



Federal Energy Regulatory Commission and the

Federal Power Act

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Federal Energy Regulatory Commission

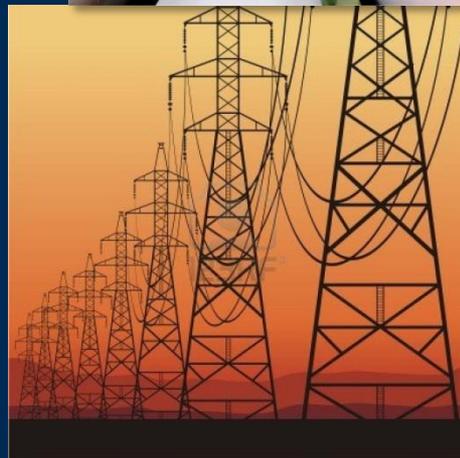


- Independent Regulatory Commission
- Five members: appointed by President, confirmed by Senate



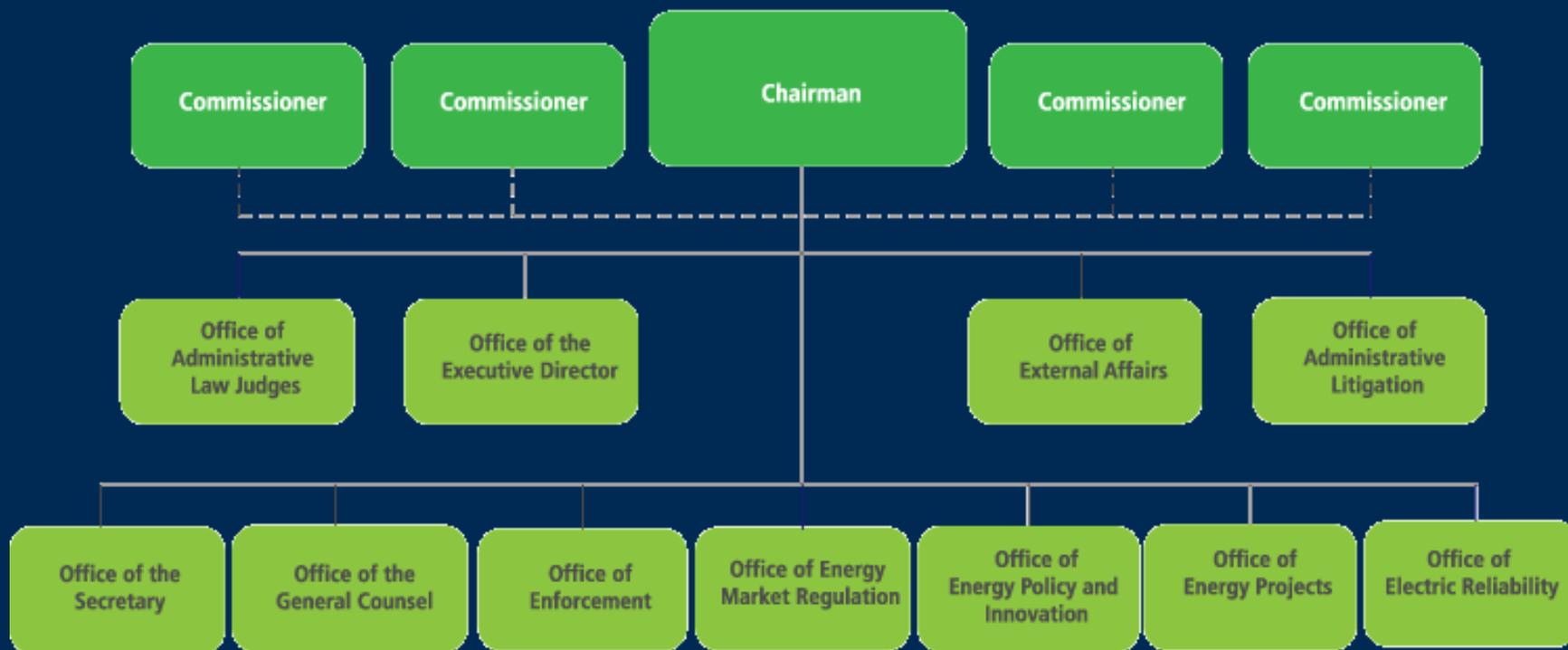
Commission Regulation

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



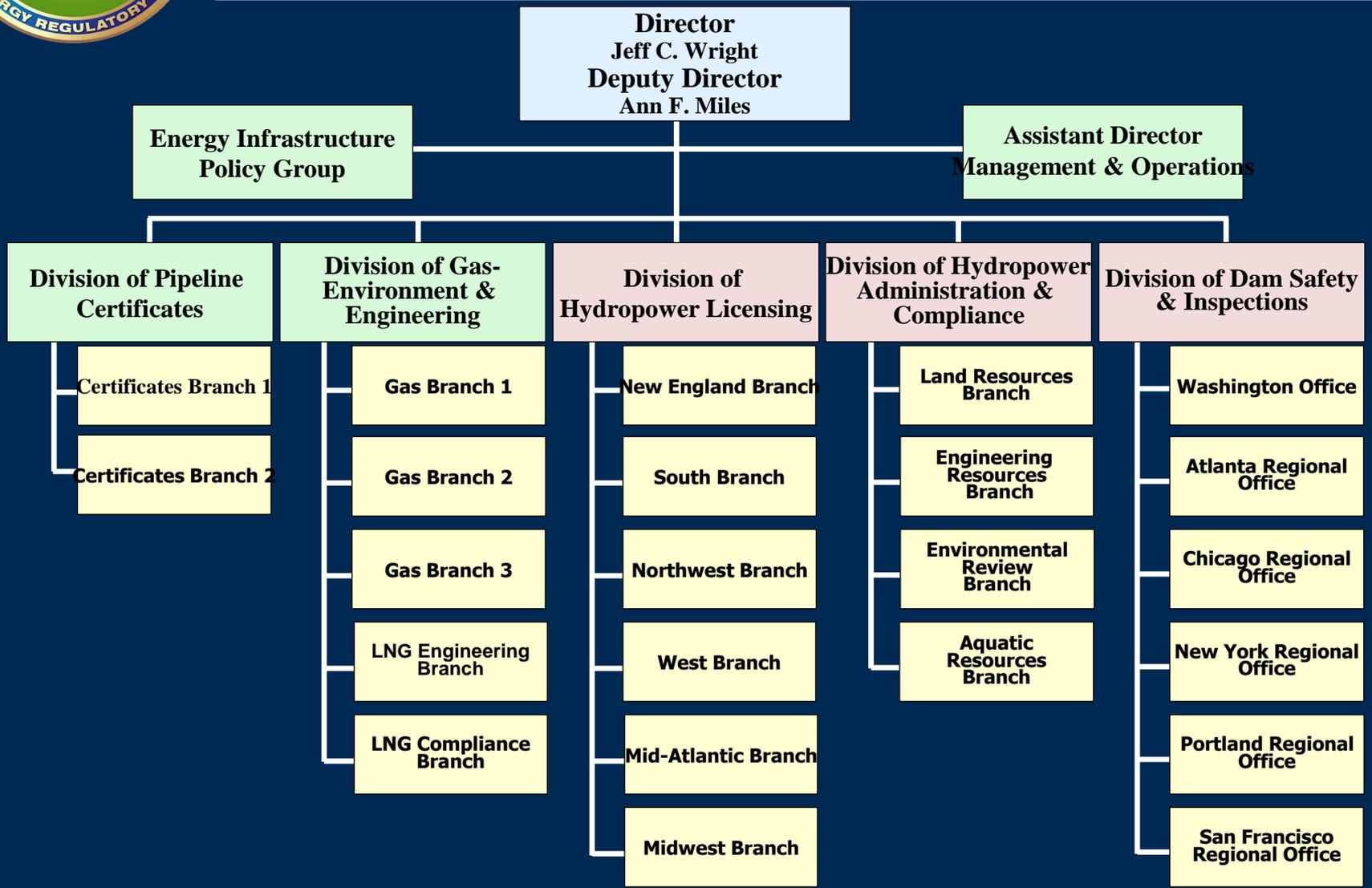


Federal Energy Regulatory Commission



