

From: Koerner, Mona M -FS
Sent: 17 Apr 2017 18:18:40 +0000
To: Mattson, Liane -FS;Vaculik, Leslie -FS;Woodruff, Reginal -FS;Mazel, Miriam - FS
Cc: Rabideaux, Randy -FS
Subject: RE: DRAFT Review for EO Promoting Energy Independence
Attachments: FSM2770.doc, FS_HydropowerProgramWOoversight.doc

Hi Liane –

For your reference, attached are:

- FSM2770 (updated in 2003, when FERC issued a new non-federal hydropower licensing process, so that FS processes were coordinated with those of FERC), and
- Direction from NFS in 2014, regarding WO/RO review and oversight processes.

In your comments on the draft Review Plan, I read that you as (b)(5);Deliberative Process Privilege (b)(5);Deliberative Process Privilege but refer you to FSM2770, other authorities/concerns listed there that I don't see in Review Plan draft include:

- Wild and Scenic Rivers Act of October 2, 1968 (82 Stat. 906; 16 U.S.C. 1278).
- Federal Power Act of June 5, 1920 (16 U.S.C. 791a, 797, 803, 806-808, 814, 818, 821, 823a-b, 824i-k).
- Energy Policy Act of October 24, 1992 (106 Stat. 2776; 43 U.S.C. 1761(d)).

Hope this helps, my apologies if I'm out in left field about this – would prefer to put off being involved until next week, as I'm on leave this week – but if need me this week, please let me know.

Thanks - Mona

From: Mattson, Liane -FS
Sent: Monday, April 17, 2017 12:28 PM
To: Vaculik, Leslie -FS <lvaculik@fs.fed.us>; Woodruff, Reginal -FS <rwoodruff@fs.fed.us>; Mazel, Miriam - FS <mmazel@fs.fed.us>
Cc: Rabideaux, Randy -FS <rrabideaux@fs.fed.us>; Koerner, Mona M -FS <mkoerner@fs.fed.us>
Subject: RE: DRAFT Review for EO Promoting Energy Independence

Hello, I also want to ensure that Mona Koerner had a chance to see this. There was a mix up in the email request for review.

I note in Reggie's comments some questions (b)(5);Deliberative Process Privilege (b)(5);Deliberative Process Privilege

Thanks, LM



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From: Vaculik, Leslie -FS
Sent: Friday, April 14, 2017 11:04 AM
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Cc: Mattson, Liane -FS <lmattson@fs.fed.us>; Rabideaux, Randy -FS <rrabideaux@fs.fed.us>
Subject: RE: DRAFT Review for EO Promoting Energy Independence

Hi Reggie and Miriam,

Thank you for getting these in.

Would one of you be available to discuss a few of these comments with me and Liane or Randy on Tuesday, 4/18?

We are on Mountain time. Something late morning or early afternoon ET would be my first choice.

Thank you

Leslie Vaculik, Petroleum Engineer
Private Mineral Rights

Forest Service
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From: Woodruff, Reginal -FS
Sent: Friday, April 14, 2017 7:40 AM
To: Vaculik, Leslie -FS <lvaculik@fs.fed.us>
Cc: Mazel, Miriam - FS <mmazel@fs.fed.us>; Smith, Greg -FS <gsmith08@fs.fed.us>
Subject: RE: DRAFT Review for EO Promoting Energy Independence

My comments on behalf of Lands staff

From: Vaculik, Leslie -FS
Sent: Thursday, April 13, 2017 5:15 PM
To: Gaugush, Samuel F - FS <sfgaugush@fs.fed.us>; Carlson, Christopher -FS <ccarlson@fs.fed.us>; Harper, Robert -FS <rharper@fs.fed.us>; Worth, Chris C -FS <cworth@fs.fed.us>; Davis, Eric -FS <joedavis@fs.fed.us>; Goode, Ann E -FS <aegoode@fs.fed.us>; Wiley, David R -FS <davidrwiley@fs.fed.us>; Baker, Sarah - FS <sbaker02@fs.fed.us>; Woodruff, Reginal -FS <rwoodruff@fs.fed.us>; Gurrieri, Joseph T -FS <jgurrieri@fs.fed.us>

Cc: Thompson, Sherri J -FS <sherrijthompson@fs.fed.us>; Rabideaux, Randy -FS <rrabideaux@fs.fed.us>; Mattson, Liane -FS <lmattson@fs.fed.us>; Douglas, Nicholas E -FS <nedouglas@fs.fed.us>; Johnson, Paul -FS <pjohnson02@fs.fed.us>
Subject: RE: DRAFT Review for EO Promoting Energy Independence

Hi Reviewers,

First, thank you to the people who have already submitted reviews.

