

Interagency Task Force Report on
FERC Noticing Procedures in Hydroelectric Licensing

Prepared by the Work Group on the Coordination of Federal Mandates:

Federal Energy Regulatory Commission

U.S. Department of the Interior

U.S. Department of Commerce

U.S. Department of Agriculture

Environmental Protection Agency

Advisory Council on Historic Preservation

Introduction

This report addresses FERC noticing procedures, the first topic taken up by the Federal Mandates Work Group. FERC issues notices at various points in the licensing proceeding, informing parties and the public of certain filings or FERC actions and inviting responses by specified deadline dates. Consequently, FERC's issuance of notices acts as a trigger point for establishing time frames for public and agency participation in the licensing process. The Work Group has addressed, and sought solutions for issues related to: (1) notice content, (2) timing of notice receipt, and (3) timing of agency response to notices.

The work group has taken up each of these issues in turn and proposes initial solutions that address the issues without lengthening the licensing process. We also sought to avoid recommending solutions that would require FERC to issue new rulemakings. However, we did agree that such rulemaking changes could be considered at a later date if any of the procedural remedies proposed below prove ineffective.

Notice Content

Issues: FERC notices sometimes do not indicate whether a project is on federal lands or distinguish between existing and proposed project facilities. Identification of affected federal lands in FERC notices would improve the chances for early involvement in the relicensing process by the land management agencies. In addition, notice headings do not always clearly indicate the nature of the notice. Agency participation would be further facilitated if the notice heading more clearly indicated the type of notice and response expected and if the project description identified which facilities are existing and which are proposed to be constructed.

Proposed Solutions:

1. Notices will be clearly titled to indicate the type of notice being issued and the response expected (e.g., Notice of Application Accepted For Filing and Soliciting Motions to Intervene and Protests).
2. Resource agencies will identify which projects are located on federal lands, including Indian reservations, in FERC's project list of upcoming relicenses.¹
3. FERC will specify in its notices any federal lands, including Indian reservations, occupied by project works or located within the project boundary.
4. FERC will distinguish between existing and proposed facilities in its notices.

¹ The Department of the Interior, with help from FERC, has developed a GIS-based mapping system which includes boundary information on FERC projects and federal lands. The Department hopes to make the web-based system available for public use in the future.

Timing of Notice Receipt and General Agency Coordination

Issue: One concern with the current noticing procedures is that the resource agency field offices may not receive notices of FERC actions in a timely manner. Delays in receiving notices can serve as an impediment to agency efforts to submit timely responses and to attend meetings. Both FERC's mailing procedures and the resource agencies' internal distribution systems may contribute to the noticing delays. While the majority of applicants provide resource agencies with pre-filing materials in a timely manner, some agencies note that they do not always receive copies of pre-filing materials and applications.

Proposed Solutions:

1. Resource agencies are currently reviewing FERC mailing lists^{2/} and providing to FERC, under agency letter, the necessary corrections, deletions, or additions.
2. To maintain accuracy of mailing lists over time and to be sure the appropriate agencies are involved up front in the licensing process, FERC will routinely attach the project mailing list to the Notice of Intent to File Application for New License issued for each project and request review and correction of the list. (The mailing list will be attached to notices mailed out but not to notices published in the Federal Register or newspaper.) Agencies, applicants, and other entities will respond to that request by providing specific additions or deletions to the list, to ensure that the appropriate entities receive notices.
3. FERC will forward any updated mailing lists to applicants.
4. If an agency does not receive pre-filing materials from an applicant in accordance with FERC regulations, the agency will first contact the applicant about the problem. If that does not remedy the situation, the agency will contact FERC. FERC will contact the applicant and inform it of the regulation to ensure that the agency receives future pre-filing materials in a timely manner.
5. In addition to the regular noticing process, FERC's web site is available to quickly obtain notices and service lists.
6. Resource agencies are currently revising their notice distribution systems to ensure that notices are delivered to relevant agency field offices as quickly as possible. Suggested improvements include use of electronic mail as well as other measures to improve their internal notice distribution systems.
7. Each year, the Department of the Interior holds a national meeting of the Department's hydropower relicensing staff to review the FERC relicensing forecast list and coordinate bureau participation in individual relicensing proceedings. Improved coordination will increase the likelihood that all Interior bureaus are aware of upcoming FERC deadlines and respond to requests for comments in a timely manner.

² "Mailing lists" contain all entities with an interest in the project. Thus, anyone may ask to be placed on a project mailing list. By contrast, "service lists" contain those entities who have officially intervened in a project proceeding.

Notice-specific Timing Issues

Resource agencies want to ensure that they receive notices in a timely manner so they can make use of the full amount of time allotted to respond. Beyond the general issue of receiving notices in a timely manner, there are several timing issues that concern specific notices. Each topic below addresses a different notice in the FERC license application process.

