

# ***RELICENSING HYDROELECTRIC POWER PROJECTS***

**A Handbook for People Involved  
In Relicensing Hydropower Projects**

**PREPARED BY:  
THE NATIONAL HYDROPOWER ASSOCIATION**

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## **Welcome to the World of Relicensing!**

The National Hydropower Association (NHA) has prepared this handbook to acquaint you with the relicensing process for hydropower (“hydro”) projects and thanks you for your interest. As a representative of an involved federal or state agency or an interested non-governmental organization (NGO), as a local government official or as an individual citizen affected in some way by a hydropower project, you are a “stakeholder” in the relicensing of the project and are encouraged to participate in the relicensing process.

This handbook describes “who” participates in relicensing hydropower projects, “what” relicensing is about, and “where” (geographically) and “when” the relicensing process occurs. Attention is given to the relicensing processes that may be used and how to get involved in these processes. Also included is a summary of the laws and regulations which make hydro relicensing a complex process. NHA hopes that this handbook will further stakeholders’ understanding of hydro relicensing and the range of innovative solutions being applied to resolve difficult hydro relicensing issues.

For over one hundred years, the United States has benefited from clean, renewable energy produced by the force of falling water. Hydropower generation is our nation’s chief source of renewable energy, representing 98 percent of the nation’s renewable energy production. In addition to providing an important source of reliable and renewable energy, licensed hydro projects provide important non-power benefits including public recreation (such as campgrounds, boat launch areas, fishing piers, and whitewater boating opportunities), fish and wildlife enhancement, water supply, flood control and irrigation. As part of their continuing commitment to enhancing the environment, hydro owners frequently implement a variety of environmental protection measures, such as water quality monitoring, fishways, and minimum flow releases to protect and enhance fishery resources.

There are about 2,500 non-federal hydropower projects subject to relicensing in the United States today with an aggregate generating capacity of 53 million kilowatts. Between the years 2000 and 2010, the licenses of approximately 220 hydropower projects representing nearly one-third of the hydropower capacity licensed by the Federal Energy Regulatory Commission (FERC) will expire. As a result, much attention is being given to the relicensing process.

As you may be aware, these are very dynamic times for the electric power industry. Utilities and other power producers are seeking ways to reduce cost to consumers and become more competitive in the power market, which has increased the importance of producing electricity at the lowest achievable cost. A licensee's needs to remain competitive in the market while undergoing an extensive relicensing process will be the challenge to all relicensing participants.

While the power industry is changing as a result of increasing cost and competitive pressures, the relicensing process is changing as well. With increasing frequency, licensees and stakeholders are abandoning confrontational and litigious relicensing and adopting more collaborative, local decision-making processes to resolve difficult resource issues. This approach has resulted in notable "gain-gain" situations for both licensees and stakeholders.

In the following pages, you'll be introduced to the relicensing processes from the view of "where we've been" to "where we are". A schematic diagram is included to help you follow with the text. There will also be a discussion on how to participate in the process. Appendix A is a summary of the sections of the Federal Power Act (FPA) and other federal laws that are relevant to the relicensing process. Appendix B is a list of common relicensing terms and acronyms.

## ***1.0 INTRODUCTION***

Under the Federal Power Act (FPA), the Federal Energy Regulatory Commission (FERC) has exclusive authority to license the construction, operation and maintenance of nonfederal hydropower projects located on navigable waterways or that effect interstate commerce. For background on the FPA and FERC's authority and responsibility, see Appendix A. There are currently about 2500 projects operating under licenses issued by FERC. In addition to issuing licenses to build or continue operating a project, FERC also monitors license compliance and dam safety.

A hydropower project license contains terms and conditions that specify how the project may be constructed and operated and requires that the project be properly maintained and operated safely. The FPA mandates that FERC issue licenses for a period of 30 to 50 years. Original licenses are typically issued for a 50-year license term. A “new” license—which is also called a “relicense”—is typically issued for a period of 30-40 years, depending on the extent of proposed new development or environmental mitigation and enhancement measures proposed by the licensee. The length of the license term is typically long enough for the owner to recover its economic investment.

Not earlier than 5 ½ years or later than 5 years before the license expires, a licensee must decide if it will seek a new license to continue operating the project and declare its intent to FERC. The total process of preparing a license application, undergoing the National Environmental Policy Act (NEPA) process and the issuance of a “new” license by FERC is called relicensing. The relicensing process is the subject of this handbook.

This is an exciting time to relicense a hydro project because a licensee has many options in deciding how to relicense a project. Before getting into the specific steps of each option, it's important to understand the basic process, how the alternative procedures evolved, and what

prompted the FERC to include alternative licensing procedures in its regulations in October 1997.

## **2.0 THE FOUR “W’s” of RELICENSING: “WHAT, WHO, WHEN, WHERE”**

### **“WHAT”**

As noted above, relicensing of a hydropower project results in an approval to continue operating for another 30–40 years, 50 years in exceptional cases. Relicensing involves evaluating the project’s benefits and its environmental and social effects. The net result of relicensing is essentially a multiple-year plan that balances stakeholder interests. During the relicensing process, potential project and community benefits can be identified and assessed. Such potential benefits can include continued production of renewable energy, new generation, if feasible, flood control and water regulation, and the protection and enhancement of fish and wildlife, recreation, water quality, and cultural and aesthetic resources at the project.

Hydro relicensing is a complex regulatory process. A number of federal laws (see Appendix A) and regulations, as well as some state laws and regulations, govern the way in which decisions are made and the procedures that must be followed. In addition, many governmental agencies are responsible for administering and enforcing these laws and regulations. During relicensing, relevant environmental, engineering and legal issues are examined and considered. As a result, relicensing participants may have very different backgrounds, and their interests in relicensing issues are frequently diverse.

## “WHO”

Participants in a relicensing process likely include the owner of the hydro project (hereinafter referred to as the “licensee” or the “applicant”), FERC, resource agencies, tribes, and the public. The licensee/applicant may be a public utility, a municipal utility, industry, or an independent power producer. Resource agencies include federal and state, and sometimes interstate, agencies. The “public” are organized groups, which are called Non-Governmental Organizations (NGOs), and unorganized groups or individuals, such as property owners or other interested individuals. In this handbook, the term “stakeholders” is used to describe all of the public individuals or groups, NGOs, and resource agencies that might participate in a relicensing process.

The primary participants in all relicensing processes are the licensee, FERC, and the resource agencies. Other participants in the process will vary based upon the issues at each project. FERC’s relicensing regulations require a licensee to consult with federal and state resource agencies, local governments, and persons affected by the project, at minimum. The extent of consultation depends on the relicensing process/procedure used and, to some extent, is at the discretion of the licensee.

Each participant’s role in the process is described in more detail below.

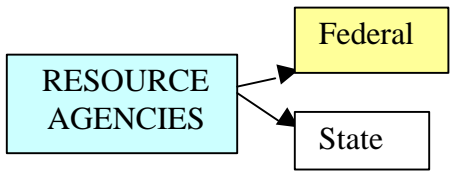
### LICENSEE

The licensee’s role is to work with the various stakeholders to develop a relicensing application that meets the requirements of FERC’s regulations. This includes consulting with federal, state and local resource agencies, as well as other persons affected by the project. The

licensee is responsible for providing project information to the resource agencies and the public and for conducting environmental and/or engineering studies to address issues or concerns regarding resources affected by the project. The study results are typically summarized in the license application and submitted to FERC and the resource agencies. A successful application will include a proposal to balance power generation and non-power benefits so that the project remains profitable and at the same time provides appropriate non-power benefits. The licensee is responsible for meeting all statutory deadlines for filing the license application with FERC and for initiating consultation with FERC and the other stakeholders.

