

**HYDROELECTRIC LICENSING  
FOR  
TRIBAL GOVERNMENTS**

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## 1) Introduction

### a. Workshop Objectives

- This workshop is intended to provide an overview of the licensing of non-federal hydroelectric projects, with a focus on areas that may be of interest to tribal governments. Hydroelectric licensing can be a lengthy and complicated process that will often result in long-term plans for resource use and protection in the area affected by a project. To be involved and effective in this process it is important for tribal governments to understand key moments in the licensing process and the interplay between the multiple federal, tribal, and state authorities involved in licensing a hydroelectric project. This workshop will provide a foundation for understanding the regulatory process, the agencies involved, and the opportunities tribes have in this process for maintaining and protecting tribal resources.
- The workshop will cover 3 areas of hydroelectric licensing: 1) overview of the 3 licensing processes, 2) specific opportunities for tribes to participate, and 3) internet tools for tracking and participating in proceedings.
- **Important Disclaimer** – As FERC’s Tribal Liaison, I have developed this workshop with the intent that it will provide a working understanding of the many facets of hydroelectric licensing. It is important to note, however, that this workshop and these materials only provide an overview. They do not include all of the information needed to participate in a hydroelectric licensing proceeding. For any particular Indian tribe and license proceeding additional information and resources will be required. In addition, please note that the statutes, regulations, and agency policy included in these materials are subject to change.

### b. The Federal Energy Regulatory Commission

- FERC is lead by 5 Commissioners that are appointed by the President for 5 year terms. One Commissioner is designated by the President to be the Chairman of the Commission. No one political party may hold more than 3 seats on the Commission.
- The Federal Energy Regulatory Commission or FERC is a little different from other federal agencies. FERC is an independent agency that acts like a court yet performs functions similar to executive branch

agencies, like the Department of the Interior or the Forest Service.

- Similar to a “typical agency,” FERC employs environmental, engineering, energy, economic, and attorney staff that support Commission decision-making. In the case of hydroelectric licensing, the Office of Energy Projects manages the licensing process and performs an environmental analysis (Environmental Impact Statement or Environmental Assessment) for the project licensing.
- Then, as the licensing proceeding moves from information collection to record development to analysis, FERC takes on more court like roles seeking a fair “hearing” of the issues. At the end of a licensing process, with a completed record, the Commission acts on that record like a trial court by issuing a decision or order that includes the project license. Any appeal of a licensing decisions is made to the United States Circuit Courts of Appeal.

#### **d. The Commission’s Statutory Authority**

- FERC’s authority for licensing hydroelectric projects is provided in the Federal Power Act. The main Federal Power Act provision describing FERC’s authority for the licensing of hydroelectric projects is called “Section 4(e),” and can be found at 16 U.S.C. § 797. A portion of Section 4(e) is quoted below:

“To issue licenses to citizens of the United States, or to any association of such citizens, or to any corporation organized under the laws of the United States or any State thereof, or to any State or municipality for the purpose of constructing, operating, and maintaining dams, water conduits, reservoirs, power houses, transmission lines, or other project works necessary or convenient for the development and improvement of navigation and for the development, transmission, and utilization of power across, along, from, or in any of the streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States, or upon any part of the public lands and reservations of the United States (including the Territories), or for the purpose of utilizing the surplus water or water power from any Government dam, . . .”

- **In plain English** - FERC licenses non-federal hydroelectric projects that are in the waters of the United States or on federal reservation lands. This does not include, for example, the federal dams on the lower Snake River or the federal Missouri River Project. Those are federal, Army Corps of Engineers, dams. But, it does include dams owned by states, municipalities, and Indian tribes. It also includes private turbines installed on Bureau of Reclamation dams.

#### **e. FERC's Tribal Liaison**

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## **2) Overview of FERC's Hydroelectric Licensing Processes and Likely Participants**

### **a. The Licensing Processes**

- FERC's regulations for the licensing of hydroelectric projects provide a selection of 3 different processes that an applicant may choose to follow for their application. Licensing is typically a 5 to 5 ½ year process. See Attachment 1 for specific box diagrams for each process.

#### **Traditional Licensing Process (TLP)**

18 C.F.R. § 4.38 (license for a new project)

18 C.F.R. § 16.8 (relicensing for existing project)

#### **Alternative Licensing Process (ALP)**

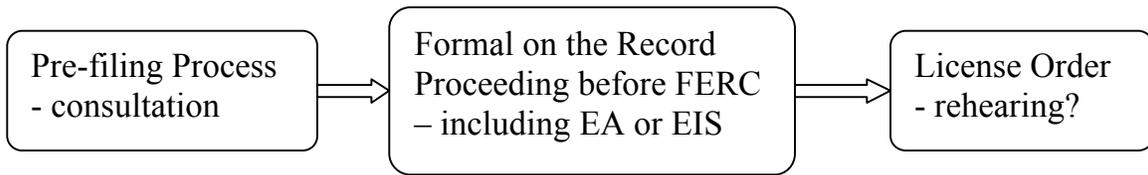
18 C.F.R. § 4.34(i)

#### **Integrated Licensing Process (ILP)**

18 C.F.R. § 5

Effective July 23, 2005, a license applicant must get Commission approval to use the Traditional or Alternative Licensing Processes. Additionally, the Alternative Licensing Process can be only be used if the license applicant can demonstrate to the Commission that there is a consensus among stakeholders to use the Alternative Licensing Process.

- Box Diagram Overview for all 3 Licensing Processes



## b. Important Components of Each Licensing Process

- **Notice of Intent to File or NOI** (5 ½ to 5 years prior to license expiration). This is the first notice a licensee gives to FERC and the public that it intends to seek a subsequent license or relicense for an existing project. The NOI provides basic information about the project, and is important because it also attempts to identify all the parties that will be interested in the project licensing.
- **Tribal Consultation.** Soon after the licensee files its Notice of Intent, FERC will begin to send out letters to Indian tribes it believes may be interested in the project licensing seeking to hold an early tribal consultation meeting.
- **Pre-Application Document or PAD.** This is a relatively new requirement that will accompany the Notice of Intent. The PAD should be a compilation of existing engineering, economic, and environmental information and is intended to serve as a foundation for issue identification, study plan development, and, ultimately, FERC’s environmental analysis.
- **Pre-filing Consultation.** This approximately a 3 to 3 ½ year process before the license application is filed with FERC. During this time, the licensee, federal, tribal, state and local participants will begin to collect and analyze information about the project as described below. Procedures used during this process will vary depending on the licensing process being used.
- **Studies and Development of Information.** Much of pre-filing consultation will be spent planning and doing studies. In effect the applicant is doing information and data collection that FERC utilizes in its environmental analysis. The information developed during the pre-filing stage, and sometimes post-filing through “additional information requests,” is also typically utilized by federal and state resources

agencies, tribes, local governments, and non-governmental organizations in the development of license conditions and recommendations.

**Traditional Licensing Process** - Studies and information are developed through a notice and comment process occurring over rounds of consultation, see 18 C.F.R. § 16.8. Many recent TLP's incorporate collaborative meetings with filing of written comments. Some people call these "hybrid" processes, but technically they are still TLP's.

**Alternative Licensing Process** – Studies and information are developed through a collaborative process tailored by the participants to the needs of a particular project licensing.

**Integrated Licensing Process** – Studies and information are developed with the assistance of FERC staff resulting in a Formal Study Plan. Expedited dispute resolution can be utilized to resolve disputes about study plans.

- **Additional Information Requests – Pre and Post-Filing**

**Traditional Licensing Process** – Following the filing of a license application, additional information can be sought for good cause.

**Alternative Licensing Process** – Attempts should be made among the participants to resolve additional information requests pre-filing. Post-filing, additional information can be sought for good cause.

**Integrated Licensing Process** – Through the development of a formal study plan, the Integrated Licensing Process attempts to avoid the need for requesting additional information. Additional information can be requested during pre-filing for good cause. No formal process for requesting additional information post-filing is provided in the Integrated Licensing Process regulations.

