Selecting a Licensing Process: Which Approach is Best for Your Project?

The Federal Energy Regulatory Commission's new integrated licensing process, the ILP, is the default process for hydroelectric licensing. However, two other processes — the TLP and ALP — are still available for use with FERC authorization. Understanding the features and differences of these processes can help determine which is most appropriate for a particular project.

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Over the next several years, owners of more than 200 hydroelectric projects will make decisions about which Federal Energy Regulatory Commission (FERC) licensing process to use when applying for a new license (a relicense). Additionally, developers of all new hydro projects under FERC jurisdiction must choose a process to use in applying for an original license. FERC's new integrated licensing process — referred to as the ILP — is the default process for hydroelectric licensing under the Federal Power Act (FPA).[1] However, two other licensing processes — the traditional licensing process, known as the TLP; and the alternative licensing process, referred to as the ALP — are still available. To use either of these processes, the project developer or owner must obtain authorization from FERC.

Before developers or owners decide to request such authorization from FERC, they need to understand the features of the three processes, their differences, and how to determine which is most appropriate for a particular project.

Comparing the three processes

The goal of all three processes — the ILP, TLP, and ALP — is to develop a complete record of information to support FERC's licensing decision, which must balance developmental and nondevelopmental values and take into account protection, mitigation, and enhancement of fish and wildlife resources. The applicant's license application must provide sufficient data for decision-makers to determine whether the project will be consistent with a plan for comprehensive use of the waterway, as required in FPA sections 10(a) and 4(e). The data must also be adequate for use by federal and state agencies or Indian tribes having mandatory authority to condition the license pursuant to sections 4(e) and 18 of the FPA or section 401 of the Clean Water Act.

The three licensing processes differ mainly in how they coordinate the applicant's pre-filing activities (i.e., before filing the license application), especially study plan development, with National Environmental Policy Act (NEPA) review and other state and federal agency processes. Table 1 compares key features of the processes.

Integrated Licensing Process

The ILP promotes efficient and timely licensing by integrating an applicant's pre-filing consultation with FERC's scoping pursuant to NEPA. These activities are conducted concurrently to integrate data gathering needs of agencies, Indian tribes, and the public into FERC's NEPA documentation. In this way, decisions of the commission and those of mandatory conditioning agencies or tribes can be made simultaneously from a common record. Other distinguishing features of the ILP include:

— Increased public participation in pre-filing consultation;

— Early assistance by commission staff during pre-filing activities;

— Firm, defined deadlines for all participants throughout the process;

— Development of a commission-approved study plan early in the process providing greater assurance that additional studies will not be required later;

— A structured, intensive, and time-constrained study plan development process that seeks to resolve study issues informally through study plan meetings; and

— Availability of formal study dispute resolution to agencies and Indian tribes with mandatory conditioning authority, wherein the determination by the director of FERC's Office of Energy Projects constitutes an amendment to the approved study plan.

Traditional Licensing Process

In the TLP, the applicant's pre-filing consultation and FERC's NEPA review are conducted sequentially. After FERC approves use of the TLP, the applicant completes three stages of pre-filing consultation for discussing data and study needs; completing studies and preparing the draft license application; and filing the final license application. Disagree-

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Table 1: Comparison of Key Features of the Federal Energy Regulatory Commission's Three Hydroelectric Licensing Processes

Feature[1]	*ILP*	*TLP*	*ALP*
Combines pre-filing consultation with National Environmental Policy Act (NEPA) review	✔		✔
Process use requires Federal Energy Regulatory Commission (FERC) approval		✔	✔
Process use requires stakeholder consensus			✔
Full public participation in pre-filing consultation	✔	✔	✔
Preliminary application document (PAD) filed with Notice of Intent (NOI)	✔	✔	✔
Early assistance by FERC staff	✔		✔[2]
FERC implements its Tribal consultation policy	✔	✔	✔
Defined deadlines for all participants	✔		
Formal process plan; distribution protocol encouraged	✔		
Formal communication protocol			✔
Structured, time-constrained study plan development process	✔		
FERC issues binding study plan order	✔		
Binding pre-filing formal study dispute resolution available	✔		
Formal study review process	✔		✔[2]
Exhibit E prepared in format of draft environmental assessment (EA)	✔	✔[2]	✔
Option for preliminary licensing proposal	✔		
Formal avenue for post-filing study requests		✔	✔[2]
Application for water quality certification due 60 days after the Ready for Environmental Analysis (REA) notice	✔	✔	✔

Notes:
[1]The features are simplified for clarity.
[2]This feature is possible/optional under this process.

ments arising over study issues in the TLP may be referred for dispute resolution to the commission, but the opinion is advisory, in contrast to the binding nature of formal study dispute resolution in the ILP. Dispute resolution rarely has been used in the TLP, perhaps in part because there was no assurance that data would not be asked for after the final license application was filed.

