 10(j), FERC is required to base such conditions on the recommendations of Federal and State fish and wildlife agencies. When disagreements arise, FERC is required to attempt to resolve the disagreements with these agencies. Section 10(j) must be timely filed and is mandatory unless the required written finding of inconsistency with law is made. FERC also has the independent requirement under Section 10(a) to consider the recommendations of fish and wildlife agencies.

(3) Exemptions from licensing are also subject to standard and discretionary terms and conditions issued by FERC. The Department may, where appropriate, recommend non-standard terms and conditions for these exemptions in areas other than fish and wildlife resources under Section 30(c). The situation is similar to Section 10 in that FERC will consider our recommendations, but may or may not accept them or will accept them with modifications.

D. Agreement About Reclamation Facilities - The Department is agreeable, under certain conditions, to the development of hydropower by non-Federal entities at Reclamation projects provided that (1) it is compatible with the authorized purposes of the Reclamation project, and (2) power generation is not an authorized purpose of the Reclamation project.

A Memorandum of Understanding (November 6, 1992) provides a process by which FERC and Reclamation resolve issues related to licensing authority at Reclamation facilities. Reclamation and FERC will attempt to resolve issues related to licensing authority in advance of the issuance of any notice by FERC. If FERC proceeds with issuance of a public notice and jurisdiction remains at issue, Reclamation may re-assert jurisdiction, with or without comments, recommendations, and Section 4(e) terms and conditions, under Departmental review procedures contained in this memorandum.

A Memorandum of Understanding (June 22, 1981) provides for the establishment of construction criteria and selected working relationships with FERC when non-Federal projects are licensed at Reclamation projects. However, it does not recognize the Secretary's authority to mandate conditions pursuant to Section 4(e) of the FPA. Departmental comments will specifically identify any such conditions provided by the Bureau of Reclamation.

5. CONSULTATION AND REVIEW PROCEDURES

A. General – This section describes the Department's roles in consulting on and reviewing FERC applications which are following the 2003 Integrated Licensing Process (ILP), the Traditional Licensing Process (TLP), or the Alternative Licensing Process (ALP). As of July 23, 2005, the ILP is the default process for all applicants. If an applicant wishes to use the TLP or ALP, it will have to request approval from FERC [18 C.F.R. 5.1(f)]. Preliminary application requirements and agency consultation requirements are contained in 18 C.F.R. §§ 5.6-5.17 for the ILP and at 18 C.F.R. §§ 4.38, 4.41, 4.51, 4.61, 4.81, 4.92 for all processes, and have been modified as required to accommodate the ILP. Bureaus should be familiar with these modifications. A table comparing the consultation activities among the ILP, TLP, and ALP is included as Attachment 1 to this memorandum. Schematic drawings showing the TLP and ILP are attached as Attachments 2 and 3, respectively.

On August 8, 2005, Congress enacted the Energy Policy Act of 2005 (EPAct), Public Law 109-58, which mandated a new process whenever the Departments of Interior, Commerce, or Agriculture submit mandatory terms and conditions pursuant to Section 4(e) or prescribes fishways pursuant to Section 18 of the FPA. This included the opportunity to submit trial-type hearing requests and alternative mandatory conditions and prescriptions, and is described in the Departmental interim final regulation implementing EPAct, 70 FR 69804, to be codified at 43 C.F.R. § 45.1. *et seq.*, which became effective upon publication in the Federal Register on the internet at: http://www.access.gpo.gov/su_docs/fedreg/frcont05.html. The new procedures mandated by EPAct effectively subsume or supercede the Mandatory Condition Review Process (MCRP), and the Department is no longer implementing MCRP, as discussed in 70 FR 69804. A separate ERM will be prepared for the Departmental procedures for implementing the 43 C.F.R. Part 45.

A Memorandum of Agreement (MOA) that provides for collaborative review of preliminary conditions and prescriptions among the Departments of the Interior, Commerce, and Agriculture, is in the development process. This MOA will also address inter-Departmental coordination on trial-type hearing requests, alternative conditions and prescriptions submitted by parties to licensing proceedings, and response to FERC's referrals to its Dispute Resolution Service.

B. Integrated Licensing Process – ILP (see Attachment 3)

(1) The ILP makes several fundamental changes from the traditional licensing process including the concurrent conduct of pre-application consultation and FERC's scoping under NEPA. In addition, public participation has been increased in pre-filing activities, and coordination between FERC's process and resource agency processes has been improved.