- **Filing of the License Application and FERC's Tendering Notice.** This is the beginning of the formal on the record proceeding before FERC. It is likely at this stage in the process that the interested parties will have been working together for a couple years and developed a lot of information. While volumes of information may have been generated up to this point, it is important to remember that only the

information that has been or will be filed with FERC may be relied upon by the Commission in its eventual licensing decision.

- **Formal Proceeding and Procedural Rules.** With the filing of the license application FERC now has a “formal” proceeding before it and the licensing process will become more like a trial court proceeding. In particular, parties in the licensing process, must begin to follow FERC’s procedural rules as they participate in the process. There will still be a lot of meetings and discussions and environmental analysis similar to the activities of a “typical” agency, but some aspects of participation in the process will be governed by FERC’s procedural rules that can be found at 18 C.F.R. Part 385.
- **Call for Interventions.** An important first step is formally intervening in the proceeding. FERC will issue a notice seeking interventions. Interested parties must formally notify the FERC that they desire to be a party for a particular proceeding. Intervening simply requires filing a notice with FERC stating your party’s authorities and interests, and providing names and addresses to be included on the service list. See procedural rules at 18 C.F.R. § 385.214.

Although it not favored, if a interested party misses the deadline for filing its intervention, or only becomes aware that its interests may be affected after the intervention deadline, the rules do allow for late interventions, but certain criteria must be met. See procedural rules at 18 C.F.R. § 385. 214 (d).

- **Ex Parte Rules.** Once the formal proceeding is before FERC and staff are developing their analysis and record, FERC “decisional” staff may not talk individually with any one party without involving all the other parties. There are some exceptions to this rule, but the general idea is that no one party should have special access to the “judge” or decision makers. Most FERC staff are included in this limitation because they are likely to be involved in developing the analysis that will be relied upon by the Commission. Thus, these staff are “decisional” or part of the decision making process.

This rule has its origins in the Administrative Procedure Act which describes fairness in agency hearings. Consequently, following the filing of a license application and interventions, all discussions between parties to a proceeding and FERC decisional staff must be open to the public and on the record.

In hydroelectric licensing, FERC's ex parte rules typically apply once the application has been filed and parties begin to intervene. This can also be referred to as a "contested" proceeding. The ex parte rules can be found at 18 C.F.R. § 385.2201.

- **Ready For Environmental Analysis Notice or REA Notice.** After FERC has reviewed the license application to determine whether all the basic criteria are met, FERC will do a more substantive review to determine whether the application contains all the information needed for FERC staff to do an environmental analysis. If more information is needed, FERC may make additional information requests. If the application contains enough information, FERC will issue a REA Notice. This notice is important because it starts timelines for developing license recommendations, conditions, and prescriptions, as well as upcoming review under the National Environmental Protection Act (NEPA).
- **Development of Section 4(e) or Mandatory Conditions**  
16 U.S.C. § 797 (e)

Where a hydroelectric project occupies federal reservation lands, Section 4(e) conditions may be developed by the appropriate land managing agency for the "protection and utilization" of the reservation. Section 4(e) conditions must be supported by "substantial evidence." **Federal Land Managing Agencies** that have exercised Section 4(e) authority in the past are: Bureau of Indian Affairs, Bureau of Land Management, and Forest Service. Note that these land management agencies may not use the same internal process for developing Section 4(e) conditions.

For important recent changes, see Mandatory Conditions Review Process and Energy Policy Act of 2005 below.

- **Development of Section 10(a) Recommendations**  
16 U.S.C. § 803 (a)

Under Section 10(a) the Commission must ensure that a hydroelectric project is best adapted to a comprehensive plan for developing the waterway for beneficial public purposes. In determining whether to include any conditions for this purpose the Commission is directed by the Federal Power Act to consider the recommendations of federal and

state resource agencies, Indian tribes, and the public.

- **Development of Section 10(j) Fish and Wildlife Recommendations**  
16 U.S.C. § 803 (j)

Under Section 10(j) the Commission must include conditions necessary to adequately and equitably protect, mitigate damage to, and enhance fish and wildlife and their habitats. Similar to Section 10(a) the Commission will determine whether the license should include any conditions based on the recommendations of federal and state fish and wildlife agencies.

Different from Section 10(a), the Commission must include these recommendations as license conditions unless the Commission finds that a Section 10(j) recommendation is inconsistent with the Federal Power Act or other applicable law. If there is a preliminary finding of inconsistency, the Commission is directed to attempt to resolve any issues with the recommending agency. Ultimately decisions on consistency or inconsistency are published by the Commission. If Commission determines that a Section 10(j) recommendation is inconsistent, the Commission also publishes the reasons for its determination.

- **Development of Section 18 Fish Passage Facilities**  
16 U.S.C. § 811

Section 18 provides that the Secretaries of Commerce and Interior can prescribe fishways at FERC licensed projects. If a Secretary prescribes a fishway, that prescription will become a mandatory license condition. Section 18 prescriptions must be supported by “substantial evidence.”

NOAA Fisheries (formally NMFS) prescribes fishways for migratory fish, i.e. salmon and steelhead, and the US Fish and Wildlife Service prescribes fishways for resident fish, i.e. bull trout. Sometimes a project licensing will require fishways for both resident and migratory fisheries.

For important recent changes, see Mandatory Conditions Review Process and Energy Policy Act of 2005 below.

- **Mandatory Conditions Review Process (MCRP) and Internal Appeals Process.** Most recently, the Department’s of Interior and Commerce developed Section 4(e) conditions for the protection and

utilization of federal reservations and Section 18 fishway prescriptions through a policy called the Mandatory Conditions Review Process. The Forest Service, under the Department of Agriculture used a different process. The Mandatory Conditions Review Process was lead independently by the Department's of Interior and Commerce, but ran concurrently with a project licensing, around the time that FERC's environmental analysis was being conducted. The MCRP provided parties with an opportunity to comment on the agency's development of mandatory conditions or prescriptions.

In addition, in the past year the Department's of Interior and Commerce began formalizing the MCRP into regulation, and Interior also planned to develop an internal appeals process for its mandatory conditions. The Department of the Interior's proposed regulations appeared in the Federal Register at 69 Fed. Reg. 54602, and the Department of Commerce's proposed regulations appeared in the Federal Register at 69 Fed. Reg. 54615.

The Energy Policy Act of 2005, however, appears to have overtaken these efforts, see below.

- **Energy Policy Act of 2005.** This act, passed and signed into law this summer, changes some of the process and considerations for agencies developing mandatory Section 4(e) conditions or Section 18 fishways. Section 241 of the Energy Policy Act amends the Federal Power Act to: 1) provide any party the opportunity for an on the record hearing for factual disputes regarding Section 4(e) or 18 conditions; and 2) allow any party to submit alternative Section 4(e) or 18 conditions that are either "lower cost" or allow improved energy production if the alternative conditions provide adequate protections for federal reservations and fish passage.

The Departments of Interior, Commerce, and Agriculture are currently writing new regulations (the Act gives them 90 days) for this new on the record hearing. In addition, because the Energy Policy Act of 2005 requires changes in the process and standards for developing mandatory conditions and prescriptions, the Departments of Interior and Commerce are also revising the Mandatory Conditions Review Process and Interior's proposed internal appeals process, described above, to fit with the new law.

- **Negotiation of Section 10(e) Payments**  
16 U.S.C. § 803 (e)

Section 10(e) provides that licensees shall pay annual charges for the use of tribal lands occupied by a hydroelectric project. This includes facilities and reservoirs. Initially, tribes and licensees may negotiate to determine what the appropriate charge should be. If an annual charge cannot be agreed upon, the statute gives FERC the authority to set the annual charge. A recent FERC licensing order gave the tribe and the licensee 6 months following the issuance of the license to negotiate an appropriate charge, before FERC would step in and set the charge itself.

The Secretary of the Interior, through the Bureau of Indian Affairs, is also likely to be interested in assessing what the annual charge should be given the Secretary's broad responsibilities for the use and protection of tribal lands.