In the past, significant disagreements over the applicant's study data would typically continue into early stages of application processing. Stakeholders were given the opportunity to request more data upon final application filing. FERC staff considered those requests and its own analysis and often requested the applicant to conduct additional studies to correct deficiencies. FERC subsequently initiates NEPA scoping.

In publishing the ILP regulations in July 2003, FERC made several important changes to the TLP to enhance its timeliness, efficiency, and flexibility.[1] Chief among these is requiring full public participation in pre-filing consultation, a change FERC believes will reduce licensing delays that formerly resulted from a lack of public input to identifying issues and study needs. Non-agency stakeholders may now voice their opinion early in pre-filing consultation, but the decision on what studies to conduct, at this stage, is the applicant's.

Other changes to the TLP include requiring a preliminary application document (PAD) as the initial consultation document; allowing applicants to request to incorporate specific ILP elements into pre-filing consultation (upon showing favorable consensus of participants); and extending the deadline for filing the water quality certification application until 60 days after FERC's ready for environmental analysis (REA) notice. The latter extension especially could enhance timeliness of TLP licensing decisions given that FERC staff cites lack of state water quality certification as the most common reason for licensing delay under the TLP.[1]

Alternative Licensing Process

Like the ILP, the ALP combines an applicant's pre-filing consultation process and FERC's NEPA review. The ALP promotes cooperative efforts between the applicant and stakeholders to narrow areas of disagreement and reach agreement or settle issues by consensus. The ALP regulations include provisions for:

— Demonstrating that stakeholder consensus exists for using the process;

— A communications protocol tailored to the proceeding and governing how the participants may communicate with one another regarding the merits of the applicant's proposals and the stakeholders' recommendations;

— Cooperative scoping of environmental issues and resource studies;

— Tailoring the three-stage pre-filing consultation process to the circumstances of each proceeding (e.g., setting reasonable deadlines);

— Non-binding pre-filing dispute resolution procedures; and

— A preliminary applicant-prepared environmental assessment (EA) in lieu of the traditional Exhibit E.

Consensus-driven, the ALP is typically the most collaborative process and tends to be more costly than the TLP.

FERC modified the ALP only slightly when publishing the ILP regulations. Changes include: requiring a PAD; extending the deadline for filing the water quality certification application to 60 days after the REA notice; and letting applicants request to incorporate specific ILP elements into pre-filing consultation.

Requesting to use the ALP or the TLP

FERC regulations require a potential applicant wishing to request use of the ALP or TLP instead of the ILP to do so at the outset of pre-filing consultation (i.e., when filing its NOI and PAD).

Requesting to use the ALP

As it always has, requesting use of the ALP requires a showing of consensus of the interested stakeholders for using the alternative procedures. This showing must be accompanied by a communications protocol supported by the interested participants. A copy of the request to use the ALP must be provided to all affected stakeholders so that they may file comments within 30 days of the filing date of the request.

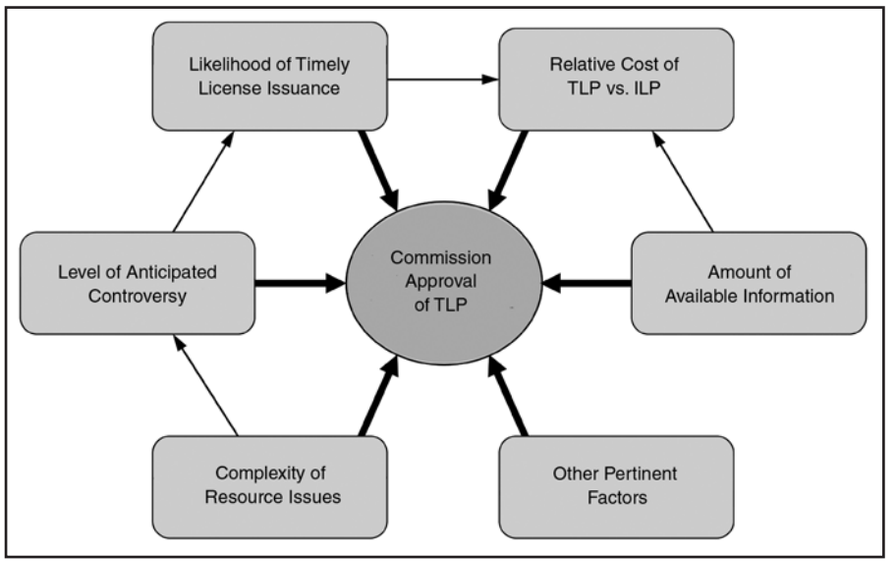


Figure 1: In determining whether to approve use of the traditional licensing process (TLP), the Federal Energy Regulatory Commission considers several factors and their interactions.