(2) FERC will now consider any comprehensive plans prepared by Tribes or inter-Tribal organizations for improving, developing, or conserving a waterway when processing a particular application. FERC has also added a specific requirement for a consultation meeting between tribes and FERC staff under the ILP.

(3) FERC will consider short suspensions of the procedural requirements for participants to pursue settlement negotiations. This will be determined on a case-by-case basis and when FERC determines that the suspension will not adversely affect timely action on the application.

(4) OEPC notices will identify the use of the ILP by an applicant through the Environmental Review Process. Attachment 3 also includes stages when EPAct will be implemented in the ILP. Appropriate instructions will be outlined in the distribution memoranda.

(5) Bureaus must be aware of the additional and early requirements (participation in early NEPA Scoping and Study Plan development processes, meeting comment period deadlines) of this process so that they can use their resources effectively to shape an outcome that meets their needs.

(6) Regional Environmental Officers (REOs) may facilitate Interior's multi-Bureau participation in this process if requested and if time and resources permit.

C. Traditional Licensing Process – TLP (see Attachment 2)

(1) The TLP is the original process for FERC applicants and consists of three stages of consultation prior to filing an application.

(2) Stage One - Applicant provides detailed maps, general engineering design, proposed operational mode, environmental setting and mitigation to the extent known, streamflow information, and detailed descriptions of any proposed studies. The first stage consultation ends when resource agencies and Indian Tribes have timely filed their comments and recommendations for studies. [18 C.F.R. 4.38(b)(6)].

(3) Stage Two - Applicant conducts all reasonable studies and obtains all reasonable information requested by the resource agencies and Indian Tribes. FERC regulations provide a mechanism for resolving study disputes. The Commission decides them, ultimately, so Bureaus must consider carefully the studies requested, and be prepared to defend their requests. The second stage consultation ends ninety days after the applicant supplies draft application documents to the resource agencies and Indian Tribes [18 C.F.R. 4.38(c)(10)] or at the conclusion of the last joint meeting held in cases where a resource agency or Indian Tribe has responded with substantive disagreements.

(4) Stage Three - Applicant files the application documents with FERC [18 C.F.R. 4.38(d)]. The applicant must also file copies of the application with Bureaus. This is the only mailing Bureaus will receive. Bureaus are strongly advised to save these copies because it may be some time before the application is ready for formal review and the OEPC review process begins.

(5) Similar requirements for applicants for new licenses at existing facilities (relicense applications) are found at 18 C.F.R. 16.8.

(6) In response to application filing, FERC will issue a tendering notice inviting comments on the application and the need for any further studies to be done. If a Bureau wishes to submit a study request at this time, then the Bureau must explain why this study request was not made during the pre-filing consultation process and show good cause why its study request should be considered. FERC will then issue a notice accepting the application for filing and inviting comments, protests, and motions to intervene.

(7) OEPC notices will identify the use of the TLP by an applicant through the ER system. Appropriate instructions will be outlined in the distribution memoranda.

(8) REOs may facilitate Interior's multi-Bureau participation in this process if requested and if time and resources permit.

D. Alternative Licensing Process - ALP

(1) The ALP is the third process, and its rules are found at 18 C.F.R. § 4.34. It is also known as the "collaborative process" and the "alternative administrative process."

(2) This process was devised before the creation of ILP. The ALP encourages settlement negotiations and permits a more collaborative process than the traditional process without the structure and mandatory time frames of the ILP. This process requires FERC's advance approval for use.

(3) OEPC notices will identify use of the ALP by an applicant through the ER system. Appropriate instructions will be outlined in the distribution memoranda.

(4) Bureaus must be aware of the requirements of this process so that they can use and participate in this process to its fullest extent and understand its larger demand on their field resources.

(5) REOs may facilitate Interior's multi-Bureau participation in this process if requested and if time permits.

E. Departmental Review

(1) OEPC is the focus point for Departmental receipt, review, and comment on policies, regulations, and project applications of FERC. OEPC maintains all necessary databases to assist Bureaus in tracking and reviewing critical FERC projects.

(a) All applications and other matters that may affect more than one bureau or the policy interests of the Secretary will be controlled through the OEPC process. OEPC may designate reviewing and lead Bureaus, review schedules, and the responsible office for forwarding comments to FERC. Upon request OEPC also revises these designations as necessary when brought to its attention by Bureau personnel or others.

