



# United States Department of the Interior

Office of the Secretary  
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PEP/NRM

## **PEP - ENVIRONMENTAL REVIEW MEMORANDUM NO. ERM 10-6**

To: Heads of Bureaus and Offices

From: Michaela E. Noble, Director /s/09/12/2018  
Office of Environmental Policy and Compliance

Subject: Evaluating Alternative Conditions and Prescriptions in Hydroelectric Power Licensing or Relicensing Proceedings Before the Federal Energy Regulatory Commission (FERC)

### **PURPOSE**

This memorandum describes the procedures to be followed in the Department of the Interior (Department) when a party to a FERC license proceeding proposes alternative conditions and prescriptions under 43 CFR Part 45, Subpart C, with respect to preliminary conditions and/or prescriptions filed by the Department under sections 4(e) and 18 of the Federal Power Act (FPA), as amended.

### **BACKGROUND**

The Department has statutory responsibilities for the management of fish, wildlife, recreation, water, and land resources. The FPA authorizes the Department to develop conditions for the protection and utilization of reservations as well as prescriptions for fishways pursuant to sections 4(e) and 18, respectively. The FERC is required to include these mandatory conditions and prescriptions without modification in any license issued for a hydroelectric project. Section 241 of the Energy Policy Act of 2005 (EPA), Public Law No. 109-58, amended the FPA to include Section 33, 16 U.S.C. § 823d, which allows any party to a FERC license proceeding to propose an alternative condition or prescription to those submitted by the Department. Section 33 also sets forth a process that the Department must follow to evaluate whether to adopt or reject a proposed alternative. On November 23, 2016, the Departments of Agriculture, the Interior, and Commerce jointly issued the revised rules as final ([81 FR 84389](#)). This ERM provides additional guidance for the consideration of alternative conditions and fishway prescriptions required by the EPA and written statements filed with FERC when a proposed alternative condition or prescription is not adopted.

## PROCESS

### 1. Proposed and Revised Alternative Conditions and Prescriptions

Under 43 CFR Part 45, Subpart C, any party to the licensing proceeding may submit an alternative (43 CFR 45.2) to a preliminary condition or prescription filed by a bureau. Proposed alternatives must be filed with OEPC within 30 days after the deadline for the Department to file the preliminary conditions or prescriptions with FERC. The proposal must include:

- (1) A description of the alternative, in an equivalent level of detail to the bureau's preliminary condition or prescription;
- (2) An explanation of how the alternative:
  - (i) If a condition, will provide for the adequate protection and utilization of the reservation; or
  - (ii) If a prescription, will be no less protective than the fishway prescribed by the bureau;
- (3) An explanation of how the alternative, as compared to the preliminary condition or prescription, will:
  - (i) Cost significantly less to implement; or
  - (ii) Result in improved operation of the project works for electricity production;
- (4) An explanation of how the alternative will affect:
  - (i) Energy supply, distribution, cost, and use;
  - (ii) Flood control;
  - (iii) Navigation;
  - (iv) Water supply;
  - (v) Air quality; and
  - (vi) Other aspects of environmental quality; and
- (5) Specific citations to any scientific studies, literature, and other documented information relied on to support the proposal, including any assumptions (e.g., regarding the cost of energy or the rate of inflation).

Also under 43 CFR Part 45, Subpart C, any party to the licensing proceeding who previously filed a proposed alternative may submit a revised alternative (43 CFR 45.72) to respond within 20 days to one or more Administrative Law Judge (ALJ) findings of fact. The revised proposal replaces the original proposal and must address the items listed above and identify how it was revised to address the ALJ findings of fact and differs from the previously filed proposed alternative.

### 2. Criteria for Accepting a Proposed Alternative

In deciding whether to adopt an alternative proposed under 43 CFR 45.71, or 43 CFR 45.72, the Department must consider evidence and supporting material provided by the license party or otherwise reasonably available to the Department, including:

1. evidence on the implementation costs or operational impacts for electricity production of a proposed alternative;
2. comments received on the Department's preliminary condition or prescription;

3. any ALJ decision on disputed issues of material fact with respect to the bureau's preliminary condition or prescription (43 CFR 45.60);
4. comments received on any draft or final National Environmental Policy Act (NEPA) documents; and
5. the license party's proposed alternative.

The Department must accept a proposed alternative if the bureau determines, based on substantial evidence provided by any license party or otherwise available to the Department, that the alternative meets the following criteria as compared to Department's preliminary condition and prescription will:

1. Cost significantly less to implement or result in improved operation of the project works for electricity production; and
2. Provide for the adequate protection and utilization of the reservation in the case of a condition or be no less protective than the Department's preliminary prescription in the case of a prescription.