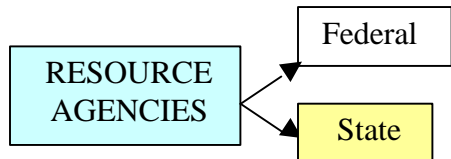
## FERC

FERC's role in the relicensing process is to provide public notice of the relicensing process, manage that process and conduct an independent analysis of the licensee's proposal to determine whether to issue a "new" license and to establish the conditions that should be included in any such license. FERC must—in making its licensing decision—be satisfied that the project is "in the public interest" and is adapted as well as possible to a comprehensive plan for developing the waterway. FERC staff are also responsible for conducting an analysis, pursuant to the National Environmental Policy Act of 1969 (NEPA), and forwarding their recommendation to the FERC Commissioners for their decision. The Commissioners may delegate the final license decision to the Director of the Office of Hydropower Licensing. When a licensee chooses an alternative licensing procedure, FERC staff may assist the licensee and stakeholders in scoping issues and alternatives pursuant to the NEPA, and provide general guidance on FERC's regulations and preparing the NEPA document (Environmental Assessment [EA] or Environmental Impact Statement [EIS]). The role of FERC staff when using alternative procedures depends upon the project, the stakeholders, and the availability of FERC staff.



Federal resource agencies that may be involved in a relicensing, depending on the nature and geographic location of the project and the resources affected, include the Fish & Wildlife Service (FWS), the National Marine Fisheries Service (NMFS), the Forest Service (FS), the Bureau of Land Management (BLM), the National Park Service (NPS), the Bureau of Indian Affairs (BIA), the Bureau of Reclamation (BuRec), Army Corps of Engineers, and the Environmental Protection Agency (EPA).

The federal resource agencies may exercise authority in the relicensing process through the Fish and Wildlife Coordination Act, FPA Sections 4(e), 10(j) and 18, and the Endangered Species Act (see Appendix A for more detail on these laws). The licensee is required to consult with all involved federal resource agencies regarding environmental studies and the content of the draft and final license application. If the licensee chooses an alternative relicensing procedure (as hereinafter explained as a relicensing process pursuant to 18 CFR Section 4.34(i)), the federal agencies will likely be involved in designing the studies, reviewing study reports, assisting in the NEPA scoping process, and assisting in the development of the NEPA document. Federal agencies may also participate in settlement negotiations with the licensee and other stakeholders, if applicable.



State resource agencies have jurisdiction over the use and protection of the states' natural resources, such as fish and wildlife, water quantity (where there are issues related to water allocation and water budgets), state threatened and endangered species, water quality, wetlands, recreation facilities and access, and cultural resources. These agencies are authorized to

participate in the relicensing process through Section 10(j) of the FPA, the Fish & Wildlife Coordination Act, the Clean Water Act (CWA), the Coastal Zone Management Act (CZMA), and National Historic Preservation Act (NHPA). See Appendix A for more detail on these laws. In some cases, there are also state laws and regulations that state agencies must carry out simultaneously with the FERC NEPA process, such as California's state NEPA process.

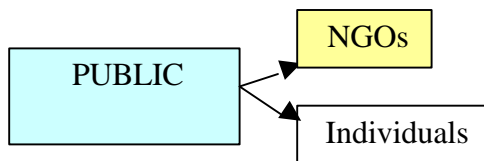
Like the federal resource agencies, state resource agencies usually participate in scoping issues and alternatives, informing the licensee as to the studies they think are necessary, reviewing and commenting on the draft application, reviewing the final license application, and providing final recommendations for license terms and conditions to FERC. State resource agencies also participate in the Section 10(j) dispute resolution process if FERC disagrees with an agency's recommendation for fish and wildlife resources.

In most states, the EPA has delegated its responsibility to administer and enforce Section 401 of the CWA to a state agency. Under Section 401 of the CWA, FERC may not issue a new project license unless the state issues (or waives) water quality certification. The state agency responsible for issuing "401 Certification" may be other than a "resource" agency, for example, a state Department of Health.

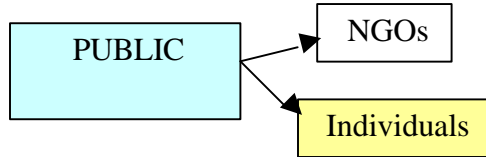
If the licensee chooses an alternative relicensing procedure, state resource agencies (and the 401 certification agency, if different) may be more involved in designing the studies, reviewing study reports, assisting in the NEPA scoping process, and assisting in the development of the NEPA document. State resource agencies may also participate in settlement negotiations with the licensee and stakeholders, if applicable.

NATIVE  
AMERICAN  
TRIBES

Native American tribes may be involved in a relicensing proceeding if tribal lands are affected by the project or if the project is located within a reservation. FERC defines “Indian tribes” as a distinct community or body of people of the same or similar aboriginal race historically inhabiting areas within the U.S. The tribe must be united in a community under one leadership or government constituted by law or long-standing custom and be recognized by treaty with the United States, federal statute, or by the U.S. Secretary of Interior.



NGOs are organized groups representing environmental, conservation or recreational users such as the BASS Federation, the Natural Heritage Institute, American Rivers, American Whitewater Affiliation, and Trout Unlimited, to name a few. NGOs can be very active in the relicensing process depending on the issue and the location of the project. NGOs frequently participate in the entire relicensing process, including reviewing and commenting on the licensee’s documents and requesting scientific studies. NGOs may provide recommendations for the licensee and FERC to consider for the new license. As is the case with the resource agencies, NGOs typically participate to a greater degree when a licensee uses an alternative licensing procedure.



Individual members of the public may play a very important role in relicensing if such individuals are directly affected by the project. Examples of public participants include landowners along the reservoir and downstream of the project, anglers, recreation users, political officials, industrial and municipal water users, residents of local communities, and customers whose power is generated from the project. It is frequently difficult for the public to participate to the extent and duration that resource agencies and NGOs can, given the complexity and length of the relicensing process. The public is, however, encouraged to review and comment on the licensee’s documents, attend public meetings, and, in an alternative process, to contribute to the NEPA scoping of project issues and alternatives.

### **“WHEN”**

The FPA requires that each licensee file a Notice of Intent (NOI) to seek to relicense the project not later than five years before license expiration, and to file its application for a new license not later than two years before license expiration. Licensees may begin relicensing activities prior to the NOI. Prior to filing the license application, which is called the “pre-filing” period, the licensee consults with interested agencies and the public, conducts studies, analyzes the results and prepares a draft license application for public comment. After the licensee files the final application with FERC, FERC will undertake a number of regulatory and procedural steps, including preparing a NEPA document, before it issues any new license. In general, an application that is complete and contains a proposal that is acceptable to both the licensee and stakeholders will minimize the time it takes for FERC to make its licensing decision.

The licensee and stakeholders commenting on the license documents must adhere to certain timeframes, both before and after filing of the application, as explained in FERC’s regulations. At specific junctures in the procedure, FERC or the licensee will issue public notice of the deadline for filing formal comments or attending public meetings.

## **“WHERE”**

Regardless of a project’s location, relicensing issues are sorted out in a several places including Washington, D.C., the offices of various state and federal agencies, the national and regional offices of various NGOs, and the community where the project is located. Although most meetings involving the public will take place at or near the project itself, varying regulatory and institutional entities located considerable distances from the project’s location will have a strong influence on the relicensing outcome. Consequently, meetings during the relicensing process may be frequent and held in various locations.

### ***3.0 RELICENSING HISTORY – “WHERE WE’VE BEEN”***

The evolution of federal environmental legislation—NEPA, as well as the Electric Consumers Protection Act (ECPA) of 1986, which amended the FPA—provided the basis for FERC to develop relicensing regulations that included a comprehensive consultation process. The relicensing process created by FERC Order 513 in 1989 is known as the “three-stage consultation” or “traditional” process. The traditional process (see Title 18 of the Code of Federal Regulations, Section 16 for a complete description) usually begins about 3 years prior to the licensee filing the relicense application with FERC. The first significant look at how the traditional process served relicensing participants occurred in the early 1990s, when FERC began reviewing applications to relicense 157 projects whose licenses expired in 1993. Those projects collectively were called the “Class of ’93”. This was the first time in the history of FERC licensing that so many licenses would expire within the same year.

