



July 15, 2005

Ms. Magalie R. Salas, Secretary  
Federal Energy Regulatory Commission  
888 First Street, N.E.  
Washington, D.C. 20426

**RE: Comments of the Hydropower Reform Coalition on the ILP Effectiveness Review and Best Practices Guide, Docket No. AD05-6**

The Hydropower Reform Coalition (HRC) files these comments in response to the Commission's Multi-Stakeholder Effectiveness Technical Conference on the Integrated Licensing Process.<sup>1</sup> We commend the Commission for its efforts to evaluate the initial implementation of the Integrated Licensing Process (ILP) and develop a guide for the best practices.

The HRC represents more than 1 million members of over 130 conservation and recreation organizations nationwide. These general members are actively involved in more than 75 percent of the relicensing proceedings currently pending before the Commission. The HRC Steering Committee consists of 15 organizations, several of whom actively participated in the National Review Group, a precursor to the ILP rule, and in the collaborative crafting of the ILP. Moreover, the Coalition and its members are participating in or tracking every one of the initial seven "pioneer" ILPs. Based on that collective experience, we are well-qualified to propose recommendations for "best practices."

As the ILP is a new process, it is vitally important that the Commission use the information recently collected in the evaluation process to identify lessons learned and apply them to specific recommendations in the best practices guide. The best practices guide should describe practices that are insufficient and inadequate in order to ensure high quality information and conduct in the ILP. The ILP will succeed or fail depending on thoughtful, active implementation by the Commission and the actions of its staff.

We expect this first evaluation exercise to be the beginning of an iterative effort to evaluate the ILP as it is implemented in an increasing number of licensing proceedings. Since this evaluation only examines the process through the study plan phase, we suggest another review before the "pioneer" projects enter the post-application phase. In

<sup>1</sup> Notice issued April 4, 2005 under this docket; conference on June 23, 2005.

**Steering Committee:**

Alabama Rivers Alliance · American Rivers · American Whitewater · Appalachian Mountain Club  
California Hydropower Reform Coalition · Friends of the River · Idaho Rivers United  
Michigan Hydro Relicensing Coalition · Natural Heritage Institute · New England FLOW · New York Rivers United  
River Alliance of Wisconsin · South Carolina Coastal Conservation League · Trout Unlimited

preparation for the second effectiveness review, we encourage FERC to hold field hearings again, but we recommend that the Commission match its hearing locations to places near the ILP licensing proceedings to ensure maximum participation by all stakeholders.

We recommend that the best practices manual developed by the Commission be a guide for all participants in the licensing process, including state and federal resource agencies, tribes, and non-governmental organizations. All stakeholders will contribute to the success of the proceeding, and will benefit from additional advice and guidelines. We also ask the Commission to consider additional comments on the best practices guide once a version has been made available. Finally, we recommend that the guide include detailed recommendations, rather than broad statements, to assure that it is a helpful roadmap.

## **I. Pre-Application Document**

The Pre-Application Document (PAD) serves as the foundation for the ILP. For example, the adequacy of the PAD bears on the NEPA scoping document, which is filed 60 days thereafter.<sup>2</sup> Moreover, a complete PAD, developed through a collaborative approach, results in an ILP that meets the licensing goal of “an efficient and timely licensing process that continues to ensure appropriate resource protections”<sup>3</sup> plans. Conversely, an incomplete PAD will lead to delays, disputes, and increase the likelihood of litigation. The PAD should provide a thorough baseline of information, meet the needs of all stakeholders, and be prepared with a standard of due diligence. It is too early to ascertain all of the ways in which deficiencies affect project licensing, but it is manifest even among the “pioneer” projects that the sliding scale exists: the more complete a PAD is, the smoother and more confident the process will be.

### **A. Develop a PAD through Collaborative Approach**

The best approach to the creation of a PAD is one that involves all stakeholders in its development. Meaningful, open meetings that allow significant participation on the part of all stakeholders and resource agencies prior to the drafting of the PAD give stakeholders a sense of ownership over the document, and ensure that the document meets the multiple needs of the diverse stakeholders. Collaborative drafting also eases the burden on the license applicant in preparing the PAD. In our experience, where project managers have undertaken these simple efforts, stakeholders are invested, more prepared, and provided significant benefits and assurance to the process.