If the above criteria are not met, then the bureau may elect to reject the proposed alternative and provide a written statement that must be filed with FERC as described below. If the above criteria are met and the bureau accepts an alternative condition or prescription, then a modified condition or prescription must be filed with FERC as described in Section 3 below.

### 3. Modified Conditions and Prescriptions From Proposed Alternatives

When the Department submits preliminary conditions and prescriptions, we reserve the right to amend them, if warranted, based on the results of new information. A license party has 60 days (from the date that the Department filed its preliminary conditions and prescriptions) (43 CFR 45.71(a)(2)(ii)) to submit a proposed alternative condition and prescription to the Department in cases where the Department is exercising its reserved authority.

The bureau should consider potential sources of new information in determining whether to modify a condition or prescription. The Department must consider evidence and supporting material provided by any license party by the deadline for filing comments on FERC's draft NEPA document. The Department also has an obligation to ensure that any modified condition or prescription is supported by substantial evidence as informed by all relevant information in the administrative record, including new information as a result of a hearing or that was not available during a hearing, or part of a settlement agreement. However, given the complexity of the issues and the volume of material to be analyzed in the typical case, the bureau cannot reasonably be expected to continue to accept and incorporate new information right up until the FERC filing deadline for modified conditions and prescriptions.

If an alternative has been filed, then the bureau must analyze the proposed alternative to determine whether the criteria outlined in Section 2 have been met.

Under paragraph (a) of 43 CFR 45.73, the bureau will generally take action on any proposed alternative and file its modified condition or prescription within 60 days after the deadline for

filing comments on FERC's draft NEPA document unless additional time is needed to complete supplemental analysis of the modified condition or prescription. This will typically be 75-90 days after the deadline for the parties to file revised alternatives under 43 CFR 45.72, depending on the issuance of any ALJ decision and when any necessary supplemental analysis is completed. Under new paragraph (b) of 43 CFR 45.73, if the bureau needs additional time to complete the steps set forth in paragraph (a), it will so inform FERC within a 60-day period after the deadline for filing comments on FERC's draft NEPA document.

When the Department files modified conditions and prescriptions with FERC, the submission must include a written statement explaining the basis for the adopted condition or prescription as well as the rationale for not accepting any alternative received or subsequently withdrawn by the license party, and any information relied upon not already part of the licensing proceeding record. The written statement must demonstrate that the bureau gave equal consideration to the effects of the condition or prescription adopted and any alternative not accepted on:

1. Energy supply, distribution, cost, and use;
2. Flood control;
3. Navigation;
4. Water supply;
5. Air quality; and
6. Preservation of other aspects of environmental quality.

This determination should be based on the existing record and information provided by the proponent of an alternative. Bureaus are not expected to develop new information at this stage of the proceeding. However, Bureaus are not precluded from providing new information. Any new information that supplements this determination must be included in the administrative record for the conditions and prescriptions. This new information may be filed with FERC prior to the submission of the mandatory conditions and prescriptions but must be filed no later than the modified mandatory conditions and prescriptions (MCPs) submission. The rationale for the adoption or rejection of a proposed alternative should be included in the justification statement for the modified condition or prescription filed with FERC. Filing a modified alternative constitutes a withdrawal of the original alternative.

#### 4. Modified Conditions and Prescriptions Through Settlement

The Bureaus may work with the party that has provided an alternative condition or prescription to develop a mutually acceptable MCP. If an agreement is reached that requires the revision of a preliminary condition or prescription, the bureau will provide a rationale for this revision to be included in the Department's filing with FERC.

#### 5. Filing Modified Conditions and Prescriptions

Modified conditions and prescriptions are to be filed with FERC within 60 days of the close of the comment period for the draft NEPA document unless additional time is needed pursuant to a proposed alternative analysis and filing with FERC under 43 CFR 45.71 or 45.72 (as discussed in Section 3). If the Department is an intervenor in the proceeding, then a copy of the

Department's filing must be provided to each party included in FERC's service list for the project. According to FERC's regulations, the service list should be provided with the letter containing the Department's recommendations, conditions, and prescriptions, as well as the administrative record, on the day that the package is filed with FERC. The bureaus are encouraged to allow adequate time for document duplication and mailing.

For a description and diagram of the filing process for modified conditions and prescriptions, see page 17175 of the preamble to the revised interim rule from the March 31, 2015 Federal Register at [80 FR 17155](#).

## **GENERAL**

This memorandum replaces ERM 11-2.

This memorandum established internal Department guidelines. It does not create any legal rights, substantive or procedural, enforceable at law by any party.