Second, the due date for comments has been extended to **Close of Business, Monday, 4/17/17.**

Please use tract changes.

Third, please send a reply even if you don't have comments.

Thank you and please call if you have questions.

**Leslie Vaculik, Petroleum Engineer
Private Mineral Rights**

**Forest Service
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From: Vaculik, Leslie -FS
Sent: Monday, April 10, 2017 5:25 PM
To: Gaugush, Samuel F - FS <sfgaugush@fs.fed.us>; Carlson, Christopher -FS <ccarlson@fs.fed.us>; Harper, Robert -FS <rharper@fs.fed.us>; Worth, Chris C -FS <cworth@fs.fed.us>; Davis, Eric -FS <joedavis@fs.fed.us>; Goode, Ann E -FS <aegoode@fs.fed.us>; Wiley, David R -FS <davidrwiley@fs.fed.us>; Baker, Sarah - FS <sbaker02@fs.fed.us>; Woodruff, Reginal -FS <rwoodruff@fs.fed.us>
Cc: Thompson, Sherri J -FS <sherrijthompson@fs.fed.us>; Rabideaux, Randy -FS <rrabideaux@fs.fed.us>; Mattson, Liane -FS <lmattson@fs.fed.us>; Vaculik, Leslie -FS <lvaculik@fs.fed.us>
Subject: DRAFT Review for EO Promoting Energy Independence

Greetings,

Last Friday you were invited to a conference call about developing the FS "Plan for Review" required in the March 28, 2017 Executive Order (EO) Promoting Energy Independence and Economic Growth.

The FS must respond to Section 2 of EO, which requires federal agencies to review all existing regulations, orders, guidance documents, policies, and other similar agency actions (collectively, agency actions) that potentially burden the development or use of domestically produced energy resources, including transmission or delivery of these resources.

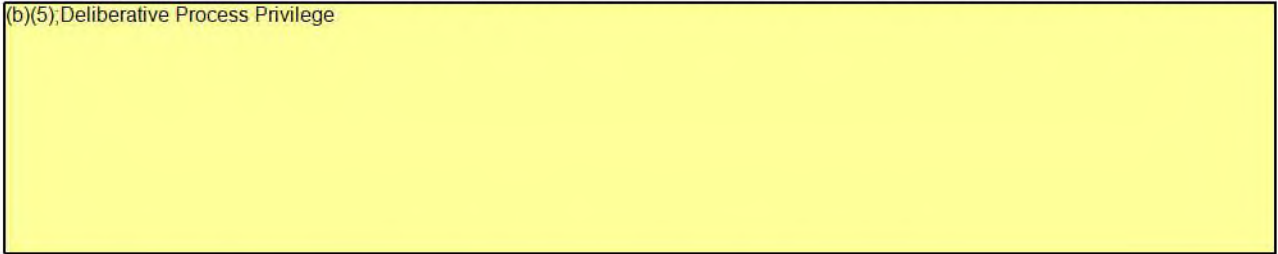
Attached for your review is the initial draft Review Plan. I have also attached the EO for your convenience.

Comments on the Review Plan are due back to me by **Close of Business, Friday, 4/14/17.** **Please use tract changes.**

Please send any comments you have to Liane Mattson, Randy Rabideaux and myself.

Evidently, there were some outstanding questions from the call on Friday. Here is info as of right now.

(b)(5);Deliberative Process Privilege



I am your contact for questions this week since Liane and Randy are gone.
Thank you



Leslie Vaculik, Petroleum Engineer

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**FOREST SERVICE MANUAL
NATIONAL HEADQUARTERS (WO)
WASHINGTON, DC**

FSM 2700 - SPECIAL USES MANAGEMENT

CHAPTER 2770 - FEDERAL POWER ACT PROJECTS

Amendment No.: 2700-2003-2

Effective Date: October 14, 2003

Duration: This amendment is effective until superseded or removed.

