

## 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 comments concerning new licensing rulemaking procedures on December 3, 2002. We reiterate those comments here. 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, and 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 our previous letter, the Council is concerned that in making hydropower project licensing rulemaking decisions, FERC must meet its responsibilities regarding conservation of essential fish habitat (EFH). Such responsibilities include consultation with the National Marine Fisheries Service (NMFS) to assure minimization of acute and cumulative impacts on salmon and other anadromous fish from hydropower operations and structural configurations as well as provide a detailed response to Council comments on FERC actions.

This EFH mandate will also help FERC assure consistency with its obligations under the 1986 Electric Consumers' Act and the 1980 Northwest Power Act, which require FERC to take a balanced approach to hydropower project licensing. These Acts require 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 and Indian Tribes, 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 rules may reduce FERC's obligations to environmental and energy conservation functions and values.

### **Concern about Multiple Processes**

The Council supports the FERC stated objectives of developing a more efficient and timely licensing process while ensuring that 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 that the efficiencies hoped for may not be realized. The Council believes that a single licensing process that fosters consistency and truly ensures that 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 that FERC will only allow the use of the traditional or Alternative Licensing Process if FERC, after soliciting appropriate input from states, tribes and federal fishery agencies, determines that those processes will result in both 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 inordinate time and resource commitment required. It appears that the new Integrated Process may also be difficult for stakeholders. We strongly urge you to incorporate the following concerns:

- The tribes and state fishery agencies are not allowed to participate in formal study dispute resolution procedures as now included under the traditional process. The integrated alternative must allow state fishery agencies and tribes to be full parties in such procedures.
- There are no explicit rules that direct which licensing alternative should be used and when or how the decision to choose one or the other is rendered. FERC should fully incorporate the recommendations of the tribes, states and federal agencies when considering which alternative should be adopted.
- The FERC Commission should decide on which process is adopted, not FERC staff.
- Timelines for key filings or decisions are much too short.
- There is no certainty as to how state and tribal environmental regulations, including 401 Clean Water Act certification, will be integrated into the rulemaking structure.
- The consultation structure with tribal sovereigns is not specified. Early consultation is important.
- Cumulative effects analysis is not developed and/or adequately addressed in the alternative.
- Only two years of studies are specified. In many cases, this is not adequate to obtain sufficient environmental and socioeconomic information, including environmental justice, necessary for adequate environmental review.

FERC staff should present the FERC Commission with alternatives for rulemaking, including the adoption of a single alternative that incorporates the needs of tribes, states and federal fisheries agencies.

Our most critical concern involves the baseline for pre-project analysis. Even though FERC believes it has the legal standing to mandate that existing conditions should be the baseline for analysis, this appears to be a poor policy choice for an agency charged with resource stewardship. Pre-project conditions should be the baseline for analysis of a license application.

Response to Request for Specific Comments

Regarding the specific requests for comments in Appendix B:

1. ¶148. The pre-Application Document should include study plans that include analysis of flows to restore essential fish habitat. State-of-the art passage facilities should be considered in cases where no passage currently exists. 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, as is done in the NEPA and ESA consultation processes. Existing fish passage conditions should be analyzed and strategies devised to improve passage conditions where necessary. Whenever fishes are blocked from historic habitat, reintroduction measures should be evaluated. Such measures include installing fishways, trapping and halting, shutting down projects, and removing dams. Mitigation should also be evaluated as an alternative. The potential positive and negative effects of hatchery mitigation on wild fish stocks should be investigated.
2. ¶166. In principle, the cost of a study should indeed be justified relative to the value of the information provided.
3. ¶190. 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 that the proper studies are agreed to by all of the licensing parties and implemented as early as possible will do the most to ensure a streamlined process.
16. ¶212. It is inappropriate to allow license applicants to submit draft environmental analyses with the license application under the integrated process because of the timeline for public participation.
17. ¶223. The Council agrees that project boundaries should be required for all licenses and exemptions.

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

Sincerely,

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Hans Radtke, Ph.D.

Chairman

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