



SUMMARY OF FERC LICENSE AMENDMENT APPROACHES AND STRATEGIC CONSIDERATIONS

INTRODUCTION AND PURPOSE

This summary provides an overview of developmental license amendments related to changes in the generating capacity (kW) of projects designed to aid licensees in deciding how to proceed with opportunities to increase the capacity or generation at their projects. This summary does not deal directly with non-developmental amendments, such as the addition or removal of recreational facilities, although such amendments would typically fall under the provisions for non-capacity amendments. It should also be noted that unless specifically stated, the references to FERC and FERC staff apply to FERC's Division of Hydropower Administration and Compliance (DHAC), the group that administers requests for capacity and non-capacity amendments.

While most applications for amendment will result in a FERC initiated public comment period and pre-filing consultations with the agencies and public, the license amendment process is not typically as comprehensive as that encountered during the relicensing of a project (*e.g.*, wholesale review of all aspects of the project, including debates over what the baseline conditions are for purposes of environmental analysis). Indeed, FERC will need to conduct an analysis pursuant to the National Environmental Policy Act (NEPA) in all cases where it cannot determine that the amendment is merely an administrative action not requiring environmental review, but the NEPA analysis tends to be focused only on the changes proposed.

MAINTENANCE/AS-BUILT AMENDMENTS

There is a narrow and vaguely defined range of project improvements to capacity and generation that can be approved by FERC through after-the-fact issuance of an amendment to correct the licensed capacity without the need for pre-filing consultation or for FERC to issue public notice. These are generally "maintenance" activities that involve in-kind replacement of turbines or turbine runners and rewinds of generators, or the replacement of an existing and operational flashboard system without altering pond levels. Historic practice indicates that turbine upgrades without an increase in hydraulic capacity and rewinds of generators can be considered simple maintenance and can be authorized upon the filing of revised as-built Exhibit F drawings or Exhibit A text to correct the license installed capacity.

Historically, in-kind runner replacement where previous equipment had failed or could no longer be maintained was sanctioned by FERC, even though hydraulic capacity increased, through after-the-fact amendments. Growing environmental concerns with increasing turbine hydraulic capacity without environmental review introduced greater scrutiny as to when FERC would approve runner replacements. New regulations in 1991 specified a distinction between capacity and non-capacity amendments (see *Capacity Amendments* and *Non-Capacity Amendments* below) and grouped all developmental amendments into those two categories.

Nonetheless, FERC maintains the practice of approving in-kind turbine and turbine runner replacements, where the replacement, even with modest increases in hydraulic capacity, can be characterized as maintenance activities. The only realistic and prudent way to ascertain whether an associated hydraulic increase can be approved without a formal amendment application process is to consult directly with FERC staff first. With advances in turbine design, there are recent examples of licensees replacing turbine runners with far more efficient runners that produce higher horsepower without an increase in hydraulic capacity. FERC favors these types of upgrades, but would still require an as-built filing to correct the license to show an increase in the installed capacity.

CAPACITY AMENDMENTS

FERC's regulations at 4.38(a)(7) and 4.200 govern the definitions and consultation requirements for the filing of both non-capacity and capacity amendments. Capacity amendments are defined at 4.201(b) as being those that would "result in an increase in the maximum hydraulic capacity of 15 percent or more, and would result in an increase in the installed capacity of two megawatts or more" (emphasis added). It's important to note that both criteria need to be met to qualify as a capacity amendment. Adding a new generating unit or changing the size or elevation of an impoundment at a project would also require a capacity amendment.

The consultation requirements for a capacity amendment mirror those for an initial or a new license application under the Three Stage Consultation Process using the TLP. The format and content of exhibits for a capacity amendment application are provided in 4.201(a).

NON-CAPACITY AMENDMENTS

A non-capacity amendment is any change in project capacity that does not meet the two criteria for a capacity amendment. The application exhibit requirements for a non-capacity amendment application are found at 4.201(c). Only the exhibits needing revision to describe the changes to the project need to be developed for the non-capacity amendment application.

The chief difference between a capacity and non-capacity amendment is in the consultation requirements. A non-capacity amendment only requires a single stage of consultation, with the licensee required to provide a draft of the amendment application to agencies, tribes and interested public for 60-day review and comment prior to filing with FERC. In most cases, FERC may elect to have a public comment period.

STRATEGIC CONSIDERATIONS

The potential for an amendment application to expose the project to agency and public scrutiny, as well as the possible interventions of third parties and requests to broaden the scope of environmental review, should be considered in planning for project upgrades that will require an amendment to license. Some strategic considerations are listed below.

1. Unlike the Division of Hydroelectric Licensing (DHL), which processes license and preliminary permit applications, DHAC does not conduct *de novo* review of all

environmental and developmental matters associated with a project. DHAC tends to apply its focus to the specific amendment proposal and considers the licensing of the project a settled matter that does not need to be revisited. DHAC will still examine environmental issues directly related to the proposed action, and will conduct a NEPA analysis in all cases that cannot be classified as administrative actions. It is helpful to contact DHAC staff by telephone prior to fashioning an approach to amending a license, especially if there is uncertainty about whether an alteration to the project can be considered maintenance and the license amended through as-built filings. The licensee should be careful, however, to realize that DHAC staff is necessarily cautious about giving advice and make speak only in generalities. If the licensee has the opportunity to pay a visit to DHAC staff, far more useful information can be gained.

2. If the proposed project alterations fall under the capacity amendment category, it may be possible to obtain waivers for some of the three-stage consultation requirements as allowed at 4.38(iii)(9). FERC's regulations say that any waiver request should be filed with FERC, but the reality is that FERC won't do much unless the licensee has already contacted agencies (as well as tribes and interested members of the public if necessary) and they have agreed to the process waivers. In cases where a project has been recently relicensed and consulted parties are already reasonably familiar with it, they may be quite willing to waive the need for first stage consultation, and perhaps agree to a shorter review time for the draft amendment application.
3. It may be especially useful to consult with DHAC staff if the licensee is not certain whether a proposed amendment will be classified as a non-capacity or capacity amendment. Since the threshold for capacity amendments (15 percent increase in hydraulic capacity and 2 MW increase in installed capacity) must both be met, it is possible to file for a non-capacity amendment if, for instance, the proposed amendment involves an increase of 20 percent in flow but an increase of only 1.5 MW of installed capacity. In addition, for multi-development projects under a single license, FERC has in the past measured the threshold requirements for a capacity amendment against the total capacities of the project, rather than against the capacities of each development proposed for upgrade.
4. In both the capacity and non-capacity cases, the licensee has the option, unlike at relicensing, to either terminate the pre-filing consultation process or to withdraw the application once filed if comments from agencies or the public are likely to expand the environmental issues beyond what the licensee thinks are reasonable or economically feasible. There is no certainty that DHAC would necessarily accept all recommendations from agencies or the public (except for those from mandatory conditioning agencies or involving Endangered Species Act issues), so the licensee, either at the pre-filing or post-filing stages, would have to use its best judgment whether to terminate the proceeding. Conceptualizing the proposed project upgrades and initiating consultation (informally as well as formally) are relatively low cost activities that can be used to determine any agency and public resistance to the proposal or efforts to expand the scope of review that a licensee might find unacceptable. Similarly, the consultation process for capacity amendments unfolds incrementally and offers a number of opportunities for the licensee to weigh the costs and benefits of continuing with the process or terminating it.