Approved: TOM L. THOMPSON
Deputy Chief for National Forest System

Date Approved: 09/30/2003

Posting Instructions: Amendments are numbered consecutively by title and calendar year. Post by document; remove the entire document and replace it with this amendment. Retain this transmittal as the first page(s) of this document. The last amendment to this title was 2700-2003-1 to 2720.

New Document	2770	15 Pages
Superseded Document(s) by Issuance Number and Effective Date	2770 (Amendment 2700-90-1, 06/01/90)	9 Pages

Digest:

A notice of issuance of this amendment was published in the Federal Register on October 14, 2003 (68 FR 59160).

2770.1 - Reorganizes the authority section and expands the narrative description in paragraph 1 for the Federal Power Act of June 5, 1920 (formerly para. 3); expands the narrative description in paragraph 2 for the Wild and Scenic River Act of October 2, 1968; and expands the narrative description in paragraph 3 for the Federal Land Policy and Management Act (FLPMA) of October 21, 1976 (formerly para. 1). Adds a new paragraph 4 referencing the Energy Policy Act

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Digest--Continued:

of October 24, 1992, as an authority that amended FLPMA and the need for a Forest Service authorization for the continued operation of hydropower projects licensed or exempted by FERC as of October 24, 1992. Adds a new paragraph 5 (formerly para. 4) revising the cross-reference to delegations of authority to the Chief on hydropower matters in Title 7, Code of Federal Regulations, from section 2.60(a)(22) to section 2.60(a)(28).

2770.2 - Corrects a typographical error by replacing “protect or effectively utilize” to “protect and effectively utilize.”

2770.3 - Revises, reorganizes, and enumerates paragraphs in this section setting out agency policy regarding the role of the Forest Service in preparation of environmental documentation for processing hydropower licensing applications.

Paragraph 10 sets out revised policy that the Forest Service participate with FERC in the preparation of needed environmental documentation, and paragraph 11 sets out policy that the Forest Service coordinate with FERC to provide information and rationale to support 4(e) conditions, 10(a) recommendations, or other conditions contained in FERC environmental analysis; this direction set out in paragraphs 10 and 11 revises the policy previously contained in the unnumbered third paragraph of this section which required the Forest Service to provide environmental documentation.

Paragraph 12 adds direction for the Forest Service to encourage project owners of unlicensed projects on National Forest System lands to obtain a determination from FERC regarding jurisdiction under the Federal Power Act.

Direction previously set out in the unnumbered fifth paragraph of this section has been removed; this direction required the Forest Service to issue special use authorizations for all hydropower projects licensed by the FERC and stated that only the Chief may deny a special use authorization for a FERC-licensed hydropower project and that the Regional Forester may, for compelling reasons and with appropriate documentation, recommend denial action to the Chief.

2770.4 - In paragraph 1, changes the responsibility for signing reports and making recommendations for approval or denial of projects proposed in designated wilderness areas or other special areas requiring Presidential approval from the Associate Deputy Chief to the Deputy Chief, National Forest System. Removes the former paragraph 2f requiring the Director of Lands, Washington Office, to forward to FERC those Regional Forester decisions involving section 4(e) of the Federal Power Act. In paragraph 3a, removes the former requirement that Regional Foresters in Regions 2, 3, 8, 9, and 10 transmit reports pursuant to section 4(e) of the Federal Power Act to the Washington Office, Director of Lands for forwarding to FERC.

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Digest--Continued:

2771 - Revises direction to clarify when a Forest Service special use authorization is or is not required for hydropower projects involving the use of National Forest System lands pursuant to the Federal Land Policy and Management Act, as amended by the Energy Policy Act.

2772.1 - 2772.12 - Revises direction on the role of the Forest Service in environmental analysis and documentation for hydropower projects involving National Forest System lands and resources; FSM 2772.11 clarifies that FERC is usually the Federal lead agency for licensed projects when an environmental impact statement is to be prepared, and FSM 2772.12 states that the Forest Service is responsible for NEPA compliance for hydropower projects on National Forest System lands exempt from a FERC license.

