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MEMORANDUM OF UNDERSTANDING BETWEEN THE FEDERAL ENERGY REGULATORY COMMISSION AND THE CALIFORNIA STATE WATER RESOURCES CONTROL BOARD CONCERNING COORDINATION OF PRE-APPLICATION ACTIVITIES FOR NON-FEDERAL HYDROPOWER PROPOSALS IN CALIFORNIA

Draft released for public comment on June 10, 2013.

Comments due by 12:00 PM (Noon) on July 8, 2013 to:

Tammy Vallejo
State Water Resources Control Board – Division of Water Rights
Water Quality Certification Program
P.O. Box 2000
Sacramento, CA 95812-2000
or
By email to: tvallejo@waterboards.ca.gov

I. Purpose

This Memorandum of Understanding (MOU) establishes the principles that the staffs of the Federal Energy Regulatory Commission (Commission) and the State Water Resources Control Board of California (State Water Board) will adhere to in the coordination of Pre-Application Activities associated with proposed non-federal hydropower projects¹ in California. Pre-Application Activities include consultation, environmental scoping², study planning, and submittal of and commenting on the applicant's preliminary licensing proposal.

The purpose of this MOU is to coordinate the procedures and schedules prior to the Commission's review of hydropower license applications and the State Water Board's review of water quality certification applications as each pertains to the Commission's authorization of non-federal hydropower projects in California. The goal is to coordinate these pre-application activities, ultimately leading, to the extent possible, to issuance of environmental documents that satisfy the legal requirements of National Environmental Policy Act (NEPA) and California Environmental Quality Act (CEQA) and otherwise meet the Commission's and the State Water Board's needs.

For projects where the State Water Board is the CEQA lead agency, within 90 days of when review in anticipation of certification is deemed to have been initiated (Cal. Code Regs., tit. 23, §3833.1, subd. (b)(2) , the State Water Board will initiate consultation with the applicant to develop a three-party MOU (between the applicant, consultant, and the State Water Board) for development of the CEQA document.

¹ This MOU is focused on traditional hydropower projects, including pumped storage projects, and does not pertain to offshore non-federal hydrokinetic projects.

² Prior to action on a proposed hydropower project, the Commission must prepare an environmental document according to the provisions of the National Environmental Policy Act of 1969 (42 U.S.C. § 4321 et seq.). Likewise, prior to action on a request for water quality certification pursuant to Section 401 of the Clean Water Act (33 U.S.C § 1341), the State Water Board must ensure compliance with the California Environmental Quality Act (Cal. Pub. Resources Code, § 21000 et seq.).

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The State Water Board recognizes that the Integrated Licensing Process (ILP) (18 C.F.R. Part 5) is the Commission's default process.³ However, as appropriate, this MOU will also pertain to the Commission's Traditional Licensing Process (TLP) (18 C.F.R. Parts 4, 16) and Alternative Licensing Process (ALP) [18 C.F.R. §4.34(i)].

II. Commitments of the Commission and the State Water Board

The Commission and the State Water Board agree as follows:

Regulatory Deadlines

1. For proceedings under the ILP (18 C.F.R. Part 5), the Commission and the State Water Board will adhere to the regulatory deadlines specified in the Commission's ILP regulations. In the case of a proceeding under the TLP or ALP, the Commission and the State Water Board will develop a mutually agreeable schedule.
2. If necessary, the Commission and the State Water Board will attempt to resolve conflicts regarding the ILP, TLP, or ALP deadlines at the staff level. If a rescheduling agreement cannot be reached at this level, staff will seek to resolve the issue at a higher level within their respective agencies.

Pre-Application Filing Activities Under the ILP

1. The State Water Board will participate in the Commission's environmental scoping process.
 - a. At the scoping meeting(s) (Box 4) or as part of its comments on the Commission's Scoping Document 1 (Box 5), the State Water Board will provide its process milestones, consistent with its regulations and this MOU, to the Commission for inclusion in the ILP Process Plan.
 - b. As part of the scoping meeting(s) (Box 4), the State Water Board and Commission will discuss and attempt to reach consensus on the proposed geographic scope of studies. If either agency thinks that the proposed project's scope needs to be modified after the scoping meeting(s) (Box 4), the Commission and State Water Board will discuss and attempt to reach consensus on the proposed scope modification. If there is no consensus on the project's scope of effects, then each agency will proceed using its own geographic scope of studies.
2. For projects where the State Water Board is lead agency for purposes of CEQA, the State Water Board and the Commission will consult with the goal of conducting the Commission's NEPA scoping meeting as a joint scoping meeting to comply with the requirements of both 18 C.F.R. § 5.8 of the Commission's regulations and the CEQA Guidelines (Cal. Code Regs., title 14, § 15000 et seq) (Boxes 3-5).

The Commission and the State Water Board will agree on a location and time for any joint scoping meetings for both NEPA and CEQA, consistent with the Commission's regulations (18 C.F.R. § 5.8(b)(3)(viii)) (Box 4) and the CEQA Guidelines.

³ The process steps of the ILP are depicted in a flow chart included in this MOU as Attachment A. Each process step described in this MOU is identified by a box number in the chart.