(b) Post-review process issues of interest to a single Bureau are usually assigned to that Bureau with only a requirement to keep OEPC informed of the results. An example would be Section 10(j) fish and wildlife consultation where recommendations previously transmitted to FERC via the Departmental comment letter are later resolved by FWS and FERC at the field level. Another example would be a single Bureau's issue received after the date of the Department's comments. It is recommended that the REO be consulted if there is any doubt about a single Bureau issue. The REO can assist in coordinating a reply if other Bureaus would be involved. For legal review, Bureaus should maintain contact with and seek the advice of the Designated Attorney or the Attorney of Record.

(c) As a general rule OEPC will assign notices for projects five megawatts or less in capacity to REOs for signature and notices for projects larger than five megawatts to headquarters, with controversial issues referred as necessary to the Assistant Secretary-Policy, Management and Budget or other senior policy officials. Projects known or later found to

occupy National Park System lands are assigned to REOs or headquarters. The REOs involvement should be made if and when it may be deemed appropriate. Projects known or later found to occupy Federal reservations may be assigned to headquarters depending on the policy nature of the issue.

(d) OEPC will establish an Environmental Review (ER) controlled Departmental reviews for the following types of notices:

- Application for Preliminary Permit
- Request/Notice of Intent to Use ALP or TLP;
- Pre-Application consultation/coordination (including tendering and NEPA scoping notices), usually direct Bureau response; ER-controlled Departmental review on a case-by-case- basis.
- Applications Tendered and Requesting Additional Studies
- Notice of Filing Accepted
- Notice of Scoping, Scoping Meetings, Scoping Documents, etc.
- Notice of Request to Intervene
- Notice of Ready for Environmental Analysis (ILP, TLP) or Draft License Application (ALP)
- Notices of Draft or Final Environmental Assessments or Statements or capacity-related amendments, that may involve changes in water levels on Federal lands, changes in flows, and other matters of concern to the Bureaus, and in which the Department may have mandatory authority.

(2) In the ILP the pre-application activity will occur at regional and field offices of the Department's Bureaus with assistance provided by the REO and SOL upon request (REO assistance depends on available resources). FERC notices issued through the ER system during this period will generally be assigned to Bureaus for direct reply or occasional coordinated replies signed by the REOs or OEPC headquarters depending upon the generating capacity of the project. Coordinated replies would be appropriate whenever multiple-Bureaus have a strong interest in the project. FERC notices issued during post-filing activities will be reviewed for a coordinated response by either the REOs or OEPC headquarters.

(3) In the TLP the first and second stages of consultation will occur at regional and field offices of the Department's Bureaus with assistance provided by the REOs and SOLs upon request (REO assistance depends on available resources). The third stage filing is the point where OEPC headquarters assumes process management of the Department's review. The OEPC will initiate third stage review activities whenever it has an official notice from FERC announcing that:

- Tendering notice;
- the application is accepted for filing (not ready for environmental analysis), and invites comments, protests, and interventions;
- and/or the application is "ready for environmental analysis."

(4) In the ALP early coordination and consultation will occur at the regional and field offices of the Department's Bureaus with assistance provided by the REOs upon request (REO assistance depends on available resources). Document review will generally lead to direct replies and some coordinated replies depending upon the project's capacity and the status of any settlement negotiations. If settlement negotiations are successful, OEPC will coordinate any replies on notices as listed above under item (2) as well as any environmental documents.

(5) All Bureaus receive FERC's notices of intent to file for a new license, which is required five years before license expiration (regardless of the process used), via the ER process. This action gives Bureaus notice that they may need to determine the importance of a project, develop a Bureau position, and track its progress through the FERC process. It is recommended that Bureaus begin working with applicants as early as possible after this notice of intent to ensure full consideration of their resource concerns. Any Bureau on the OEPC review request which did not receive copies of review documents should call the applicant's contact noted in the FERC notice and request those copies. Copies are often available electronically on CD-ROM and over the Internet at FERC's web site. The notices generally give an Internet address.

