

HYDRO LICENSING: GET ORGANIZED – STAY ORGANIZED

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ABSTRACT:

The federal licensing or relicensing of a hydroelectric project involves long and convoluted processes that can be very daunting. Those who carefully plan and organize a projected licensing effort in a comprehensive manner will face less difficulty. Managers of licensing projects and key decision makers participating on a hydro licensing team need to appreciate the various nuances and challenges they could face through the multi year process in order to adjust their approach as circumstances change through the process.

Each licensing project is unique and each prospective license applicant has a different management structure and company business philosophies. The planned licensing project needs to be adapted to work within these constraints. The size and complexity of the hydro project also can significantly affect the approach and level of effort needed to get the job done. The purpose of this paper is to discuss how to take these variables into consideration when tailoring a licensing organization that is best adapted to suit the situation. The author will draw from his experience to present a variety of large and small licensing project examples.

Federal Energy Regulatory Commission (FERC) regulations prescribe three basic processes for licensing a hydro project:

- The Integrated Licensing Process (ILP) – the default process;
- The Traditional Licensing Process (TLP); and
- The Alternative Licensing Process (ALP).

The emergence of hydrokinetic projects in recent years has led FERC to issue a statement describing how FERC will license hydrokinetic pilot projects. FERC's new policy is aimed at facilitating the adaptive steps that applicants need to accomplish in order to pursue a long term tidal, wave, or river based hydrokinetic project license.

In addition to discussing the core organizational objectives that any applicant must address in any project licensing plan, this paper will review how the process that the applicant selects could have a bearing on the applicant's organizational approach. In addition we will compare the organizational nuances relating to ILP, TLP and ALP approaches, nuances that could have a bearing on the process selection decision.

Finally, I will stress the importance of continuity and not losing focus in light of the extensive time and resources needed to obtain a FERC license, together with suggestions for practices and practical measures that could help keep the project on track.

THE “IDEAL” LICENSING ORGANIZATION

First, as there is no such thing as the ideal licensing project, there also is no such thing as the ideal licensing organization. With that said, the table below is aimed at helping you gain perspective on the numerous staffing and areas of expertise that would need to be covered if the ideal licensing organization was attainable.

COMPANY SENIOR MANAGEMENT LICENSING PROJECT MANAGER

In-House Resources

Administrative Assistant	Licensing Coordinator	Accounting and Scheduling Staff	Public Relations Support
Engineering	Environmental Staff	Legal Staff	Operations Supervisor
Purchasing Procurement Staff	Financial Staff	Land Management Staff	Operations Field Staff

Outside Resources

FERC Licensing Specialists	Hydro Engineering Specialists	Hydrologist	Fishery Biologists
Wetlands Specialist	Licensed Land Surveyor	Land Use Specialist	Water Quality Specialist
Recreational Specialist	Drafting Technicians	Soils and Geology Specialist	Operations Modeler
Document Production Support	Cultural Resources Specialist	GIS and Mapping Specialists	Wildlife Biologists
Economics Specialists	Botanical Resources Specialists	Information Technology Specialists	Graphics Specialists
Aquatic Ecologists	Stenographic Services	Website Designer	Outside FERC Law Firm

Process Driven Participants

Agency “Experts”	NGO “Experts”	Individual Stakeholders	FERC Staff Participants
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This “Ideal Licensing Organization” is randomly ordered and not displayed with any detailed organizational hierarchy in mind. To prescribe a specific organizational structure for this diverse mix of disciplines and players would take volumes beyond what is permitted for this paper. In addition, it would be beyond the means of most hydro owners to recruit individuals to cover each of these disciplines. This “Ideal Licensing Organization” illustration is purely to set the backdrop for what needs to be considered when planning and executing a program to license or relicense a hydro project.

GETTING ORGANIZED

When you are faced with the daunting task of organizing a plan to license or relicense a hydro project, consider the following questions:

What am I licensing?