Although FERC’s regulations described in detail how the licensee should proceed with and document the traditional process, FERC found most of the Class of ’93 license applications were incomplete, primarily due to the complex consultation portion of the regulations. As part of the traditional process, the licensee is required to solicit study requests from resource agencies and to attempt to resolve disputes prior to filing the application with FERC. FERC required virtually all of the licensees submitting Class of ’93 applications to file additional information, and, as part of the NEPA process, required many licensees to complete additional studies. Upon issuing notices inviting additional scientific study requests for the Class of ’93, FERC received over 700 individual study requests from resource agencies, NGOs and the public.

The reason for the inordinate amount of study requests was three-fold: 1) disputes between the licensee and stakeholders on the need to conduct recommended studies were not resolved in the pre-filing period; 2) stakeholders believed that data upon which FERC was to base its licensing decision were insufficient; and 3) stakeholders requested that projects undergoing relicensing be grouped by river basin in order to develop a basin-wide approach to impacts and enhancement measures. With FERC requiring additional information from licensees and, in many cases, requiring licensees to complete further environmental studies, the relicensing process was significantly extended.

The “Class of ’93” relicensing applications were considered by many, to be a catalyst for devising a new method of relicensing hydro projects.

With hydro licensing awash with controversy and polarization, inefficiency, delay, and high costs to licensees and other participants, everyone involved-- FERC, the industry, federal and state resource agencies, and NGOs—sought an alternative process that would increase public participation, reduce polarization and promote agreement. Any alternative process would also

need to combine the various environmental processes (particularly the NEPA process) with the license application development process to reduce administrative delay.

#### ***4.0 TODAY'S RELICENSING METHODS***

In 1992, Congress passed the Energy Policy Act (EPAcT) which, among other things, required FERC to develop alternative licensing procedures to allow an applicant to (a) file a preliminary draft environmental assessment (otherwise known as an Applicant Prepared Environmental Assessment or "APEA") with the license application or (b) employ a third party contractor to prepare a draft Environmental Impact Statement (Third Party EIS) with FERC's guidance. EPAcT provides a unique opportunity for licensees and stakeholders to develop a relicensing process tailored to the specific issues at the project.

The controversy of the "Class of 93", the success of some earlier hydro relicensing efforts using negotiated settlements, and the enactment of EPAcT combined to prompt FERC to adopt its "Alternative Licensing Procedures" regulations (Rule Making 95-16 Order 596), issued in October 1997. Order 596 provided regulations for implementing alternative licensing procedures and formally established these procedures as an alternative to the more structured, traditional three-stage consultation process. The "alternative" procedures encourage greater public involvement in the relicensing proceeding, provide an opportunity for licensees and stakeholders to tailor the relicensing process to the specific issues at the project, and streamline procedural compliance with the multiple federal laws that are involved in the relicensing process.

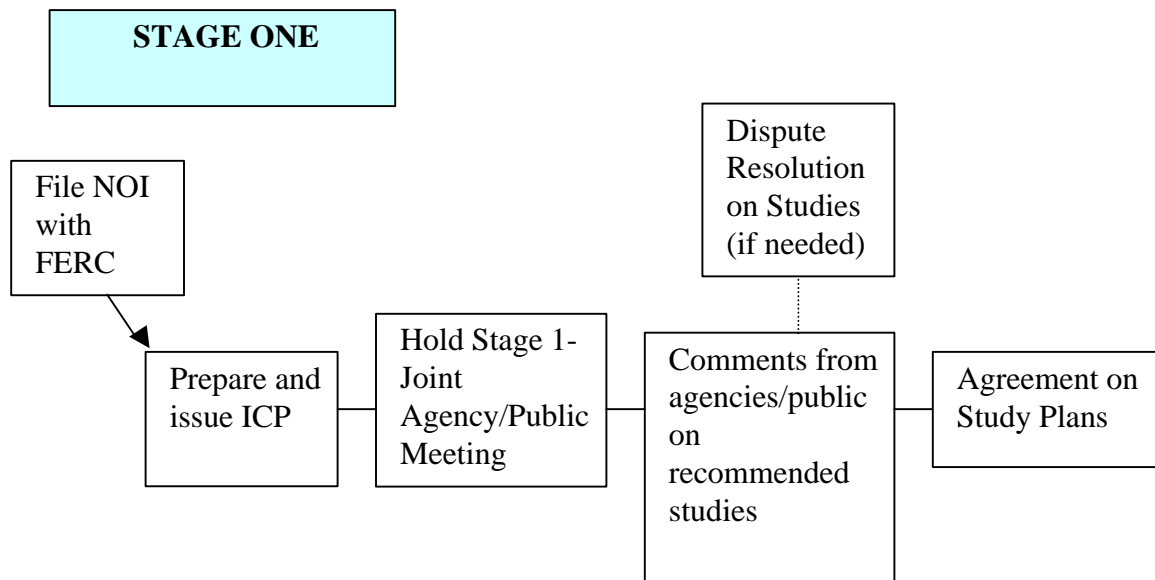
Thus, there are two relicensing processes currently available to licensees: 1) the traditional process and 2) the alternative procedures employing either of the alternative procedures specified by EPAcT: the APEA or the Third Party EIS. It is very important to note that Order 596 does not confine licensees to using either an APEA or Third Party EIS; rather, FERC encourages licensees and stakeholders to develop a procedure that will fit the specific needs of the project and then request FERC's permission to it. An example would be having a licensee

complete a pre-filing NEPA scoping process but not filing an APEA or Third Party EIS. Each of the relicensing processes is discussed in detail below.

#### 4.1 “Traditional” Three-Stage Consultation Process

The relicensing process created by FERC Order 513 in 1989<sup>1</sup> is the traditional approach to relicensing (see Title 18 of the Code of Federal Regulations, Section 16). The process gets its name from three discreet “stages” of consultation activities (Section 16.8).

While the traditional process has often been controversial and unsuccessful in resolving issues prior to FERC’s licensing decision, licensees have had success using this process by adding opportunities for stakeholder involvement, such as holding additional meetings to discuss study plans and study results, and working with the stakeholders to negotiate a settlement agreement. The following summarizes the three stages of consultation required by FERC in the traditional approach.



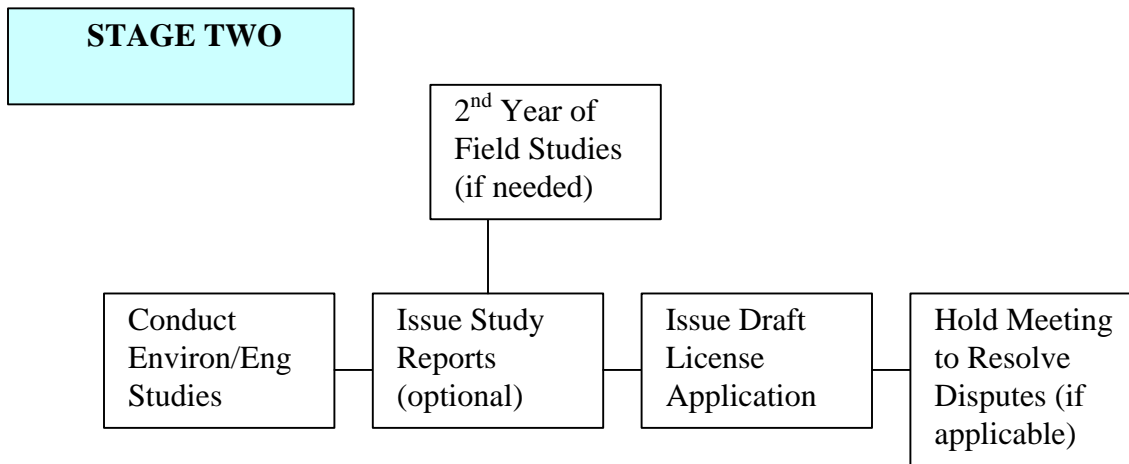
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<sup>1</sup> FERC issued a final rule (Docket No. RM87—33-000, Order 513) on May 17, 1989 and the final relicensing rules became effective July 3, 1989.

