

142. The Commission has previously issued draft license articles only in the extraordinary circumstance of a lengthy proceeding in which the Commission's jurisdiction was at issue and where it was concluded that issuance of draft license articles might provide assurance to the operator of existing, previously unlicensed facilities that a Commission license would not undermine its ability to operate the project in a manner consistent with certain state laws affecting project operations.¹⁷⁹

143. We propose to attach to the draft NEPA document for comment the preliminary terms and conditions of any Federal or state agency with mandatory conditioning authority, plus additional draft articles proposed by the Commission to be required pursuant to FPA section 10(a)(1).¹⁸⁰ This will provide the parties with more specific information concerning the staff's licensing recommendations. Where no draft NEPA document is issued, we would include draft license articles and preliminary terms and conditions with the environmental assessment. Parties would have an opportunity to file comments before the Commission issued an order acting on the license application. We also propose to begin this practice for applications developed under the traditional process and ALP.¹⁸¹

e. Endangered Species Act Consultation

144. Currently, neither Interior and Commerce rules nor Commission rules specifically address how the ESA section 7 consultation process is to be integrated into the Commission's licensing process.¹⁸² NHA and others state that ESA consultation is often deferred until the end of the licensing process, causing delay and disruption. The ITF prepared a report on this

subject¹⁸³ containing recommendations for integrating consultation in the context of the traditional process, but which also includes an outline of a process beginning at the time the NOI is filed.¹⁸⁴ These commenters state that the ITF recommendations have met with little success, and suggest that it is because the ITF recommendations are unenforceable. WPPD recommends that the Commission, Interior, and Commerce cooperate in developing joint rules to integrate ESA Section 7 consultation with the licensing process. Interior and NMFS recommend that the integrated process regulations identify the key steps and requirements for completing ESA consultation.

145. The proposed integrated licensing process encourages early ESA consultation, and is consistent with the ITF Report on section 7 consultation. First, it encourages an applicant to request designation as the Commission's non-Federal representative at the time it files its NOI and distributes its Pre-Application Document.¹⁸⁵ The proposed process also provides a vehicle for all parties to make their issues and information needs known from the beginning. This, in conjunction early development of a process plan for coordinating regulatory processes, a Commission-approved study plan, binding dispute resolution process, periodic status reports, a high standard for requesting additional data and studies following an initial status report on studies and information gathering, a recommendation to include a draft Biological Assessment (BA) in the draft license application, and requirement for applicants that are designated non-Federal representatives to include a draft BA in their license application, should help to ensure that ESA consultation proceeds on the same track as the rest of the process. We acknowledge however that timely completion of ESA consultation has been an ongoing issue, particularly concerning projects in the Pacific Northwest, and we are open to working with the Departments of Interior and Commerce to develop additional means of effecting improvements in this area.

f. Fish and Wildlife Agency Recommendations

146. The proposed integrated process rules incorporate the Commission's existing practices with respect to consideration of fish and wildlife

agency recommendations made pursuant to the Fish and Wildlife Coordination Act and FPA section 10(j), with minor modifications to the timing of any meetings that may occur in order to ensure that the 10(j) process is fully compatible with the proposed application processing milestones.¹⁸⁶

g. National Historic Preservation Act Consultation

147. Consultation pursuant to section 106 of the National Historic Preservation Act has not been a significant source of delay in licensing. The few parties who addressed section 106 recommend that such consultation begin early.¹⁸⁷ We agree. The proposed integrated process includes SHPOs among the entities to be consulted and encourages applicants to request to initiate section 106 consultation when the NOI is filed.¹⁸⁸

5. Public Participation

148. The traditional process regulations concerning pre-filing consultation focus on the applicant's interactions with agencies and Indian tribes. Potential license applicants are required to conduct only one public meeting prior to filing the license application,¹⁸⁹ and the draft license application is required to be served only on agencies and tribes.¹⁹⁰ Thus, unless an applicant voluntarily consults with the public, the traditional process often causes identification of issues and study requests from the public to be delayed until after the license application is filed. Commenters from across the spectrum of interests agree that identifying NGO issues and study requests as early as possible is important to alleviating this source of delay.¹⁹¹

149. We agree that improving public participation in pre-filing consultation is essential to the success of an integrated licensing process, and believe that the traditional process regulations should also be revised in this regard. The specific provisions for enhancing

¹⁷⁹ See Hudson River-Black River Regulating District, Project No. 2318, letter dated February 8, 2002.

¹⁸⁰ This would encompass conditions based on 10(j) recommendations. We do not propose to attach the standard L-Form license articles (See 54 FPC 1799–1928 (1975)) to draft or final NEPA documents, as we have consistently rejected requests to modify these articles, which are intentionally broad, in the context of specific license proceedings.

¹⁸¹ NYSDEC states that project operational effects cannot be fully understood before a new project is built, so license articles should be included to determine what a new project's actual impacts are, and to reserve authority to modify the project as needed to meet resource goals. Licenses very often include monitoring requirements and every license includes a standard form article reserving our authority to modify the license to respond to fish and wildlife concerns. Specific post-licensing articles are, of course, a matter best determined in the context of project-specific proceedings.

¹⁸² The joint Interior and Commerce regulations implementing the ESA are found at 50 CFR part 402.

¹⁸³ *Interagency Task Force Report on Improving Coordination of ESA Section 7 with the FERC Licensing Process*. <http://www.ferc.gov/hydro/docs/interagency.htm>.

¹⁸⁴ ITF ESA Report, Figure 1.

¹⁸⁵ Proposed 18 CFR 5.1.

¹⁸⁶ The Commission also proposes to make non-substantive modifications to the existing 10(j) process rule at 18 CFR 4.34(e), so that the language of that section will better track the statutory provisions.

¹⁸⁷ ACHP, Menominee.

¹⁸⁸ Proposed 18 CFR 5.1.

¹⁸⁹ 18 CFR 4.38(b)(3); 16.8(b)(3).

¹⁹⁰ 18 CFR 4.38(c)(4); 16.8(c)(4).

¹⁹¹ EEI, PG&E, NRG, SCE, NHA, Michigan DNR, HRC, NYSDEC, Idaho Power, NF Rancheria, Caddo, ADK, AmRivers, AMC, SCL, C–WRC, CDWR, Interior, PG&E, HETF, PCWA, APT, DM&GLH, Skancke, NYRU, Oregon, Wausau, Salish-Kootenai, HLRTC, PREPA, Kleinschmidt, Xcel, California, Michigan DNR, WPPD, RAW, GLIFWC, Virginia, NE FLOW, Wehnes, RAW, AmRivers, CRWC, WDOE.