The ALP has proven especially effective in settling contentious issues and minimizing delays in proceedings that involve agencies or tribes exercising their mandatory conditioning authority over license conditions.

Other factors that may influence a decision whether to request to use the ALP include: availability of staff resources and funding to sustain resource-intensive collaboration; prior knowledge, experience, and success of the parties in using the process; the importance of reaching consensus-based settlement of issues; and even corporate philosophy of the applicant for achieving environmental solutions.

Requesting to use the TLP

In making a decision about whether to request using the TLP, an applicant should consider:

— Complexity of the resource issues;
— Level of anticipated controversy;
— Amount of available information and potential for significant disputes over studies;
— Likelihood of timely license issuance; and
— Relative cost compared to the ILP.

These factors and potential interactions between them, as shown in Figure 1, influence FERC's decision about whether to grant approval for using the TLP. In the preamble to the ILP rule, FERC suggested that it is more likely to approve a TLP request if it appears that an application will have relatively few issues and little controversy, can be expeditiously processed, and can be processed less expensively under the TLP than the ILP.[1] However, FERC allows an applicant to also consider other factors it believes to be pertinent.

The PAD likely will be an important tool for conveying information needed by the commission to determine whether use of the TLP would be appropriate. In addition, public stakeholders interested in the proceeding may file comments within 30 days of the filing date of the request to use the TLP.

The following paragraphs describe various factors that may favor or disfavor use of the TLP compared to the ILP.

Complexity of Resource Issues and Anticipated Controversy. Complex resource issues and controversy surround many major projects and may not necessarily weigh against the TLP in favor of the ILP. Some applicants in the southeastern U.S. have been implementing TLPs for large and multi-development projects involving complex issues by incorporating full public participation into pre-filing consultation. Their "enhanced traditionals," which started before the ILP became the default, resemble the newly modified TLP. In addition, an applicant using the TLP may adopt specific elements of ILP pre-filing consultation with the consensus of interested stakeholders to encourage informal resolution of study issues and reduce the likelihood of post-filing study requests.

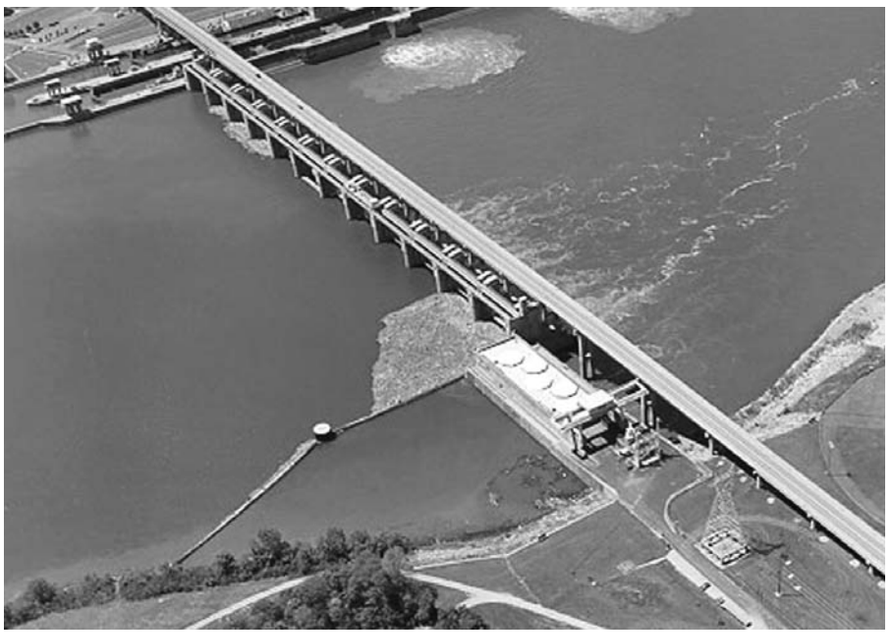
The extent to which the complexity of resource issues, and the related need for adequate data to make decisions, should bear on approval of the TLP would seem to depend largely on the anticipated level of controversy surrounding the exercise of mandatory conditioning authority. Formal dispute resolution in the ILP, a potential advantage over the TLP, is available only to agencies and Indian tribes with mandatory conditioning authority, and only for studies pertaining directly to exercise of their authorities.

Thus, the TLP might be considered broadly applicable to any size project regardless of operational or resource issue complexities as long as it appears adequate information is available to evaluate the issues and the anticipated level of controversy over mandatory conditioning authority appears to be low. In proceedings where a high level of controversy is anticipated, the ILP may be more advantageous for resolving study issues and minimizing licensing delays.