(6) Bureaus should recommend that any studies needed to define and mitigate impacts to our properties and resources be completed prior to filing the license application unless such studies are dependent on post construction operations. Bureaus are also encouraged to make study requests when commenting on an Application for Preliminary Permit, during pre-application activity (ILP/ALP) and pre-filing consultation (TLP) and whenever a tendering notice is issued so studies are completed and available for use in developing terms and conditions and recommendations. Studies can provide the substantial evidence to support the Department's mandatory conditions and prescriptions as well as provide data to inform FERC's decision-making.

(7) OEPC makes available to the Bureaus, through the ER system, certain FERC notices it retrieves from the Internet. This is done electronically on OEPC's web site. Please refer to ERM 04-2 for information on this process. If a Bureau receives a notice or document directly or retrieves it independently via the Internet and is unsure regarding the review instructions, then it is appropriate to check with their ER staff and/or OEPC to determine if a control number has been assigned and to receive the review instructions. Bureaus can expedite this activity by checking OEPC's web site for a daily posting of new ER requests.

(8) As soon as memoranda regarding FERC notices are ready for electronic distribution, OEPC will forward, via fax, certain time-sensitive (a 30-day or less review period) project notices directly to the appropriate Bureau and SOL reviewers in the field.

OEPC will maintain a current list of field office fax numbers for this purpose. Bureaus should notify OEPC when contact information changes.

(9) In its licensing process FERC (rather than the applicant) must consult with the Department pursuant, but not limited to, the following statutes and associated regulations, directives, or procedures:

- Federal Power Act
- Water Resources Planning Act
- Wild and Scenic Rivers Act
- Fish and Wildlife Coordination Act
- Endangered Species Act
- National Historic Preservation Act
- National Environmental Policy Act

(10) In addition, the Department may have additional jurisdiction over all or portions of a FERC hydroelectric project pursuant, but not limited, to the following statutes:

- Reclamation Law
- Federal Land Policy and Management Act
- Alaska Native Claims Settlement Act
- Alaska National Interest Lands and Conservation Act
- National Park Service Organic Act
- National Wildlife Refuge System Administration Act
- Land and Water Conservation Fund Act
- Urban Park and Recreation Recovery Act
- Federal Property and Administrative Services Act
- Recreation Demonstration Project Act
- National Trails System Act
- Mining Law of 1872

(11) Other Documents:

(a) When FERC issues a notice of application acceptance and ready for environmental analysis (REA) [18 C.F.R. §5.22], the notice must include a request for preliminary conditions and prescriptions from the Department [18 C.F.R. §5.22]. The Department must file comments, protests, recommendations, and preliminary conditions and prescriptions with FERC within 60 days after the REA [18 C.F.R. §5.23(a)].

(b) All comments must be filed within 105 days of the REA (60 days for comments, terms and conditions, prescriptions; 45 day reply comment period) [18 C.F.R. §5.23(a)]. When FERC determines that a NEPA document will be prepared, FERC will issue a draft EIS or EA no later than 180 days from the deadline for responses to the REA [18 C.F.R. §5.25(a)]. The draft EIS or EA must include, for comment, any preliminary conditions or prescriptions [18 C.F.R. §5.25(b)].

(c) Comments to the draft EIS or EA must be filed within 30, 45, or 60 days after issuance of the draft NEPA document, as specified by FERC [18 C.F.R. §5.25(c)].

(d) The Department's modified conditions and prescriptions are due 60 days after the deadline for comments on the NEPA document (EIS or EA). FERC will issue a final EIS or EA within 90 days after deadline for filing the modified conditions and prescriptions [18 C.F.R.

§5.25(d)-(e)]. FERC will then issue the license order including any mandatory conditions and prescriptions [18 C.F.R. §5.29(h)].

F. Bureau Review - Bureaus should be involved in all of the ILP, TLP, and ALP, as necessary, to protect their program interests and to develop the Department's complete position on a particular project. Bureaus may establish their own internal review processes for carrying out FERC project review in accordance with this memorandum and 516 DM 4.

G. Legal Review - In order to ensure the development of a strong, defensible administrative record for all FERC proceedings, Bureau responses to FERC requests need to be consistent with one another, and with Departmental policy.