Public outreach meetings held at convenient times and places are the responsibility of the license applicant, but should be strongly encouraged by the Commission. The license applicant should use these outreach meetings as an opportunity to describe what it plans to include in the PAD, to allow stakeholders to suggest and provide materials that might have been overlooked.

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<sup>2</sup> 18 CFR § 5.8

<sup>3</sup> 18 CFR § 5.1(e).

A collaboratively-drafted PAD will provide: 1) a more complete baseline of data on project impacts and studies available pertinent to the issues; 2) acceptance and support from all stakeholders, and a general feeling of collaboration and goodwill moving forward ; and 3) less controversy in the face of impending deadlines. Certainly, where collaboration has taken place, the Commission has heard nothing but high praise and a recommendation that future license applicants take the reins and develop strong and truly collaborative relationships early.

### **B. Create a Draft PAD**

The Commission should encourage license applicants to create a draft PAD. While this document is not required by the regulations, it allows stakeholders an opportunity to constructively agree on baseline information and minimize risk of not meeting deadlines later in the process. A pre-PAD demonstrates a commitment to collaboration, ensures the license applicant will create the most complete document possible, and expedites the process. A draft PAD has been used in three licensing proceedings that appear to be going smoothly: Canaan, Smith Mountain, and Mystic Lake.

### **C. Ensure that a PAD is Complete**

The PAD is designed to help stakeholders “identify issues and related information needs, develop study requests and prepare documents analyzing any license application that must be filed.”<sup>4</sup> It should include any monitoring results under any existing license. It should also include all existing information available to the applicant even if published or otherwise held by non-licensees. In sum, it should completely describe the existing conditions of the resources affected by the project in a systematic and user-friendly manner that minimizes the need for further study of those existing conditions following the NOI.

The Commission should be prepared to receive an inadequate PAD, as one will surely land on its desk (if one has not already). The Commission has sufficient authority to reject an inadequate PAD; this authority is implicit in the list of mandatory features of a PAD and the requirement that applicants exercise due diligence.<sup>5</sup> The Commission should utilize this authority to invoke consequences for a lesser quality PAD, such as loosening of the burden of proof for an AIR, greater likelihood of a notice of deficient application, the imposition of interim PM&E measures in any annual license that is necessary as a result of the delay caused by the inadequate PAD, or the establishment of a new timeline for the license application that would allow for the deficiencies to be addressed. However, in the absence of exercising this authority, the Commission can and should encourage complete PADs from all license applicants.

The Commission has suggested that there is proper incentive to prevent a deficient PAD because the process in effect forces a license applicant to make up for the data gap with

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<sup>4</sup> 18 CFR § 5.6(b)

<sup>5</sup> 18 CFR § 5.6(b) and (d).

studies. The Commission should not presume that missing data in the PAD will be added during the study phase. The time lost in study seasons and in evaluating alternative operation plans will result in delays, additional costs, and less precise and poorer quality study decisions. The Commission must remember that these disincentives are not always enough to spur license applicants to create adequate PADs – particularly when delays ultimately allow the license applicant to continue operating under existing license conditions.

#### **D. Begin Studies in Advance**

The PAD should be a systematic, well-organized compilation of existing conditions relevant to the application, not just a list of readily available data. Though the ILP rules specify that a license applicant is not obligated to conduct studies for inclusion in the PAD,<sup>6</sup> the Commission should encourage license applicants to do so if such studies will ensure an accurate description of baseline information. Particularly in cases in which an applicant has no information of an entire area of concern, baseline studies can help determine the project nexus and inform the level of need for additional study, and when to dismiss impacts that are not relevant to the project. At Mystic Lake, the license applicant conducted minimal studies that helped guide the structure of the PAD and identify important study areas at the outset.

License applicants may be reticent to conduct studies that may later be rejected as inadequate, but if the PAD is a collaborative effort, these fears are unfounded. Further, the study phase will advance with greater ease and focus if the licensee has conducted baseline studies such as determining the presence or absence of impacts, or river use studies.

### **II. Process Planning and Communication**

The ILP's requirement for a proposed process plan and schedule and the opportunity for stakeholders to comment on it<sup>7</sup> should be the bare minimum for communications with stakeholders. The Commission should encourage license applicants to work with other stakeholders to develop an open, transparent communications plan that maximizes interface and access for all stakeholders. The communications plan should be merged with the process plan into a single, simplified document. For every meeting, detailed notes should be taken that capture group decisions made, and stakeholders should be allowed to comment on the meeting notes. A summary of the meetings should also be publicly available. A website that includes all important filings and documents that is frequently updated is a useful tool for communicating with stakeholders.