- Will the project involve total new development, expansion of power resources at an existing dam, or relicensing a current project with no power enhancements?
- If relicensing an existing project, what condition are the facilities in? Do you predict any major repairs or overheads in the near future? How much will life extension of the project cost?
- Is this a relatively large project (say over 100 mega-watts), or a very small project (less than 5 MW) or somewhere in between? Is it a minor project (less than 1.5 MW)?
- What is the geographic setting for the project? Urban? Rural? Is it a multiple development project covering more than one community?

What are my scheduling objectives?

- What is driving my schedule? Is it to develop new generating capacity as quickly as possible? Is it to comply with deadlines mandated by the Federal Power Act? Is it to minimize process cost? Is it more than one of these factors?
- How soon should I start the process?

What primary objectives do I want to achieve at the end of the process?

- How much can my proposed new project afford in mitigation cost? How much can my existing relicensing project afford in protection or enhancement costs?
- How important is it to retain operating flexibility? Is continuing status quo operations attainable?

How will I get there?

- What licensing process (ILP, TLP, or ALP) best suits my project circumstances?
- What tangible and intangible circumstances could affect how I achieve my licensing goals? Who are the potential stakeholders? If relicensing an existing project, what relations does our company have with current stakeholders and neighbors on the project reservoir? What past licensing experiences (by your own company or other project owners) can I draw from to license my project?

What resources will I need to license the project?

- Do I already have a hydro licensing management team in place? If not, what project management staffing resources already exist at my company that could be organized to suit hydro licensing project needs?
- Does my company have in-house engineering, technical, and/or environmental specialists to develop information needed to prepare the licensing documents?
- What, if any, services will I need to out-source to pursue a hydro license? Will I contract for multi-discipline consulting services covering all aspects of the licensing process, or manage separate consulting contracts with numerous consultants each focused on individual specific disciplines (fishery specialists, recreational specialists, etc.)?

Answering the above questions should help you develop both an organizational plan and a strategic plan for licensing the hydro project. There will be no instantaneous answers to these questions. You will need to determine the answers carefully through assessment and research.

What am I licensing?

I have often stated that people forming a licensing team should collectively know each aspect of the project like the backs of their hands. The more intimate knowledge the project proponent has of the project, the more efficiently the licensing schedule and primary licensing objectives can be met. The more readily you can describe the project plans and current project baseline details to stakeholders in the process, the less likely will the stakeholders be to place obstructions in your way. If you don't have this important knowledge at the onset of your process, go get it. One attribute of being required to prepare a PAD to initiate the licensing process is that it will force you to obtain good project baseline data.

What are my scheduling objectives?

You will hear numerous experienced licensing practitioners, the author included, state that it is important to start the licensing process early. Pursuant to Section 15 of the Federal Power Act (FPA), current project owners must issue their Notice of Intent (NOI) to relicense the project at least five years prior to the expiration of the existing project license. FERC regulations (18 CFR § 5.3) also require that the license applicant issue the Preliminary Application Document (PAD) simultaneously upon NOI issuance. However, it is wise for current project owners to get organized even ahead of these statutory deadlines. Owners of very large projects typically initiate their licensing project planning process 7 or 8 years before the existing license expiration date. Depending on answers to some of the other planning questions noted above, it may be appropriate to initiate some pre-process outreach with key stakeholders during these early phases.

One factor dictating how soon to start your licensing program is that you should first ensure that you have corporate understanding and buy-in on the plan to license the project. This could take some time, although probably less time for smaller companies with fewer levels of executive hierarchy. However, a larger corporate structure entails the need to inform senior management carefully of the costs, risks, and opportunities, and your plan to execute the project.

The other statutory nuance that may affect your relicensing scheduling objectives is the fact that an application for a new license must be submitted no later than two years prior to the expiration of the current license. If the incumbent licensee fails to meet that deadline, that project owner faces the risk that FERC will open the site to competing applications under a new open-ended proceeding. Obviously, this presents a significant threat that the project could be taken away from you.

