

U.S Forest Service Recommendations for the *Understanding the Study Criteria* Guidance Document
Docket: AD10-7
Attachment

I. Purpose of the Study Plan Process

The Forest Service recommends that the Commission explain the purpose of the study plan process in an introductory section in the guidance document so that all stakeholders have a common understanding. Studies are important because they fill in information gaps and lead to defensible license terms and conditions based on substantial evidence. The Commission could draw on language from three sources which the Commission adopted and/or wrote: the Integrated Task Force (ITF) Report on Improving the Studies Process in FERC Licensing, the Notice of ILP Proposed Rulemaking, and the Preamble to the ILP Final Rule.

While it focused on the Traditional Licensing Process, the ITF report succinctly explained the importance of studies, which is relevant for all three licensing processes. The Forest Service encourages FERC to draw from the first two paragraphs of the ITF Report. In particular, the report stated:

Before FERC can make an informed decision as to whether to issue a new hydropower license, it must obtain adequate information on all aspects of the project, including effects on fish and wildlife and natural, cultural, recreational and tribal resources. In order to obtain this information, it is typically necessary for the applicant to conduct studies to assess those environmental effects and to determine the resource protection, mitigation and enhancement measures needed at the project.

These studies constitute a critical element of the licensing process in a number of ways. Studies, and the resulting information, provide the foundation for analyzing the proposed project and alternatives, assessing effects, and determining appropriate protection, mitigation, and enhancement measures. Studies also provide much of the basis for resource agencies to develop proposed license conditions to protect resources for which they have statutory responsibilities. The Bangor decision, which requires that conditions be supported by substantial evidence, highlights the importance of the information resulting from studies. Finally, FERC needs the information generated by studies to perform its NEPA environmental analysis and other regulatory responsibilities, to make an informed decision as to the appropriate level and type of resource measures to attach to licenses, and to ensure that its decisions are supported by substantial evidence.¹

¹ INTERAGENCY TASK FORCE REPORT ON IMPROVING THE STUDIES PROCESS IN FERC LICENSING 2 (Dec. 8, 2000).

In its Notice of ILP Proposed Rulemaking, the Commission presented a well-stated explanation of its intentions regarding the study criteria. It stated:

Our intention is that the criteria will be applied as a whole, so that the mere fact that a study request can be related to an agency management goal will not ensure that the study is required to be conducted. This necessarily implies that judgment calls will be made, and it is our intention that those calls be made in light of the principle that the integrated licensing process should to the extent reasonably possible serve to establish an evidentiary record upon which the Commission and all agencies or tribes with mandatory conditioning authority can carry out their responsibilities. We do not intend to second guess the appropriateness of agency or Tribal resource management goals, but must consider study requests based on those management goals in light of all applicable criteria, such as the “nexus” criteria, as well as the potential for conflict with important Commission policies, practices, or rules.²

In the Preamble to the ILP Final Rule, the Commission stated that “[t]he purpose of an approved study plan is to bring, to the extent possible, pre-filing finality to the issue of what information gathering and studies will be required by the Commission to provide a sound evidentiary basis on which the Commission and other participants in the process can make recommendations and provide terms and conditions.” With regard to the study criteria, they are to be considered as a whole, and “no single criteria is determinative.” The Commission also noted that “[e]very project is likely to have unique features that need to be accounted for in the development of the study plan.”³ The Forest Service agrees with these assessments and encourages the Commission to factor in the unique circumstances of each project in evaluating whether to grant study requests. Taken together, the ITF Report, the Notice of ILP Proposed Rulemaking, and the Preamble to the ILP Final Rule all provide useful starting points which the Commission could draw on in developing an introductory section in its guidance document.

II. More Clarity Regarding the Project Nexus and Cost Criteria

The Forest Service commends the Commission for recognizing that project nexus is a significant issue.⁴ The Forest Service recommends that FERC address four components of the project nexus issue in the guidance document.

First, the guidance document should make it clear that project effects are not limited to project boundaries. In the September 28, 2010 regional conference in Sacramento, California, participants expressed difficulty in defining the project boundary for study requests. As the Commission noted in its March 2011 ILP Comments

² Hydroelectric Licensing Under the Federal Power Act, Proposed Rule, 68 Fed. Reg. 13995 (Mar. 21, 2003).

