Federal Energy Regulatory Commission
and the
Federal Power Act
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Federal Energy Regulatory Commission

• Independent Regulatory Commission
• Five members: appointed by President, confirmed by Senate
Commission Regulation

- Hydropower
- Natural Gas/LNG
- Oil Pipeline Rates/Tariffs
- Electric Rates
- Electric Transmission
Hydropower Program

Licensees
Resource agencies
Tribes
NGOs
Local stakeholders

LICENSE ADMINISTRATION & COMPLIANCE
Division of Hydropower Licensing (DHL)

- Efficiently process hydropower project applications
- Prepare and issue environmental documents
- Address agency, tribe, and public concerns fairly
- Analyze recommendations and incorporate reasonable environmental conditions into licenses
DHL Responsibilities

- Preliminary Permits (issuance and surrenders)
- 10-MW Exemptions
- Original licenses
- New licenses (relicensing)
- Pilot licenses
- Management Plan approval (when part of license application)
- Amendments to applications for license or 10-MW exemption
DHL Branches

Northwest Branch
Jennifer Hill, Chief
(202) 502-6797

West Branch
Timothy Konnert, Chief
(202) 502-6359

Midwest Branch
Janet Hutzel, Chief
(202) 502-8675

South Branch
David Turner, Chief
(202) 502-6091

Mid-Atlantic Branch
John Smith, Chief
(202) 502-8972

New England Branch
Robert Easton, Chief
(202) 502-6045
Division of Hydropower Administration and Compliance (DHAC)

- Ensure timely and effective compliance with license
- Take enforcement action if needed, including penalties
- Review and approve project changes
- Handle license surrender
DHAC Responsibilities

- Conduit exemptions
- License amendments
- Jurisdictional determinations
- Headwater benefits
- Compliance and penalties
- License transfers
- Complaints
- License surrenders
Division of Dam Safety and Inspections (D2SI)

- Implement dam and public safety
- Ensure protection of life, property, and the environment
- Develop policies, programs, and standards for assessing dam safety
- Assess security measures
D2SI Responsibilities

- Review of Project Designs
- Review of Plans and Specifications
- Quality Control and Inspection Program
- Construction Inspections
- Operation Inspections (Post-Construction)
- Part 12 D Safety Inspections
- Emergency Action Plans
- Incident Reporting
Brief History of the Federal Power Act
Prior to Federal Power Act

• Before 1920, acts of Congress were required for projects on navigable rivers
• Rivers and Harbors Act of 1899 – Can’t obstruct a navigable river without Congressional authorization
• Interior or Agriculture authorized projects using U.S. lands, national forests.
• Usually without term, revocable at will
Federal Water Power Act of 1920

- Comprehensive federal control of the nation’s water resources, superseding earlier piecemeal approach
- Federal Power Commission had 3 members:
  - Secretaries of the Interior, Agriculture, and War
- Jurisdiction based on the Commerce Clause (waters) and the Property Clause (U.S. lands)
- Preempted state law; See First Iowa Hydro-Electric Coop. v. FPC, 328 U.S. 152 (1946).
Federal Power Act of 1935

- Increased jurisdiction over non-navigable waters
- Reflects broad view of commerce
  - See *FPC v. Union Electric Co.* (1965) (Taum Sauk), 381 U.S. 90 (1965) (pumped storage project; effect on “full spectrum of commerce interests”)

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Part I of the Federal Power Act

- Not many amendments since 1935
- Some highlights:
  - Non-power license (1968)
  - Electric Consumers Protection Act of 1986 (ECPA)
    - Relicensing provisions – Sections 14 and 15
    - Equal consideration of energy and environmental values – Sections 4(e) and 10(a)
    - Fish and wildlife recommendations – Section 10(j)
  - Energy Policy Act of 2005
    - Alternative mandatory conditions and prescriptions – Sections 4(e) and 18
- Change in focus over the years
Commission authorization is required for non-federal hydropower projects:

- located on navigable waters;
- located on federal lands;
- using surplus water/power from a federal dam; or
- involve post-1935 construction, on commerce clause water, and affect interstate commerce.
Part I of the Federal Power Act (cont’d)