- **Water Quality Certification or 401 Permit**  
Clean Water Act, 33 U.S.C. § 1342

Under Section 401 of the Clean Water Act, a licensee must obtain a certificate verifying compliance with the Clean Water Act from the state, tribe, or Environmental Protection Agency with authority over project discharges. This certificate usually includes mandatory license conditions, similar to Section 4(e) conditions. Water quality conditions must be based upon the designated uses found in the in the underlying water quality program. The State, Tribe, or the Environmental Protection Agency with the authority to issue the 401 Permit will typically run a separate process concurrently with the project licensing to develop and take comment on the proposed Section 401 permit.

Clean Water Act Section 518, 33 U.S.C. § 1377, describes the process the Environmental Protection Agency uses for delegating the authority to administer this and other Clean Water Act programs to tribes.

- **License Term**  
16 U.S.C. § 799

The Federal Power Act states that FERC may issue licenses not to exceed 50 years. Most original project licenses were 50 year licenses. As these projects have been seeking subsequent licenses, it has been FERC's practice to issue licenses for a 30 to 50 year period depending

on the level of investment required for project improvements and resource mitigation in the subsequent license.

- **Endangered Species Act**  
16 U.S.C. §§ 1531 et seq.

In the licensing of hydroelectric projects, FERC must consult with the US Fish and Wildlife Service or NOAA Fisheries to determine whether licensing a project is likely to jeopardize the continued existence of any endangered or threatened species or result in critical habitat destruction. When threatened or endangered species may be present, FERC must prepare a Biological Assessment as a part of its environmental analysis. The US Fish and Wildlife Service or NOAA Fisheries uses this information to make a determination as to whether the project licensing will or will not jeopardize a threatened or endangered species. If these agencies find that jeopardy exists, these agencies will develop “reasonable and prudent alternatives” to be included in the project license to avoid the jeopardy to threatened or endangered species.

To assist in its licensing efforts, FERC may allow the licensee to develop a preliminary Biological Assessment.

- **Historic Properties Management Plan or Section 106 Process**  
National Historic Preservation Act, 16 U.S.C. §§ 470 et seq.  
Section 106 Process, 36 C.F.R. Part 800

The National Historic Preservation Act and its Section 106 Process requires FERC to take into account the effect of its licensing action on any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register of Historic Places, and to give the Advisory Council on Historic Preservation a reasonable opportunity to comment on a proposed action. Although the licensee may perform much of the information collection, the final responsibility for compliance with the National Historic Preservation Act remains with FERC. To ensure appropriate survey and protection of historic properties, FERC typically enters into a Programmatic Agreement with the licensee, the Advisory Council on Historic Preservation, and State Historic Preservation Officer or Tribal Historic Preservation Officer (SHPO or THPO). A primary function of the Programmatic Agreement, will be for the licensee to develop a Historic Properties Management Plan to cover activities over the course of a license term. Development of a Historic Properties Management Plan is typically included as a

license condition.

As in other areas of information collection, FERC as the licensing agency, may designate the licensee to survey, collect, and develop information regarding historic properties at a project site. Following the Section 106 regulations, the licensee, as FERC's designee, typically works with State Historic Preservation Officers, Tribal Historic Preservation Officers, representatives of local governments, and interested tribes to formulate this information into a Historic Properties Management Plan that will include proposed mitigation for any affected properties.

- **National Environmental Protection Act or NEPA**  
42 U.S.C. 42 U.S.C. § 4321 et seq.

Where is all of the above information going? Into the environmental analysis or NEPA document which will be relied upon by the Commission, in addition to other parts of the record, for its licensing decision. This NEPA document will be either an Environmental Analysis (EA) or Environmental Impact Statement (EIS). In most cases there will be a draft and final NEPA document with corresponding comment opportunities.

### **3) Opportunities for Tribes to Participate**

Participating in a FERC hydroelectric licensing process is a multifaceted effort that involves a number of major federal laws, court like processes, numerous parties, and inevitably a lot of effort. It is a process that requires federal, state, tribal and local agencies to develop relationships among themselves and with the licensee. Below I highlight here some of the most significant opportunities for tribes to participate in FERC's licensing process. Please note, there are many other opportunities and ways to participate that could not be included in these materials.

#### **a. Consultation with Tribes**

- FERC's tribal policy statement, 18 C.F.R. § 2.1c, describes FERC's commitment to consult and work with tribes in all areas of FERC jurisdiction. As discussed above, in hydroelectric licensing, FERC seeks consultation with tribes during the pre-filing process. Due to FERC's quasi-judicial nature some limitations on consultation may occur to avoid violating the Commission's ex parte rules.

- In addition to FERC, many of the federal and state agencies noted above have formal consultation policies or are likely to be interested in consulting with tribes.

**b. Section 10(a) Recommendations**

16 U.S.C. § 803 (a)

- Through Section 10(a) of the Federal Power Act tribes can recommend to FERC conditions for inclusion in a hydroelectric license. Recommendations under Section 10(a) are intended to ensure that a project is best adapted to a comprehensive plan for developing the waterway for beneficial public purposes. Tribal use of a waterway or other tribal resources affected by a project are potential issues that could be covered by a 10(a) recommendation.

**c. Section 10(j) Preliminary Findings of Inconsistency**

16 U.S.C. § 803 (j)

- If FERC makes a preliminary finding of inconsistency regarding a Section 10(j) license condition proposed by a federal or state fish and wildlife agency, FERC will issue a notice and invite comments regarding its finding of inconsistency. Tribes and other parties may comment on this finding of inconsistency.

**d. State, Tribal or Federal Clean Water Act Section 401 Permits**

Clean Water Act, 33 U.S.C. § 1342

- Whether a state, tribe, or the Environmental Protection Agency is the agency with authority over the waters affected by a project, tribes can work closely with these entities to develop what will be mandatory license conditions for the protection of water quality.

**e. Tribal Comprehensive Plans**

- In evaluating a proposed hydroelectric project, the Commission will consider any comprehensive plans prepared by Indian tribes or inter-tribal organizations for improving, developing, or conserving a waterway or waterways affected by a proposed project.

**f. Endangered Species Act Process**

- The Secretaries of Interior and Commerce, in addition to their trustee obligations, have committed through a Secretarial Order to working with tribes in the development of Endangered Species Act protections.

**g. National Historic Preservation Act or Section 106 Process**

- Regardless of the location of the project in relation to tribal lands the National Historic Preservation Act ensures that tribal representatives be involved and consulted in the development of plans to mitigate for any effects to historic properties. In addition, if the impacts are on reservation or the Tribe has a Tribal Historic Preservation Officer the Act seeks official representation and decision-making by the Tribe in the Section 106 process.

**h. Comments on the NEPA Document**

- As a part of its environmental analysis, FERC typically develops a draft and final Environmental Assessment (EA) or Environmental Impact Statement (EIS) which will be released for comment. These documents are typically major compilations and analysis of the licensing record that will have a primary role in the Commission's licensing decision.