³ Hydroelectric Licensing Under the Federal Power Act, Final Rule, 68 Fed. Reg. 51078-80 (Aug. 25, 2003).

⁴ INTEGRATED LICENSING PROCESS EFFECTIVENESS EVALUATION FEEDBACK 2010 9 (Mar. 2011).

document, “FERC staff explained that the boundary, as marked on a map, has no relation to study effects. Study scope is not limited to within a project boundary, but rather are tied to that particular project’s effect. Therefore, the scope is different for water, recreation, etc.”⁵ The guidance document should explicitly state that project effects are not limited to project boundaries.

Secondly, the Commission should reaffirm its position, first articulated in the Preamble to the ILP Final Rule, that the burden of proof for study requesters is “reasonably demonstrate.”⁶ The requesting party needs to reasonably demonstrate a nexus between project operations and effects on a resource. The requesting party does not need to prove that a nexus exists beyond any doubt. The Forest Service encourages the Commission to define the term “reasonably demonstrate” in its guidance document so that all stakeholders have a common understanding of the burden of proof for the project nexus criterion.

Thirdly, studies are clearly needed to determine if a project is having an effect and help describe the degree of that effect. Additional information is frequently needed to generate sufficient information to help resolve significant differences of opinion of project effect and not just affirm a preconceived perception of magnitude of effect. The Commission should note in its guidance document that the study requester needs to reasonably demonstrate **any** nexus between project operations and effects on a resource.⁷ This means that one nexus should be sufficient for meeting this part of the criteria, as provided in the Commission’s regulations. Moreover, the Commission should approve study requests so long as requesters reasonably demonstrate a linkage to project operations and effects based on existing information or expert opinion of agency professionals or practitioners with experience in conducting resource assessments or on existing information. Approval of a proposed study should not depend on an a priori conclusion that a project has a known effect versus a suspected effect requiring additional information to determine if the suspected effect exists and the magnitude of the effect.

Project operations and their effect on lake levels and streamflow are the most common issues where there are differences of opinion regarding the scope of effects and project nexus. In order to have a substantial basis to resolve these differences over the scope of effects and the strength of the nexus, the Commission should routinely require applicants to conduct mass balance operation models to show the degree of effect and connection to project operations. The mass balance project operation models should serve as a cornerstone study to determine if additional studies will be triggered based on the results of the modeling. The Director, Office of Energy Projects, supported this approach to resolve formal study disputes in the Merced Irrigation District

⁵ *Id.* at 39.

⁶ *Supra* note 3 at 51079.

⁷ 18 C.F.R. § 5.9(b)(5) states: “Explain any nexus between project operations and effects (direct, indirect, and/or cumulative) on the resource to be studied, and how the study results would inform the development of license requirements.”

proceeding (Accession Number 20091222-3035). This should be a regular practice to resolve issues of scope and nexus. In the Merced proceeding, the Director supported the phased approach of this recommendation by stating that:

I am requiring that four studies be considered during the second study season ((5) *Reservoir Water Temperature Management Feasibility Study*; (12) *Salmonid Floodplain Rearing Study*; (13) *Chinook Salmon Egg Viability Study*; and (14) *Instream Flow (PHABSIM) Study downstream of Crocker Hoffman*). These four studies would evaluate a biological or ecological response to water quality and quantity variables associated with project operations. Because of the confounding effects of the downstream Crocker-Hoffman diversion dam, **an evaluation of the need for these studies should be based upon receipt of results from two approved first-season studies (Water Balance/Operations Model Study and the Water Temperature Model Study) to identify and isolate direct project effects on water quality and quantity variables.** (emphasis added)

This recommendation does not suggest that the Commission approve all studies for which there is disagreement. A very large body of information exists in Commission records, in scientific literature, and based on the expertise of professionals with experience in resource assessments and specifically in hydropower project operations to target resources. This body of information and expertise can serve as the basis to reasonably demonstrate a nexus to project effects.

