United States Department of the Interior

OFFICE OF THE SECRETARY
Washington, D.C. 20240

MAR 27 2000

PEP - Environmental Review Memorandum NO. ERM00-2

To: Heads of Bureaus and Offices

From: 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 7. 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. Following an extensive Secretarial hydropower initiative (1998-2000) to improve bureau coordination, a number of existing Departmental policies and practices in this area were revised and a number of new policies and practices were introduced. In addition, measures are provided to coordinate legal and technical review and to assure the development of a sound administrative record in FERC licensing proceedings. Legal review for the Department is provided by the Office of the Solicitor (SOL).

The purpose of this memorandum is to provide additional information, policies, and procedures resulting from the Secretarial initiative and past practices to be used by all bureaus in the review of FERC applications. It is not intended to replace any other bureau procedural guidance and such guidance is recommended where necessary. Handbooks and other less formal guidance may be prepared, published, and utilized by bureaus so long as they do not conflict with this memorandum.

2. REISSUE

This memorandum has been revised and reissued as ERM00-2. ERM00-2 replaces ERM94-5 which is no longer applicable to Interior's hydropower review activity.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 during their conduct of a permitting, licensing or re-licensing action. Bureaus are cautioned to carefully track projects and comment at all appropriate times during the permitting and licensing processes. In

general, bureaus may rely on the distribution from OEPC of FERC notices and review documents to alert them of pending FERC developments. However, bureaus are also strongly urged to maintain local information on all hydroelectric projects at their field and regional offices so that they do not have to catch up on licensing actions further along in the process. In this regard, notices of intent to file for a new license which are issued by FERC approximately five years before license expiration are circulated by OEPC for information [see 5.D(2), below].

A. Preliminary Permit - An application for a preliminary permit is a voluntary action and is not a prerequisite to filing a license application. The permit grants a priority over other competing interests in applying for a project license during the permit period. The permit period may be up to three years. Permits are generally sought to study new projects or to add power to existing non-power projects (18 CFR 4.80-4.84). Because of the voluntary nature of the permit, any comments made by Interior on a permit do not automatically carry over to the licensing process. 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 permit but should be ready to provide consultative advice regarding their programs, facilities, and missions. 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 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 the National Environmental Policy Act (NEPA).

B. License - A license application is a request to construct, operate, and maintain a new hydroelectric project (original license) or 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 with a major project license issued to any project with an installed capacity of more than 1.5 megawatts and a minor license 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 capture of a project license and apply both to major and minor projects (18 CFR 4.40-4.71, 4.200-4.202, and 16.1-16.26).

Close attention must be given to licensing actions to ensure that the Department seeks the necessary terms and conditions in the license that will protect its program area 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 CFR 16.18).

A license, like 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 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.

C. Exemptions from Licensing - 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. The exemption process is still considered a form of licensing and has strict fish and wildlife protection provisions. In both types of exemptions the Department has an opportunity to provide comments, recommended terms and conditions, and mandatory terms and conditions to protect resources managed by the Department. Exemptions do not have expiration dates.

(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 CFR 4.90-4.96).

(2) Small hydroelectric projects are projects with a total installed capacity of 5 megawatts or less at existing, non-Federal dams or utilizing 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 CFR 4.101-4.108).

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

A. Prohibitions - FERC is prohibited from issuing original licenses under Part I of the FPA (or exemptions from such Part) for any hydroelectric power project located within the boundaries of any unit of the National Park System that would have a direct adverse effect on Federal land within such unit or unless projects have been specifically authorized by Congress. The FERC is prohibited from issuing licenses for construction of hydroelectric projects on or having a direct and adverse effect on any river listed as a component of the National Wild and Scenic River System including potential additions to the system during such periods as the Wild and Scenic River Act provides. The FERC is also prohibited from licensing projects in wilderness areas 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 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 utilization of a reservation under the Department's supervision. The project 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 will specifically identify any Section 4(e) conditions and be supported by substantial evidence in the record. It should be noted that Section 4(e) pertains to licenses, not permits; and the Department interprets it to pertain to those few unique circumstances where exemptible projects could occupy Departmental reservations. FERC states that Section 4(e) pertains only to licenses.

(2) Section 18 of the FPA requires FERC to accept any license terms and conditions for the construction, maintenance, and operation of such fishways as may be prescribed by the Secretary. Departmental comments will specifically identify any Section 18 prescriptions and be supported by appropriate fisheries information and substantial evidence in the record. 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 (Article 15) 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 purposes 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.

C. Recommended Terms and Conditions

(1) Section 10 of the FPA allows FERC to prescribe terms and conditions within any permit or license for a number of reasons. The FERC has established a number of 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 FERC uses a number of typical articles which provide uniformity for non-standard terms and conditions recommended by Federal agencies. The Department's comments will transmit its recommended terms and conditions, including the underlying bases for making them, along with substantial evidence in the record.

FERC will consider our recommendations, but may or may not accept them or will accept them with modifications. The FERC order issuing a license discusses its disposition of any Departmental recommendations.

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

(3) Section 10 also has a provision for the protection, mitigation, and enhancement of fish and wildlife resources. 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. If resolution cannot be obtained and FERC does not adopt the agency recommendations, FERC must publish its findings that such conditions are inconsistent with the FPA and/or the conditions selected by FERC comply with Section 10(j)(1) of the FPA.