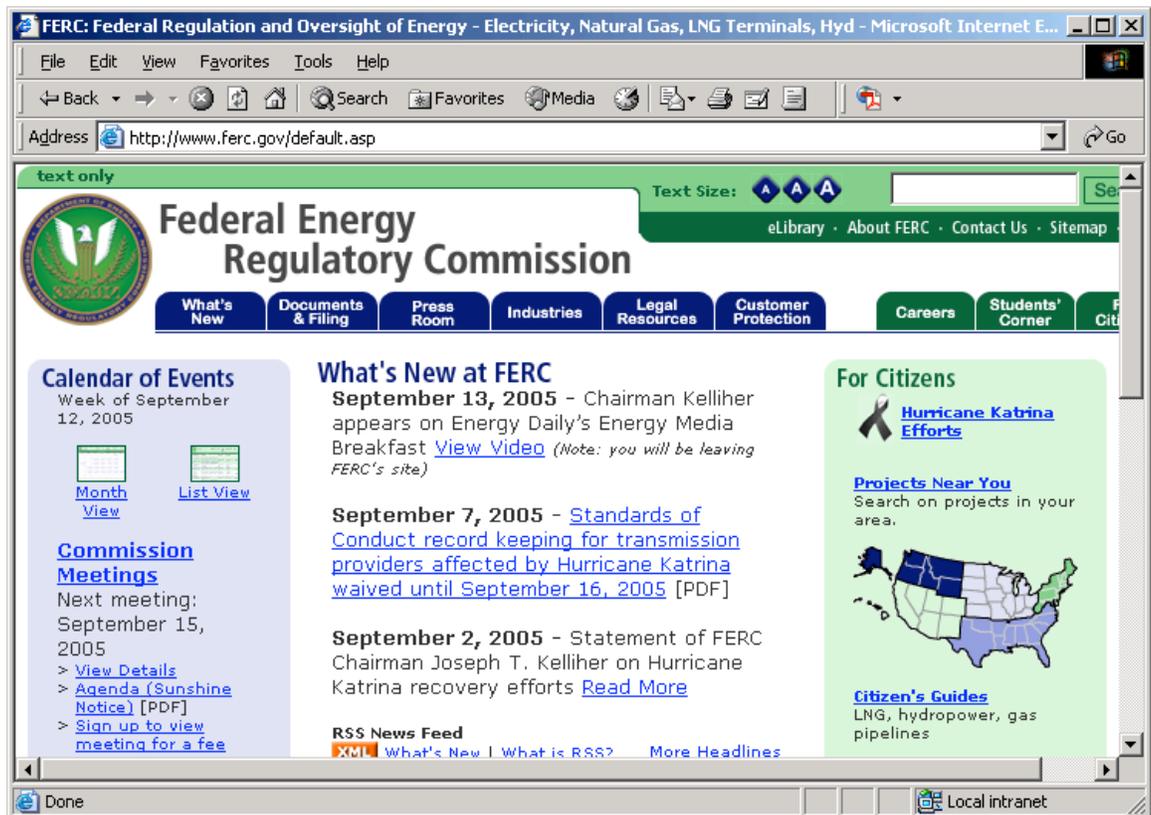
**i. Rehearing and Appeal of a Commission Order**

- Following the issuance of a Commission order licensing a project, parties that have intervened in the proceeding may seek rehearing before the Commission, and if needed can appeal a Commission order to the United States Circuit Courts of Appeals. Requests for rehearing must be made within 30 days of the license order, see 18 C.F.R. § 385.713, and appeals of a Commission decision on rehearing must be made within 60 days of the order on rehearing, see 16 U.S.C. § 8251 (b).

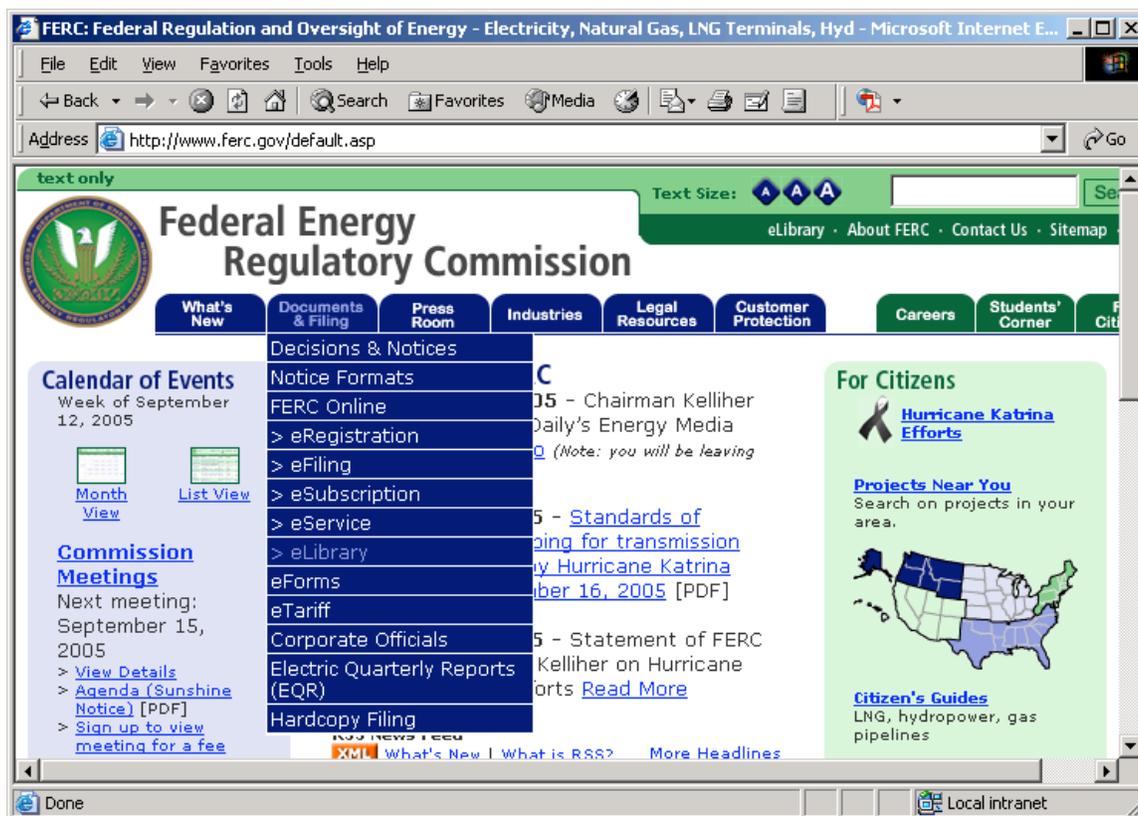
#### 4) Internet Tools for Tracking and Participating in Licensing Processes

##### a. Keeping Track of a Hydroelectric License Proceeding

- Go to the Federal Energy Regulatory Commission Homepage – [www.ferc.gov](http://www.ferc.gov)

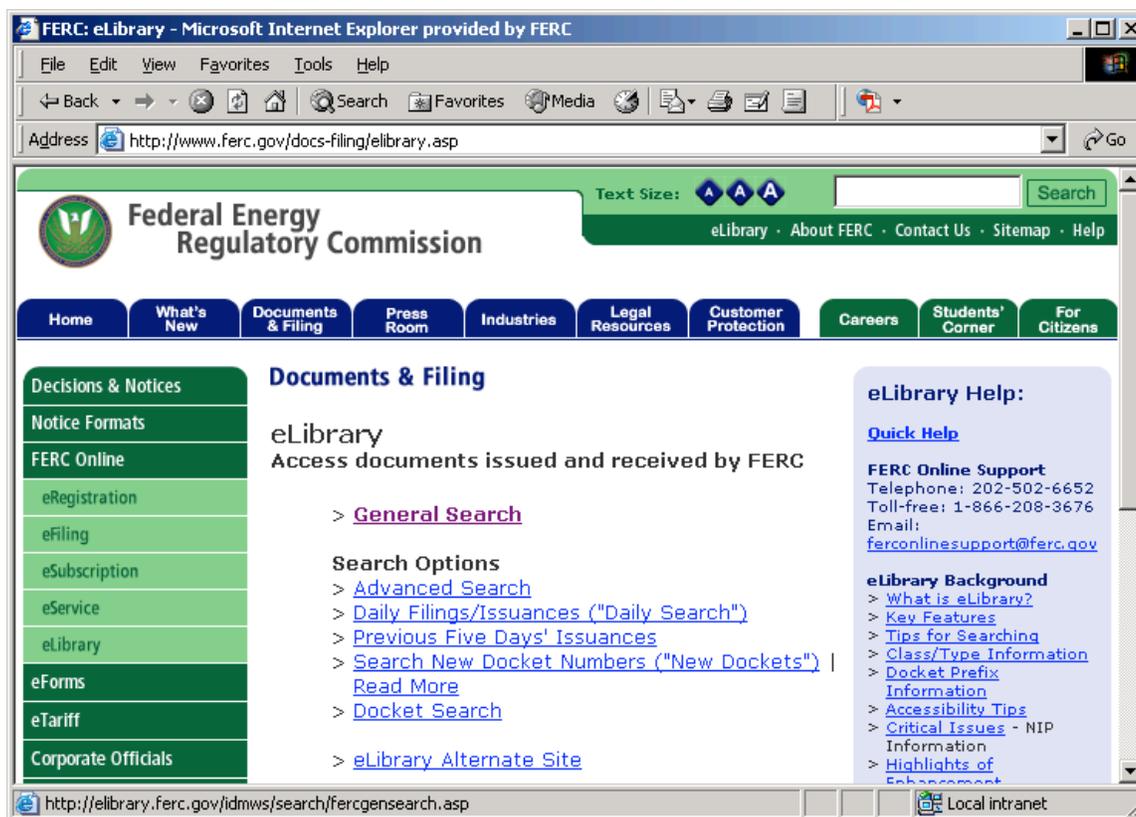


- Move your mouse over the blue tab entitled “Documents and Filing.” Move your mouse down the menu that pops up to “ eLibrary” and click on “eLibrary.” FERC’s eLibrary is where the record for all proceedings is stored.