2775.3 - Revises direction concerning hydropower projects in “designated” and “study” Wild and Scenic Rivers Act areas on National Forest System lands.

2775.32 - Adds new direction concerning hydropower projects in Forest Service identified “designated” and “study” wild and scenic rivers areas on National Forest System lands.

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This chapter covers the review of proposals and the granting of special use authorizations for those hydropower projects and primary transmission lines subject to licensing by the Federal Energy Regulatory Commission (FERC) that are partly or wholly on National Forest System land. This chapter also covers the Forest Service-Federal Energy Regulatory Commission relationship during project planning, construction, and operation. For related direction, refer to FSM 7500 for dam safety, FSM 2600 for fish and wildlife, FSM 2520 for riparian areas, FSM 2320 for wilderness areas, FSM 2350 for wild and scenic river areas, and FSM 2540 for instream flow coordination requirements.

2770.1 - Authority

1. The Federal Power Act of June 5, 1920 (16 U.S.C. 791a, 797, 803, 806-808, 814, 818, 821, 823a-b, 824i-k). This act authorizes the Federal Energy Regulatory Commission (FERC) to grant licenses for hydropower projects that affect: the navigable waters and lands of the United States; surplus water from a Government dam; and interstate commerce (interstate power line). When a project is located on National Forest System lands, section 4(e) of the act authorizes the Forest Service to impose mandatory conditions in the FERC license for a hydropower project. 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 section 10(a) of the act to mitigate impacts or enhance natural resources.

2. Wild and Scenic Rivers Act of October 2, 1968 (82 Stat. 906; 16 U.S.C. 1278). This act authorizes the Forest Service, acting for the Secretary of Agriculture, to determine the acceptability of projects within and upstream, downstream, or on a stream tributary to wild and scenic rivers designated under section 3(a) of the act; and wild and scenic study rivers designated under section 5(a) of the act. Section 7(a) directs the Forest Service to determine whether a proposed project within a designated river corridor would be on or directly affecting a proposed project located upstream, downstream, or on a stream tributary would invade the designated river area or unreasonably diminish its scenic, recreational, fish, or wildlife values present at date of designation. The same protection is provided to a section 5(a) study river with the exception that project proposals upstream, downstream, or on a stream tributary may not invade the study river area or diminish its scenic, recreational, fish, or wildlife values present at date of designation for study.

3. Federal Land Policy and Management Act (FLPMA) of October 21, 1976, as amended (43 U.S.C. 1761-1771). Title V of this act authorizes the Secretary of Agriculture to issue, renew, or grant authorizations to occupy, use, or traverse National Forest System lands for the generation, transmission, and distribution of electric power.

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4. Energy Policy Act of October 24, 1992 (106 Stat. 2776; 43 U.S.C. 1761(d)). This act amends section 501 of FLPMA by providing that Forest Service authorizations are not required for the continued operation of projects licensed or exempted by FERC as of October 24, 1992, unless prior to that time, all or part of the project had been under a FLPMA act authorization or additional National Forest System lands were proposed to be added to the licensed or exempted project area.

5. Title 7, Code of Federal Regulations, Section 2.60(a)(28). Delegates to the Chief the authority to represent the U. S. Department of Agriculture in all matters relating to responsibilities and authorities under the Federal Power Act.

2770.2 - Objective

To encourage hydropower production where it is compatible with National Forest purposes and ensure that the planning, construction, and operation of hydropower projects protect and effectively utilize National Forest System lands and resources.

2770.3 - Policy

1. Consider energy potential a National Forest System resource in arriving at management decisions concerning proposed hydropower projects.
2. Respond to the Federal Energy Regulatory Commission's (FERC) notice of acceptance of a license application with a report pursuant to section 4(e) of the Federal Power Act of October 24, 1992 (43 U.S.C 1761(d)) for any project that occupies National Forest System land. See FSH 2709.15, chapter 50 for additional direction in responding to FERC license applications.
3. Provide FERC with a statement of the conclusions as to the project's consistency or interference with National Forest purposes and the project's consistency with the applicable land management plan. Identify the nature and extent of any significant inconsistency or interference.
4. Coordinate with FERC and other Federal and State agencies, as appropriate, in determining the license conditions necessary for the protection and utilization of National Forest System lands and resources. Transmit to FERC those section 4(e) license conditions the Forest Service considers necessary to mitigate effects on National Forest System lands and resources that are directly attributable to project operations and maintenance. Section 4(e) conditions shall be:

