



Hydroelectric Regulation in Alaska: An Overview

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Projects Subject to Federal Jurisdiction – Mandatory Jurisdiction

- Pursuant to Section 23(b)(1) of the Federal Power Act (FPA), 16 U.S.C. §817(1), a non-federal hydroelectric project must (unless it has a still-valid pre-1920 federal permit) be licensed by the Federal Energy Regulatory Commission (FERC) if it:
 - (1) is located on a navigable water of the United States;
 - (2) occupies “public lands” or “reservations” of the United States;
 - (3) utilizes surplus water or water power from a government dam; or
 - (4) is located on a body of water over which Congress has Commerce Clause jurisdiction, project construction has occurred on or after August 26, 1935, and affects the interests of interstate or foreign commerce.

Jurisdiction Based on Navigability

- The definition of “navigability” is very broad.
 - *See, e.g., PacifiCorp*, 76 FERC ¶ 62,267 (1996) (finding prior use for log drives and present use for recreational canoeing, as well as confirmation of suitability for use for transportation purposes in published canoeing guides, sufficient to support navigability).

- A hydroelectric project is subject to federal licensing jurisdiction if the reach of the waterway in which the entire project—or any individual project work—is navigable.
 - *See* 16 U.S.C. §§ 796(11), 796(12) (defining “project” and “project works”).
 - *See also Sheldon Jackson Coll.*, 101 FERC ¶ 61,334 (2003) (finding jurisdictional a 100-kilowatt hydroelectric project located on the Indian River at Sitka, because the project’s tailrace was located on Crescent Bay, a navigable waterway).

Jurisdiction over Commerce Clause Waterways

- The 1935 amendments to the FPA broadened prospectively FERC's jurisdiction beyond navigable waters, to include hydroelectric projects located on non-navigable waters that:
 - (1) Are located on Commerce Clause streams;
 - Non-navigable tributaries to navigable waterways are deemed Commerce Clause streams. *FPC v. Union Elec. Co.*, 381 U.S. 90 (1965).
 - (2) Affect interstate or foreign commerce; and
 - In most states, an effect on interstate commerce is established if the project is interconnected to the interstate grid. *Fairfax County Water Authority*, 43 FERC ¶ 61,062 (1988).
 - In Alaska, however, FERC may find that a project has an effect on interstate or foreign commerce if it is shown that the project would impact anadromous fish. *See U.S. Dep't of Commerce v. FERC*, 36 F.3d 893 (9th Cir. 1994); *see, e.g., Alaska Power & Tel. Co.*, 101 FERC ¶ 61,191 (2002) (finding a proposed project in Alaska jurisdictional, because the project would reduce pink salmon by 600,000, an 8-percent reduction of the commercial harvest of pink salmon in the distinct fishery district in which the project would be located).

Jurisdiction over Commerce Clause Waterways (con't.)

(3) Have undergone construction or major modification after 1935.

- Repairs, even substantial repairs, or work that merely restores a damaged project to its former specifications is not post-1935 construction. *Puget Sound Power & Light v. FPC*, 557 F.2d 1311, 1315–16 (9th Cir. 1977). Generally, to qualify as post-1935 construction, the activity must enlarge the project's generating capacity, diversion, or physical plant.
- Almost any repairs or rehabilitation after a period of abandonment constitutes post-1935 construction. *Aquaenergy Sys. Inc. v. FERC*, 857 F.2d (4th Cir. 1988).

Projects Subject to Federal Jurisdiction – Permissive Jurisdiction

- In addition to FERC's "mandatory" jurisdiction under Section 23(b)(1), Section 4(e) of the FPA gives FERC "permissive" jurisdiction to license hydroelectric projects not subject to mandatory jurisdiction, upon request of an applicant.
- FERC may only issue a voluntary license if not prohibited by another federal law, e.g., the Wild and Scenic Rivers Act.

Prohibition on Licensing in National Parks or the Wild and Scenic Rivers System

■ National Wild and Scenic Rivers:

- The Wild and Scenic Rivers Act prohibits FERC from licensing the construction of any dam or other project works:

(1) on or directly affecting any river that has been designated for inclusion in the National Wild and Scenic Rivers System; or

(2) that would have a “direct and adverse effect” on the values for which a river was designated, as determined by the land management agency charged with its administration.