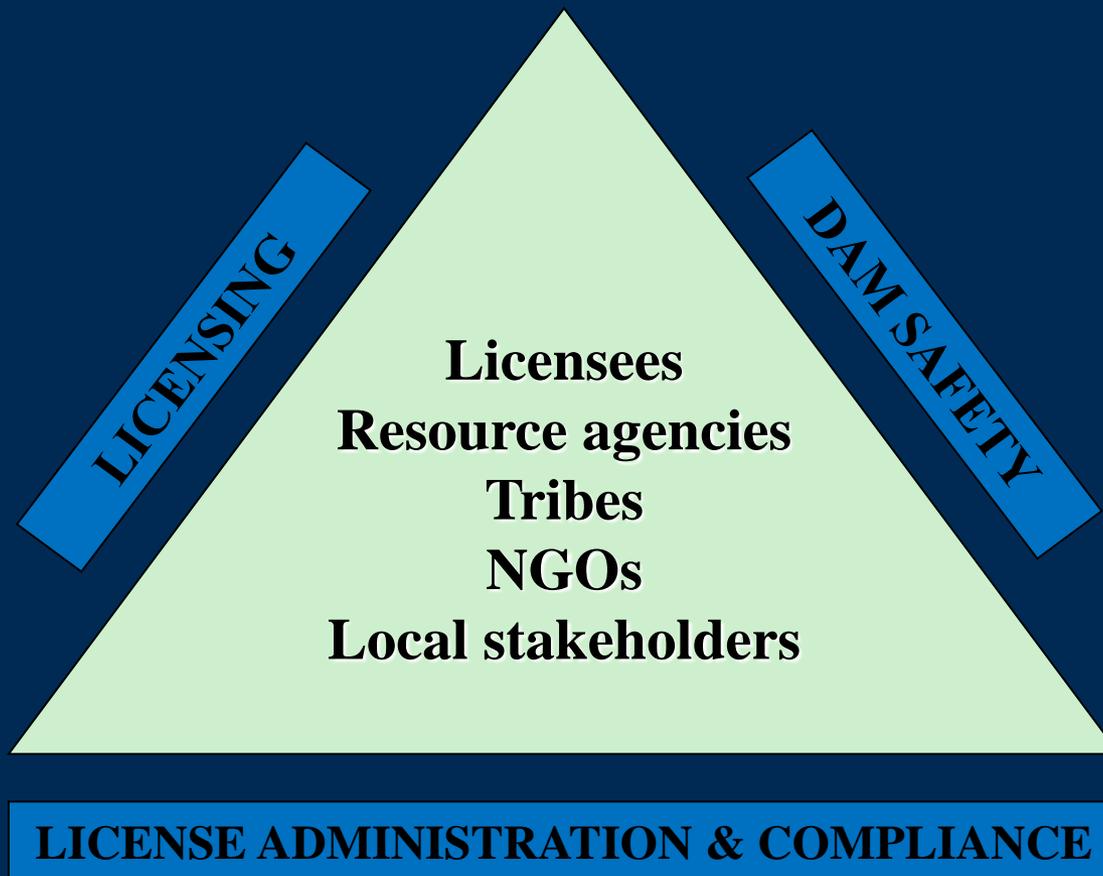


Office of Energy Projects



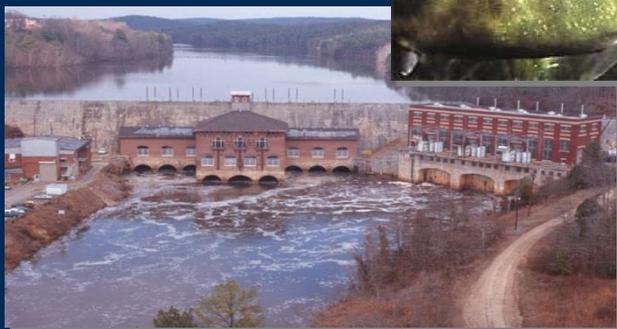


Hydropower Program





Division of Hydropower Licensing (DHL)

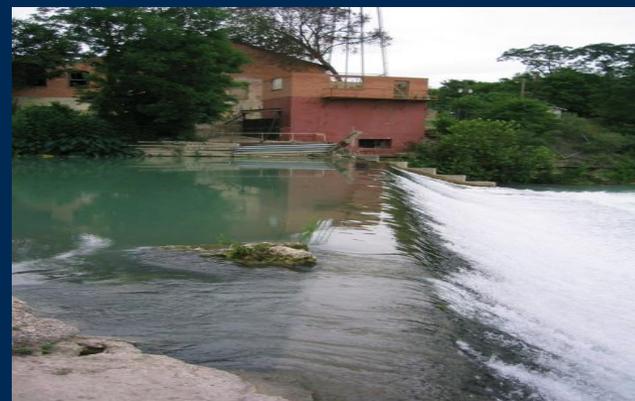
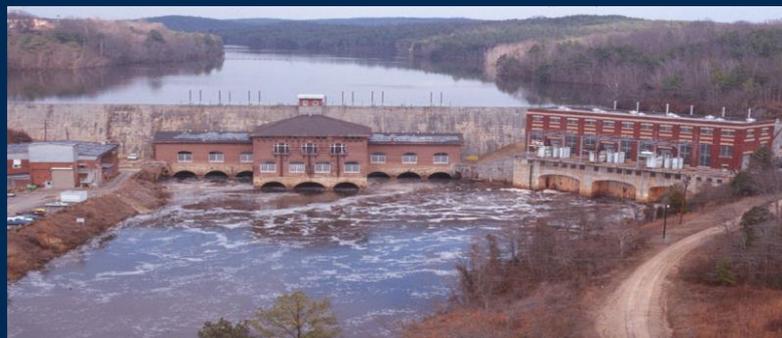