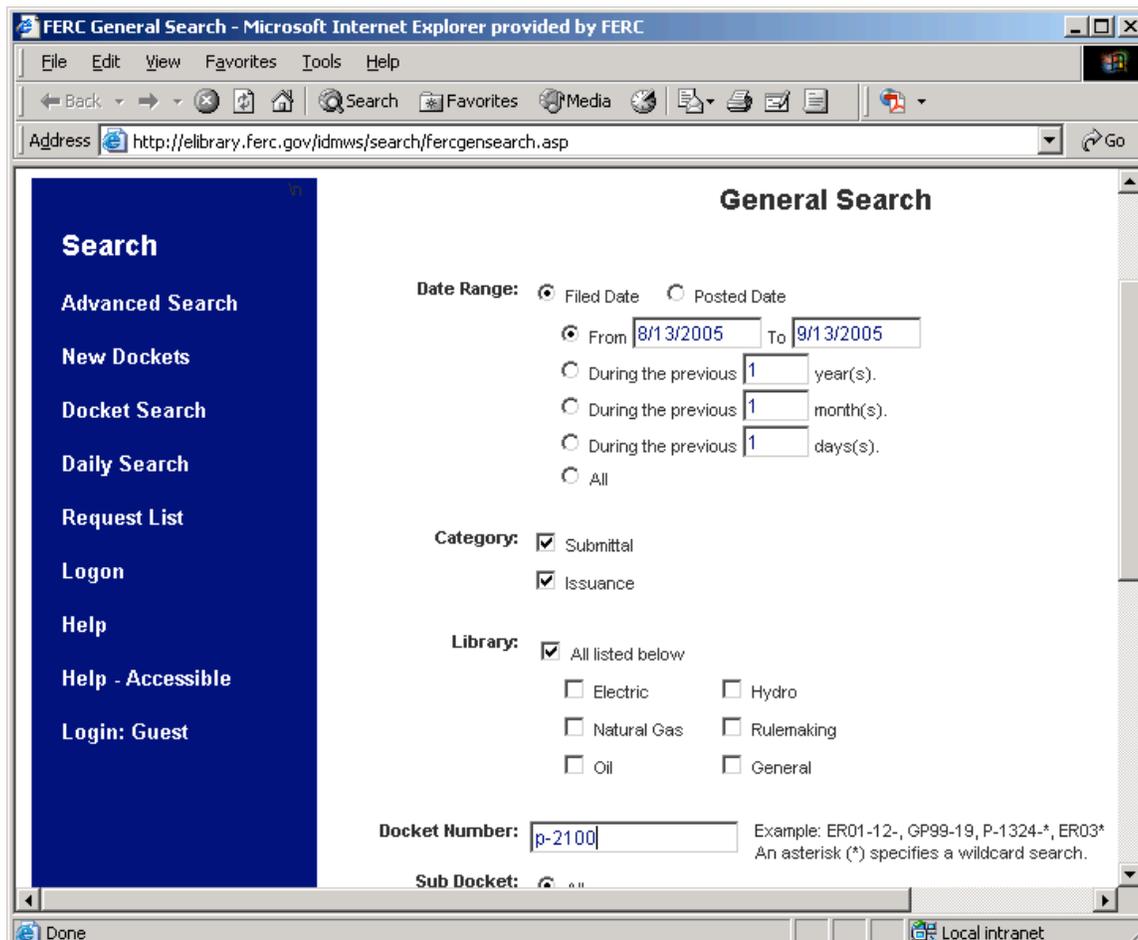


- Also note under this tab the selections called eFiling, eSubscription, and eService. Again, like a court, FERC requires that documents submitted into the record are filed in a certain way and served on all the parties to a proceeding, see FERC’s procedural rules at 18 C.F.R. Part 385. Documents can be filed and served in hard copy form, but using eFiling and eService can help by reducing the number of copies that need to be made.
- eSubscription is a useful service for keeping track of one or many license proceedings. After signing up and telling the service which processes you want to follow (by hydroelectric project number), eSubscription will send you email notices with a link to the filing when there is a filing in a proceeding. Keeping track of a few proceedings through eSubscription is a useful way to see how issues are handled by a variety of agencies, licensees, tribes, and public participants.

- Okay, back to doing a search in eLibrary. On the eLibrary page click “General Search.”



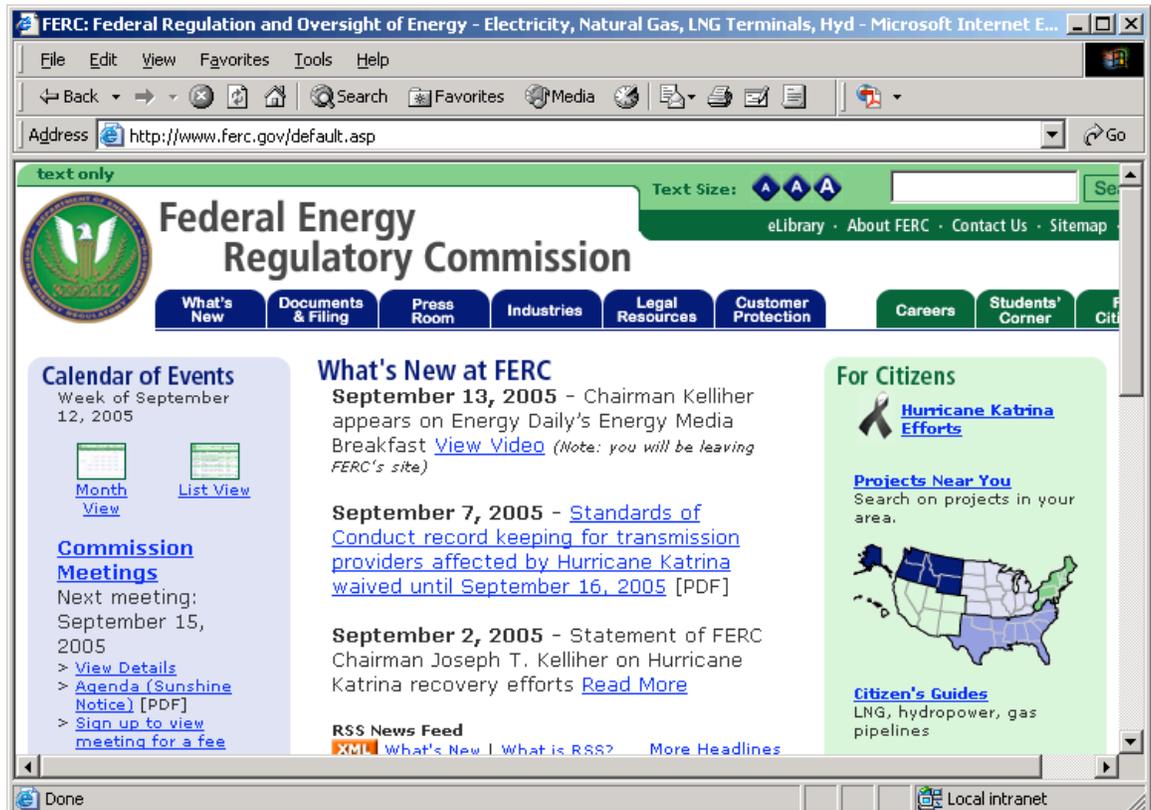
- On the General Search page fill in the appropriate information on the page and click “submit” at the bottom of the page. To bring up the record for a hydroelectric proceeding enter a date range and the FERC project number. All FERC hydroelectric project numbers are “P-” and then the project number. See search example below,