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. Pre-Application Consultation - FERC requires all applicants for a license or exemption from licensing to consult with each appropriate Federal and State resource agency before submitting its application (18 CFR 4.38). Consultation consists of the following:

(1) First Stage - 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 [18 CFR 4.38(b)(6)].

(2) Second Stage - Applicant conducts all reasonable studies and obtains all reasonable information requested by the resource agencies and Indian Tribes. The second stage consultation ends ninety days after the applicant supplies draft application documents to the resource agencies and Indian Tribes [18 CFR 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.

(3) Third Stage - Applicant files the application documents with FERC [18 CFR 4.38(d)]. The applicant must also file copies of the application with the resource agencies. 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 request is issued. Similar requirements for applicants for new licenses at existing facilities (relicense applications) are found at 18 CFR 16.8. 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. Following that FERC will issue a notice accepting the application for filing and inviting comments, protests, and motions to intervene.

B. Bureau Review - Bureaus will be involved in all three stages of consultation as necessary to protect their program interests and to develop the Department's complete position on a particular project.

C. Legal Review - In order to ensure the development of a strong, defensible administrative record for all FERC licensings, bureau responses to FERC requests need to be consistent with one another, and with Department policy. To achieve this, the Department must work to identify bureau interests, coordinate bureau comments where there are cross-Department issues, and routinely subject those comments to legal review. Since the FERC licensing process is quasi-judicial, the Department has adopted policies to insure that adequate legal review of its submissions to FERC is carried out.

(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 (i.e., during first stage consultation) 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 client'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 and scoping comments before bureaus submit those comments to FERC. Bureaus will fax those draft comments to the appropriate Solicitor's Office at least one week before the FERC deadline in order to allow sufficient time for possible revisions.

D. Departmental Review

(1) The first and second stages of consultation will occur at regional and field offices of the Department's bureaus with assistance provided by the Regional Environmental Officers (REO) upon request. The third stage filing is the point where OEPC assumes process management of the Department's review in accordance with this section. The OEPC will initiate third stage review activities whenever it has an official notice from FERC announcing that:

- the application is accepted for filing and invites comments, protests, and interventions;
- the application is "not ready for environmental analysis" but invites intervention in the proceeding;
- and/or the application is "ready for environmental analysis".

Any bureau on the OEPC review request not in receipt of copies of the application should call the applicant's contact noted in the FERC notice and request those copies. It is not likely that OEPC will have any extra copies since OEPC will have already distributed those copies in its possession. Copies are often available electronically on CD-ROM and over the Internet at FERC's web site. The notices generally give an Internet address.

(2) All bureaus receive FERC's notices of intent to file for a new license, which is required five years before license expiration, via the environmental review system. 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 insure full consideration of their resource concerns.

(3) Bureaus should recommend that any studies needed to define and mitigate impacts to our properties and resources be completed prior to issuance of a license unless such studies are dependent on post construction operations. Bureaus are also encouraged to make study requests during pre-filing consultation and whenever a tendering notice is issued so studies are completed and available for use in developing terms and conditions and recommendations.

(4) OEPC is the focal 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 by OEPC. In this regard 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. Examples include 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 and any other single bureau issue occurring later than 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 are 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 projects five megawatts or less in capacity to REOs for signature and 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 headquarters. Projects known or later found to occupy Federal reservations may be assigned to headquarters depending on the policy nature of the issue.

(5) OEPC forwards to the bureaus, through the environmental review (ER) system, certain FERC notices it retrieves from the Internet. This provides a significant time saving over waiting for FERC's mailing of the notices. Bureaus receiving notices via the Internet or any other means must always check with their ER staff and/or OEPC to determine if a control number has been assigned and to receive review instructions if not previously made available.

(6) As soon as memoranda regarding FERC notices are ready for distribution, OEPC will forward, via fax, certain time-sensitive project notices directly to the appropriate bureau reviewers in the field. This is another time saving practice utilized for the following types of notices:

- Applications Tendered and Requesting Additional Studies
- Notice of Filing Accepted
- Notice of Scoping, Scoping Meetings, Scoping Documents, etc.
- Notice of Request to Intervene
- Applications Ready for Environmental Analysis
- Notices of Draft or Final Environmental Assessments or Statements

OEPC will maintain a current list of field office fax numbers for this purpose.

(7) In its licensing process FERC (rather than the applicant) must consult with the Department pursuant, but not limited, to the following statutes and subordinate 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

(8) 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

E. Alternative Administrative Process

(1) This is a parallel process to the three stage consultation process (see 18 CFR 4.34 and related modifications to existing sections of FERC's rules). It is also known as the "collaborative process" and "alternative licensing process".

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

(3) 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.

(4) REOs may facilitate Interior's participation in this process if requested and if time permits.

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. Time Extensions - OEPC will seek time extensions based upon a written request from an REO or any reviewing bureau. 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 ERM99-2.

8. NATIONAL HYDROPOWER MEETING

To assist in managing the Department's activities relating to hydropower licensing, the Department will hold an annual hydropower meeting for the appropriate Departmental bureaus and staff. The meeting's main purposes are: (1) to foster discussions among bureaus and other Departmental offices on broad policy matters relating to FERC hydropower licensing and (2) to identify, discuss, and prepare for those hydropower projects of critical importance to the Department in the coming year. This meeting is subject to the availability of funding and a willing bureau sponsor.