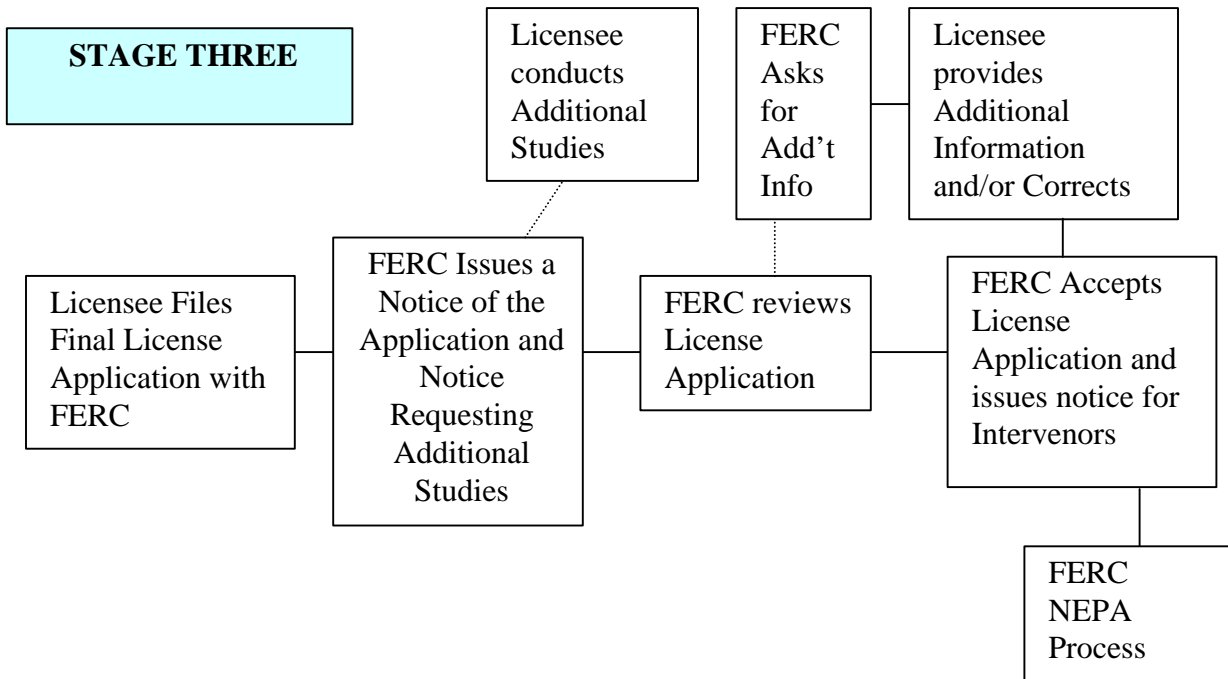
Before the formal activities of the relicensing process begin, the licensee files a Notice of Intent (NOI), which notifies FERC and the public that it intends to apply for a new license to continue operating the project. The NOI also specifies where the public can review background information—called the “Public Information File”—on the project. Stage One activities begin when the licensee distributes an Initial Consultation Package (ICP) to the stakeholders and requests comments. The ICP contains information on the dam, the powerhouse and other structures, describes how the project operates, and describes the environmental resources that exist within the project boundary. The ICP also discusses any planned changes in project operations and other project related information.

The licensee schedules a meeting with the resource agencies and the public to discuss the contents of the ICP and provide stakeholders the opportunity to make formal comments or ask questions. This meeting may include a project tour. The stakeholders may request specific information—usually in the form of environmental studies—necessary to adequately evaluate how the project affects various resources. Study requests and comments on the ICP are due 60 days after the public meeting. The licensee considers all study requests and comments in determining the studies to be conducted. While not required in the regulations, some licensees develop draft study plans for agency review and comment, meet with resource agencies and public to negotiate the scope of studies, and try to reach consensus on the study plans. Studies might include, but are not limited to, fish population assessments, instream flow studies, recreation use surveys, cultural resource surveys, inventories for threatened and endangered species, and water quality sampling.

In accordance with FERC’s regulations, Stage One concludes when all participating resource agencies and Native American tribes, if applicable, provide written comments on the ICP. If there is disagreement on study plans that cannot be resolved among the licensee and disagreeing entity, the licensee may formally request that FERC begin the dispute resolution process (see Section 16.8) to determine what studies must be conducted.



Stage Two is typically the longest period of consultation because it usually includes one to two years of field studies. The licensee conducts the studies agreed upon in Stage One, prepares study reports (optional) and prepares a draft relicense application. The draft application summarizes the results of the studies and describes how the licensee plans to modify and operate the project and any environmental or other non-power measures that the licensee plans to implement. The licensee distributes the draft application to the stakeholders and allows a 90-day review and comment period. Then, the licensee prepares a final application that addresses the stakeholders' comments. If disagreements exist on the method of operation or level or type of proposed enhancement, the licensee must meet with the disagreeing stakeholder(s) and attempt to resolve the dispute. Disagreements that exist at the time when the licensee files the application with FERC are addressed in FERC's NEPA document either an environmental assessment (EA) or an environmental impact statement (EIS), depending on the nature of the proposal and the extent to which the human environment is affected.



Stage Three begins when the licensee submits the final application and Clean Water Act §401 Certification (or evidence of application for certification) to FERC and all consulted stakeholders. In the traditional process, Stage Three normally initiates FERC’s formal involvement in the relicensing process, as it is very rare for FERC staff to participate in the pre-filing process (unless the licensee requests formal dispute resolution). FERC publishes a notice announcing the submission of the final application and invites interested parties to request additional studies.

FERC reviews the application for adequacy and may request the licensee to correct deficiencies or submit additional information. Once FERC receives the additional information and finds it adequate, it publishes a notice “Accepting the License Application” and inviting comment, protest or intervention, usually within a specified timeframe of 30-90 days. An intervenor is recognized by FERC as a formal party in the process.

Following acceptance of the application and as required by NEPA, FERC begins its environmental review of the resource issues and project alternatives. In essence, consultation with stakeholders (and any parties who have intervened) begins again, with FERC as the lead entity. FERC conducts a “scoping” process, asking for public and agency comment on project issues and alternatives. Depending on the results of the scoping process, a licensee may be required to conduct additional studies or provide FERC with additional information. Once FERC has the information it needs to complete a NEPA analysis, it publishes a notice that the project is “Ready For Environmental Analysis” (REA). The REA notice requests that the resource agencies provide their final recommendations, terms and conditions, and prescriptions on enhancement, mitigation and protection measures.

FERC then prepares a draft NEPA document (either an EA or an EIS) and issues the document for public comment (30-45 days). FERC reviews and addresses the comments received on the draft NEPA document and issues a final NEPA document. FERC may—at the same time they issue the final NEPA document—issue a new license with terms and conditions based on the recommendations of the resource agencies and on FERC’s own analysis. The licensee and intervenors may seek rehearing of parts or the entire new license.

Usually, under a traditional process, a new license will not have been issued until after the existing license expires. In this case, FERC issues an annual license, which allows the project to operate under the conditions in the existing license until a new license is issued.