### **III. Scoping Document and Meeting**

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<sup>6</sup> 18 CFR § 5.6(b)(2).

<sup>7</sup> 18 CFR § 5.8(b)(3)(iv).

The scoping meeting should be held at a time and place convenient to all stakeholders. All stakeholders should be given the opportunity to provide input and to informally exchange ideas with the license applicant and the resource agencies. The Commission should hold more than one scoping meeting if there is sufficient public interest or if significant issues remain unresolved.

The scoping document should broadly consider the issues to be included in the NEPA analysis, provide ample consideration to explore the wide range of alternatives that could address direct, indirect, and cumulative impacts. The Commission should also describe why a decision has been made to propose an EA without a draft, an EA with a draft, or an EIS.

#### **IV. Study Plans**

The Commission should require the license applicant to propose study plans that are as specific as possible in terms of methodology, timing, and scope, to allow stakeholders to provide productive comments on plans without having to create them themselves. License applicants should not prejudge what future conditions will be “adequate” for the purpose of FPA section 10(a). Sufficient deference should be accorded to the resource agencies (those with mandatory conditioning authority and with authority pursuant to Section 10(a) and 10(j)) on technical issues and disputes regarding the choice of study method, given their expertise on such matters and their history of experience with the affected resources. Moreover, the Commission should allow studies to proceed that are recommended by resource agencies to provide them with the data they need to determine whether or not to impose conditions.

The Commission should evenly apply its study criteria. Just as a study request is expected to meet the criteria under 18 CFR § 5.9, so should the Commission reject an applicant’s study plan that fails to sufficiently address the same criteria under 18 CFR § 5.11. In fact, the burden should be higher for the license applicant, as it is unreasonable to expect citizens to provide detailed descriptions of methodology and cost. Generally, the Commission should establish a high threshold for study plans, because the ILP heightens the standard for study requests as the licensing process progresses.

License applicants should develop the study plan in a collaborative manner. Numerous public meetings and on-going study groups composed of resource agencies and citizens should be an integral part of developing and refining the study plan, and if possible, should begin prior to the filing of the initial study plan. This effort benefits the license applicant, as joint study requests strengthen a request and ensure stakeholder agreement on study needs. Detailed meeting notes should be taken, distributed to stakeholders, and available for made public review.

#### **V. Study Dispute Resolution Process**

The Commission should encourage the license applicant to resolve all study disputes informally. However, should a study between the Commission and an agency with

mandatory conditioning authority or Section 401 authority be the subject of a formal dispute, the Commission should take care to create a fair and unbiased dispute resolution process that clearly characterizes the dispute as one between the resource agency and the Commission, not between the license applicant and the resource agency. The technical conference should be structured to include participation guidelines for all stakeholders, an agenda and schedule, and ground rules that are distributed in advance, including when stakeholders, including the license applicant, may and may not provide input. A moderator, who is not a member of the panel or staff to the Commission, should lead the meeting, keep order, limit the discussion to the narrow scope of the study dispute, and provide appropriate and even-handed opportunities for input from the license applicant and other stakeholders.

To provide credibility to the formal study dispute process, the Director of the Office of Energy Projects should only overturn the findings of the Dispute Resolution Panel in rare cases, and should justify its determination with ample evidence, citing the rules and regulations, applicable law, and Commission policy and practices that it has employed. The Commission should also provide deference to resource agencies in cases in which the study requested may be the basis for exercising conditioning authority.

## **VI. ILP vs. TLP**

The Commission has repeatedly requested comments on how it should consider requests to use the Traditional Licensing Process (TLP) or Alternative Licensing Process (ALP) rather than the default ILP. In reply, the Coalition has consistently made three observations: that three licensing processes is too many for FERC to maintain, that multiple processes adds to confusion, inaccessibility, inequitable treatment among projects, and that for the ILP to work, the Commission must create an extraordinary standard for any applicant to use another process.<sup>8</sup>

The ILP was designed to reduce costs, delays, staff load, and repetition in the process, and to enhance and encourage greater stakeholder collaboration and public involvement while preserving environmental protection and the public interest. We firmly believe that FERC can create a single process with the flexibility to accommodate all of the projects under its jurisdiction. When problems arise, FERC should attempt to fix them within the bounds of the ILP. If the ILP consistently yields quality decisions, then the Commission should sunset the TLP and the ALP.

