

Recommendations, Terms, and Conditions

A quick guide to law and practice

Ways to influence the outcome of FERC's licensing process

- Comments on the record
- Record evidence
- Being a NEPA cooperating agency
- Section 401 of the Clean Water Act or other non FPA authority
- Recommendations under the Federal Power Act
 - Section 10(a)
 - Section 10(j)
- Mandatory terms and conditions under the Federal Power Act
 - Section 4(e)
 - Section 18
 - Section 30(c)

SECTION 10(a) of the FPA: 16 U.S. C. § 803(a)

All licenses issued under this subchapter shall be on the following conditions:

(a) Modification of plans; factors considered to secure adaptability of project; recommendations for proposed terms and conditions

(1) That the project adopted, including the maps, plans, and specifications, shall be such as in the judgment of the Commission will be **best adapted to a comprehensive plan** for

improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce,

for the improvement and utilization of water-power development,

for the adequate protection, mitigation, and enhancement of fish and wildlife (including related spawning grounds and habitat),

and for other beneficial public uses, including irrigation, flood control, water supply, and recreational and other purposes referred to in section 797(e) of this title...

CONTINUED....

(2) In order to ensure that the project adopted will be best adapted to the comprehensive plan described in paragraph (1), the Commission shall consider each of the following:

(A) The extent to which the project is consistent with a comprehensive plan (where one exists) for improving, developing, or conserving a waterway or waterways affected by the project that is prepared by—

- (i) an agency established pursuant to Federal law that has the authority to prepare such a plan; or
- (ii) the State in which the facility is or will be located.

And further Continued

(B) The recommendations of Federal and State agencies exercising administration over flood control, navigation, irrigation, recreation, cultural and other relevant resources of the State in which the project is located, and the recommendations (including fish and wildlife recommendations) of Indian tribes affected by the project.

.....

(3) Upon receipt of an application for a license, the Commission shall solicit recommendations from the agencies and Indian tribes identified in subparagraphs (A) and (B) of paragraph (2) for proposed terms and conditions for the Commission's consideration for inclusion in the license.

How to write effective 10(a) recommendations

- Back up with record evidence concerning the problem or objective
- Explain why it will satisfy a comprehensive plan
- Relate it to project purposes
- Make it specific
- Make sure it is within FERC's jurisdiction!
- Be timely

SECTION 10(j) of the FPA: 16 U.S. C. § 803(j)

(1) That in order to adequately and equitably protect, mitigate damages to, and enhance, fish and wildlife (including related spawning grounds and habitat) affected by the development, operation, and management of the project, each license issued under this subchapter **shall** include conditions for such protection, mitigation, and enhancement. Subject to paragraph (2), such conditions **shall** be based on recommendations received pursuant to the Fish and Wildlife Coordination Act (16 U.S.C. 661 et seq.) from the National Marine Fisheries Service, the United States Fish and Wildlife Service, and State fish and wildlife agencies.

(2) Whenever the Commission believes that any recommendation referred to in paragraph (1) may be inconsistent with the purposes and requirements of this subchapter or other applicable law, the Commission and the agencies referred to in paragraph (1) shall attempt to resolve any such inconsistency, giving due weight to the recommendations, expertise, and statutory responsibilities of such agencies. If, after such attempt, the Commission does not adopt in whole or in part a recommendation of any such agency, the Commission shall publish each of the following findings (together with a statement of the basis for each of the findings):

(A) A finding that adoption of such recommendation is inconsistent with the purposes and requirements of this subchapter or with other applicable provisions of law.

(B) A finding that the conditions selected by the Commission comply with the requirements of paragraph (1).

The catch:

...the six recommendations discussed above may be inconsistent with the substantial evidence standard of [section 313\(b\) of the FPA](#), or with the public interest and comprehensive planning standards of [sections 4\(e\)](#) and [10\(a\) of the FPA](#)...

In the final EA, six recommendations were determined to be outside of the scope of [10\(j\)](#). Based on further review, the measure to survey for and document threatened and endangered plants is also outside the scope of [section 10\(j\)](#) and is addressed in the discussion of [section 10\(a\)\(1\)](#)...

PUD of Okanagan County 114 FERC ¶ 62,018 (2013)

Can FERC DO this?

Yes: **American Rivers v. FERC**, [201 F.3d 1186](#) (9th Cir. 1999) **National Wildlife Federation v. FERC**, **912 F.2d 1471 (D.C. Cir. 1990)**

“While the Commission must pay due regard to such recommendations, [section 10(j)] cannot be read to force upon the Commission the burden of strict acceptance of each and every proper recommendation. While the Commission must address each recommendation, the discretion ultimately vests in the Commission as to how to incorporate each recommendation.”