(1) For every licensing project, the Solicitor's Office will designate an Attorney Point of Contact (also, Designated Attorney) at the beginning of the licensing process with the notice of intent (NOI) [i.e., for ILP with the pre-application document (PAD), for TLP with the first stage of consultation, and for ALP with the notice of intent to use the ALP] for the provision of general legal advice throughout that process. The Attorney Point of Contact is likely to become the "Attorney of Record" for the project if the Department intervenes in FERC's process. At the Bureau's request and within resource constraints, the Designated Attorney will provide legal representation and legal review of draft comments submitted to FERC or the applicant through the Departmental review process. SOL will keep OEPC informed of these Attorney Points of Contact and Attorneys of Record so that the attorney can be identified on all OEPC distribution memoranda.

(2) Bureaus will provide the Office of the Solicitor three business days for informal legal review of all Bureau tendering, scoping, ILP-study requests, comments on draft and final Study Plans, All Processes- REA responses, comments on draft NEPA documents, and/or other review comments before Bureaus, REOs, and/or HQ submit those comments to FERC. Bureaus will fax those draft comments to the appropriate Solicitor's Office at least two weeks before the FERC deadline in order to allow sufficient time for possible revisions.

6. TIME PERIODS FOR DEPARTMENTAL REVIEW

A. Permits - The FERC rules do not specify a review period. The notice from FERC announcing the permit will indicate a review period, and it is usually 60 days. Time extensions are not routinely sought on permit applications because FERC issues all permits with a set of standard conditions requiring the permittee to consult with all agencies concerned with natural resources and environmental matters.

B. Licenses and Exemptions - FERC regulations state that all review comments and recommendations and mandatory terms and conditions and prescriptions are due to FERC no later than 60 days after FERC announces the application as being "ready for environmental analysis". Extensions may be granted by FERC for good cause or extraordinary circumstances. Therefore, the OEPC review request will specify a firm date for response by Bureaus to the lead Bureau and to OEPC. All comments and recommendations received by that date will be

considered for the Departmental letter. Any comments and recommendations received after that date may be considered for a supplemental letter to FERC.

C. Other Review Documents – FERC issues many other actions which the Department reviews. OEPC will assign review schedules to fit the FERC due date in the notice or seek an extension of time.

D. Time Extensions - OEPC or the SOL will seek time extensions based upon a written request from an REO, any reviewing Bureau or SOL. All such requests must provide the reason(s) for the extension. These requests may be electronically transmitted to OEPC.

7. INTERVENTION

A. Intervention is the legal process by which the Department becomes a formal party to FERC's quasi-judicial process and establishes its right to appeal permits, licenses, and exemptions and associated terms and conditions once they are issued. Petitions to intervene and subsequent proceedings are processed by the Solicitor's Office.

B. Procedures for requesting intervention in FERC's proceedings are found in 452 DM 2. Reviewers should follow the additional guidance found in ERM 10-3.

This memorandum replaces ERM 06-2.