A new development project being studied pursuant to a preliminary permit will have a statutory 36 month limit to complete the studies and file the license application, or else the project could be open to competing applications at the end of the three year term. If you examine the ILP flow chart timeline illustrated on FERC's website (www.FERC.gov) you will realize quickly that completing the licensing process in 36 months is an extreme challenge. You won't have any time to waste, which makes getting started as early as possible so important.

Proponents of new development projects will want to expedite the process in order to construct their proposed new project and begin gaining project revenues sooner, thus enhancing the financial payback on their investment. That scheduling objective may influence the developer's perspective on compromise and selecting a process that enables the developer to expedite the schedule through settlement agreements.

Developers planning a new hydrokinetic, or wave power project may need to avail themselves of FERC's recently proposed hydrokinetic pilot license approach as the scheduling strategy to follow. The pilot licensing process may seem open ended,

but it does give the project developer the ability to limit investment in constructing a smaller scale pilot project in order to prove its viability to resource agencies before investing in the larger full scale project under a long term license.

Organize a master licensing schedule that suits your primary strategic objectives while following the requisite licensing process milestones. Be sure to build in allowance for contingencies as the process is seldom easy to control.

What primary objectives do I want to achieve at the end of the process?

Plan your project with the understanding that you probably won't end up with exactly the project scheme you envisioned at the beginning of the process. You might need to modify your proposed project operations, or make modifications to the project facilities to protect non-power resources, or mitigate for project impacts. As a project proponent you need to establish your corporate strategic goals concerning operations that you don't want to compromise. For instance, you may be relicensing a project that has historically operated to provide peaking generation and other ancillary power benefits. To retain that flexibility through relicensing, you may need to conduct additional environmental impact studies and/or devise a scheme for providing off site mitigation.

Some existing projects may require significant life extension costs due to age, condition, poor efficiency, or other factors. These projects might not have sufficient economic margin to support the cost of protection, mitigation, or enhancement measures that could result from relicensing. Perhaps redeveloping the project will be your best business decision or transitioning the project to a non-power licensing process. On the other hand, the cost of decommissioning the project, should the project owner decide not to relicense the project, may exceed the license extension cost. It may be crucial to plan your relicensing objectives around these considerations and conduct appropriate life extension studies to support your decisions.

How will I get there?

FERC regulations now enable a license applicant to follow the ILP, TLP or the ALP. Smaller new development projects may also qualify for a license exemption.

The Integrated Licensing Process (ILP) is the default process. The ILP has certain advantages in maintaining orderly process deadlines and explicit dispute resolution procedures. The Alternative Licensing Process (ALP) also has been used occasionally in recent years by owners of larger projects, as it involves extensive environmental analysis on the part of the license applicant aimed at expediting FERC's National Environmental Policies Act (NEPA) compliance. Some owners of smaller projects have found the Traditional Licensing Process (TLP) to be more practical and cost effective than either the ILP or the ALP. The TLP is less structured, and this

flexibility better enables license applicants to negotiate a settlement with the agencies if appropriate

However, because the ILP is the default process, an applicant must first obtain FERC permission to use the TLP or the ALP. FERC regulations (18 CFR § 5.3) outline procedures to request the use of the TLP or the ALP. Basically, the applicant must give good cause why it would be appropriate to use the TLP or ALP for licensing the project and invite comments from resource agencies on the request. Pending the results of the agency responses, FERC will make a determination whether or not to allow the applicant to use the TLP or ALP as requested. Although the TLP requires extra steps to receive FERC's permission, some project owners have found that a degree of flexibility gained by following the TLP more than compensates for this lost up-front time.

In developing your licensing plan and strategy, take your own specific project circumstances into account. A project with a lot of complex issues may be best adapted for the ILP or the applicant may wish to expedite FERC's NEPA process by dedicating applicant resources to use the ALP. The TLP may prove to be favorable for a less controversial project that could achieve relicensing with relative smooth sailing. In organizing your licensing plan to follow a process other than the default ILP, you should present convincing circumstances to FERC warranting your proposed alternative process. You also should have a contingency plan and build into your schedule the possibility that FERC may deny your request to use the TLP or the ALP.