- Efficiently process hydropower project applications
- Prepare and issue environmental documents
- Address agency, tribe, and public concerns fairly
- Analyze recommendations and incorporate reasonable environmental conditions into licenses



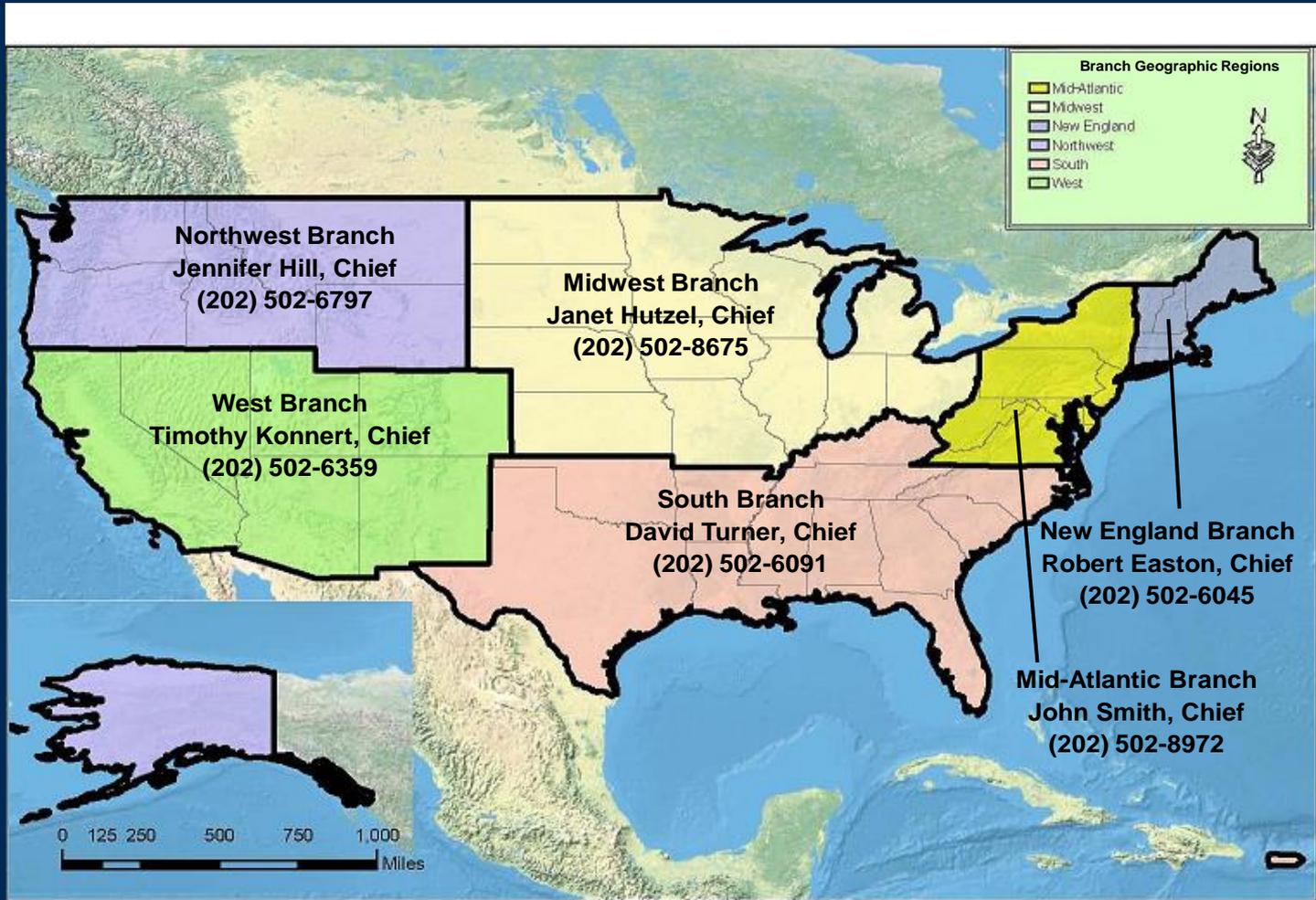
DHL Responsibilities

- 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





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

- FPWA became Part I of the Federal Power Act (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”)



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



Part I of the Federal Power Act

(cont'd)

- 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, mitigation 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



Eminent Domain – Section 21

- 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



Enforcement – Section 31

- 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?

