**DEPARTMENT OF ENERGY**

**Federal Energy Regulatory Commission**

**18 CFR Parts 2, 4, 5, 9, 16, 375 and 385**

**[Docket No. RM02–16–000; Order No. 2002]**

# Hydroelectric Licensing Under the Federal Power Act

July 23, 2003.

**AGENCY:** Federal Energy Regulatory Commission.

**ACTION:** Final rule.

**SUMMARY:** The Federal Energy Regulatory Commission (Commission) is revising its regulations pertaining to hydroelectric licensing under the Federal Power Act. The revisions create a new licensing process in which a potential license applicant's pre-filing consultation and the Commission's scoping pursuant to the National Environmental Policy Act (NEPA) are conducted concurrently, rather than sequentially. The revised rules also provide for increased public participation in pre-filing consultation; development by the potential applicant of a Commission-approved study plan; better coordination between the Commission's processes, including NEPA document preparation, and those of Federal and state agencies with authority to require conditions for Commission-issued licenses; encouragement of informal resolution of study disagreements, followed by dispute resolution, and schedules and deadlines.

The traditional licensing process is being retained, and modified by increased public participation and additional time before an application for water quality certification must be filed. No changes are being made to the Alternative Licensing Process (ALP).

For a period of two years from the date of issuance of the new rule, potential license applicants will be permitted to elect to use the traditional or the integrated licensing process, or to request authorization to use the ALP. Thereafter, the integrated process will become the default, and Commission approval will be required to use the traditional process or the ALP.

Under the revised rules, a new part 5 will be added to Title 18 of the Code of Federal Regulations and 18 CFR parts 2, 4, 9, 16, 375, and 385 will be amended to implement the new procedures.

**EFFECTIVE DATE:** The rule will become effective October 23, 2003.

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**SUPPLEMENTARY INFORMATION:**

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*Before Commissioners:* Pat Wood, III, Chairman; William L. Massey, and Nora Mead Brownell.

## I. Introduction

1. In this final rule, the Federal Energy Regulatory Commission (Commission) amends its regulations for licensing of hydroelectric power projects by establishing a new licensing process. The amendments are the culmination of efforts by the Commission, other Federal and state agencies, Indian tribes, licensees, and members of the public to develop a more efficient and timely licensing process, while ensuring that licenses provide appropriate resource protections required by the Federal Power Act (FPA) and other applicable laws.

2. The new licensing process is designed to create efficiencies by integrating a potential license applicant's pre-filing consultation with

the Commission's scoping pursuant to the National Environmental Policy Act (NEPA).[1] Highlights of this ''integrated'' process include:

- Increased assistance by Commission staff to the potential applicant and stakeholders during the development of a license application;
- Increased public participation in pre-filing consultation;
- Development by the potential applicant of a Commission-approved study plan;
- Opportunities for better coordination between the Commission's processes, including NEPA document preparation, and those of Federal and state agencies and Indian tribes with authority to require conditions for Commission-issued licenses;
- Encouragement of informal resolution of study disagreements, followed by study dispute resolution; and
- Issuance of public schedules.

3. In response to oral and written comments on the Notice of Proposed Rulemaking (NOPR),[2] public drafting workshops, and additional consultations with other Federal agencies, the following significant modifications have been made to the integrated process in the final rule:

- The content and distribution requirements for the Pre-Application Document (PAD) have been changed to make it less burdensome on potential applicants and easier for recipients to use;
- More time has been provided for potential applicants and participants to develop and informally resolve differences concerning study needs;
- A technical conference open to all participants has been added to the formal dispute resolution process;
- The draft license application has been replaced by a less burdensome ''Preliminary Licensing Proposal'';
- The deadline for filing a water quality certification application has been extended to 60 days after the ready for environmental analysis notice;
- The integrated process will become the default process in two years; in the interim license applicants may choose the integrated process or the traditional process as it is currently constituted; and
- We are withdrawing our proposal to permit a cooperating agency for NEPA document preparation to also intervene in the relevant proceeding.

We believe that the changes we are adopting will significantly improve the integrated licensing process.