■ National Parks:

- Prior to the Energy Policy Act of 1992 (EPAct 1992), FERC was without authority to grant licenses on National Park lands; EPAct 1992 broadened this prohibition by including all lands within a unit of the National Park System, such as private inholdings.

State of Alaska Hydro Jurisdiction

- Federal law preempts state regulation of most aspects of hydroelectric projects on waters over which the federal government has jurisdiction.
- Even where FERC has jurisdiction, under FPA Section 27 states retain authority to regulate matters “relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein.” 16 U.S.C. § 821.

The State of Alaska Has a Unique Option to Regulate Small Hydro

- In 2000, Congress added Section 32 to the FPA to allow Alaska to assume jurisdiction over hydroelectric projects under 5 MW, if, after review, FERC certifies that Alaska's program for licensing and regulating hydroelectric projects protects the public interest and the environment to the same extent as licensing and regulation by FERC. 16 U.S.C. § 823c.
- Although the Alaska Legislature adopted legislation to establish a regulatory program for small hydro projects, no regulatory program has been submitted to FERC.
- If the State legislation were to be submitted to FERC and approved, the Regulatory Commission of Alaska would be the regulatory agency responsible. All current environmental protections under federal law would still apply and could not be preempted by the State program.

Compliance with Federal Programs

- The FERC licensing process is a lengthy, detailed, and complex procedure. In addition to obtaining a FERC license or exemption under the FPA, hydropower developers are required to consult and obtain permits, certifications, and other approvals under other federal statutory programs, including:
 - National Environmental Policy Act
 - Clean Water Act
 - Endangered Species Act
 - Magnuson-Stevens Fishery Conservation and Management Act
 - Coastal Zone Management Act
 - National Historic Preservation Act
 - Wild and Scenic Rivers Act
 - Federal Land Management Policy Act

The National Environmental Policy Act

- Other than the FPA, the National Environmental Policy Act (NEPA) is the most important statute affecting the FERC licensing process.
- NEPA requires federal agencies to take a “hard look” at the environmental impact of their actions.
- NEPA is a procedural statute; it does not require or authorize any protection, mitigation or enhancement measures based on the requisite “hard look.”

NEPA – Categorical Exclusions

- Certain actions by FERC are categorically excluded from the requirement to produce either an Environmental Assessment (EA) or Environmental Impact Statement (EIS), including:
 - Issuance of preliminary permits
 - License transfers
 - Approvals of post-license plans and exhibits
 - Exemptions for small conduit projects

NEPA – Environmental Assessments

- If FERC believes that the proposed facility will not significantly affect the quality of the human environment, it may initially prepare an EA to determine if an EIS is necessary.
- If the EA indicates a significant impact on the environment, then an EIS is also required. If the agency determines that an EIS is not required, it must prepare a finding of no significant impact (FONSI).
- FERC regulations state that certain projects may require only an EA, including:
 - Licenses for projects at existing dams
 - Exemptions under the Public Utility Regulatory Policies Act and the FPA for small hydropower projects of 5 MW or less
 - Licenses for additional project works at licensed projects
 - Applications for relicensing under Section 15 of the FPA
- The EPAct of 1992 authorizes FERC to allow applicants as well as contractors to prepare EAs, including EAs filed as part of the FERC application.

NEPA – Environmental Impact Statements

- FERC's regulations provide that the issuance of licenses for unconstructed water power projects will normally require an EIS.
- Even if an EA "will normally be prepared first" under FERC regulations, FERC may elect to proceed directly to an EIS.
 - Over the last ten years, FERC increasingly has used EISs for the relicensing of projects, and even for certain license amendments.
- A third-party contractor may prepare an EIS, but the contractor must be approved by FERC.

State of Alaska – Clean Water Act Section 401 Water Quality Certification

- State water quality certification under Section 401 of the federal Clean Water Act (CWA) is required for any permit that may result in any discharge into navigable waters, to ensure that the proposed project complies with state water quality standards and other requirements under the CWA.