Likelihood of Timely License Issuance: The likelihood of timely license issuance may become less of a distinguishing feature between processes because the TLP no longer represents the TLP of old. The process now allows full public participation from the outset and has the same deadline for filing the water quality certification application as the ILP and ALP. These changes address two of the most common reasons cited for licensing delays under the TLP. Moreover, the new TLP requirements for the PAD, the applicant's request to use the TLP, and the public comment period should allow FERC to determine whether there will be significant issues surrounding necessary studies and potential for developing adequate data without having to resort to requests for additional information after filing of the license application.

The ILP may not completely avoid delays. In the first and only formal dispute resolution process yet invoked under the ILP, the director of FERC's Office of Energy Projects delayed his determination to request additional information from the disputing agency, in part because it was the first use of formal dispute resolution; such opportunity may not be extended in the future. However, the disputing agency then requested rehearing of the commission's determination, raising questions as to how accepting agencies will be of dispute determinations and how common formal disputes and associated delays might become. Five other projects using the ILP have had their study plans approved by the commission, and none of them had formal dispute resolution.

Costs. In determining the anticipated cost of the TLP, a potential applicant may wish to consider such factors as the



For relicensing the 64.8-MW Markland project on the Ohio River, owner Duke Energy requested and received approval from the Federal Energy Regulatory Commission to use the traditional licensing process (TLP) rather than the integrated licensing process (ILP).

availability of existing data and the potential for controversy over resource studies. Costs of the TLP could be more favorable than those for the ILP if it is anticipated that, after completing studies conducted during pre-filing consultation, there will be sufficient data on the record for FERC to make decisions regarding study issues and for resource agencies to reasonably commit to recommending license terms and conditions in a timely manner. Where the potential for substantial controversy exists over study needs, costs of the TLP could be higher relative to the ILP because of the possible need to repeat studies or conduct additional studies after the license application is filed, which could also affect the timeliness of license issuance.

Recent approvals to use the ALP and TLP

Since the integrated licensing process became the default, FERC has approved the use of both the ALP and TLP for licensing a project.

For the ALP, on February 7, 2006, the director of FERC's Office of Energy Projects approved Gibson Dam Hydroelectric Company's use of this process for the proposed 15-MW Gibson Dam Hydroelectric Project to be built at the existing Gibson Dam owned by the Bureau of Reclamation, U.S. Department of the Interior. The director found that the TLP process would be appropriate because it would be based on consensus and foster improved communications, participation, and cooperation, and ultimately simplify and expedite licensing.

With regard to FERC approval of requests to use the TLP, two recent examples demonstrate FERC's use of the factors described in the previous section of this article in granting approval.

On December 1, 2005, the director of FERC's Office of Energy Projects approved a request to use the TLP for relicensing of Duke Energy's 64.8-MW Markland project on the Ohio River downstream of Cincinnati. The director found that timely license issuance appears likely because the issues are similar to those at other recently licensed projects on the Ohio River and are not expected to be too complex; agencies are familiar with the issues and their informational needs; the level of anticipated controversy and the potential for study disputes appear to be low; significant resource information is available; and the TLP is expected to cost less than the ILP.

On December 23, 2005, the director approved Ha-Best Inc.'s use of the TLP for the proposed 1.32-MW Miner Shoal Waterpower Project, finding that pertinent data had already been collected; consultation had already been ongoing with agencies and non-governmental organizations; the complexity of issues and anticipated level of controversy were expected to be minimal; and the TLP was expected to cost $40,000 less than the ILP.

Choosing a licensing process in the future

The future of licensing process choice in hydroelectric licensing depends on how well the ILP proves its effectiveness for improving the cost, efficiency, and timeliness of licensing over time and whether the newly modified TLP and ALP retain their integrity as distinct and viable alternatives. At least 17 potential applicants are currently using the ILP. Feedback from participants in FERC's ILP effectiveness workshops and technical conference in June 2005 generally indicates that the ILP is proceeding successfully and is being applied flexibly to accommodate many different types of hydroelectric projects, applicants, and proceedings, all within the demanding time frames.

Stakeholders participating in the technical conference expressed a general desire for greater collaborative participation in the ILP. The applicant would have to weigh whether the increased effort and costs of extra collaboration within the set timeline of the ILP would better inform participants and reduce controversy. Of course, applicants favoring a more consensus-driven approach have the option of requesting to use the ALP. The TLP, however, with its increased public participation and added flexibility, may offer the greatest contrast to the ILP as a distinct and viable licensing process alternative. ■

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Note

[1]"Hydroelectric Licensing under the Federal Power Act: Final Rule and Tribal Policy Statement," 18 Code of Federal Regulations Parts 2, 4, 5, 9, 16, 375 and 385, Docket No. RM02-16-000, Order No. 2002, Federal Energy Regulatory Commission, Office of Energy Projects, Washington, D.C., July 23, 2003; February 23, 2004 (revision).