Attachments

ATTACHMENT 1 TO ERM 10-2

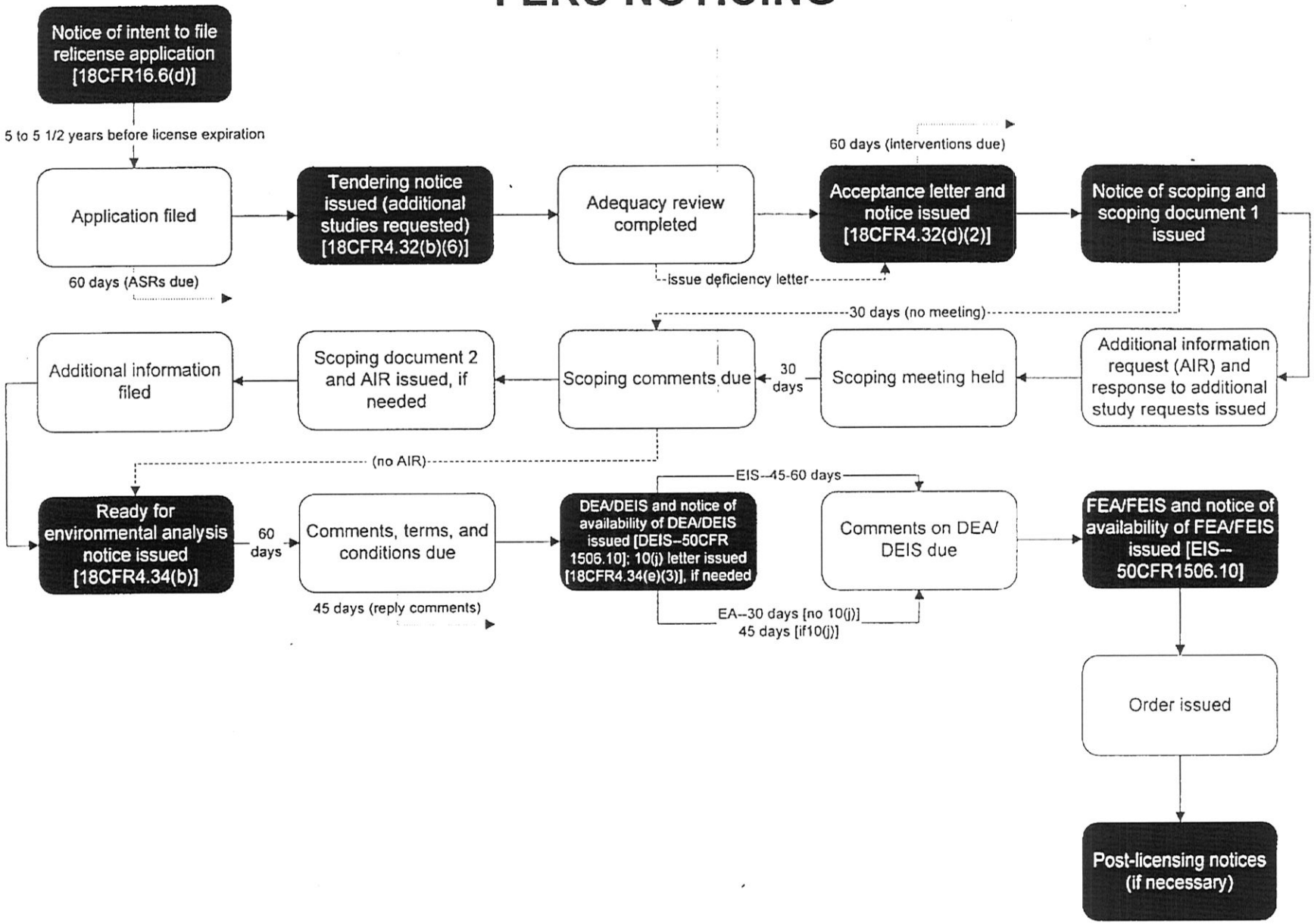
Table showing a comparison of activities among the ILP, TLP and ALP.

	Traditional Licensing Process (TLP)	Alternative Licensing Process (ALP)	Integrated Licensing Process (ILP)
Consultation w/ Resource Agencies and Indian Tribes	Paper driven	Collaborative	Integrated
FERC Staff Involvement	- Post Application filing	- Pre-filing - Early involvement on requested basis	- Pre-filing; beginning at filing of NOI - Early and sustained throughout process
Deadlines	- Pre-filing - some deadlines for participants - Post-filing - defined deadlines for participants	- Pre-filing - deadlines defined by collaborative group - Post-filing - defined deadlines for participants	- Defined deadlines for all participants throughout the process, including FERC
Study Plan Development	- Developed by applicant based on early agency and tribal recommendations - No FERC involvement	- Developed by collaborative group - FERC staff assist as resources allow	- Developed through study plan meetings - Plan approved by FERC
Study Dispute Resolution	- FERC study dispute resolution available upon request - OEP Director issues advisory opinion	- FERC study dispute resolution available upon request - OEP Director issues advisory opinion	- Informal dispute resolution available to all participants - Formal dispute resolution available to agencies w/ mandatory conditioning authority. 3-member panel technical recommendation on study dispute - OEP Director opinion binding on applicant
Application	- Draft and final application include Exhibit E	- Draft and final application with applicant prepared EA or 3rd party EIS	- Preliminary licensing proposal or draft application and final application include Exhibit E that has form and contents of an EA
Additional Information Requests	- Available to participants after filing of Application	- Available to participants primarily before filing of application - Post-filing requests available but should be limited due to collaborative approach	- Available to participants before filing of application - No additional info requests after application filed
Timing of Resource Agency Terms and Conditions	- Preliminary terms and conditions filed 60 days after REA notice - Schedule for final terms and conditions	- Preliminary terms and conditions filed 60 days after REA notice - Schedule for final terms and conditions	- Preliminary terms and conditions filed 60 days after REA notice - Modified terms and conditions 30 or 60 days after comments on draft NEPA document

ATTACHMENT 2 TO ERM 10-2

A schematic drawing showing the TLP.