A chief advantage of the traditional approach is that the process is straightforward and familiar to licensees, agencies, NGOs, and FERC. Therefore, there is little room for disagreement on the process. However, its chief disadvantage is that the both the pre-filing consultation process and the NEPA process follow an extensive study and consultation period, thus making the relicensing process duplicative and costly for both the licensee and the stakeholders. Often, stakeholders may become involved in relicensing only after the NEPA

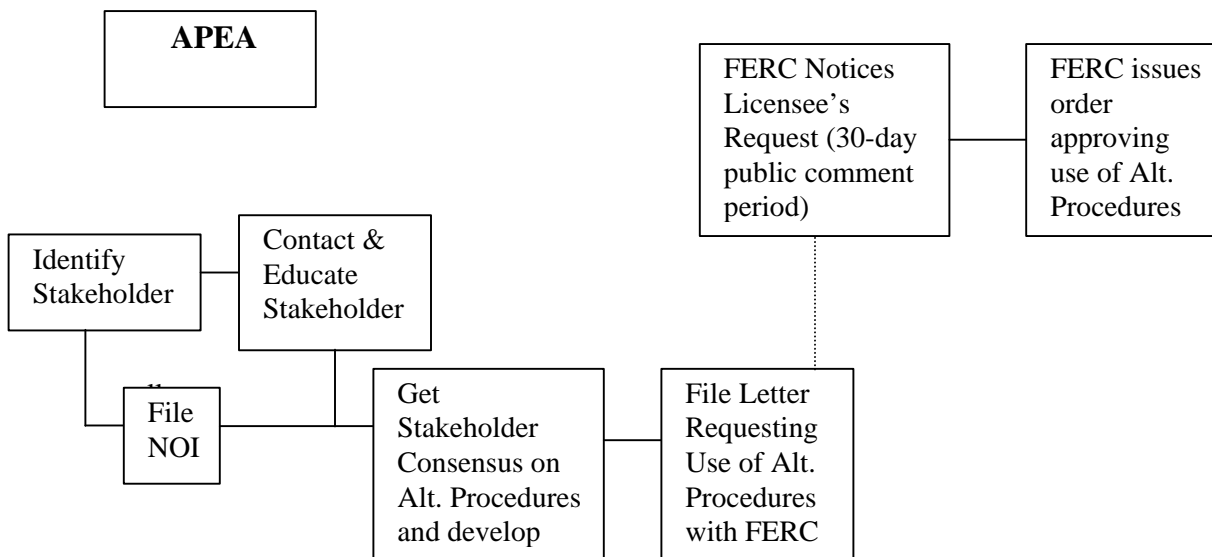
process begins and raise new issues after significant time and resources have been spent. This contributes to the often-contentious nature of the traditional process.

## 4.2 Alternative Licensing Procedures

FERC formally established optional alternative licensing procedures with RM95-16. As noted previously, this handbook focuses on the APEA and Third Party EIS. The preliminary draft APEA or draft EIS replaces the Exhibit E (environmental report) that is required in the traditional licensing or relicensing process. The primary difference between the alternative procedures and the traditional process is that the alternative procedures integrate the pre-filing consultation and environmental review (NEPA) processes during the pre-filing period. Consultation, review and studies required by laws other than NEPA are also conducted during the pre-filing period.

Again, it is important to note that the alternative licensing procedures may include other procedures for relicensing not described herein. Many licensees and stakeholders are using the alternative procedures to construct a process that fits the needs of the project.

### 4.2.1 Applicant Prepared Environmental Assessment (APEA)



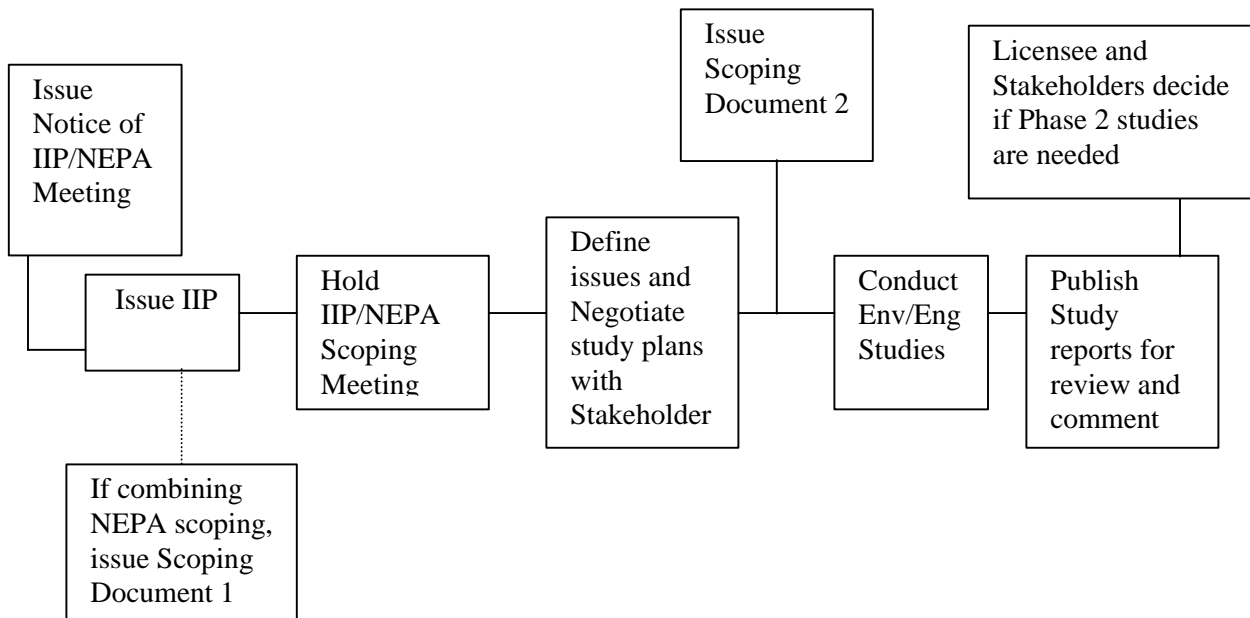
To use the APEA procedures, the licensee requests FERC's approval to use alternative procedures for relicensing the project. In making that request, the licensee must demonstrate to FERC that it has contacted interested stakeholders and that there is a consensus among the stakeholders that alternative procedures should be used for the project relicensing. As you can see from the above diagram, getting consensus requires a licensee to identify the interested stakeholders and to educate them on the procedures that the licensee would like to use for the project relicensing.

To use an alternative procedure does not require unanimous approval by the stakeholders, and FERC explicitly states in Order 596 that no one stakeholder shall have veto power to stop a licensee from using an alternative procedure. FERC does, however, underscore the importance of consensus since a primary objective of the alternative procedures is to promote cooperation and improved communication among the stakeholders and the licensee.

In addition to obtaining stakeholder consensus, the licensee develops a communications protocol that describes how the stakeholders, licensee, and FERC will communicate until the final license application and NEPA document are filed with the FERC.

The applicant is required to send copies of its request to all affected resource agencies and "all entities that have expressed an interest in the alternative procedures." FERC gives public notice of the licensee's request to use alternative procedures in the Federal Register and allows a 30-day comment period.

During the comment period, some licensees meet with stakeholders to form a "relicensing team." This team will assist the licensee in the conducting NEPA and other consultation activities.