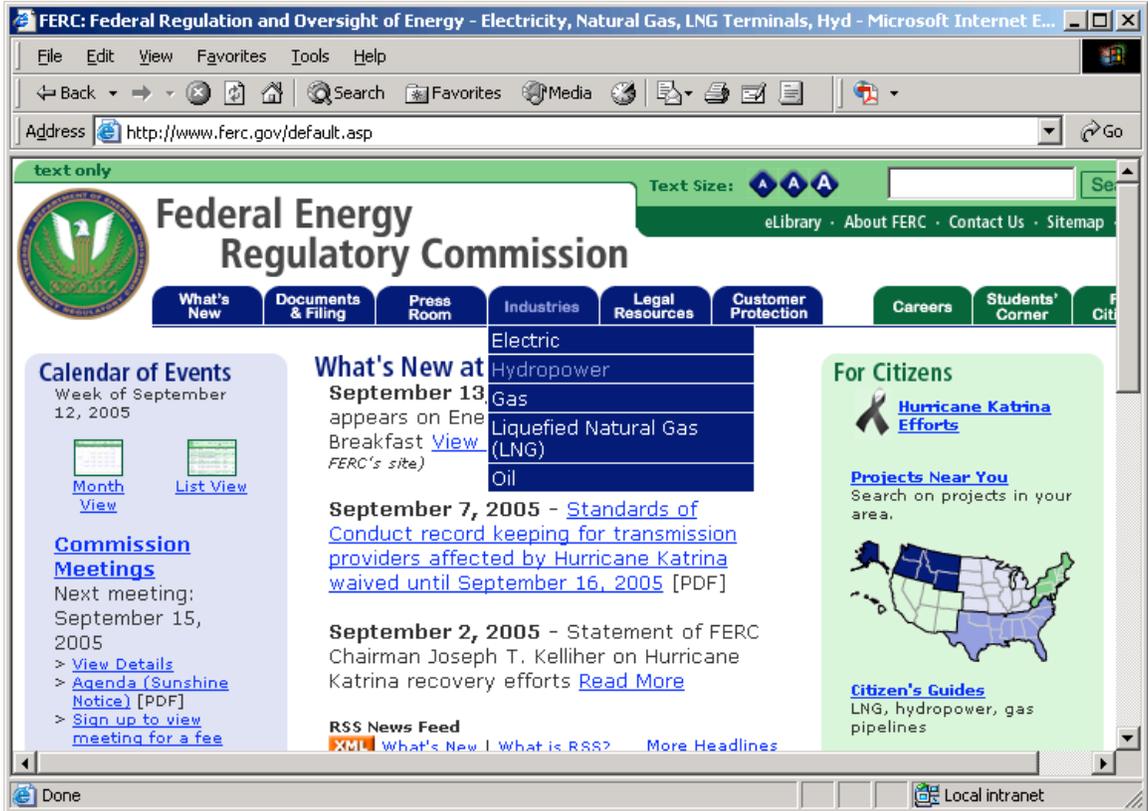
- Occasionally, it can be difficult to find the FERC project number for a licensed project. FERC’s Hydropower website, see below, provides a list of licensed projects by project number under the “General Information” heading. Also, an internet search may bring up the project, or a licensee’s relicensing web page, where the project number can usually be found.
- Scrolling down on the page above would reveal additional search options. For example, the text of documents can be searched, so entering a person’s name may provide a more refined search result.

## b. Resources to Help Participate in a Hydroelectric Licensing Proceeding

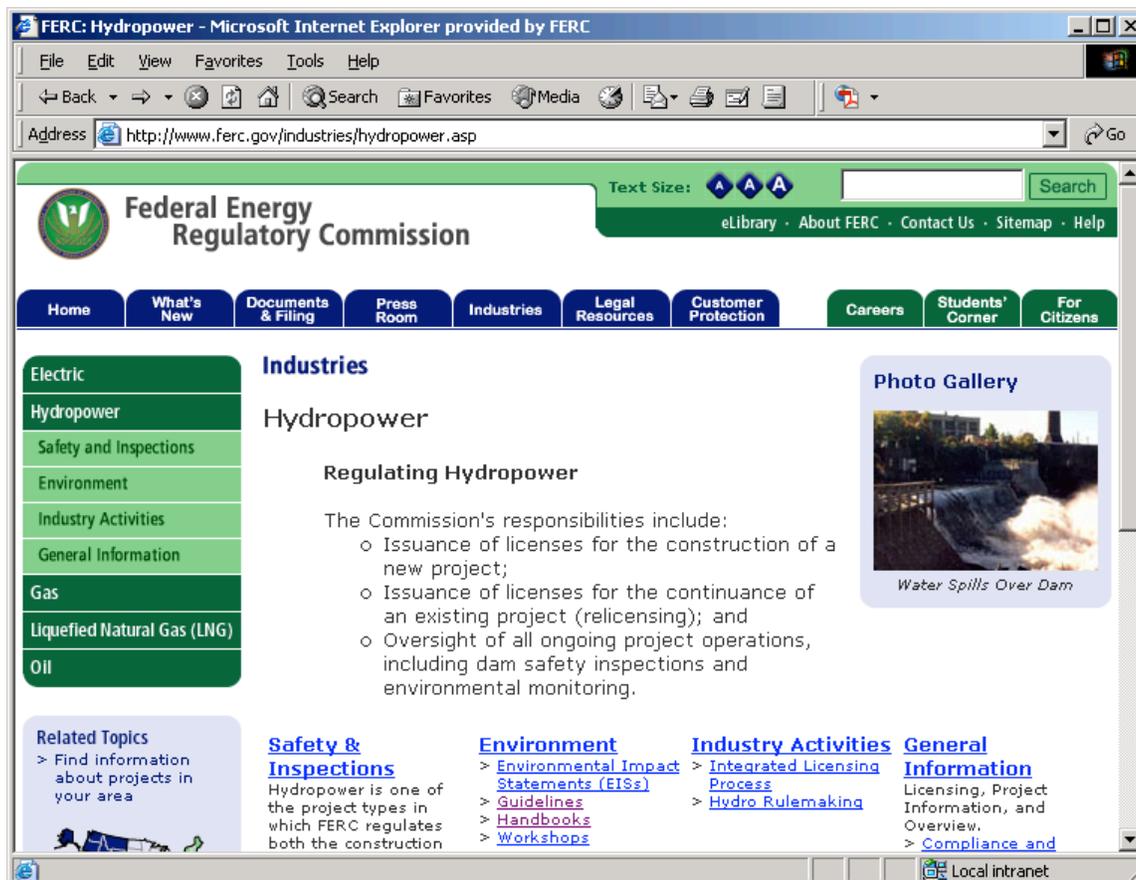
- Many of the resources I pulled together for this workshop can also be found, in more complete form, on FERC's webpage. Again, go to the Federal Energy Regulatory Commission Homepage – [www.ferc.gov](http://www.ferc.gov)



