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**Date:** June 5, 2014

**Route To:**

**Subject:** Forest Service Hydropower Program; Providing Capacity, Ensuring Appropriate Alignment

**To:** Regional Foresters

We want to take this opportunity to reemphasize the importance of the Forest Service Hydropower Program. We also want to share our intention to improve on the agency's responsiveness and capacity as well as ensure alignment as appropriate. It is vital that we are actively involved in Federal Energy Regulatory Commission (FERC) license proceedings in order to support rural and urban communities as well as provide for mitigation. We need to ensure that our requests for mitigation are coordinated with the WO and appropriately consistent.

Hydropower is receiving renewed interest by the Administration and by Congress as a means to diversify the nation's energy portfolio. As you are aware, hydropower is a non-carbon generation source and serves a unique role in meeting peak energy demand and maintaining the Nation's grid stability as more renewable energy sources such as wind, solar, biomass connect to the grid. National Forest System land significantly contributes to the Nation's hydropower capacity. There is currently about 96,000 megawatts (MW) of hydropower capacity in the U.S., contributing about 9 percent of the Nation's annual electrical production. FERC regulates 54,000 MW or about half of the national hydropower generation capacity. About one-third, or 18,000 MW, of production capacity under FERC's jurisdiction occurs on National Forest System land. The President signed two bills in 2013 that target increasing hydropower production in the U.S., and more legislation is anticipated to encourage additional development or improve efficiencies at existing facilities.

#### Agency Capacity

While we appreciate the critical importance of hydropower, it is important that we are appropriately involved in FERC proceedings to ensure that interests of the agency and expectations of the public are addressed primarily through implementation of the applicable land and resource management plan. Without agency involvement, those interests such as flat water recreation facilities, predictable whitewater recreation days, invasive species management, cultural resource protection, and flow regimes for fisheries would likely not be adequately addressed. Agency capacity has declined and the demands on staff assigned to each project have increased as a result of the loss of capacity.

Yet if we are not involved in these proceedings, opportunities to address recreation pressure and resource challenges may well be lost. In terms of addressing capacity, we are looking at our ability to expand funding options from different functions. We are also discussing legislative alternatives and implications of allowing the agency to retain cost recovery receipts.



FERC administered proceedings are procedurally and technically rigorous efforts. To provide staffing needed to address the concerns and opportunities, I have directed Greg Smith, Director of Lands, to work with the Regions on succession planning, training, and development of organizational options such as the Region 1 through 4 Interregional Hydropower Team in order to maintain agency presence and effectiveness in FERC proceedings.

### Alignment

It is very important that the mitigation measures specified by the Forest Service are directly tied to impacts as specified in legislation, are *necessary and appropriate*, and are consistent across Forest and Regional boundaries.

We are concerned about alignment in the following areas: the appropriate use of cost recovery for FERC administered proceedings, policy boundaries, and the Washington Office review process. The Energy Policy Act of 2005 imposed two new requirements that the Forest Service must participate if petitioned by interested parties. These requirements include a formal Alternative Condition Review process and the Trial Type Hearing. Both processes require that agencies have the facts to support the imposition of license conditions and they can significantly increase the amount of effort and costs expended on individual cases. Therefore, it is important to efficiently, effectively, and consistently redeem our responsibilities while meeting FERC administered timelines and minimizing the need for the aforementioned review process and hearings where possible.

When a project is located on National Forest System lands, § 4(e) of the Federal Power Act (FPA) authorizes the Forest Service, as delegated from the Secretary of Agriculture, to submit conditions it deems necessary to FERC for inclusion in any license issued for the *adequate protection and utilization of such reservation*. When a project is not located on National Forest System lands, but affects National Forest System lands and resources, the Forest Service may make recommendations to FERC under §10(a) of the act to mitigate effects to National Forest System land and resources. The authority under § 4(e) provides the means to ensure projects are located, built, and operated in a manner consistent with Forest Plans and allows the Forest Service to mitigate for negative effects or to deliver beneficial outcomes.

### Cost Recovery:

My 2770 letter of April 18, 2012, noted that costs associated with participating in FERC license proceedings are not recoverable under the Forest Service's cost recovery regulations at 36 CFR 251.58. The exception to this is time spent to process and issue the Special Use Permit. Forest Service cost recovery applies only to processing special use applications and monitoring compliance with those authorizations (36CFR251.58 (b)(1)-(b)(3) and (c)); (b)(4) and (d)).