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- a. Necessary to protect and utilize National Forest System lands and resources; these conditions must be clearly described or guided by the applicable land management plan and authorities;
 - b. Capable of achieving the desired results and supported by substantial evidence regarding their effectiveness; and
 - c. Directly attributed to the operation, maintenance, and/or occupancy of the project on National Forest System lands.
5. In a licensing proceeding for an existing project, do not require a licensee under section 4(e) to mitigate for impacts associated with original inundation of National Forest System lands authorized under the current license.
 6. Coordinate with other Federal and State agencies that have the authority for mandatory license conditions to achieve consistency and avoid conflicting license conditions.
 7. Coordinate with the license applicant(s), Federal and State authorities, and, where appropriate, Tribal and local governments and other interested parties to develop mutually agreed upon license conditions.
 8. Participate in FERC licensing to reduce delays and minimize the need for post-licensing data collection and analyses and to provide information, as appropriate, for other agencies to consider in fulfilling their responsibilities in project licensing.
 9. Provide additional license conditions to FERC as recommendations under section 10(a) of the Federal Power Act. Such additional license conditions may include mitigation or enhancement measures contained in settlement agreements applicable to National Forest System lands or resources.
 10. Participate with FERC in the preparation of needed environmental documentation such that on-the-ground activities on National Forest System land required by the license or license amendment may be implemented without additional environmental review and documentation required and/or performed by the Forest Service.
 11. Coordinate with FERC to provide information and rationale to support 4(e) conditions, 10(a) recommendations, or other conditions contained in FERC environmental analyses. File license conditions and supporting analyses with FERC in a timely manner to meet procedural deadlines.
 12. Encourage the project owners of unlicensed hydropower projects on National Forest System lands to obtain a determination from FERC regarding jurisdiction under the Federal Power Act.

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2770.4 - Responsibility

1. Deputy Chief, National Forest System. It is the responsibility of the Deputy Chief for National Forest System to:

- a. Sign reports and correspondence that make recommendations for approval or denial of projects proposed in designated wilderness areas or other special areas which require Presidential approval.
- b. Approve for forwarding to the Department those recommendations that the Forest Service considers to be in the public interest.

2. Director of Lands, Washington Office. It is the responsibility of the Director of Lands, Washington Office, to:

- a. Sign reports and correspondence to the Federal Energy Regulatory Commission (FERC) relating to activities under the Federal Power Act.
- b. Represent the Department of Agriculture in contacts with FERC at the Washington level in matters relating to hydropower projects (FSM 1043).
- c. Coordinate the review of matters pertaining to hydropower projects with other agencies of the Department.
- d. Schedule the assignment of Forest Service personnel as witnesses in FERC hearings, secure Office of the General Counsel review, and approve testimony prior to its being filed with FERC.

3. Regional Forester. It is the responsibility of the Regional Forester to:

- a. Sign reports and correspondence with the FERC on behalf of the Department of Agriculture relating to licensing activities under the Federal Power Act, as amended, including reports under section 4(e) of the Federal Power Act. This authority may not be delegated.
- b. Establish Region-wide guidelines for analysis and coordination of hydropower projects on National Forest System lands.
- c. Coordinate with FERC staff as necessary.
- d. Maintain information base for use in managing Federal Power Act (FPA) project activities.

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- e. Coordinate review of applications, field investigations, and preparation of draft 4(e) reports for FERC licenses.
- f. Respond directly to FERC in behalf of the Department of Agriculture on applications for preliminary permits and exemptions.
- g. Establish procedures to contact licensees or special use holders at least 5 years prior to license or special use expiration to ascertain their intentions concerning continuation of the project.
- h. Prepare, or assist FERC in preparing, for approval by the Deputy Chief, National Forest System, the environmental impact statement necessary to recommend Presidential action on projects proposed in wilderness areas.
- i. Sign and transmit determinations under section 7 of the Wild and Scenic Rivers Act for hydropower projects. This authority may not be delegated.
- j. As appropriate, authorize Forest Supervisors to correspond directly with FERC on all administrative and construction matters during construction and operation of a project.
- k. Sign special use authorizations for hydropower projects after the project has been licensed or exempted from licensing by FERC. The authority to sign special use permits for these projects may be redelegated to the Forest Supervisor, but may not be redelegated by the Forest Supervisor.