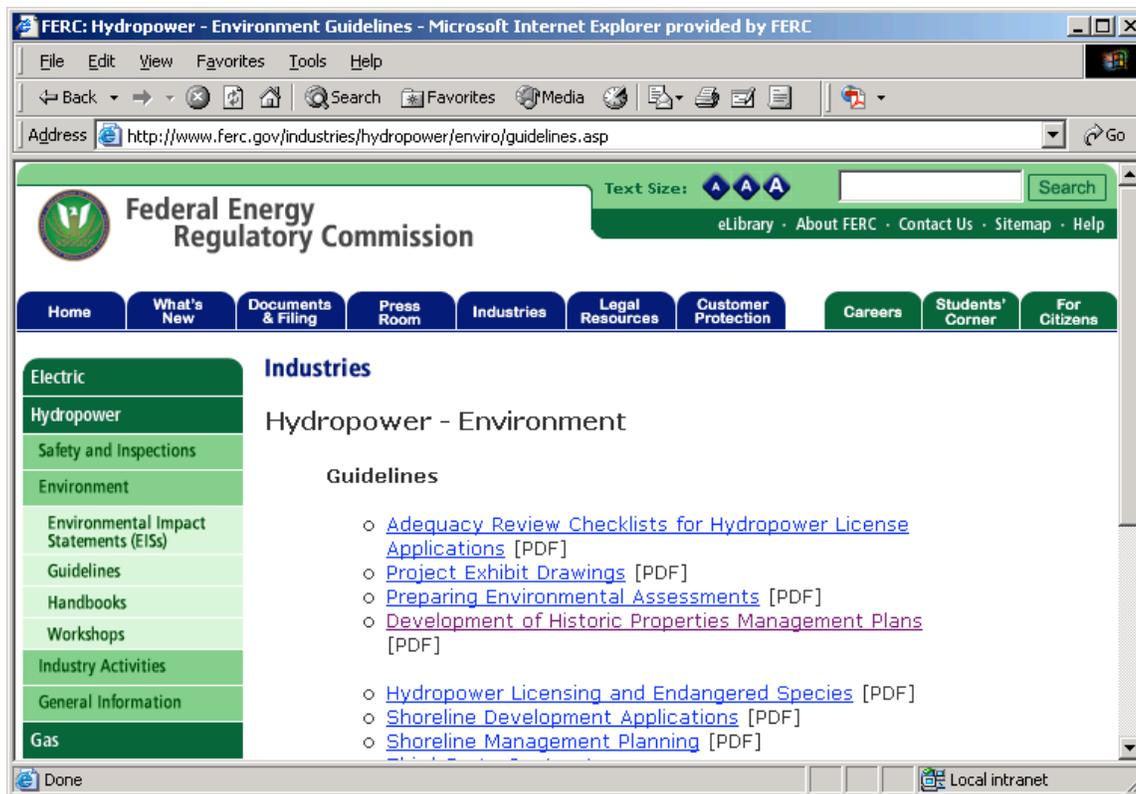
- Move your mouse over the blue tab entitled “Industries.” Move your mouse down the menu that pops up to “Hydropower” and click on “Hydropower.”



- On the Hydropower page many of the resources utilized to develop this presentation are available in their complete form.



- For example, if you click on “Guidelines” FERC has a link to the guidelines we follow for compliance with the National Historic Preservation Act.