Once FERC approves the use of alternative procedures, the licensee, at a minimum, must conduct the following steps:

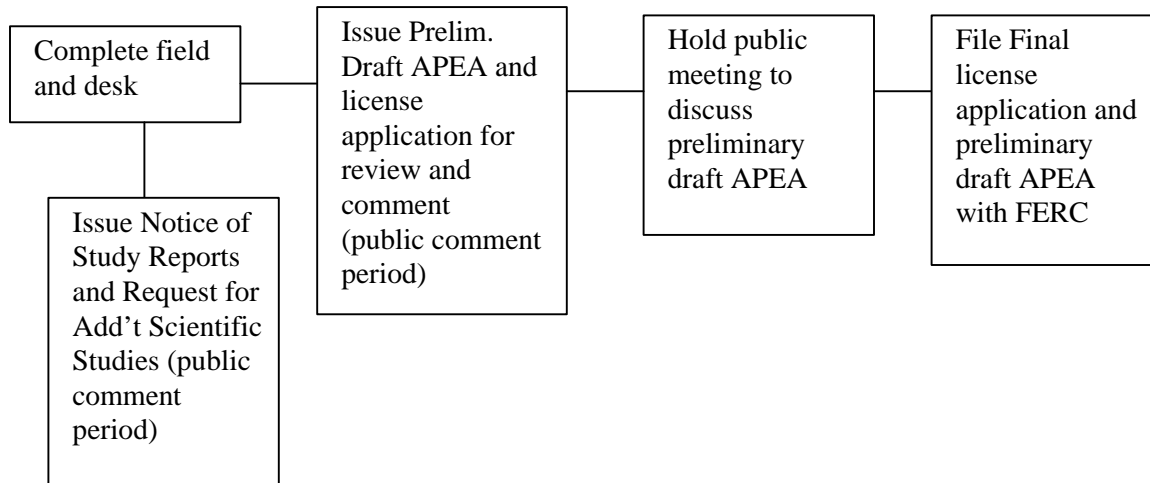
- Prepare and distribute an initial information package (“IIP”) containing information on the project works, operation, and environmental resources
- Conduct an initial information meeting open to the public
- Conduct a cooperative scoping of environmental issues with all participants, including the selection and design of required scientific studies
- Prepare and file with FERC every 6 six months a status report of the proceeding
- Prepare and submit a preliminary draft NEPA analysis with the final license application

The licensee distributes the IIP and holds a public meeting. The licensee may combine the IIP and scoping activities to issue a combined IIP and Scoping Document 1 (SD1), and hold a combined IIP and NEPA Scoping Meeting.

The licensee and stakeholders proceed with identifying (scoping) issues and project alternatives. “Scoping”, which is one of the most important aspects of this process, involves working cooperatively to identify project issues and alternatives and developing the best method of resolving issues.

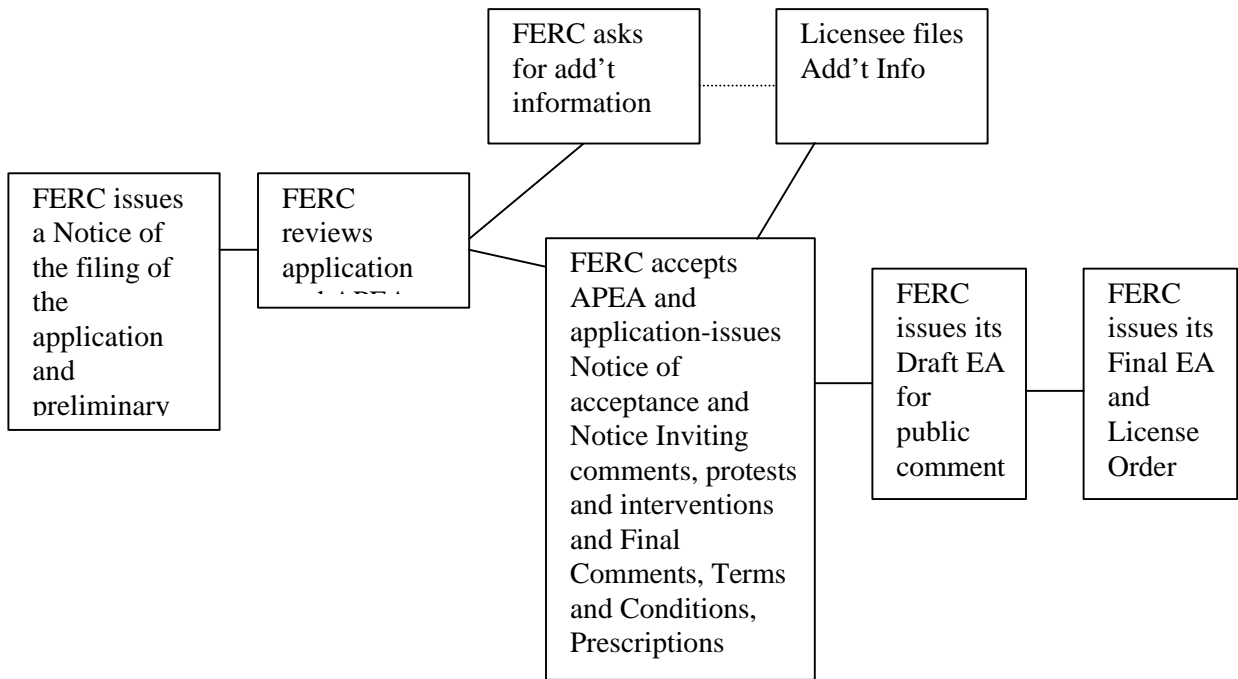
Following the scoping meeting, the stakeholders and the licensee further define resource issues and study scopes, which are summarized in Scoping Document 2 (SD2). The licensee conducts the studies and issues study reports for the stakeholders’ review and comment. At this point, the licensee and stakeholders decide whether they have enough information to make a decision about the effects, if any, on a resource and what enhancement measures should be proposed. If they conclude that more information is necessary, a Phase 2 study plan for the resource(s) in question is developed.

Although it does not appear on the above diagram, the relicensing team will meet frequently during this time. If appropriate, the relicensing team may be subdivided into smaller groups according to specific resource issues. Also, FERC typically assigns staff to participate in the proceeding. As you can see from the schematic diagram for the traditional process, some FERC activities traditionally done in the post-filing period are now completed in the pre-filing period under the alternative procedures.



After completing the studies to address project issues and distributing reports, FERC and the licensee issue a notice requesting any additional studies. This comment period is typically 60 days. The licensee will prepare the preliminary draft APEA and draft license application, usually with participation of the stakeholders, and distribute these documents for public review and comment. FERC will issue a notice of availability of the documents and request agencies' preliminary terms and conditions, prescriptions, and recommendations. This review and comment period is typically 60 to 90 days. The licensee may hold a public meeting during the comment period to listen to any public concerns/comments on the APEA.

The licensee incorporates stakeholder comments on the preliminary draft APEA and draft application, as well as preliminary terms and conditions, prescriptions and recommendations submitted by stakeholders, and files the final license application and preliminary draft APEA with FERC.



FERC issues a notice that the licensee has filed an application and APEA and then reviews the application and APEA to ensure that the documents conform to FERC’s regulations. Since, in most cases, FERC staff will have been involved in the project proceeding from the beginning--providing guidance and reviewing the licensee’s documents--it is unlikely that the APEA and license application will be found deficient or that FERC will require additional information.

After determining that it has the information needed to complete an independent analysis, FERC will issue a notice requesting final terms and conditions, prescriptions, and recommendations and invite comments, protests and interventions. Since all key parties will likely have been involved in the pre-filing activities, it is less likely that significant adverse comments or protests will be submitted; however, stakeholders not satisfied with the resulting

proposal or preliminary draft APEA have the right to intervene and/or protest. Following this comment period, FERC will prepare and issue a draft EA for comment.

FERC will review and incorporate the final terms and conditions and other comments and issue a final EA. FERC may issue the license order with the final EA or shortly following the issuance of the final EA. Only a licensee or intervenor may seek rehearing of a license order.

As stated, the APEA process combines the NEPA process, pre-filing consultation process, and other processes associated with relicensing, such as the Section 401 Water Quality Certification process, endangered species consultation, coastal zone consistency, and historic preservation consultation. This early initiation of these processes generally results in the earlier involvement of key stakeholders and FERC, early identification of issues and potential conflicts, and resolution of issues. It minimizes, if not avoids, the costly late stakeholder intervention and additional information requests that commonly extend and add cost to the traditional process. Conducting an APEA is no guarantee that there will not be differences among the licensee and stakeholders, but the likelihood of resolving those differences before an application is filed is greatly enhanced.

Because the APEA process combines NEPA and other processes in the pre-filing period, the licensee may expend more resources – time and money – earlier than in the traditional process. The trade-off is, of course, that post-filing (relicensing and study) costs may be avoided or significantly reduced, license terms will be more predictable (because it's likely that fewer issues remain unresolved), and licensee and stakeholder commitment to and satisfaction with the new license will increase.