- Projects may be located at federal (U.S. Army Corps of Engineers or Bureau of Reclamation) dams, but

- Commission has no jurisdiction over federal dams or federal projects
FPA Sections
FPA Section 5 – Preliminary Permits

• Solely for maintaining priority of application for license

• Do not authorize entry onto land or land-disturbing activities

• Cannot exceed three years (two-year extension permitted under Hydropower Regulatory Efficiency Act)
Municipal Preference – Section 7(a)

- All else being equal, states and municipalities are granted preference with regard to permits and original licenses
- Commission has questioned scope of preference
Comprehensive Development – Section 10(a)(1)

• Projects must be best adapted to comprehensive improvement/development of waterway
• Interstate/Foreign Commerce
• Waterpower Development
• Fish and wildlife
• Other beneficial uses (irrigation, flood control, water supply, recreation, energy)
Section 4(e)

- Authorizes Commission to issue licenses
- For licenses issued within U.S. reservations, requires Commission to make no interference/inconsistency finding
- Licenses on reservations are subject to mandatory conditions
Section 4(e)

- With section 10(a), sets out matters to be given equal consideration (not equal treatment)
  - Power and Development
  - Energy Conservation
  - Fish and Wildlife
  - Recreational Opportunities
  - Other Aspects of Environmental Quality
Section 10(j) Conditions

- Licenses must include conditions to protect, mitigate damages to, and enhance, fish and wildlife related habitat.
- Conditions are to be based on recommendations from federal and state fish and wildlife agencies.
- The Commission considers rejected section 10(j) conditions as section 10(a) recommendations.
Section 10(j) Conditions (cont’d)

• If the Commission decides that a proposed condition is inconsistent with Part I of the FPA or other law, it must attempt to resolve the matter, giving due weight to the agency in question.

• If the inconsistency cannot be resolved, the Commission must explain the inconsistency and why the conditions it includes in the license meet the purposes of section 10(j).
FPA Mandatory Conditions

- Under FPA section 4(e), federal land management agencies may impose conditions to protect “reservations”
- Under FPA section 18, Interior and Commerce can require fishways
- Commission must include mandatory conditions in license
Hearings on Mandatory Conditions

- The Energy Policy Act of 2005 provided for expedited agency hearings on fishways and on alternatives to mandatory conditions.
- Interior, Commerce, and Agriculture working on implementing regulations.
Annual Charges –
Section 10(e)

- To reimburse U.S. for costs of administering FPA Part I (including other agency costs)
- For use of government lands
- For use of government dams and tribal lands
- Charges go to treasury, reclamation fund, and states (see section 17)
Project Takeover – Section 14

- U.S. can take over any project upon license expiration
- U.S., states, and municipalities can condemn projects at any time
Relicensing – Section 15

- Relicense application due two years before license expiration
- Annual licenses
- Public Interest standard (Section 10(a)(2) factors)
- Non-Power licenses
Relicensing – Section 15 (cont’d)

- Competitive relicensing/slight incumbent preference (section 15(a)(2)) (“insignificant differences” don’t count)
- No state/municipal preference
- Orphaned Projects
Fishways – Section 18

- Departments of Commerce and Interior can require fishways
- Licensee can request hearing
- Coast Guard can require lights and signals
Under FPA section 21, licensees may use eminent domain to acquire necessary non-federal lands or property.

Special rules apply to state and local parks, recreation areas, and wildlife refuges.

Commission has no involvement in eminent domain proceedings.
• The Commission has broad enforcement powers, including
  – Revocation of license or exemption
  – Assessment of civil penalty (up to $11,000/day per violation)
  – Implied Surrender (not statutory)
Judicial Review – Section 313

- Party may seek hearing before the Commission within 30 days of order issuance (Section 313(a))
- Party which has sought rehearing may seek judicial review within 60 days of rehearing order
- Other than civil penalties, courts of appeals have exclusive jurisdiction
Key FERC Concepts

• Some Key FERC Terms/Concepts:
  – Substantial Evidence
  – Ex Parte
  – Cooperator/Intervenor
  – Due Diligence
  – FERC’s Process/FERC’s Decisions
  – “Consult” does NOT necessarily mean endangered species consultation
Questions?