The HRC believes that there is no class of projects for which the TLP is universally appropriate. We have heard in workshops and in comments that (1) the ILP is not appropriate for small projects; (2) the ILP is not appropriate for large projects; and (3) the ILP is not appropriate for new projects. When is the ILP appropriate? The Commission should demonstrate its confidence in the ILP by subjecting requests to use any other process to great scrutiny and allowing variances from the process rarely, if ever. Finally, the burden to make a case for using another process should be placed entirely on the

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<sup>8</sup> Filed April 21, 2003 under Docket No. RM02-16, p. 4-5.

license applicant. If the Commission finds itself questioning an applicant's reasons not to use the ILP, permission to use another process should not be granted.

In the final rule, the Commission described seven factors that will influence the Commission's decision.<sup>9</sup> We analyze each criterion below:

**(1) Likelihood of timely license issuance**

It is not clear to us how an applicant, five years in advance and before any studies have been performed or agency authorities exercised, can make a credible argument that another process will be more expedient but yield equal value. The Commission should not put expediency before quality of the license.

**(2) Complexity of resource issues**

The Commission should consider this factor only when there is clear factual evidence that the environmental impacts are minute. Conversely, if the complexity of resource issues or project impact is great, the ILP should be the preferred process. Where the impacts are unclear, the Commission should actively seek and heavily rely upon comments on the project impact submitted by resource agencies. Where that is not possible or available, FERC should err on the side of resource protection and require the use of the ILP.

**(3) Level of anticipated controversy**

It is difficult to guess at lack of controversy when no studies have been performed and no agency authorities exercised. If this factor is to be considered, the burden of proof should be upon the license applicant to demonstrate that it made an extraordinary effort to seek comment and involvement and that none was forthcoming. If a stakeholder opposes the use of the TLP, this should be given considerable weight in the Commission's decision. The Commission should not approve the use of a TLP when an agency with authorities in the process opposes the request.

**(4) The amount of available information and potential for significant disputes over studies**

This factor suggests that the TLP may be more useful for new projects than the ILP because there will be less available information. We disagree. The ILP's treatment of information is precisely why it is considered an improvement over the TLP: it eliminates redundant processes and ensures adequate information in the application phase of the process.

This factor also suggests that proceedings in which there is likely to be no controversy over studies are more appropriate for the TLP. We would suggest that proceedings with

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<sup>9</sup> Final Rule issued July 23, 2003 under Docket No. RM02-16, p. 16. Also, *see*: 18 CFR § 5.3. The factors are "(1) likelihood of timely license issuance; (2) complexity of the resource issues; (3) level of anticipated controversy; (4) the relative cost of the traditional process compared to the integrated process; (5) the amount of available information and potential for significant disputes over studies, and (6) other factors believed by the commenter to be pertinent."

no controversy over study issues will still benefit from the expediency and process aggregation of the ILP.

**(5) The relative cost of the traditional process compared to the integrated process.**

The costs considered by the Commission should be those for all participants and throughout the process. The ILP's upfront investment in information and staff is expected to pay dividends through the remainder of the process in avoided costs of litigation, delays, and uncertainty. In any case, cost should not be the overarching or most important criteria.

**(6) Other factors believed by the commenter to be pertinent**

Since these are not described, we can not comment on the "other factors." However, we urge the Commission to carefully consider these unspecified issues and not allow them to override other specified considerations.

**(7) "Good Cause"**

The final determination of process selection is simply based upon "good cause," which is undefined.<sup>10</sup> In our request for rehearing, HRC requested clarification as to how the "good cause" standard connects to the identified criteria, but this information was not forthcoming. We urge that the "good cause" determination be based upon the specified criteria, as narrowly defined in our comments above.

**VII. Conclusion**

We urge the Commission to provide guidance to license applicants and other stakeholders and implementation decisions that ensure ILPs that maximize complete and thorough information and collaboration and ensure the integrity of the process.

Respectfully submitted,

Robbin Marks, Chair  
Hydropower Reform Coalition

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<sup>10</sup> 18 CFR § 5.3 (e)