2771 - SPECIAL USE AUTHORIZATION

For additional direction on special use authorizations, see FSH 2709.11 and FSH 2709.15, chapter 60.

The Federal Land Policy and Management Act (FLPMA) of October 21, 1976 (43 U.S.C. 1761-1771) authorizes the Forest Service to issue special use authorizations for hydropower projects located on National Forest System lands. However, the Energy Policy Act of October 24, 1992 (43 U.S.C. 1761(d)) amended FLPMA by providing that a special use authorization is not required for any existing project, whether licensed or exempted, that was not subject to an authorization under FLPMA prior to October 24, 1992. Many projects in existence on October 24, 1992, did not have FLPMA special use authorizations and, therefore, are exempt from a Forest Service special use authorization requirement in the future. A special use authorization is required for new hydropower projects proposed after October 24, 1992.

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Issue a special use authorization for hydropower projects:

1. In existence on October 24, 1992, and subject to the Forest Service authorization requirement; or
2. Proposed after October 24, 1992, only after the project is licensed or exempted from licensing by FERC.

2771.1 - Coordination With the License

Use the following to provide a reasonable and orderly phase-in of Federal Land Policy and Management Act (FLPMA) requirements:

1. License Issued Prior to FLPMA. A licensee does not need a Forest Service special use authorization for project facilities authorized by a Federal Power Commission (FPC) license issued prior to October 21, 1976. A license issued prior to FLPMA by the FPC (now FERC) under the Federal Power Act serves as authorization to occupy Federal lands.
2. License Issued Between October 21, 1976, and July 6, 1980. A holder of a FPC/FERC license or license amendment issued between October 21, 1976, and July 6, 1980, must have a Forest Service special use authorization if advised to do so by the Forest Service during that period (or if a Forest Service special use authorization was actually issued during that period).
3. License Issued After July 6, 1980. A holder of a FERC license issued after July 6, 1980, must have a Forest Service special use authorization. This includes original and new (reissued) licenses unless the requirement for a permit was waived by the Forest Service during the period October 21, 1976, and July 6, 1980. If a Forest Service special use authorization already exists, amend it to include the added lands.
4. License Amendments After July 6, 1980, of Licenses Issued Prior to FLPMA. A special use authorization is required for the use of National Forest System lands affected by a license amendment issued after July 6, 1980, even though the current license was issued prior to passage of FLPMA.

2771.2 - Content

Special use authorizations shall authorize the occupancy and use of National Forest lands and shall include those conditions and requirements that are not included in the license but which are necessary for comprehensive and compatible use of land, water, and energy resources consistent with the purposes for which the National Forests were created or acquired.

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2771.3 - Term

For FERC licensed projects, issue special use authorization for the same term as the license. For FERC exempted projects, an authorized officer shall determine the term of the permit. Temporary facilities may be authorized for a shorter time period.

2772 - ANALYSIS

2772.1 - Environmental Analysis and Documentation

For additional direction, see FSM 1950, FSH 1909.15, and FSH 2709.15, chapter 30.

2772.11 - Licensed Projects

The Federal Energy Regulatory Commission (FERC) is responsible for National Environmental Policy Act (NEPA) compliance for projects licensed by FERC. FERC is usually the Federal lead agency for licensed projects when an environmental impact statement (EIS) is to be prepared. It is the responsibility of the authorized officer to request to designate the Forest Service as a cooperating agency when National Forest System lands are affected.

2772.12 - Exempted Projects

The Forest Service is responsible for NEPA compliance for hydropower projects on National Forest System lands exempt from a FERC license.

2772.2 - Mitigation

Document those resource losses which can be mitigated under existing laws. Identify alternative methods of mitigating such losses.