SO: FERC may not even have to make the findings required by the statute if the recommendation is not within the scope of 10(j) – and the Commission decides.

Things that may not protect, mitigate impacts to, or enhance fish and wildlife or habitat

- Studies

- Funds for enhancement

- Fishing piers (unless you're clever)

- Operating run of river

- Compensatory mitigation for fish killed by turbines
(City of New Martinsville v. FERC, 102 F.3d 567 (D.C. Cir. 1997))

Things that may protect:

- Species management plans
- Invasive species management plans
- Shoreline management plans
- Adaptive management plans (which may include data gathering).

Be timely!

PROCESS

The agency must specifically identify and explain the recommendations and the relevant resource goals and objectives and their evidentiary or legal basis.... 18 C.F.R. § 5.26(b).

Plus agencies may resolve disputes with the Commission:

- Preliminary determination of inconsistency in DEIS/EA under 18 C.F.R. § 5.26(b)

- On request, Commission and agency may meet, within 90 days of preliminary determination of inconsistency. 18 C.F.R. § 5.26(d).

Section 4(e) of the FPA: 16 U.S.C. § 797(e)
(Mandatory conditioning authority)

Provided, That licenses shall be issued within any reservation **only after a finding by the Commission** that the license will not interfere or be inconsistent with the purpose for which such reservation was created or acquired, and **shall** be subject to and contain such conditions as the Secretary of the department under whose supervision such reservation falls shall deem necessary for the adequate protection and utilization of such reservation

""[Reservations]' means national forests, tribal lands embraced within Indian reservations, military reservations, and other lands and interests in lands owned by the United States, and withdrawn, reserved, or withheld from private appropriation and disposal under the public land laws. . . ." 16 U. S. C. § 796(2)

...essentially all federal land

“SHALL” Means SHALL!

See Escondido Mutual Water Co. v. La Jolla Band of Mission Indians. 466 U.S. 765 (1984)

BUT:

“the Commission must make its "no inconsistency or interference" determination and include the Secretary's conditions in the license only with respect to projects located "within" the geographical boundaries of a federal reservation.” Id.

City of Tacoma v. FERC 460 F.3d 53 (D.C. Cir. 2007)

The Commission may not reject a mandatory condition because it is “untimely” according to FERC regulations:

“We conclude FERC exceeded its statutory authority by placing a strict time restriction on responsibilities Congress delegated to other federal agencies....Though FERC makes the final decision as to *whether* to issue a license, FERC *shares* its authority to impose license conditions with other federal agencies. *See Escondido Mut. Water Co. v. La Jolla Band of Mission Indians*, 466 U.S. 765, 772-79, 104 S. Ct. 2105, 80 L. Ed. 2d 753 (1984). To the extent Congress has delegated licensing authority to agencies other than FERC, those agencies, and not FERC, determine how to exercise that authority, subject of course to judicial review. FERC can no more dictate to Interior when Interior should complete its work than Interior can dictate to FERC when FERC should do so.”

City of Tacoma v. FERC 460 F.3d 53 (D.C. Cir. 2007)

If any part of project on reservation – the whole license may be conditioned:

“This language nowhere limits Interior's regulatory authority to those portions of the project that are on the reservation. On the contrary, so long as some portion of the project is on the reservation, the Secretary is authorized to impose any conditions that will protect the reservation, including *utilization* of the reservation in a manner consistent with its original purpose.”

Section 18 of the FPA: 16 U.S.C. § 811
Mandatory conditioning authority

The Commission **shall** require the construction, maintenance, and operation by the licensee at its own expense of...such fishways as may be prescribed by the Secretary of the Interior or the Secretary of Commerce, as appropriate

“SHALL” means SHALL:

Under this statute, FERC performs primarily as a neutral forum responsible for compiling the record for the benefit of the court of appeals.

Bangor Hydro-electric Co. v. FERC, 78 F.3d 659 (D.C. Cir. 1996)

Courts have treated Section 4(e) and Section 18 the same way:

We, too, find *Escondido* controlling in the section 18 context and therefore hold that the Commission may not modify, reject, or reclassify any prescriptions submitted by the Secretaries under color of section 18. Where the Commission disagrees with the scope of a fishway prescription, it may withhold a license altogether or voice its concerns in the court of appeals, but at the administrative stages, "it is not the Commission's role to judge the validity of [the Secretary's] position - substantially or procedurally." *American Rivers v. FERC*, 201 F.3d 1186 (9th Cir. 1999)

What is a fishway?