- Under CWA Section 4d:
 - Any conditions in the State certification become terms of the FERC license
 - FERC cannot deny or modify any conditions in a state Section 401 certification
 - A state may waive certification either affirmatively or by not acting on the request within one year

State of Alaska – Coastal Zone Management Act Consistency Determination

- Section 307 of the Coastal Zone Management Act (CZMA) requires that federally licensed or permitted activities that affect a State's coastal zone, be consistent with the State's approved coastal management policies.
- The Alaska Coastal Management Program (ACMP) implements requirements of the CZMA to promote the orderly development and protection of the country's coastal resources.
- The State of Alaska coordinates agencies' authorization and permitting authorities and processes to determine whether a given activity is consistent with the standards and objectives of the ACMP.

CZMA – Consistency Review Process

- Significant components of the ACMP consistency process include:

- (1) Application –

- The Coastal Project Questionnaire (CPQ) serves as the application for starting the consistency review process.
 - The CPQ helps identify which state and federal permits will be required for a project; a completed CPQ provides reviewers with a description of the project and certifies that the project will be conducted in a manner consistent with the ACMP.
 - Before an applicant finalizes project plans or submits the CPQ and other information for a complete application packet, the state can arrange a pre-application meeting with the applicant and other review participants to discuss the draft plans.

- (2) Consistency Determination –

- A Final Consistency Determination is issued when the applicant and the project reviewers concur with the proposed determination, including any alternative measures (i.e. project modifications). Once the final consistency determination is completed, some state agencies issue permits covered by the determination within five days. Generally, additional time is necessary.

State of Alaska – Best Interest Finding(s)

- In order to approve a contract for the sale, lease, or other disposal of state land, resources, property, or interests therein under the Alaska Land Act, the Alaska Department of Natural Resources (ADNR) must issue a written finding that issuance of the lease will serve the best interests of the state.
 - A best interest finding is a written analysis that describes the facts and applicable law relevant to the proposed disposal and renders a decision based on these factors. The finding also must discuss material issues that are raised during a public comment period.

State of Alaska – Other Permits and Findings Required

- Other approvals required may include:
 - Water appropriation permits
 - Required before using a specific amount of water from a specific water source which is diverted, impounded, or withdrawn for a specific use (DNR, Division of Mining, Land & Water, Water Resources Section).
 - Mineral closure orders (for closure of state land to entry under the mineral location and mining laws of Alaska, under AS 38.05.185(a) and AS 38.05.300)
 - Amendments as necessary to State land classification and management plans
 - Approval as necessary for land exchanges

Federal Power Act – Preliminary Permits

- Section 5 of the FPA states that “the sole purpose” of issuing a preliminary permit is for “maintaining priority of application for a license ... , not exceeding a total of three years, ... for making examinations and surveys, for preparing maps, plans, specifications, and estimates, and for making financial arrangements.”

Federal Power Act – Preliminary Permits

- A preliminary permit:
 - Does authorize the permit holder, or permittee, to study the technical and economic feasibility of pursuing a license for a hydro project.
 - Does not grant the permittee authority to access lands subject to the preliminary permit.
 - Does grant priority status to the permittee in any subsequent license proceeding, provided that the permittee's license application is at least as well adapted as other competing applications.

- The preliminary permit allows an individual who is interested in developing the project the right to investigate the feasibility of the project without incurring substantial financial risk.

- The right is exclusive – only one permit may be issued at a time.

- Permits are not transferable and changing applicants at the license stage results in losing the permit priority.

Competition for Preliminary Permits

- The FPA requires FERC to award a permit to a municipality if the municipality's application is or can be made to be at least as well adapted as competing applications filed by non-municipalities.
- Where more than one applicant is a municipality (or all are non-municipalities), FERC must grant the license to the applicant whose plans are better adapted.
- If two or more competing municipal applications are equally well adapted, FERC will award the license to the municipality that was first to file an accepted application (same rule if there are no municipal competitors).
- Because applicants are now authorized to file their applications electronically, if more than one applicant submits applications after the close of business, and before 8:30 a.m. the following morning, the Commission deems all applications filed at exactly 8:30 a.m.
- If more than one municipal applicant files at the same time, the Commission's new policy is to determine priority among the municipal applicants by conducting a random drawing (presumably the same rule would apply if all competitors were non-municipalities who filed at the same time).
 - *See City of Angoon, City of Petersburg, City of Wrangell and Cascade Creek, LLC*, 129 FERC ¶ 62,101 (2009).