FERC NOTICING

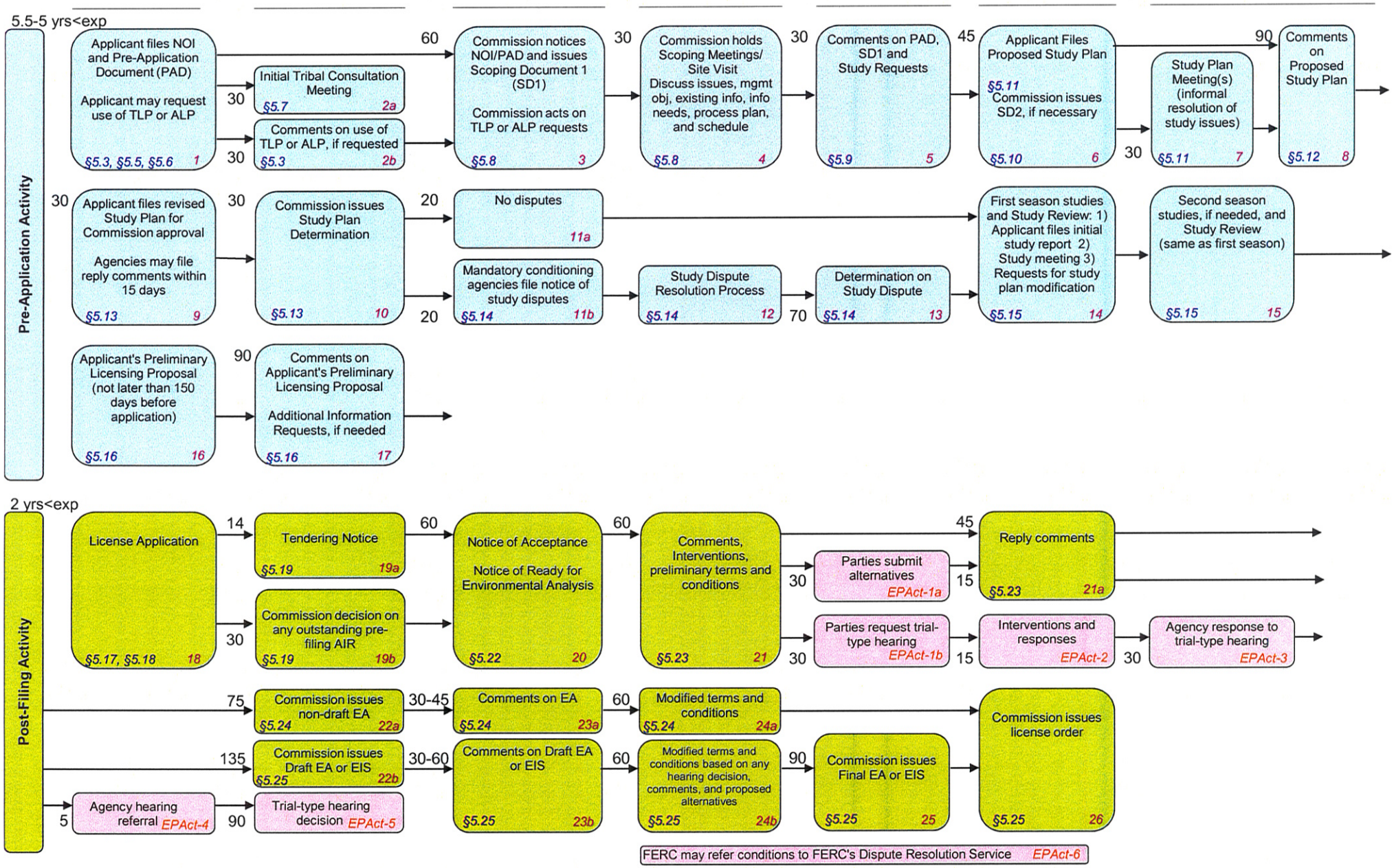


October 14, 1998

ATTACHMENT 3 TO ERM 10-2

A schematic drawing showing the ILP and stages to implement Section 241 of the Energy Policy Act of 2005.

Integrated Licensing Process and Section 241 of the Energy Policy Act of 2005



*Section 241 of the Energy Policy Act of 2005 in pink.