#### *4.2.2. Third Party EIS*

The Third Party EIS procedure is similar to the APEA, except the licensee contracts with a consulting firm to prepare the environmental document, in this case an EIS. The consulting

firm is pre-approved, selected, and supervised by FERC. A licensee may consider the Third Party EIS (as opposed to an APEA) if the licensee believes that FERC will require an EIS anyway, due to the size, scope and potential impact of the project.

A Third Party EIS ensures that FERC is involved early in the relicensing process and thus minimizes the likelihood of a deficient application. This approach may involve significantly greater expenditure of the licensee's money and resources up-front. While the involvement of the Third Party EIS contractor may reduce the licensee's and stakeholders' participation, compared to an APEA, some projects using a Third Party EIS process have incorporated collaborative planning into the process to encourage stakeholder participation and cooperation. Again, this does not mean significant differences will not occur among the licensee and the stakeholders, but rather, that such differences will more likely be resolved in a mutually agreeable fashion earlier in the relicensing process.

## ***5.0 HOW TO PARTICIPATE IN THE RELICENSING PROCESS***

The licensee, FERC, and all stakeholder participants play important roles in a relicensing process. In the relicensing process, the licensee provides a large amount of information to stakeholders and requests that stakeholders review and comment on the information and provide any other sources of information for the licensee to consider. Stakeholders also participate by commenting on the licensee's documents, and working with the licensee to resolve issues. The relicensing process is a long-term commitment of time and resources, usually occurring over a 3 to 5 year time period. Water and related resources are public resources. Therefore, it is the responsibility of all stakeholders to participate to represent the public interest.

**Participating in the relicensing process involves two-way communication.**

The opportunities to participate in a relicensing process fall into two categories: participating in meetings, and reviewing and commenting on written documents. Let's explore each of these categories and define the various activities in which an NGO or individual citizen may participate.

## MEETINGS

Some meetings that occur in the relicensing process are mandatory in that FERC's regulations require the licensee to publish notice of the meeting and hold the meeting. Other meetings are held at the licensee's discretion, depending on what task the licensee is trying to accomplish. For example, a licensee might decide that the best method of getting stakeholders' advice and comment on resource study plans is to hold meetings to discuss the various studies.

The major categories of meetings in which a stakeholder might attend or participate include: initial meetings, relicensing team meetings, study scope meetings, NEPA scoping meetings, and the draft application meetings.

**Initial Meeting:** Regardless of the process or procedure used to relicense a project, the licensee is required to hold a public meeting at the beginning of the process to provide information on the project and to identify issues. By participating in this meeting, an individual or group will have an opportunity to learn about the project and to raise any issues or concerns for consideration in the relicensing process.

**Relicensing Team Meetings:** If the licensee uses an alternative procedure, it may choose to form a "Relicensing Team" comprised of the licensee and stakeholders who will assist the licensee in designing studies, reviewing study reports, negotiating project operation and

enhancement measures, and developing the NEPA document. The Relicensing Team usually meets on a regular basis (monthly or every other month) until the final license application and NEPA documents are filed with FERC. Being involved in these meetings requires a significant commitment of time and energy; however, past experience has shown that team members feel the results are worth the effort.

**Study Scope Meetings:** Whether a licensee uses the traditional licensing process or an alternative procedure, they may choose to have meetings with stakeholders to develop study plans. Working cooperatively on study plans significantly reduces disputes on whether an “adequate” level of study was performed to address a particular resource issue.

**NEPA Scoping Meeting:** The NEPA scoping meeting is a requirement of an alternative procedure. The scoping meeting is an opportunity for stakeholders to define resource issues and project operation alternatives and to present concerns and/or support for the project. The scoping meeting is documented using a court reporter, and all comments are made part of the public record for the project. The scoping meeting may occur either before or after the license application is filed with FERC, depending on what type of relicensing process (traditional or alternative procedure) is followed.

**Draft Application Meeting:** When using a traditional relicensing process, this meeting is mandatory if there is any disagreement on the contents of the draft license application. The meeting occurs after the licensee issues the draft application, within the 90-day comment period. Its primary purpose is to attempt to resolve any remaining disagreements before the licensee files the final license application with FERC.

This meeting is not required when using an alternative procedure; however, licensees often hold a public meeting following the formal comment period to take oral comments on the draft license application and preliminary draft APEA.

## REVIEW AND COMMENT

Stakeholders may also participate by reviewing and commenting on the licensee's documents. At the beginning of the process, the licensee must make all of the relevant information about the project and its operation, including information about the environmental, recreational, and land use related to the project, available to the public for review.

Other documents that a stakeholder may review and comment on include:

- ➡ Initial Consultation Package (ICP) or the Initial Information Package (IIP)
- ➡ Study plans
- ➡ Study reports
- ➡ NEPA Scoping Documents 1 and 2
- ➡ FERC Notice Requesting Additional Scientific Studies
- ➡ Draft license application
- ➡ The licensee's preliminary draft NEPA document
- ➡ Final license application
- ➡ The licensee's NEPA document (if applicable),
- ➡ FERC Notice Inviting Comments, Protests, and Interventions
- ➡ FERC Notice Ready For Environmental Analysis
- ➡ FERC's draft NEPA document
- ➡ FERC's final NEPA document (only if it is an EIS)
- ➡ License order (Request for rehearing of a license order can be made only by an entity who is a recognized "party" to the proceeding, otherwise known as an "Intervenor").

## **APPENDIX A**

### **Summary of Federal Legislation Applicable to Hydro Relicensing**

## **Laws Affecting Relicensing**

There are a few sections of the Federal Power Act (FPA) that particularly affect the relicensing process: Section 4(e), Section 10(a), Section 10(j) and Section 18. We describe each section in more detail below.

- Section 4(e) applies to projects within a federal reservation, such as a National Forest or tribal lands. This section authorizes federal land management agencies (notably the Forest Service and the Bureau of Land Management) to issue mandatory conditions to include in the license to ensure that project operations do not interfere with the intended public use of the land. These conditions are referred to as Section “4(e) conditions” and are mandatory in that FERC must include them—as written—in the new license.
- Section 10(a) requires FERC to give equal consideration to power and non-power values to provide the “best public use of the waterway”. This is commonly referred to as “balancing”.
- In 1986, the Electric Consumers Protection Act amended the FPA to, among other things, include Section 10(j). Section 10(j) requires FERC to include in a new license such fish and wildlife terms and conditions as are recommended by state and federal fish and wildlife agencies unless FERC believes such “10(j) recommendations” may be inconsistent with the purposes and requirements of the FPA. FERC and the agencies must attempt to resolve inconsistencies between 10(j) recommendations and the FPA. If FERC does not adopt a 10(j) recommendation, it must publish a finding that (a) the recommendation is inconsistent with the FPA and (b) the conditions of the new license otherwise will protect and enhance fish and wildlife.

- Section 18 requires FERC to order the construction, operation and maintenance of fishways prescribed by the Secretary of Interior (US Fish & Wildlife Service) or Secretary of Commerce (National Marine Fisheries Service). A “Section 18 prescription” is considered mandatory and may not be rejected or altered by FERC. Either Secretary may reserve authority to prescribe fishways some time later in the license term; if so, FERC will reserve its authority in the license to require fishways if subsequently prescribed by either Secretary.

When relicensing a project, a hydro owner and FERC must not only comply with the FPA and FERC’s regulations but with other laws and regulations. Incorporating the requirements of other laws into the relicensing process is lengthy and complicated. Of these, the National Environmental Policy Act (NEPA) is the most complex and is the primary tool used by FERC to determine if the project should be relicensed. Below we list the laws affecting relicensing and briefly describe how they are integrated in the relicensing process.