4. We also proposed in the NOPR to modify the traditional process by increasing public participation in pre-filing consultation, adding mandatory, binding dispute resolution, and extending the deadline for filing an application for water quality certification. We have decided not to include mandatory, binding pre-filing dispute resolution, but are adopting the other proposals.[3]

5. To improve consultation with Indian tribes, we are establishing the position of tribal liaison, providing in the regulations for a meeting between the Commission and interested Indian tribes at the beginning of the licensing process, and issuing simultaneously with this final rule a Tribal Consultation Policy applicable to the hydroelectric, gas, and electric programs.

6. No changes will be made to the alternative licensing procedures (ALP).

7. The Commission appreciates the active participation and thoughtful comments provided by the industry representatives, Federal and state resource agencies, Indian tribes, and members of the public in this proceeding. We believe the provisions of the final rule, discussed below, fully take into consideration the interests of all of the stakeholders and will establish an integrated licensing process that serves the public interest.

## II. Background

8. The background of this proceeding was set forth in detail in the NOPR, and need not be repeated here. Since the NOPR was issued on February 21, 2003, the Commission has held public and tribal regional workshops to hear and consider stakeholder concerns about the proposed rule, and to find stakeholder consensus on recommendations to resolve those concerns.[4] Written comments were due by April 21, 2003.[5] Thereafter, we held a four-day stakeholder drafting session from April 29, 2003 to May 2, 2003, at Commission headquarters. At the stakeholder drafting sessions, participants were divided into four groups: Studies, Overall Process, Dispute Resolution, and Tribal issues, with each group including members from all the major stakeholder groups. The goal of the drafting sessions was to develop consensus recommendations on final rule language.

9. Following the drafting sessions, the Commission staff held additional discussion and drafting sessions with other Federal agencies before preparing the final rule.

## III. Discussion

### *A. Need for New Integrated Process Confirmed*

10. Many commenters commended the Commission for undertaking the rulemaking and indicated that the proposed integrated licensing process holds strong promise of accomplishing its objectives.[6] The commenters also provided hundreds of general and specific recommendations regarding how the proposed rule might be improved. After careful review of these comments, we affirm the need for the proposed rule and conclude that we should finalize it with certain modifications discussed below.

11. A few commenters[7] question the need for an integrated process. They are not convinced that it will simplify matters or reduce the time needed for licensing, and think it is certain to be more expensive for license applicants. WPSR is disappointed that the rule does not resolve their concerns about the exercise by federal and state agencies of mandatory conditioning authority. WPSR adds that the integrated process will be overly burdensome for small projects and that the dispute resolution provisions and proposed change in the cooperating agencies policy unreasonably diminish the role of the applicant. SCE and Georgia DNR state that the objectives of the integrated process could be achieved by modifying the traditional process, the consensus-based ALP,[8] or both.[9] These concerns are addressed in the following pages.[10]

12. We are committed to making the integrated process a success. Potential applicants who choose this process during the transition period may rest assured that the Commission will

[1] 42 U.S.C. 4321, *et seq.*

[2] 68 FR 13988 (Mar. 21, 2003); IV FERC Stats. & Regs. ¶32,568 (Feb. 20, 2003).

[3] For the convenience of commenters on the proposed rule, a redline/strikeout version of the affected regulatory text will be posted on the hydroelectric page of the Commission's website.

[4] The regional workshops were held in Portland, Oregon; Sacramento, California; Charlotte, North Carolina; Manchester, New Hampshire; Milwaukee, Wisconsin; and Washington, D.C.

[5] Entities that filed comments in response to the NOPR are listed in the Appendix to the preamble. For administrative ease, the commenters' names are abbreviated in the preamble, as indicated on the Appendix. On April 21, 2003, the California Public Utilities Commission filed a notice of intervention. However, rulemaking proceedings do not have parties.

[6] Virginia DEQ, WGA, WPPD, Interior, PCWA, EPA, Advisory Council, VANR, WPPD, Alabama Power, AmRivers, PG&E, Long View, NHA.

[7] SCE, NEU, Xcel, Georgia DNR

[8] *See* 18 CFR 4.34(i).

[9] SCE's detailed recommendations for improvements to the traditional process are discussed in Section III.T.