The items which may constitute a “fishway” under Section 18 for the safe and timely upstream and downstream passage of fish shall be limited to physical structures, facilities, or devices necessary to maintain all life stages of such fish, and project operations and measures related to such structures, facilities, or devices which are necessary to ensure the effectiveness of such structures, facilities, or devices.

P.L. 102-486, Section 1701(b) (1992)

Examples

- Lifts, locks and passes
- Turbine operations and shutdowns
- Exclusion screens for downstream passage
- Operations and maintenance plans
- Effectiveness testing
- Adaptive management or phased installation
- Turbines? Bypassed reach?

ISSUES Raised by this “divided authority”

- What is the administrative record on which a decision is made?
- Who conducts a NEPA analysis?
- Who enforces mandatory conditions?
- Isn't it unfair that Federal agencies can impose these conditions without the procedural due process represented by the FERC licensing process?
- How do you appeal a mandatory condition?
- What if something changes during the term of the license?

Most of these may be answered by
meditating on this:

By providing instead that Interior's prescription is to be a FERC license requirement, Congress implicitly indicated that it would have to be supported as would any other Commission licensing requirement.

Bangor Hydro-Electric Co. v. FERC, 78 F.3d 659 (D.C. Cir. 1996)

And this:

...the substantial evidence standards normally applicable to review of the Commission's orders apply to the findings of the Secretary.

Wisconsin Power and Light Co. v. FERC.
363 F. 3d. 453 (D.C. Cir. 2004)

Congress thought this was unfair, and added:

The license applicant and any party to the proceeding shall be entitled to a determination on the record, after opportunity for an agency trial-type hearing of no more than 90 days, on any disputed issues of material fact with respect to such (conditions/fishways). All disputed issues of material fact raised by any party shall be determined in a single trial-type hearing to be conducted by the relevant resource agency in accordance with the regulations promulgated under this subsection and within the time frame established by the Commission for each license proceeding.

16 U.S.C. §§ 797(e), 811. (FPA §§ 4(e), 18)

(As modified by Energy Policy Act of 2005).

AND THIS

...the license applicant or any other party to the license proceeding may propose an alternative (condition/prescription)... the Secretary **shall** accept the proposed alternative condition ...if the Secretary determines, based on substantial evidence...that such alternative condition—

(A) (provides for the adequate protection and utilization of the reservation/ will be no less protective than the fishway initially prescribed by the Secretary; and

(B) will either, as compared to the condition initially by the Secretary—

(i) cost significantly less to implement; or

(ii) result in improved operation of the project works for electricity production.

16 U.S.C. §823d

Appeal to a U.S. Court of Appeal

“Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the United States court of appeals for any circuit wherein the licensee or public utility to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing...”

16 U.S.C. § 825l(b).

Changes during license

Licenses under this subchapter shall be issued for a period not exceeding fifty years. Each such license shall be conditioned upon acceptance by the licensee of all of the terms and conditions of this chapter and such further conditions, if any, as the Commission shall prescribe in conformity with this chapter, which said terms and conditions and the acceptance thereof shall be expressed in said license. Licenses may be revoked only for the reasons and in the manner prescribed under the provisions of this chapter, and may be altered or surrendered only upon mutual agreement between the licensee and the Commission after thirty days' public notice.

16 U.S.C. § 799 (FPA § 6)

Conditioning Exemptions

Mandatory conditioning authority

- 5 MW or less (16 U.S.C. §2705)

- Conduits (16 U.S.C. § 823a)

- Lasts forever (So reserve authority!)

- No Trial-Type Hearing

- No mandatory consideration of alternatives

Section 30(c) of the FPA: 16 U.S.C. 823a(c),
(The Commission) shall consult with the (FWS &
NMFS) and the State agency exercising
administration over the fish and wildlife resources
of the State in which the facility is or will be
located...and shall include in any such exemption—
(1) such terms and conditions as the (FWS,
NMFS) and the State agency each determine are
appropriate to prevent loss of, or damage to, such
resources and to otherwise carry out the purposes
of such Act, and

RECAP:

FPA §§ 10(a), 10(j)

Agency recommendations

-FERC decides, may alter or reject

FPA §§ 4(e), 18

Mandatory agency authority

-Agency decides— FERC cannot alter or reject

FPA § 30(c)

Mandatory Authority – for small projects