2773 - FEDERAL ENERGY REGULATORY COMMISSION APPLICATION

2773.1 - Applications for License

The Regional Forester shall state the official position of the Department of Agriculture regarding licensing of projects affecting National Forest System lands and resources in the report submitted to the Federal Energy Regulatory Commission (FERC) under the provisions of Section 4(e) of the Federal Power Act (FSH 2709.15, ch. 50). Where appropriate, include comments on the effects on other programs of the secretary.

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2773.2 - Applications for Preliminary Permit

The Regional Forester shall provide comments on potential problems and concerns and conditions for applications for preliminary permits on projects affecting National Forest System lands and resources. Do not prepare a 4(e) report for a preliminary permit.

2773.3 - Applications for Exemption

The Regional Forester shall identify potential problems and provide comments and recommendations to FERC on applications for exemptions. Incorporate standard and special conditions required on exemptions in the special use authorization. Do not prepare a 4(e) report for an exemption.

2773.4 - Requirements Affecting Power Production Capability

Do not include conditions and requirements affecting power production capability in the Forest Service special use authorization for a FERC licensed project, except where a Federally-owned dam under the jurisdiction of the Forest Service is involved.

2774 - COORDINATION

2774.1 - Actions Within Project Boundaries

Prior to initiating activities or authorizing uses by others on National Forest System lands covered by a hydropower project special use authorization or license, ensure that such activities or uses will not adversely affect project operations or conflict with the terms and conditions of the project special use authorization or license. Prior to granting special use authorizations to third parties, review with the Federal Energy Regulatory Commission (FERC) and affected licensee the proposed non-project uses within the boundaries of licensed projects.

2774.2 - Exchange Within Withdrawals

Exchange or otherwise dispose of lands withdrawn for power purposes within licensed project boundaries only after (1) FERC vacates or amends the withdrawal, opening (restoring) the lands, or (2) FERC makes a determination that the lands may be conveyed subject to a Section 24 (Federal Power Act) reservation in the patent or deed.

2774.3 - Removal of Withdrawals

Petition FERC to release the powersite withdrawal and retract the project boundary from National Forest lands in excess of that actually needed for the project.

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2774.4 - Federal Takeover of Project Facilities

See FSM 2716.4 and FSM 7530 for directions on Federal takeover of project facilities.

2774.5 - Coordinated Forest Service Administration

Where a project involves more than one forest or region, the Chief or the appropriate Regional Forester shall designate a lead region or forest to serve as the primary contact for coordination purposes.

2775 - SPECIAL AREAS

2775.1 - Projects in Designated Wilderness Areas

For additional direction, see FSM 2320.

A new hydropower project may occupy land in a wilderness only if the President approves (16 U.S.C. 1133(d)(4)). The Federal Energy Regulatory Commission (FERC) is responsible for the environmental impact statement (EIS) needed to evaluate proposed licensing of the project. Such an EIS would be prepared with the cooperation of the Forest Service. If the Forest Service determined that the proposal was in the public interest, the Forest Service would submit the EIS, along with its recommendation and proposed regulations, through the Department of Agriculture to the President for a decision. The 4(e) report, then, would be submitted to FERC by the Forest Service if the President approves the project and the associated use of the wilderness. Special use authorization for study and other non-ground-disturbing activities in a wilderness may be issued without Presidential approval.

2775.2 - Projects in Roadless Areas

Roadless areas include legislatively unreleased RARE II areas, Further Planning Areas, and Congressionally mandated Wilderness Study Areas. Generally, grant special use authorizations in these areas only for study and other non-ground disturbing activities pending implementation of the forest plan. Preferably hold proposals within these areas until the forest plan is approved. If the land use decision must be made earlier, conduct a suitable analysis in compliance with the National Environmental Policy Act.

