



## Overview of the Hydropower Program

### 2018 Habitat Enterprise Fish Passage Program Review

#### Background

Under the Federal Power Act, NOAA Fisheries' Hydropower Program has authority to require fish passage at non-federal hydropower dams licensed by the Federal Energy Regulatory Commission (FERC). FERC regulates more than 1,000 hydropower projects and generally issues a 30- to 50-year license for each project's operation. Projects often consist of multiple dams, and many dams lack adequate fish passage. NOAA Fisheries is currently involved in more than 100 relicensings a year and is also engaged in initial project licensings. Due to the length of a typical license, these relicensings provide once-in-a-lifetime opportunities to improve fish populations. These opportunities are increasingly important as the multiple threats facing migrating fish populations, especially endangered and threatened populations, are compounded by changing climate conditions.

NOAA Fisheries restores and improves fish passage at FERC hydropower projects by issuing mandatory "fishway prescriptions" under Section 18 of the Federal Power Act (FPA): measures to change operations or build structures to ensure the safe, timely, and effective upstream and downstream passage of migrating fish. NOAA Fisheries can also recommend improvements to fish habitat and river flows under Sections 10(a) and 10(j) of the FPA to compensate for project impacts on migrating fish. Our fishway prescriptions and habitat recommendations aid in the recovery of threatened and endangered species and contribute to the sustainability of economically important commercial and recreational fisheries by making previously blocked upstream habitat accessible and protecting existing fish access, allowing fish to breed and complete their life cycles.

Our program focus is different in Alaska where we are generally involved in preventing fish passage from being blocked in the first place, versus working to restore fish passage. There is much more industry focus on planning and building new hydropower projects than we see in other regions of the country.

The NOAA Hydropower Program works with partners—including other federal agencies, industry, states, non-governmental organizations, and tribes—to identify and implement solutions to reopen rivers to migratory fish while preserving hydropower generation. In the past decade, the program has re-opened nearly 1,000 stream miles for migrating fish. Additionally we have worked with developers, state and federal agencies, NGOs, and an active and involved public to protect existing fish passage in the context of new hydropower developments.

Click on the following links for more information on [NOAA's Hydropower Program](#) and [barriers to fish migration](#).

#### Description of NOAA's Authorities under the FPA for Hydropower Projects

##### Section 18 of the FPA

Section 18 of the FPA expressly grants to the Department of Commerce and the Department of the Interior unilateral authority to prescribe fishways. Section 18 of the FPA states that FERC must require construction, maintenance, and operation by a Licensee at the Licensee's own expense of such fishways, as may be prescribed by the Secretary of Commerce or the Secretary of the Interior. Within the Department of Commerce, the authority to prescribe fishways is delegated to the NMFS Regional Administrators.

Section 18 of the FPA, 16 U.S.C. §811, states in relevant part that, "the Commission must require the construction, maintenance, and operation by a Licensee of...such fishways as may be prescribed by the Secretary of Commerce or the Secretary of the Interior."

Section 1701(b) of the NEPA of 1992, P.L. 102-486, provides guidance as to what constitutes a fishway. Section 1701(b) states, "The items which may constitute a 'fishway' under Section 18 for the safe and timely upstream and downstream passage of fish must be limited to physical structures, facilities, or devices necessary to maintain all life stages of such fish, and Project operations and measures related to such structures, facilities, or devices which are necessary to ensure the effectiveness of such structures, facilities, or devices for such fish."

### Section 10(j) of the FPA

Under Section 10(j) of the FPA, 16 U.S.C. § 803(j), licenses for hydroelectric projects must include conditions to protect, mitigate damages to, and enhance fish and wildlife resources, including related spawning grounds and habitat. These conditions are to be based on recommendations received from Federal and State fish and wildlife agencies. FERC is required to include such recommendations unless it finds that they are inconsistent with Part I of the FPA or other applicable law, and that alternative conditions must adequately address fish and wildlife issues. Before rejecting an agency recommendation, FERC must attempt to resolve the inconsistency, giving due weight to the agency's recommendations, expertise, and statutory authority. If FERC does not adopt a Section 10(j) recommendation, in whole or in part, it must publish findings that adoption of the recommendation is inconsistent with the purposes and requirements of Part I of the FPA or other applicable provisions of law, and that conditions selected by FERC adequately and equitably protect, mitigate damages to, and enhance fish and wildlife and their habitats.

### Section 10(a)(1) of the FPA

Resource agencies may also recommend conditions under Section 10(a)(1) of the FPA. However, FERC may accept, modify, or reject those conditions under the comprehensive development standard of Section 10(a)(1) without attempting to resolve inconsistencies or making the findings required by Section 10(j).

Section 10(a)(1) of the FPA requires the project adopted by the Commission to be, in its judgment, the "best adapted to a comprehensive plan for ... beneficial public uses, including ... purposes referred to in section 4(e) ..." 16 U.S.C. § 803(a)(1). Section 10(a)(2) requires that, in making this determination, the Commission consider the recommendations of Federal agencies exercising jurisdiction over resources of the state in which the project is located (16 U.S.C. § 803(a)(2)).