Fourthly, the Commission should clarify in its guidance document that it views direct, indirect, and cumulative effects as all being important. In the guidance document, the Commission should describe the key characteristics that it uses in determining if a proposed study is tied to project effects to meet the project nexus threshold. The ILP regulations at 18 C.F.R. § 5.9(b)(5) state that study requesters must explain any nexus between project operations and direct, indirect, and/or cumulative effects on the resource to be studied.

Also, the Forest Service recommends that the Commission provide guidance on what it is looking for regarding the cost criterion. 18 C.F.R. § 5.9(b)(7) states, "Describe considerations of level of effort and cost, as applicable, and why any proposed alternative studies would not be sufficient to meet the stated information needs." In multiple study plan determinations, the Commission determined that study requests were not warranted in part due to cost. In one study plan determination, in particular, the Commission, in one sentence, concluded that the study would not provide a commensurate increase in the information necessary for making resource management decisions. The Commission, however, did not explain how it arrived at its decision. It would be helpful if the Commission explained its cost rationale in its guidance document and in individual study plan determinations.

III. More Thoroughly Explained Study Plan Determinations

The Forest Service commends the Commission for recognizing the need to provide more thorough study plan determinations and undertaking the project-specific initiative of ensuring that study plan determinations clearly explain why a study was rejected.⁸ Currently, many study plan determinations do not explain whether each of the 18 C.F.R. § 5.9(b) criteria are met. Rather, the Commission only analyzes a few 5.9(b) criteria and recommends or does not recommend study requests. In the preamble to the ILP final rule, the Commission stated that the criteria are to be considered as a whole and no single criteria is determinative. When the Commission includes a discussion of only a few criteria, it is unclear whether that means that the other criteria have been met. FOREST SERVICE recommends that the Commission clarify this in both its guidance document and in individual decisions.

The Forest Service strongly recommends that the Commission include in its study decisions a detailed explanation of its determination regarding whether each 5.9(b) study request criteria is met or not. If the Commission believes that a particular criterion is met, it could indicate as such without an explanation (to minimize the Commission's workload). If a criterion is not met, then the Commission should explain why. If the Commission rejects a study request, it should provide a thorough explanation of why the study request was rejected. This would ensure that the resource agencies and other stakeholders would have a better understanding of the Commission's rationale regarding study requests. It would allow stakeholders to understand the things the Commission considers important and allow us to improve our rationales for meeting the criteria for the next project.

The Commission could develop a template that it follows for addressing each study request in its study plan determinations. The Forest Service recommends that the Commission utilize the suggestions the Hydropower Reform Coalition provided in its December 3, 2010, letter to the Commission under Docket Number 10-7 in developing the template.

IV. When Field Studies are Appropriate

The Forest Service recommends that the Commission clarify in the guidance document under what circumstances it believes field studies are appropriate. In many study plan determinations, the Commission has concluded that literature reviews are sufficient, and field studies are not needed. This is particularly troubling because if the Commission denies a mandatory conditioning agency's request for a site specific study, the licensee may later challenge, in a trial-type hearing, the factual basis for a mandatory condition related to the issue that was the subject of the study request.

⁸ Federal Energy Regulatory Comm'n, ILP Effectiveness Study Action Plan, <http://www.ferc.gov/industries/hydropower/gen-info/licensing/ilp/eff-eva.asp> (last visited Aug. 12, 2011).

In particular, literature reviews assessing the effects of one type of technology on a particular resource may not be helpful in determining the effects of a different type of technology that would be needed at the particular project. For example, literature reviews regarding diadromous fish entrainment or mortality for traditional hydropower projects may not be appropriate for assessing effects related to pumped storage projects. When an agency with mandatory conditioning authority requests field studies for which there is not any appropriate literature, then the Commission should require field studies.

V. Phased Studies

The Forest Service recommends that in study plan determinations the Commission require project operation studies under a phased approach to help determine the scope of effects of projects and facilities. When there is conflicting information regarding whether a particular resource exists in a particular area, the Commission should require a study to conclusively determine the issue. The Commission should then specify a clearly articulated plan for future studies in a phased format in the study plan determination to better understand project effects on a particular resource. The Commission should explicitly note that a phased study approach is different than, and in addition to, the standards the Commission has set forth for second year studies.