All mitigation measures that affect project operations and economics are to be submitted for inclusion in a license typically under § 4(e). This creates the administrative record allowing FERC to conduct its economic analysis. Costs incurred due to agency staff participation in a license proceeding to develop the mitigation in a license are submitted to FERC in response to its request for Other Federal Agency costs. FERC has the lead under §10(e) of the Federal Power

Act to collect the Other Federal Agency costs from licensees in order to reimburse the United States for the costs of administering Part I of the Federal Power Act. Costs reported by the Forest Service to FERC for time spent participating in license proceedings to develop necessary and appropriate mitigation are not subject to cost recovery by the proponent. In some cases, costs incurred in processing a special use application (SUA) and monitoring the authorization can be recovered and are separate from costs reported to FERC. See FSH 2709.15 - 61.23 for guidance on the scope of terms and conditions contained in a SUA. Please coordinate with the WO to clarify the appropriate use of the Special Use permit and associated cost recovery and ensure that these costs are not reported to FERC to avoid “double counting” of fees which are to be paid by the licensees to FERC.

Again, as noted above, we understand the capacity challenges. The WO will continue to work to address these challenges.

#### Policy Boundaries:

Agency policy is outlined in FSM 2770. The following clarifies the direction contained in the Manual as there has been inconsistent application or interpretation. There may be instances where some negative effects cannot be mitigated immediately below the project such as the effects of peaking operations on aquatic resources. Therefore, suitable offsite or compensatory mitigation is appropriate and justified to protect the operational value of a peaking project. Objective or outcome based mitigation measures allow the licensee to work with the FS and other parties to the proceeding to develop the most appropriate means to achieve the desired outcome.

FSM 2770.3 – (5) explicitly prohibits requiring mitigation associated with the original inundation. This prohibition is limited to seeking compensation for the original flooding of NFS land. This means that any lands inundated by the existing project reservoir cannot be used to require the licensee to purchase or offset those original losses due to flooding. This does not mean taking a static look at the effects of a project nor does it preclude incorporating alternative operations (i.e., downstream flow levels and lake levels) or new facilities (i.e., fish passage, boat ramps, invasive species check/clean stations, etc.) to meet agency goals and objectives.

It is also important to request studies that directly lead to development of specific license provisions that mitigate for known project effects.

#### WO Oversight:

In a letter dated July 27, 2011, the Deputy Chief required that all preliminary §4(e) conditions and any proposed settlement agreements are to be reviewed and approved by the NFS Deputy Chief before they are made public or transmitted to FERC by the Regional Forester. The letter also noted procedures and timelines for the coordinated review will be developed in conjunction with the Region to ensure timely processing and filing of preliminary §4(e) conditions and the signing of settlement agreements in order to meet FERC regulatory timelines. WO and Regional staff met in February 2014 and followed up via conference call to reach consensus on an approach that limits additional procedural burdens on staff at both levels. The process includes the following key components:

- a. Regions notify National Hydropower Program manager via e-mail of any application for a Preliminary Permit and/or filing of the Pre-Application Document (PAD) that initiates a formal proceeding before FERC;
- b. Add the National Hydropower Program manager and WO OGC lead for Hydropower on the Official FERC Service List so they receive all filings and issuances in a proceeding;
- c. Initial coordination occurs during the response to the PAD where the FS proposes revisions to draft study plans or proposes new studies. This is important for all to understand how the studies may lead to a mitigation prescription under §4(e);
- d. The Regions and WO should informally coordinate when the FS comments on the applicant's study plans to ensure consistent application of technical approaches and that the studies are germane to the protection and utilization of the reservation;
- e. Regions should submit their draft preliminary §4(e) conditions to the Director of Lands at least 10 days ahead of the FERC filing deadline; and
- f. Regions should submit their proposed final §4(e) conditions to the WO Director of Lands at least 10 days ahead of the FERC filing deadline.

For Settlement Negotiations, the Regions should provide ongoing updates on negotiations for multi-party settlement agreements in order to avoid reviews after stipulations have been agreed to and prior to signing by the authorized officer.

Our intent is to support the appropriate use and development of hydropower energy on the National Forests, while mitigating for and minimizing adverse impacts as prescribed in statute in a consistent manner. We understand the challenges of capacity and want to convey the need for an appropriate degree of alignment. If you need additional information, please contact Greg Smith, Director of Lands, or Gary Schiff, Assistant Director for Land Stewardship.

*/s/ Tony Tooke (for)*

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