Federal Power Act – Licenses

- A license confers the basic authority to construct and operate a hydroelectric project.
- The FPA governs many conditions of the license, including surrender, competitive preferences, transfer, and general license conditions.
- The purpose of the FPA is to encourage nonfederal hydropower development and to establish a centralized regulatory authority and one federal licensing process.
- FERC must balance power needs and other, competing interests in a “comprehensive plan” for the basin.
- Original licenses are issued for up to 50 years.

Original Licenses – “Municipal Preference”

- The same preferences apply to competing original license applications as to competing permit applications, including municipal preference.
- FERC rarely encounters competing original license applications.

Licenses – Eminent Domain

- Section 21 of the FPA confers the federal power of eminent domain on any licensee unable to acquire an unimproved dam site by contract or pledges.
- The owner of lands condemned is entitled to “just compensation,” and state rather than federal law is applied to determine just compensation.
- Licensees may exercise eminent domain authority to condemn state lands.
 - *See City of Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320, (1958)
- Under EPAct 1992, licensees may not exercise eminent domain authority over parks, recreational areas, or wildlife areas owned by a state or political subdivision, except in circumstances spelled out under that Act.

Licenses – Focus on Environmental Standards

- A license includes the terms and conditions under which a project must operate.
- FERC must give “equal consideration” to the purposes of “energy conservation, the protection, mitigation of damage to, and enhancement of, fish and wildlife (including related spawning grounds and habitat), the protection of recreational opportunities, and the preservation of other aspects of environmental quality.” 16 U.S.C. § 797(e).
- For projects occupying a federal reservation, FPA Section 4(e) empowers federal land management agencies to submit “mandatory” license conditions for the adequate protection and utilization of the reservation. 16 U.S.C. § 797(e).
 - FERC cannot modify or reject FPA Section 4(e) “mandatory conditions” submitted by federal resource agencies.

Licenses – Focus on Environmental Standards

- Federal fishery agencies have mandatory conditioning authority to prescribe fish passageways. FPA Section 18 requires FERC to order the construction, operation and maintenance of “fishways” prescribed by the Secretary of the Interior, through the U.S. Fish and Wildlife Service, or the Secretary of Commerce through the National Marine Fisheries Service. 16 U.S.C. § 811.
- FERC must consider fish and wildlife recommendations from Federal or State agencies and adopt unless inconsistent with the purposes of the FPA. 16 U.S.C. § 803 (j).
 - FPA Section 10(j) establishes a process for attempting to resolve disagreements.

Licenses – Comprehensive Waterways Planning under FPA § 10(a)

- FERC is required to ensure that the project to be licensed is “best adapted” to a comprehensive plan for improving or developing a waterway or waterways for beneficial public purposes, in accordance with Section 10(a) of the FPA.
 - FERC considers comprehensive plans prepared by federal and state entities, under Section 10(a)(2)(A), as well as the recommendations of federal and state resource agencies and Indian tribes, under Section 10(a)(2)(B).
- License applicants are directed to identify relevant comprehensive plans and to explain how and why the proposed project would comply with those plans.

Licenses – Size Matters

- Minor projects, with a total installed generation capacity of 2,000 horsepower (1.5 MW) or less, are exempted from many of the FPA's licensing conditions.
- FERC has established regulations for different types of major projects depending upon the size of the project (more or less than 5 MW) and whether it involves an unconstructed or existing dam.

New Licenses

- When issuing a license for a proposed or existing hydroelectric facility, FERC first grants an “original license” for a term of up to fifty years.
- A “new license” is granted by the FERC after the expiration of the original license, and can be for a term of 30-50 years.