[10] Some commenters, such as WPSR, state that the rulemaking should have focused on a perceived unreasonable exercise of authority by agencies with mandatory conditioning authority. As we explained in the NOPR, this is a matter that should be addressed elsewhere.

dedicate the resources necessary to meet our goals for the process. To this end, the Office of Energy Projects has established outreach and training teams to promote the integrated process and educate participants in its implementation.

13. It is also our intention to conduct an effectiveness study of the integrated process in order to quantify the resulting reductions in processing time and costs.

*B. Number of Processes*

14. The NOPR proposed to retain both the traditional process and the ALP in light of comments by industry that a single process is not suitable for all projects and that the integrated process and ALP might be too time constrained or resource intensive for small projects. We also proposed to retain the ALP in light of its demonstrated track record of reducing license application processing times and fostering settlement agreements.[11]

15. We discussed the concerns of environmental groups, and some agencies and Indian tribes, that multiple processes would confuse participants with modest resources, particularly those that rely on volunteers. We concluded that the benefits of having different processes that can be applied to differing circumstances outweighs this concern. We also proposed to require any potential applicant wishing to use the traditional process to obtain Commission authorization to do so, and to provide an opportunity for all stakeholders to comment on the request.[12]

16. Industry commenters and a few others continue to support retaining the traditional process and ALP. They state that flexibility is required by the diversity of project circumstances, issues, and stakeholders; the traditional process and ALP have both been shown to be effective under the right circumstances; the integrated process is too costly and labor-intensive for many small projects and for small stakeholders; and the integrated process is not suitable where stakeholders and the potential applicant are very polarized. They add that the integrated process is untested and that the traditional process needs to be retained as a backstop if an ALP or the integrated process break down.[13]

17. Agency and non-governmental organization (NGO) commenters continue overwhelmingly to favor one integrated process sufficiently flexible to accommodate the diverse circumstances of license applications. They, along with SCE, reiterate that the existing two processes are already confusing, making participants unclear about their rights and duties, and making it difficult for parties with few human and financial resources to effectively participate. A third process, they say, will make matters worse. Some also question the logic of retaining a traditional process which they say stakeholders agree does not achieve the goals of the integrated process.[14] Several note that one process would obviate the need for time in the process to comment on the potential applicant's process proposal.[15]

18. California adds that there is no reason to retain the traditional process because the information requirements and scope and level of analysis are essentially the same as those of the integrated process, so costs should be similar; that polarization is irrelevant if both processes have mandatory, binding study dispute resolution; and project size is no indicator that the issues will be relatively simple or few.

19. SCE also asserts that the revised traditional process, if supplemented by the PAD, more early identification of issues and study design, study request criteria, and study dispute resolution, would differ from the integrated process and the ALP only with respect to the timing of NEPA process. This, says SCE, would make the integrated process needless, so the Commission should just make appropriate modifications to the traditional process.

20. Upon review of the comments, we remain convinced that having three processes is the most effective means of ensuring that the licensing process used is suited to the circumstances of the project, consistent with our intention to reduce the time required for the process without sacrificing resource protection standards. The process selection for each licensing proceeding will be made at the outset, so stakeholders should not be confused about which process they are in. We designed the integrated process to show the steps clearly in sequence from beginning to end and to be as self-contained (*i.e.*, with a minimum of cross-referencing to parts 4 and 16) as is practicable. To the extent stakeholders are concerned about process ambiguities in the ALP, they can negotiate the terms of participation. The Commission staff also stands ready to assist in clearing up any remaining ambiguities about what the regulations may require.

21. We also disagree with those who imply that the traditional process never works well. About one third of traditional license process proceedings are concluded before the existing license expires. The most common reason for delay in the remaining cases is lack of state water quality certification. As discussed below,[16] the integrated licensing process addresses this by providing opportunities and inducements for water quality certification agencies and tribes to participate from the beginning of pre-filing consultation.

22. Some commenters recommend that we consider establishing a sunset provision to eliminate or phase out the traditional process, ALP, or both when the integrated process has become sufficiently established and fine-tuned in light of experience.[17] We agree this idea may have merit. It is our intention to conduct an ongoing review of the progress being made in realizing the goals of the integrated process. If it becomes clear in the future that the integrated process is substantially meeting these goals and the traditional process is not, then it may be appropriate to eliminate the traditional process at that time.