2775.3 - Projects in Wild and Scenic Rivers Areas

Any hydropower project-work licensed under the Federal Power Act (FPA) of June 5, 1920 (16 U.S.C. 791(a) et seq.) within the corridor of a river designated as a "wild and scenic river" as provided for in sections 2(a)(ii) and 3(a) of the Wild and Scenic River (W&SR) Act of October 2, 1968 (16 U.S.C. 1278) or a study river as provided for in section 5(a) of the W&SR Act is prohibited. Project proposals upstream, downstream, or on a stream tributary to a designated wild and scenic river may not invade the designated river area or unreasonably

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diminish its scenery, recreation, fish, or wildlife values as present at the date of designation. Project proposals upstream, downstream, or on a stream tributary to a designated study river may not invade the study river area or diminish its scenery, recreation, fish, or wildlife values as present at date of designation for study. The Regional Forester must make this determination on rivers administered by the Department of Agriculture in accordance with section 7 of the W&SR Act prior to issuance of an exemption or license by FERC. See FSM 2354.04 and 2770.4 for delegation of authority for making this determination. See FSH 2709.15, section 54.7 and 36 CFR 297 for further requirements.

2775.31 - Lands in Conservation Units in Alaska

Ensure that the streamflow of and transportation on the river are not interfered with or impeded and that the transportation and utility system is located and constructed in an environmentally sound manner where hydropower projects are located within the boundaries of a unit of the National Wild and Scenic Rivers System in Alaska. See Section 1107(b) of the Alaska National Interest Lands Conservation Act (ANILCA) (94 Stat. 2464; 16 U.S.C. 3167).

2775.32 - Projects on Agency-Identified Wild and Scenic Study Rivers

Rivers found eligible or suitable for the National Wild and Scenic Rivers System through agency planning processes are not protected by the W&SR Act from proposed hydropower facilities that have potential to affect river values. Forest Service policy is to protect rivers under study for suitability or inclusion in the National Wild and Scenic Rivers System by managing those lands to protect the river's free-flowing condition, outstandingly remarkable value(s), and classification as long as the river is considered either eligible or suitable for inclusion in the National Wild and Scenic Rivers System.

2775.4 - Projects in Research Natural Areas

In general, any hydropower facility would be incompatible with the purposes of a research natural area (RNA); therefore, line officers shall not issue a special use authorization for a project which includes land within an RNA boundary (FSM 4063). When the Regional Forester feels that the hydropower values that would be foregone are of greater public benefit than keeping the RNA fully protected, the Regional Forester may request, with Station Director concurrence, reconsideration or modification by the Chief of the designation order establishing the RNA.

Do not issue an investigation special use authorization for a RNA; however, a non-ground disturbing investigation special use authorization may be issued in the following situations (1) The RNA's management plan allows actions which would include or be similar to those proposed by the hydropower project, (2) there would be no direct or indirect modification to the ecological processes of the RNA such as a tunnel under the RNA, or (3) where the Regional Forester anticipates that a proposed hydropower development may have significant public benefits.

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Issue no project special use authorization for candidate RNA's until the land management planning decision is implemented. Line officers may issue investigation special use authorizations for candidate RNA's where no ground disturbance will take place.

Coordinate the issuance of any special use authorizing actions within the RNA with the Research Station Director.

2775.5 - Projects in Other Special Areas

There may be other special areas established by the forest plan or unit plan, or legislation, where the Forest Service may determine that hydropower development would not be compatible. These special areas may include:

1. Special interest areas, such as scenic, geological, botanical, zoological, and paleontological areas (FSM 2362).
2. Cultural resources (FSM 2361).
3. National scenic or historic trails (FSM 2353.4).
4. Other special land allocations such as National recreation areas established through the forest plan or other procedure where hydropower development would be incompatible.

Issue non-ground disturbing investigation authorizations for future hydropower development that could be incompatible with other resources or if the proposal is in a study area. Where the hydropower use is incompatible with the special land allocation for the affected area and the effects cannot be adequately mitigated, inform FERC that the proposal is inconsistent and would interfere with National Forest purposes (FSH 2709.15, sec. 54).

2775.6 - Projects in State-Designated Special Areas

The States may designate special areas, such as State wild and scenic rivers, wild trout streams, and State game refuges, which may include National Forest land. A State may have passed laws that prohibit State permits for hydropower projects on these special areas, but these laws are not binding on Federally authorized projects. However, in the spirit of cooperation, give them very careful analysis when considering projects which may impact them. Under section 4(e) of the Federal Power Act, the Forest Service is not authorized to condition the license to ensure protection of the State's designated special areas. However, the Forest Service and the State may request that such protection be provided by FERC.



File Code: 2720

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)

LESLIE A. C. WELDON

Deputy Chief, National Forest System