

NMFS and U.S. Fish and Wildlife Service Regulatory Authorities under the Federal Power Act and the ESA:

1. Federal Power Act:

During the FERC licensing or relicensing of hydropower projects, NMFS and USFWS is granted other authorities, beyond those encompassed under the ESA. Under the Federal Power Act (FPA), these authorities allow NMFS and USFWS to recommend or mandate license conditions for the purpose of ameliorating the environmental impacts of those facilities on both listed and non-listed diadromous species and their habitat.

Non-Mandatory Authority:

Section 10(j) of the FPA requires FERC to include license conditions for the protection, mitigation, and enhancement of fish and wildlife resources based on the recommendations of fish and wildlife agencies, such as NMFS and USFWS, FERC must also attempt to resolve inconsistencies between agency recommendations and applicable law, giving due deference to the recommendations, expertise, and statutory responsibilities of the fish and wildlife agencies.

In a hydropower licensing or relicensing proceeding, the 10(j) process starts when fish and wildlife agencies file recommendations, in response to FERC's notice that a license application is ready for environmental analysis (known as the "REA Notice"). The FPA limits the scope of 10(j) recommendations – they must specifically provide for the protection, mitigation, or enhancement of fish and wildlife resources affected by the project. While FERC is required to give deference to the 10(j) recommendations of Fish and Wildlife agencies, ultimately, those recommendations are not required to be included in any project license. Based upon its mandate to balance developmental and environmental considerations, FERC is permitted to modify, or simply not include, 10(j) recommendations in a project license.

Mandatory Authority

Section 18 of the FPA requires FERC to include in a license fishways prescribed by the Secretary of the Interior or the Secretary of Commerce (delegated to the NOAA Assistant Administrator for Fisheries). In an interagency policy statement, NMFS and the U.S. Fish and Wildlife Service defined "fishways" as:

“Any facility, structure, device, measure, or project operation, or any combination thereof, necessary for safe, timely, and effective movement of fish, regardless of life stage, whether upstream or downstream, through, over, or around a reach affected by a hydropower project, including, but not limited to: (1) fish ladders, locks, lifts, bypasses, barriers, and screens; (2) breaches, notches, spillways, gates, tunnels, flumes, pipes, or other conveyances, and channel modifications; and (3) water spill, flow, temperature, and level; (4) operating schedules; and (5) any other facilities, structures, devices, measures, or project operations necessary to attract,

guide, pass, repel, exclude, transport, or trap fish, or provide information by monitoring, modeling, evaluating, and studying, to ensure safe, timely and effective passage of fish.”

NMFS submits fishway prescriptions during FERC’s licensing process in draft and final versions, called “preliminary” and “modified,” respectively. NMFS files preliminary prescriptions within 60 days of FERC’s REA notice. NMFS then reviews comments on the draft Environmental Impact Statement prepared by FERC, as well as any comments specific to the filed preliminary prescription and then files its modified prescription. As implied by the term “mandatory prescription,” FERC may not modify a section 18 fishway prescription and is required to include any such prescription in the project license, although it may state any objections it has to the prescription. An applicant may propose an alternative prescription.

In some cases, limited information may preclude NMFS and USFWS from prescribing a fishway. If NMFS and USFWS determines at the time of the REA notice that it does not have sufficient information, such as completed reports on required studies or information on technical feasibility, to support the filing of preliminary prescriptions, it may exercise its authority under section 18 of the FPA by reserving the authority to submit prescriptions at a later date. In these situations, NMFS and USFWS will file with FERC its reservation of authority within 60 days after FERC issues its REA Notice and will provide justification for doing so.

2. Engaging with FERC through the ESA:

To obtain an exemption from the prohibitions on take from NMFS under Section 7, licensees of existing, FERC-licensed projects could either voluntarily: a) request FERC to reopen the license to trigger a formal consultation; or b) enter into a settlement agreement to develop an ESA species protection plan (SPP). Under the settlement agreement alternative, the licensee would request FERC to amend the existing license to incorporate the provisions of the SPP. A Section 7 consultation with FERC would then proceed on the basis on the provisions of the SPP. Both of the above alternatives may take several years to complete and require significant staff resources depending on the scope and complexity of the issues; however, the conservation benefits to Atlantic salmon can be significant.

Alternatively, licensees could obtain an incidental take permit pursuant to Section 10 of the ESA. Section 10(a)(1)(b) provides non-Federal entities a mechanism to receive an incidental take permit from the Services if such taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity. To receive an incidental take permit, licensees would need to submit an application to NMFS which contains a Habitat Conservation Plan (HCP). The HCP would need to specify: a) the impact which will result from taking; b) steps applicant will take to minimize and mitigate such impacts and funding for implementation; c) alternative actions to the taking that were considered and reasons why they are not being utilized; and d) other measures that NMFS may require as necessary or appropriate for purposes of the plan. The Section 10 permit and HCP process may take a significant amount of time and resources for projects that are broad in scope and/or present complex issues; however, the conservation benefits to Atlantic salmon can be significant.

While not a preferred approach, the agencies may need to issue “Section 9” take letters to licensees in order to initiate ESA dialog with dam owners. Typically, these letters outline specific threats to listed species which may be occurring as a result of a project activity and encourage remedial action.