Tendering Notice

Issues: The tendering notice notifies entities that an application has been filed and provides them with an opportunity to request additional studies, if needed. Agencies and others must reply within 60 days *from the date the application is filed*. Delay in distributing this notice is particularly problematic because the 60-day comment period begins with application filing, not notice issuance. Although applicants are required to file a copy of their application with all consulted agencies, not all offices within an agency may receive notice of the filing at this point, nor have the applicants been serving the applications on all interested agencies.

Proposed Solutions:

The solutions below involve efforts to distribute the notice more quickly and to increase agency awareness of application filing due dates well in advance of filing.

1. FERC will issue tendering notices not more than 14 days after applications are filed.
2. Resource agencies will take steps to improve internal distribution of FERC notices.
3. FERC has provided its updated “forecast” list of license expirations through 2010 to the agencies. The list should help alert agencies to upcoming license proceedings and all the attendant deadlines they will need to meet.
4. FERC will indicate the actual deadline (due date) for additional study requests in the tendering notice.

Scoping Notice and Meetings

Issues: Resource agencies and FERC believe that scoping meetings could be more productive if they were adapted to encourage face-to-face discussion of issues, alternatives, and any outstanding study needs. Currently, the scoping meetings are not well attended by resource agencies, in part because agencies do not believe the meetings provide an opportunity for interaction. There is general concern that use of stenographers at scoping meetings can sometimes inhibit an open exchange of information.

Proposed Solutions^{3/}

1. FERC and the resource agencies will emphasize to their respective staffs that scoping meetings are important and should be used to exchange information with resource agencies and applicants with the aim of clarifying or resolving issues regarding the NEPA process and study needs, if applicable.
2. Resource agencies will encourage their staffs to attend and actively participate in scoping meetings.
3. FERC will make an effort to hold agency scoping meetings at locations easily accessible to agency staff, and to the extent practicable, coordinate meeting dates.
4. As a general rule, FERC will issue notices announcing scoping meetings at least 30 days before the meeting.
5. FERC will add an “Upcoming Scoping Meetings” section to its web site.
6. Stenographers will continue to be used at scoping meetings. However, FERC will work with them to ensure that their presence is as unobtrusive as possible. At the beginning of a scoping meeting, FERC staff will explain the role of the stenographer at the meeting and answer questions regarding the use of the meeting transcript.

Ready for Environmental Analysis (REA) Notice

Issues: The issuance by FERC of the Ready for Environmental Analysis notice is a critical milestone. However, because the period between the filing of the application and the subsequent issuance of the REA varies in duration, due to a variety of factors, resource agencies sometimes feel caught off guard when an REA notice is issued. Also, it is sometimes the case that FERC issues intervention and REA notices concurrently, which puts a strain on agencies which then have to prepare their comments and their motion to intervene at the same time.

Proposed Solutions:

1. FERC will include a tentative schedule for REA notice in its initial scoping document and any necessary revisions in scoping document 2.
2. When there is a need for additional information after scoping, FERC will indicate any necessary revision to the REA notice schedule in its additional information request.
3. To the extent possible, FERC will seek to avoid issuing intervention and REA notices concurrently.
4. FERC will consider written requests by resource agencies during the scoping process to host project-specific “status teleconferences” prior to the REA notice. The purpose of the teleconferences would be for FERC, resource agencies, applicants, and other entities to exchange information on a project’s schedule as well as provide an opportunity to discuss issues of interest or concern.
5. Whenever possible, resource agencies will continue making every effort to begin preparing their terms and conditions before issuance of the REA notice.

³These recommendations apply only to the agency scoping meeting, not the public scoping meeting typically held in the evening.

Final NEPA Notice

Issue: The resource agencies request that FERC not issue a license order until at least 30 days after EPA publishes notice of the Final EIS (FEIS) in the Federal Register. CEQ regulations generally require this 30-day “waiting period” but permit any agency with an internal appeal procedure, like FERC, to issue a final decision concurrently with publication of the FEIS. In such cases, the FEIS must explain the timing and the public’s right of appeal. In virtually all cases, FERC waits at least 30 days after publication of an FEIS before issuing a license. However, in a few cases, FERC has issued a licensing decision less than 30 days after publication of the FEIS. In these cases, agencies did not regard the notice of appeal procedures in the FEIS as providing sufficiently clear information about the possible timing of the pending license decision, making it difficult to coordinate their review of the FEIS with any possible requests for rehearing.

Proposed Solution:

1. FERC will continue its practice of waiting at least 30 days after the FEIS notice is issued before issuing the license order. If FERC relies on the alternative procedure allowed under CEQ regulations, it will explain more clearly in the FEIS the possible timing of the order and availability of rehearing under FERC regulations.