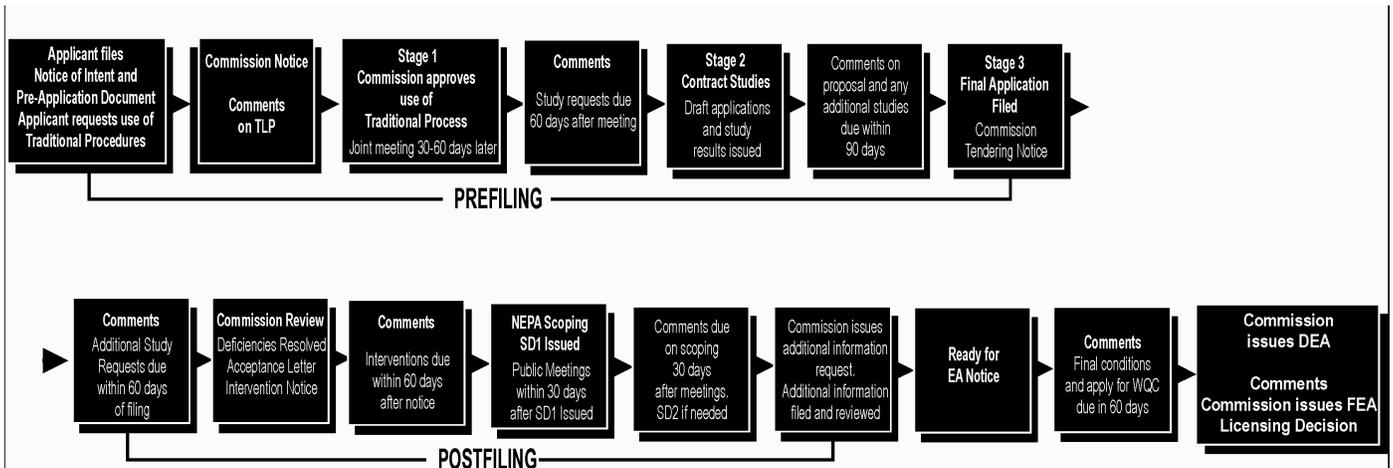
## Attachments

### Attachment 1 - Box Diagrams for the 3 Licensing Processes

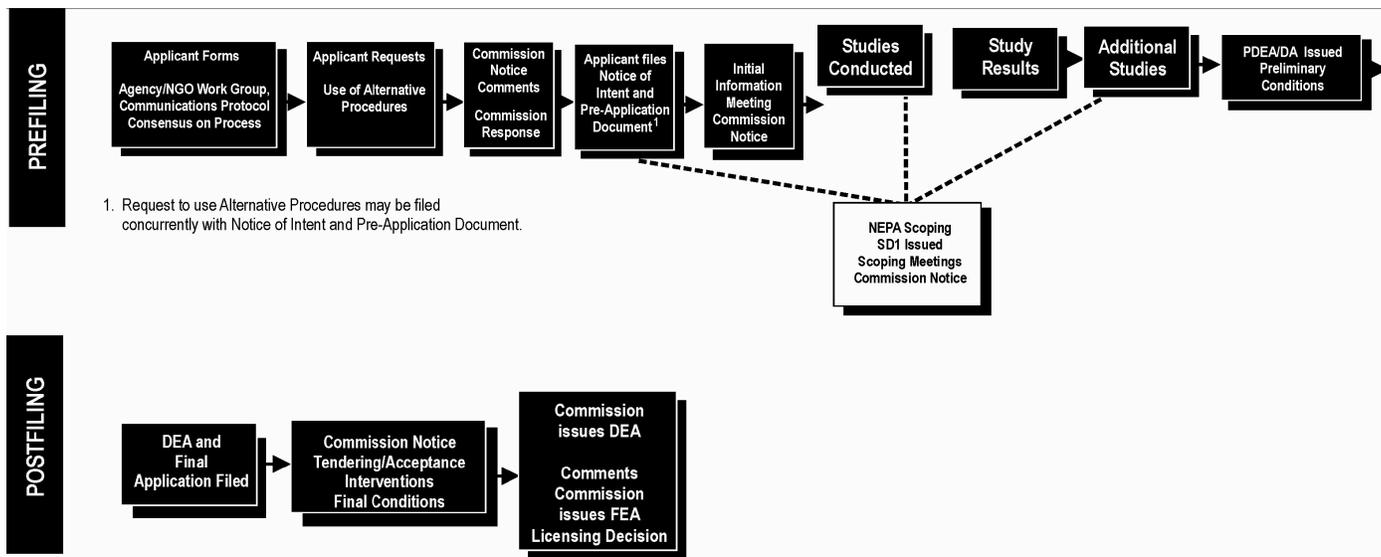
#### Traditional Licensing Process

18 C.F.R. § 4.38 (license for a new project)

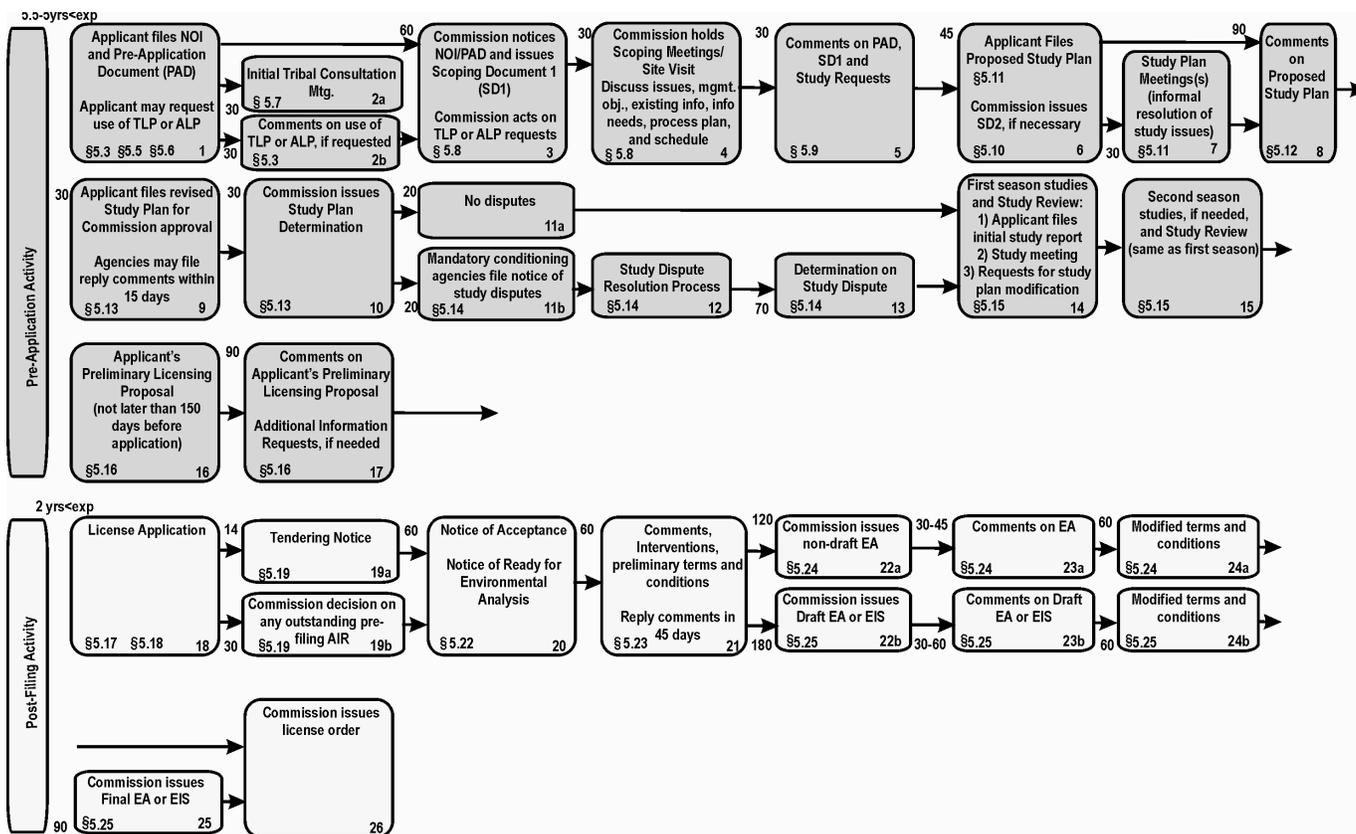
18 C.F.R. § 16.8 (relicensing for existing project)



## Alternative Licensing Process 18 C.F.R. § 4.34(i)



## Integrated Licensing Process 18 C.F.R. § 5



**Attachment 2 - FERC's Policy Statement on Consultation with Indian Tribes  
in Commission Proceedings**

TITLE 18 ---- CONSERVATION OF POWER AND WATER  
RESOURCES  
CHAPTER I ---- FEDERAL ENERGY REGULATORY COMMISSION,  
DEPARTMENT OF ENERGY  
SUBCHAPTER A ---- GENERAL RULES  
PART 2 ---- GENERAL POLICY AND INTERPRETATIONS  
STATEMENTS OF GENERAL POLICY AND INTERPRETATIONS OF  
THE COMMISSION

*18 CFR 2.1c*

§ 2.1c Policy statement on consultation with Indian tribes in Commission proceedings

(a) The Commission recognizes the unique relationship between the United States and Indian tribes as defined by treaties, statutes, and judicial decisions. Indian tribes have various sovereign authorities, including the power to make and enforce laws, administer justice, and manage and control their lands and resources. Through several Executive Orders and a Presidential Memorandum, departments and agencies of the Executive Branch have been urged to consult with federally--recognized Indian tribes in a manner that recognizes the government--to--government relationship between these agencies and tribes. In essence, this means that consultation should involve direct contact between agencies and tribes and should recognize the status of the tribes as governmental sovereigns.

(b) The Commission acknowledges that, as an independent agency of the federal government, it has a trust responsibility to Indian tribes and this historic relationship requires it to adhere to certain fiduciary standards in its dealings with Indian tribes.

(c) The Commission will endeavor to work with Indian tribes on a government--to--government basis, and will seek to address the effects of proposed projects on tribal rights and resources through consultation pursuant to the Commission's trust responsibility, the Federal Power Act, the Natural Gas Act, the Public Utility Regulatory Policies Act, section 32 of the Public Utility Holding Company Act, the Interstate Commerce Act,

the Outer Continental Shelf Lands Act, section 106 of the National Historic Preservation Act, and in the Commission's environmental and decisional documents.

(d) As an independent regulatory agency, the Commission functions as a neutral, quasi-judicial body, rendering decisions on applications filed with it, and resolving issues among parties appearing before it, including Indian tribes. Therefore, the provisions of the Administrative Procedure Act and the Commission's rules concerning off-the-record communications, as well as the nature of the Commission's licensing and certificating processes and of the Commission's review of jurisdictional rates, terms and conditions, place some limitations on the nature and type of consultation that the Commission may engage in with any party in a contested case. Nevertheless, the Commission will endeavor, to the extent authorized by law, to reduce procedural impediments to working directly and effectively with tribal governments.

(e) The Commission, in keeping with its trust responsibility, will assure that tribal concerns and interests are considered whenever the Commission's actions or decisions have the potential to adversely affect Indian tribes or Indian trust resources.

(f) The Commission will seek to engage tribes in high-level meetings to discuss general matters of importance, such as those that uniquely affect the tribes. Where appropriate, these meetings may be arranged for particular tribes, by region, or in some proceedings involving hydroelectric projects, by river basins.

(g) The Commission will strive to develop working relationships with tribes and will seek to establish procedures to educate Commission staff about tribal governments and cultures and to educate tribes about the Commission's various statutory functions and programs. To assist in this effort, the Commission is establishing the position of tribal liaison. The tribal liaison will provide a point of contact and a resource for tribes for any proceeding at the Commission.

(h) Concurrently with this policy statement, the Commission is issuing certain new regulations regarding the licensing of hydroelectric projects. In this connection, the Commission sets forth the following additional policies for the hydroelectric licensing process.

(i) The Commission believes that the hydroelectric licensing process will benefit by more direct and substantial consultation between the Commission staff and Indian tribes. Because of the unique status of Indian tribes in relation to the Federal government, the Commission will endeavor to increase direct communications with tribal representatives in appropriate circumstances, recognizing that different issues and stages of a proceeding may call for different approaches, and there are some limitations that must be observed.

(j) The Commission will seek to notify potentially--affected tribes about upcoming hydroelectric licensing processes, to discuss the consultation process and the importance of tribal participation, to learn more about each tribe's culture, and to establish case--by--case consultation procedures consistent with our ex parte rules.

(k) In evaluating a proposed hydroelectric project, the Commission will consider any comprehensive plans prepared by Indian tribes or inter--tribal organizations for improving, developing, or conserving a waterway or waterways affected by a proposed project. The Commission will treat as a comprehensive plan, a plan that:

- (1) Is a comprehensive study of one or more of the beneficial uses of a waterway or waterways;
- (2) Includes a description of the standards applied, the data relied upon, and the methodology used in preparing the plan; and
- (3) Is filed with the Secretary of the Commission. See generally *18 CFR 2.19*.

**HISTORY:** [*68 FR 46452, 46455, Aug. 6, 2003*]

**AUTHORITY:** AUTHORITY NOTE APPLICABLE TO ENTIRE PART: *5 U.S.C. 601; 15 U.S.C. 717--717w, 3301--3432; 16 U.S.C. 792--825y, 2601--2645; 42 U.S.C. 4321--4361, 7101--7352.*

**NOTES:** [EFFECTIVE DATE NOTE: *68 FR 46452, 46455, Aug. 6, 2003*, added this section, effective Sept. 5, 2003.]