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3. The Commission and the State Water Board agree to actively participate in study plan development (18 C.F.R. §§ 5.9 – 5.13) (Boxes 5-10). The State Water Board will, to the extent possible, identify studies and information necessary for water quality certification (Box 5).
 - a. As a part of the study plan meeting(s) (Box 7), the Commission and the State Water Board will discuss their respective study requests and attempt to reach consensus on studies that meet the needs of the Commission for issuance of a license and the State Water Board for issuance of water quality certification.
 - b. In its comments on the proposed study plan (Box 8), the State Water Board will note what studies it anticipates will be needed for issuance of water quality certification.
 - c. The Commission will consider in its Study Plan Determination any study that is necessary to ensure that the environmental document(s) for the project meets the needs of the Commission for issuance of the license and the State Water Board for issuance of water quality certification (Box 10).
 - d. The Commission and the State Water Board recognize that, if the Commission's Study Plan Determination excludes or modifies any study or studies identified by the State Water Board as necessary for water quality certification, including any studies necessary for CEQA compliance, the State Water Board may independently require additional study or studies. The State Water Board will make every attempt to request studies and information as early in the licensing process as possible. However, participation in this MOU will not affect the State Water Board's authority to require any study or information it later determines to be necessary for issuance of water quality certification.
 - e. Within 35 days of the Commission's Study Plan Determination (Box 10), the State Water Board may issue a letter notifying the applicant what additional studies the State Water Board anticipates will be necessary for issuance of water quality certification.
4. In its comments on the Preliminary Licensing Proposal (or Draft License Application) (Box 17), the State Water Board will, to the extent possible, make clear to the applicant any specific environmental analyses needed for issuance of water quality certification and that should be included in the Final License Application (Box 18).
5. Prior to the start of the Post-Filing Activity portion of the ILP (prior to Box 18), the Commission and the State Water Board will discuss the needs of their respective agencies related to the Commission's issuance of the license and the State Water Board's issuance of water quality certification. With respect to the development of environmental documents, this discussion should include the types of alternatives that the Commission may consider in the environmental documents, as well as what analyses, data, or information are expected to be necessary to complete the environmental documents. To the extent possible, the State Water Board will present to the Commission alternatives and analyses that it has determined are necessary for issuance of water quality certification.

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Post-Application Filing Activities Under the ILP

1. On a case-specific basis, the Commission and the State Water Board will attempt to identify projects where a single, cooperative environmental document can be issued that satisfies, to the extent possible, the legal requirements of NEPA and CEQA, and otherwise meets the Commission's and the State Water Board's needs. If such project(s) are identified, the Commission and the State Water Board will develop a case-specific letter of understanding that outlines the cooperative post-application filing procedures and schedules.
2. While the focus of this MOU is on Pre-Application Activities, to the extent that information is available, the State Water Board will provide comments and preliminary terms and conditions in response to the Commission's Notice of Ready for Environmental Analysis (Box 21).

Baseline

Pursuant to the Commission's policy and California case law, the current state of the environment, with the existing project facilities, is the baseline condition against which the proposed action and all alternatives in the environmental document(s) will be compared for purposes of NEPA and CEQA. The State Water Board's water quality certification authority, however, extends to project-related impacts to water quality notwithstanding whether those impacts are due to existing conditions.

Communication

1. Within 10 days of the filing with the Commission of a Pre-Application Document for a project in California, the Commission and the State Water Board agree to designate points-of-contact to facilitate effective communication.
2. The State Water Board will notify the Commission within 30 days of receiving an application for water quality certification. This is consistent with the application notification requirements in California Code of Regulations, title 23, section 3835.
3. The Commission and the State Water Board will each identify staff as the designated points of contact (in Communication #1 above) who will register online at <http://www.ferc.gov/esubscribenow.htm> to be notified via e-mail of new filings and issuances related to the project.
4. On a semi-annual basis, the Commission and the State Water Board will exchange information regarding: (1) the number of water quality certification and license applications for California hydropower projects pending before the State Water Board and the Commission, respectively; (2) the dates by which the State Water Board needs to act on requests for water quality certification; (3) the projected dates for a final decision on the merits of water quality certification for each project; and (4) the processing status of both the water quality certification and license applications.

Funding

Each agency is responsible for securing sufficient appropriations and imposing and collecting any fees necessary to carry out its responsibilities under this MOU.

III. Term and Applicability of the MOU

This MOU shall take effect on the date of the last approving signature specified in IV below. Within 30 days of execution of the MOU, Commission and State Water Board staffs will meet to discuss how the MOU provisions relate to upcoming and existing projects. Either party may withdraw from the MOU with 60 days notice to the other.

Neither participation in nor withdrawal from this MOU shall create an independent basis for the Commission to deem the State Water Board to have waived its Clean Water Act section 401 (33 U.S.C. § 1341) water quality certification authority.

IV. Signatories

Federal Energy Regulatory Commission by:

Jeff C. Wright
Director
Office of Energy Projects

Date:

California State Water Resources Control Board by:

Thomas Howard
Executive Director

Date:

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