It often is wise, if you don't already know and have good relations with stakeholders affected by the project, to engage in a proactive outreach program before you begin the formal licensing process. Resource agencies and stakeholders will be process driven participants or de facto licensing team members as the "Ideal Licensing Team" illustration at the beginning of this paper indicates. By fostering good collaborative dialogue up front, you will gain insights on potential hot button issues that you should plan to address in your process, and discover opportunities where you can stave off potential resistance by devising some resource enhancement schemes desired by some stakeholders. Information gained by this initiative will help you tailor your licensing strategy.

What resources will I need to license the project?

The process you follow may affect the licensing team organization you need to adopt. Greater focus on process scheduling may be needed to follow the ILP. A greater concentration of NEPA expertise might be needed on the team in order to follow the ALP. If settlement negotiations are key to your licensing strategy, you might want to engage expert facilitators to help achieve that goal.

These days only companies with a huge base of hydro generating assets maintain a large staff dedicated to FERC licensing and license compliance. Those companies generally have experienced licensing practitioners on staff that can manage

the process using oversight from in-house scientists and engineers and through multiple contracts for consulting services. There has been much corporate downsizing in recent years that has changed the former proportion of in-house staffing resources companies are able to dedicate to hydro project licensing.

A significant number of hydro project owners and proponents of new generation projects function with a project manager reporting to senior management and a limited administrative, procurement, and financial staff team. Completion of the bulk of the licensing tasks rely on outsourcing to consultants.

Your specific circumstances will dictate how to manage the resources needed. Look back to the “Ideal Licensing Organization” at the beginning of this paper to discern what, if any, of the illustrated disciplines pertain to your project and company situation. If you have the time, experience, and in-house staffing support, you may be capable of managing multiple consultants contributing studies and other consulting services. If you have limited in-house resources to coordinate the many facets of the process, you may need to aim your outsourcing goals at hiring full service hydro development and licensing consultants with the depth of staff resources and expertise to handle virtually all of the tasks needed to support the process.

It is important to ensure that the key people you recruit on your licensing team know the big picture as it pertains to your strategy for licensing the project. As I indicated previously that people on your team should know the project like the backs of their hands, you also need to recruit staff or consultants who know the licensing process nuances or the pertinent environmental science details like the backs of their hands as this dynamic process will demand the ability for your team to be quick on their feet.

STAYING ORGANIZED

A good licensing plan should not only be well organized for effective implementation of the licensing project. You should also adopt good practices to stay organized. The licensing process can take several years and it is important to stay focused throughout the protracted process.

Continuity of the licensee’s key licensing team is important. People selected to participate need to understand the scheduling nuances affecting the process and be prepared to stay on board for the long haul, notwithstanding circumstances beyond people’s control. There often can be attrition of stakeholder participants during the process and thorough institutional memory among core team members may be critical when a new stakeholder representative is introduced at mid course. Below are some practices you should consider to help stay organized throughout the licensing process.

Good Communications Procedures

Good communications is paramount to effective management of a licensing program. Establish some ground rules and protocols to ensure that communications will be efficient and participants will not get out of line. Electronic mail is very effective. However, people on the team need to realize that such non-paper communications can be discoverable should an issue erupt to litigation and what may be perceived as a justifiable rant in an e-mail might come back to haunt the sender and the license applicant.

Most telephone communications need not be commemorated in a teleconference summary; however, contacts with agencies, whether as a substantive part of the consultation or just to seek environmental resource insights should generally be summarized in writing by the license applicant's representative in the call.

Some owners of larger projects also have found it to be effective to maintain a licensing project website that will provide updates to stakeholders on planned licensing activities. Through use of this tool a license applicant can keep stakeholders informed with less need for person to person outreach.