**C. Pre-NOI Activity**

1. Filing Date for NOI and PAD

23. In the NOPR we rejected California's recommendation that the regulations be modified to move the deadline date for the notification of intent to seek a license (NOI) forward to 6.5 years before license expiration because it would be inconsistent with our goal of developing a more timely process. We stated that in the great majority of cases, a license applicant should be able to complete the pre-filing aspects of the integrated process in the three and one-half year period provided for in the regulations.[18]

24. Several commenters request that we reconsider our position, and specifically authorize licensees to voluntarily issue the NOI and circulate

[11] 68 FR 13988 at p. 13991–992; IV FERC Stats. & Regs. ¶ 32,568 at pp. 34,698–699.

[12] The requirement for a consensus to support approval of a request to use the ALP would be unchanged. *See* 18 CFR 4.34(i).

[13] NHA, Idaho Power, EEI, WUWC, SCE, Alabama Power, NEU, WPPD, WPSC, Snohomish, CSWC, FWS, CHI, Maryland DNR, Minnesota DNR. NF Rancheria states that the rules should clarify what would happen if the ALP or integrated process break down, and that any change of process should consider impacts to participants other than the potential applicant.

[14] MDEP, HRC, CRITFC, Nez Perce.

[15] Wisconsin DNR, PFMC, CHRC, Whitewater, SC League, IRU, Interior, CRITFC, RAW, Georgia DNR, HRC.

[16] *See* Sections III.F, G, and M.2.

[17] HRC, AmRivers, Washington, RAW, AMC, NPS, Georgia DNR.

[18] 68 FR 13988 at pp. 13992–993; IV FERC Stats. & Regs. ¶ 32,568 at p. 34,701.

the PAD prior to 5.5 years before license expiration.[19] They reiterate that the FPA requires only that the NOI be filed no later than five years before the license expires and that some cases simply take longer. They cite the diversity of stakeholder interests, development of complex study plans, and unpreventable gaps between approval of a study plan and commencement of studies owing to seasonal considerations and the time needed to negotiate contracts with consultants. They state that adding three to six months at the front end will, in many cases, permit an additional field season of studies before the application deadline, thus increasing the likelihood that the application will be complete when filed. They stress that the goal should be to conclude the licensing proceeding and put into place improved terms and conditions before an existing license expires, and that maintaining an unrealistic time frame for commencing the process will result in the continued issuance of unnecessary annual licenses.[20]

25. NHA and Longview suggest that an alternative would be to permit the applicant to issue the PAD before the earliest date the NOI can be filed if resource agencies and stakeholders approve. They state however that this is much less desirable because stakeholders could decline to participate before the NOI is filed, forcing the potential applicant to repeat steps already completed with some stakeholders after the NOI is filed.

26. These advocates of commencing the licensing process before the NOI is issued are correct that some proceedings will exceed 5.5 years, notwithstanding the best efforts of all participants. They base their comments however on experience under the traditional process, which lacks the crucial features of the integrated process designed to minimize delays. If all stakeholders work together in good faith, the integrated process should minimize the number of instances where a new license application proceeding cannot be concluded before the existing license expires by integrating pre-filing consultation and development of the Commission's NEPA document and resolving study disputes early in the process.

2. Advance Notice

27. In the NOPR we proposed to issue to licensees an advance notice of license expiration. This would be done sufficiently in advance of the NOI deadline date to ensure that the existing licensee is alerted to the requirements for the NOI, PAD, and any potential request to use the traditional process or ALP. We noted that because the advance notice is an administrative action which requires no action on the part of any other entity, and which will be undertaken regardless of the process selected, there is no need to include this action in the regulations. [21]

28. Some commenters state that the advance notice should be included in the regulations because it notifies stakeholders as well as the existing licensee. Barring that, some request publication of a written policy on when the notice will be issued and its contents.[22] Suggestions in this regard include reminding the licensee that seasonal study considerations may be relevant to timely application development [23] and giving directions to contact resource agencies and assemble a list of entities to be consulted and potential issues to address.[24] CHRC and Whitewater similarly recommend that the Commission issue public notice when the advance notice is issued.