New Licenses – Incumbent Preference

- Amendments to the FPA under the Electric Consumer Protection Act of 1986 (ECPA) clarified that the municipal preference does not apply to relicensing where an existing licensee seeks a new license.
- While the ECPA amendments removed the municipal preference at relicensing, they also created an “incumbent preference” among competing applicants for the new license by requiring FERC to “ensure that insignificant differences ... between the competing applications are not determinative and shall not result in the transfer of a project.”
- The competitive relicensing process envisioned by the FPA never has resulted in an involuntary transfer of the project from the incumbent licensee to a competitor.

Exemptions

- Certain projects may be exempted from statutory licensing requirements.
 - Small hydro projects of less than 15 MW (or 40 MW in the case of facilities constructed and operated by a municipality) that are located on nonfederal lands and utilize manmade conduits may be exempted.
 - Some small hydro projects with proposed installed capacity of 5 MW or less may also be exempted on a case-by-case basis from the licensing requirements.

Exemptions

- An exemption by no means implies that the project is free from FERC regulation.
 - Exemption proceedings consist of an evaluation of mandatory environmental conditions, albeit with an abbreviated review.
- Unlike license applicants, exemption applicants may not rely on the FPA's grant of eminent domain to acquire project property, but must instead own sufficient rights in property to develop and operate the project.

FERC Licensing Processes

- Three to choose from, with advantages and disadvantages for each:
 - Integrated Licensing Process
 - Traditional Licensing Process
 - Alternative Licensing Process

The Integrated Licensing Process (ILP)

- The ILP, implemented by FERC in 2003, aims to streamline the licensing of hydropower projects under the FPA.
- Under ILP, a potential license applicant's pre-filing consultation and FERC's scoping pursuant to NEPA are conducted concurrently, rather than sequentially.
- ILP is the default process. FERC approval is required to use any other process.

ILP – Features/Process

■ Features of the new ILP include:

(1) increased FERC staff involvement during development of a license application;

(2) increased public participation during pre-filing consultation;

(3) development of study plans and schedules, which must be approved by FERC, that include deadlines on all participants and provide for mandatory, binding study dispute resolution;

(4) required studies, to be supported by specific criteria;

(5) enhanced consultation with Indian tribes; and

(6) improved coordination of processes with federal and state agencies, especially those with mandatory conditioning authority under the FPA.

The Traditional Licensing Process (TLP)

- The TLP is the longest-standing of the three existing processes developed by FERC for the licensing of hydropower projects.
- Until July 23, 2005, this process was the default process for the issuance of both original licenses and new licenses (i.e., relicenses) for hydropower projects.
- Under the TLP, as modified by FERC in its 2003 rulemaking that also established the ILP, the formal FERC licensing proceeding begins when FERC notices the applicant's filing of a Notification of Intent (NOI) and Pre-Application Document (PAD).

TLP – Features/Process

- Before filing an application for a license, an exemption from licensing, an amendment to an application for a license or exemption that materially amends the proposed development, or an application to amend an existing license to increase a project's capacity, a licensee or prospective licensee must engage in a prescribed pre-application consultation process with resource agencies, Indian tribes, and members of the public.
- Unlike the ALP and the ILP, FERC staff generally do not participate in pre-application consultation under the TLP.
- FERC conducts NEPA scoping and review after application filed.

The Alternative Licensing Process (ALP)

- The ALP, promulgated in 1997, was designed to be more collaborative among the participants and to provide flexibility to accommodate the facts and circumstances of each particular proceeding.
- The alternative procedures are available to applicants on a voluntary basis, and can be used only if there is a consensus among the participants in support of their use and with FERC's approval.

ALP – Features/Process

- Under the ALP, even though most of the application exhibits are the same as those required under the TLP, an applicant may submit a preliminary draft NEPA document and additional material specified by FERC, in lieu of an Exhibit E environmental report, as part of its application, and “need not supply additional documentation of the pre-filing consultation process.”
- Any resource agency, Indian tribe, citizens group, or public requests for studies, as well as any preliminary fish and wildlife recommendations, prescriptions, mandatory conditions, and comments, must be submitted during the pre-filing consultation process.
 - FERC will allow additional requests for studies after the filing of an application only for good cause.

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