

HABITAT COMMITTEE PROPOSED ACTION FORM

HC Sponsor: Mr. Stuart Ellis

Title of Issue: Comment on Federal Energy Regulatory Commission (FERC) Rule Making

Deadline (if any): 04/21/03

Proposed Action: Send letter to FERC regarding proposed language and issues in rulemaking.

Addressed To:

Ms. Magalie Roman Salas, Esq.
Office of the Secretary
Federal Energy Regulatory Commission
888 First Street NE
Washington, DC 20426

Description of Issue:

The FERC is engaged in a rule making process that will create a third process for hydropower facility relicensing. This new process is referred to as the "Integrated Process." FERC claims it will increase efficiency in the relicensing process. The HC has expressed concerns as to whether this or the existing processes will provide needed protection for fishery resources.

Description of Regional Significance:

There are hundreds of FERC projects in basins throughout Washington, Idaho, Oregon, and California that are or will be going through relicensing in the next few years. These projects can have significant impacts to Council-managed salmon species.

Potential Adverse Impacts to Essential Fish Habitat?

Yes

No

For Which Species? All salmon species.

Potential Benefits of Proposed Action:

By sending a letter with Council comments, it helps provide FERC with the perspective of the Council and Council family regarding hydropower relicensing issues and the impacts that relicensing will have on ocean salmon fisheries.

Attach draft document for HC consideration.

PACIFIC FISHERY MANAGEMENT COUNCIL

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Ms. Magalie Roman Salas, Esq.
Office of the Secretary
Federal Energy Regulatory Commission
888 First Street NE
Washington, DC 20426

Dear Secretary Roman Salas:

Re: Docket No. RM02-16-000

The Pacific Fishery Management Council (Council) is writing to comment on the Federal Energy Regulatory Commission's (FERC) rulemaking procedure for a new licensing process. The Council previously submitted a series of general comments concerning relicensing procedures on December 3, 2002. On March 10, 2003, FERC staff member Mr. John Mudre met with the Council's Habitat Committee and presented the *Public and Tribal Post-NOPR Regional Workshop Document*, containing draft language for the proposed rulemaking. Mr. Mudre indicated it would be appropriate for the Council to comment again. The Council would like to comment on the series of questions presented in the document.

Essential Fish Habitat Consultation Mandate

As mentioned in the previous letter, the Council is concerned that in making its hydropower project relicensing decisions, FERC meets its responsibilities regarding conservation of essential fish habitat (EFH). Such responsibilities include consultation with the Council and National Marine Fisheries Service (NMFS) to assure minimization of acute and cumulative impacts on salmon from hydropower operations.

This EFH consultation mandate will also help FERC assure consistency with its obligations under the 1986 Electric Power Consumers' Act, which requires FERC to take a balanced approach to hydropower project licensing. The Act requires that when deciding whether to issue a license, FERC consider not only the power generation potential of a river, but *give equal consideration to energy conservation, protection of fish and wildlife, and general environmental quality*. This mandate requires FERC to consult with federal, state, and local resource agencies, including fish, wildlife, recreation, and land management agencies, in order to assess the impact of a hydropower project on the environment. We are concerned that new FERC regulations may reduce FERC's obligations to environmental and energy conservation functions and values.

Concern about Multiple Processes

The Council approves of the stated FERC objectives of developing a more efficient and timely licensing process while ensuring licenses provide appropriate resource protections. However, because FERC intends to retain both the traditional and alternative licensing processes and

allow the applicants to choose which process they wish to use, the Council is concerned the hoped-for efficiencies may not be realized. The Council believes a single process that truly ensures fishery and water resources are protected would be best. If FERC insists on multiple processes, stronger language should be inserted in Section 5.f.(5) that indicates FERC will only allow the use of the traditional or alternative licensing process if FERC determines those processes will result in the greatest efficiencies for all participants and the highest level of resource protection. With so many licensing proceedings taking place, it is difficult for the Council and other important stakeholders to effectively engage in the alternative licensing process, because of the large time and resource commitment required. It appears the new Integrated Process may also be difficult for stakeholders. Thus, FERC should carefully weigh each licensing proceeding with respect to the Alternative Process or the Integrated Process and defer to the traditional three-stage consultation process if stakeholders provide evidence the Alternative Process is inappropriate based upon their available resources.

Baseline for Analysis

Even though FERC believes it has the legal standing to mandate the baseline for analysis should be the existing conditions, this appears to be simply a policy choice. It is a poor choice for an agency charged with resource stewardship. The baseline for analysis of a license application should be the pre-project conditions.

Response to Request for Specific Comments

Regarding the specific requests for comments in Appendix B:

1. ¶48. The pre-Application Document should include study plans that include analysis of both passage and screening in cases where none currently exist. The document should also include study plans that address any needed information required to obtain state water quality certification. The document should address potential cumulative impacts of projects throughout a basin. Existing fish passage conditions should be analyzed and strategies devised to improve passage conditions where necessary. Wherever fishes are blocked from historic habitat, reintroduction measures should be evaluated and implemented. Such measures include installing fishways, trapping and hauling, shutting down projects, and removing dams. Mitigation should also be evaluated as an alternative.
2. ¶66. In principle, the cost of a study should indeed be justified relative to the value of the information provided. However, there are not only economic costs to the licensee to consider, but also economic and non-economic costs to fishery resources that may be dramatically undervalued in this consideration.
3. ¶90. The Council generally supports the positions of the commenters in Paragraphs 89-91, including the states of California and Oregon concerning the dispute resolution process.
4. ¶105. The deadline for filing for water quality certification should not be moved to a later date.
5. ¶163. License applicants should be encouraged to include a non-binding statement on whether or not they intend to engage in settlement negotiations.
6. ¶172. The Integrated Process should apply to original licenses.
7. ¶181. It would be appropriate for dispute resolution panels to make recommendations regarding related resources such as fisheries or aquatic resources.
8. ¶184. It is appropriate that participants be permitted to make new information gathering or study requests following the updated status report. This is appropriate, because the status report may raise issues that were not foreseen originally.

9. ¶185. It is appropriate that the parties file written comments on the potential applicants status reports prior to the required meeting. This would be important to maintain a clear record of issues and should reduce miscommunication.
10. ¶187. It is appropriate to file a draft license for comment to allow all interested parties access to the process.
11. ¶190. It would be more appropriate for FERC to work with the other federal and state agencies to determine the appropriate point for them to provide preliminary terms and conditions rather than dictating it at a set point in the process.
12. ¶191. See previous comment.
13. ¶198. For the integrated process to work efficiently, it needs to be sensitive to the needs and abilities of state and federal agencies charged with water and fishery resource protection to participate in the process and fulfill their legal mandates concerning water quality certification and resource protection.
14. ¶207. Yes, binding dispute resolution can encourage collaboration prior to the dispute.
15. ¶211. Ensuring the proper studies are carried out as early as possible will do the most to ensure a streamlined process.
16. ¶212. It is not appropriate to allow license applicants to submit draft environmental analyses with the license application under the traditional process, because of the timeline for public participation.
17. ¶223. The Council agrees that project boundaries should be required for all licenses and exemptions.

The Council appreciates this opportunity to comment. We appreciate your attention to our concerns and suggestions.

Sincerely,

Draft

Hans Radtke, Ph.D.
Chairman