Communications during consultation meetings and in response to public or media inquiries needs to be carefully planned. Members of a licensing team should be able to participate in appropriate dialogue and not feel as if they are constrained under a gag order. However, people on your team need to defer to designated spokespersons where appropriate and be careful not to slip with loose cannon remarks or gestures that could be taken out of context. I once had a federal agency dispute my company's meeting minutes summarizing a licensing consultation meeting. These meeting minutes had concluded that we did not reach agreement on a particular issue. The agency's refuting claim was, "Your consultant nodded in agreement while our spokesperson was talking." Laughing at this absurdity, my consultant and I concluded that he had probably nodded off during the conversation in question. Nevertheless, there was a lesson learned.

Document Management

It is prudent for you to dedicate an administrative staff member on the licensing team to organize and manage files and documents. Set up folders with clear categories such as: consultation documents; in-house data and information files; draft reports; final reports; correspondence; etc. In addition to maintaining files for process related documents, FERC requires the license applicant to make certain project information details available to the public (see 18 CFR § 4.32 (b)(3)(i), 18 CFR § 5.2, or 18 CFR § 16.7). Failure to adequately comply with these regulatory requirements could expose you to public complaints to FERC that could detract from your main goals to proceed to the next step in the process.

Pay close attention to version control and quality control of documents. I have seen documents handed out at agency meetings with the project owner's track change edits still revealed on the hand out document.

Set up procedures for document review and chain of custody of review and comment on documents. Time permitting, review and comment by a team of reviewers in sequence enables the comments to be consolidated more readily. This takes careful coordination.

FERC also can deem your project deficient (or worse yet, patently deficient) if you fail to include adequate records documenting the consultation process performed in the preparation of the license application. Developing a complete chronology of the consultation activities with relevant correspondence, especially recording instances where agencies, Tribes or public entities have not responded in a timely manner, will help you ensure against this shortcoming.

Meeting, Meetings and More Meetings

Numerous joint agency\public meetings and scoping meetings are driven by each respective licensing process. In between the formal process milestones you may engage stakeholders in additional meetings and discussions aimed at clarification or resolving differences. Often meetings may be scheduled in the field at the project to monitor study activities. Coordinating such numerous meetings can be very difficult and even using sophisticated scheduling software might not be practical and effective. Agencies and stakeholders may be participating in other collaborative hydro licensing processes or non-hydro regulatory activities that would be competing for your time.

I have found the most effective means of coordinating and scheduling meeting and site visit activities is to circulate a simple calendar to all stakeholders involved with my project as well as other concurrent licensing projects soliciting each party's feedback regarding availability in order to find common windows on the calendar that all parties can participate in licensing activities. For a brief period I was maintaining a calendar denoting licensing activities of four different owners projects in New York ranging from the New York Power Authority's Niagara Falls Project down to the much smaller projects I was relicensing. The parties were very cooperative during this calendaring exercise as this simple scheduling gesture helped everyone involved.

Equally crucial is to regularly schedule licensing team meetings to update on status, discuss strategies and adjust plans to respond to circumstances. Usually a monthly meeting or conference call is adequate to keep the team focused; however, depending on the situation and the intensity of the licensing activities, you may need to schedule more frequent meetings with your in-house staff and consultants. Company management also may need periodic updates that would stem from the more detailed licensing team meetings.

Check out the Checklists

I find the use of action item lists to be very effective to ensure that tasks get done and the persons responsible are designated. Also, checklists for document preparation and written itineraries for field activities ensure against oversight. In reviewing documents such as License Applications or PADs, FERC staff uses adequacy review checklists. These adequacy review checklists can be downloaded from the FERC website and adopted as your checklist template for ensuring that your documents will withstand FERC scrutiny and avoid deficiencies or additional information requests.

CONCLUSION

The myriad number of potential licensing tasks and functions illustrated in the hypothetical “Ideal Licensing Organization” shown at the beginning of this paper would intimidate most individuals setting out to initiate a hydro licensing program. However, if you endeavor to answer a few fundamental questions as discussed in this paper, you can organize a licensing team that is commensurate with the scope of your project and you can discern what factors you will need to integrate into your planning process. Once you have your licensing project underway, staying organized can be accomplished by adopting a few common sense and straight forward practices.

Author

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