#### National Environmental Policy Act (NEPA) – 1969

NEPA requires environmental review whenever a federal action may have significant environmental consequences. In the case of non-federal hydro projects, FERC’s issuance of a license constitutes a federal action. Since a hydro project (which can include dam(s), powerhouse(s), reservoir(s) and surrounding lands) may contain historic structures, discharge waters into receiving streams, and provide habitat for plants, animals and invertebrates, it is important to assess the effect of project operations on all of these resources.

Normally, FERC will conduct a “scoping” process to identify project issues and alternatives and then prepare an environmental assessment (EA). The EA describes the existing environment and the applicant’s proposal to operate the project and to provide environmental enhancements. FERC will analyze the project’s effect on environmental resources as well as power generation and will determine how the project should be operated to “balance” power and non-power values. If the analysis in the EA indicates that relicensing will significantly affect the

quality of the human environment, or if the project scope or impact otherwise dictates, FERC (or their contractor) will prepare an environmental impact statement (EIS).

#### Clean Water Act (CWA) – 1972

The CWA prohibits the discharge of pollutants or fill into most waterways of the U.S. without a permit issued under EPA's National Pollutants Discharge Elimination System (NPDES) or the Corps of Engineers' Section 404 permit. Section 401 of the CWA requires that before FERC issues a license to construct or operate a hydroelectric project, the owner must secure a water quality certificate ("401 Certification") from the state water quality agency. Often the state agency will require the licensee to perform specific studies to evaluate the hydro project's effects on water quality before issuing a 401 Certification. FERC must incorporate the 401 Certification conditions into the final license conditions.

#### Fish and Wildlife Coordination Act (FWCA)– 1934

The FWCA requires FERC to first consult with the U.S. Department of Interior, Fish and Wildlife Service and appropriate state fish agencies before granting a license to a hydro owner to control, impound or modify a stream or water body.

#### National Historic Preservation Act (NHPA) – 1966

The NHPA requires FERC to take into account the effect of issuing a license for a project on any district, site, building, structure or object that is included in or eligible for inclusion in the National Register of Historic Places (NRHP). In such cases where there would be an effect, FERC must provide the Advisory Council on Historic Preservation the opportunity to comment on the licensing of a project.

### Wild and Scenic Rivers Act (WSR Act)– 1968

Section 7(a) of the WSR Act (a) prohibits FERC from issuing a license for the construction of any project “on or directly affecting” a wild and scenic river and (b) limits the power of any Federal agency to assist in the construction of any “water resources project having a direct and diverse effect on the values for which the river was established.” The National Park Service is responsible for maintaining a list of all designated rivers under the WSR Act and those that are being studied for inclusion under the WSR Act.

### Endangered Species Act (ESA) – 1973

FERC must consult with the FWS or National Marine Fisheries Service (NMFS) to determine whether the licensing of a project is likely to jeopardize the continued existence of any endangered or threatened species (T&E) or result in destruction of critical habitat. If a threatened or endangered species is in the area affected by a hydro project, FERC may write a biological assessment (BA) to identify the species and to assess the project’s effects on the species. FERC will submit the BA to the FWS or NMFS and they will respond by issuing a Biological Opinion (BO). The BO analyzes FERC’s assessment of effect and the FWS or NMFS will either concur or disagree with the measures FERC recommends for protecting the T&E species.

### Coastal Zone Management Act (CZMA) - 1972

FERC must comply with Section 307(c)(3)(A) prior to issuing a license. FERC must certify to the state that the proposed activity (i.e., issuing a license to operate—or continue operating—the project), whether in or outside the coastal zone, affecting any land or water use or natural resource of the coastal zone, will be conducted in a manner that is consistent with the enforceable policies of the state’s Coastal Management Program (CMP). If a project is located in

a coastal zone, the licensee must submit a CZMA federal consistency certification to the FERC and the CMP agency (the license application, or parts of, usually suffice for the certification). The licensee must provide the state with data showing the project's effects, if any, on coastal resources. The CMP agency has six months to review the information and determine if the project is consistent—or inconsistent—with the CMP.

#### Americans with Disabilities Act (ADA)– 1990

This act was created to protect the civil rights of persons with disabilities. Titles II and III of the ADA apply to licensee's recreation facilities. This law requires public and private entities which have "public accommodations", such as recreation facilities at hydro projects, to be accessible to persons with disabilities. FERC requires new facilities and access areas to comply with the requirements of the ADA, although FERC does not enforce requirements of the ADA. The Department of Justice is responsible for enforcing the ADA.

## **APPENDIX B**

### **Common Terms and Acronyms**

## **List of Common Terms and Acronyms**

<b>APEA</b>	Applicant Prepared Environmental Assessment
<b>CEA</b>	Cumulative Effects Analysis
<b>CWA</b>	Clean Water Act
<b>EA</b>	Environmental Assessment
<b>ECPA</b>	Electric Consumers Protection Act
<b>EIS</b>	Environmental Impact Statement
<b>EPAct</b>	Energy Policy Act of 1992
<b>ESA</b>	Endangered Species Act
<b>FERC</b>	Federal Energy Regulatory Commission (also called “Commission”)
<b>FPA</b>	Federal Power Act
<b>ICP</b>	Initial Consultation Package
<b>IIP</b>	Initial Information Package
<b>NEPA</b>	National Environmental Policy Act (1969)
<b>NOI</b>	Notice of Intent
<b>NGO</b>	Non Governmental Organization
<b>RM</b>	Rulemaking
<b>Section 106</b>	Refers to Section 106 of the National Historic Preservation Act
<b>SD1 or 2</b>	Scoping Document 1 or 2
<b>401 Certification</b>	Water quality certification by the state agency responsible for administering Section 401 of the Clean Water Act

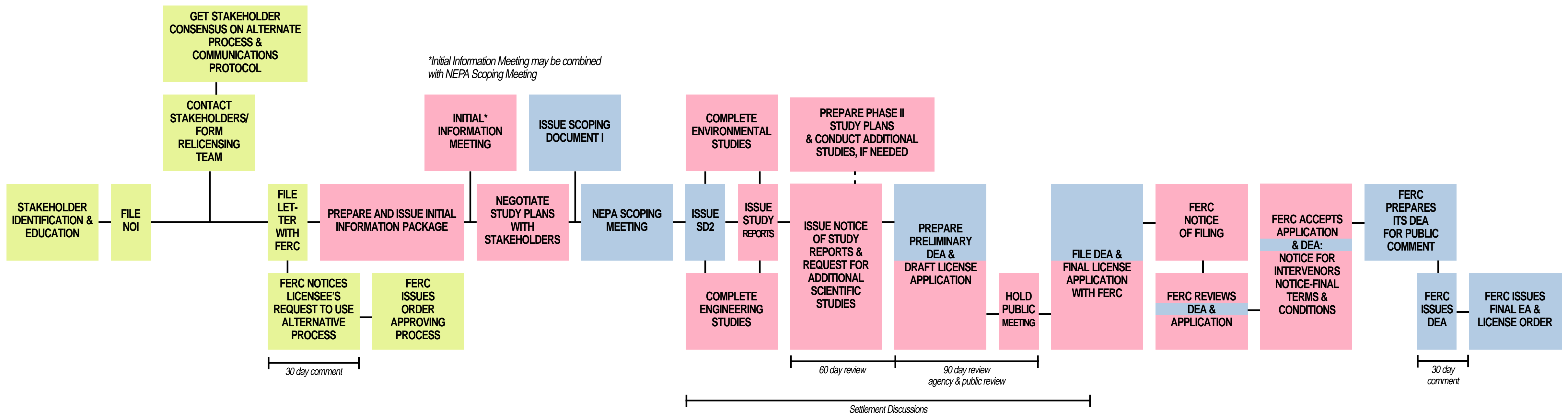
## **APPENDIX C**

### **Traditional vs Alternative Relicensing Process**

#### **A Comparison**

# Relicensing: A Comparison of Alternative Procedures and the "Traditional" 3-stage Consultation Process

## APPLICANT PREPARED EA



## TRADITIONAL RELICENSING