29. There is no need to put the advance notice in the regulations. The Commission has for many years published in its annual report and annually in the **Federal Register** a table showing the projects for which the license will expire during the succeeding six years and providing essential information about each project's physical and geographical characteristics.[25] The Commission's annual report is posted on the Commission's Web site.

30. A written policy on the content of the notice would be superfluous. As stated above, the purpose of the notice is to alert licensees to the requirements for the NOI, PAD, and any potential request to use the traditional process or ALP. These requirements are found in the regulations.

31. Recommendations for when the advance notice should be made range from one to three years before the NOI deadline date.[26] We intend to issue the notice approximately 1.5 years before the NOI deadline date. This should provide adequate time for existing licensees to make decisions concerning process selection and to gather existing information for the PAD.

*D. Process Selection*

1. Default Process

32. The NOPR proposed to make the integrated process the default process. A potential applicant would have to request Commission approval to use the traditional process or ALP when it files the NOI and PAD.[27]

33. Licensee commenters question the need for a default process and Commission approval of the potential applicant's choice of the integrated and traditional process.[28] PG&E, SCE, and WUWC state that no rationale has been offered for eliminating the applicant's existing right to choose the traditional process and others say that applicants should not have to show good cause to use the traditional process because it has been tested and shown to be effective in many cases.[29] Licensee commenters also emphasize that the integrated process is untested, and that the ALP was formally adopted by the Commission only after several years of case-by-case experience based on requests for waiver of the of the traditional process requirements.

34. WPPD suggests that stakeholders will threaten to withhold support for the applicant's potential process proposal in order to pressure potential applicants into making other procedural or substantive concessions, and that there would be more certainty if potential applicants had unfettered process choice.

35. Several licensees state that the potential applicant has the most knowledge of the complexity, level of stakeholder involvement, and the resources available to itself and others, so the Commission should defer to its judgment.[30] Other reasons offered in support of applicant choice are that the applicant bears the cost of the process, a lack of choice will inhibit

[19] California, Long View, MWH, PG&E, VANR, MHW, NOAA Fisheries, Process Group. VANR states that the NOI deadline date should be moved to six years before the license expires.

[20] PG&E adds that in Order No. 513, Hydroelectric Licensing Regulations under the Federal Power Act, 54 FR at p. 31384 (June 2, 1989), FERC Stats. & Regs., Regulations Preambles 1986–1990 ¶ 30,854 (May 17, 1989), which promulgated the existing time frame for filing the NOI, the Commission specifically encouraged pre-NOI consultation. The rule we are promulgating today does not discourage pre-NOI activity. Indeed, the PAD cannot be prepared without it. Rather, we are declining to require provisions that could be construed to require or encourage consultation before the NOI is filed.

[21] 68 FR at pp. 13992–993; IV FERC Stats. & Regs. ¶ 32,568 at pp. 34,700–701.

[22] NOAA, HRC, NHA, NEU, CRITFC, Interior, SCE.

[23] PG&E.

[24] Wisconsin DNR.

[25] *See* 18 CFR 16.3.

[26] Wisconsin DNR, SCE.

[27] 68 FR at pp. 13992, 14009; IV FERC Stats. & Regs. ¶ 32,568 at pp. 34,699, 34,730.

[28] Troutman, Snohomish, WPPD, Idaho Power, EEI, Alabama Power, Xcel, NEU, WUWC, SCE, NHA. No commenter appears to advocate a change in the requirements for use of the ALP, and the Process Group at the drafting sessions agreed that the existing criteria are satisfactory.

[29] WUWC, Snohomish, EEI, SCE.

[30] NHA, EEI, SCE, Long View, PG&E, B&B.

commitment of the potential applicant to the success of the process, and the cooperation of stakeholders can be achieved without Commission approval.[31]

36. Several of these commenters suggest that if the integrated process is to be made the default, that it be done only after a 5–6 year test period, during which there would be a presumption that the applicant's choice is appropriate. If the potential applicant chooses the traditional process, proponents of the integrated process would have the burden of showing that the integrated process would be significantly better or significantly disadvantage non-applicant stakeholders. If, at the end of this period, the integrated process appeared successful, it would be made the default process, with any modifications needed in light of experience.[32] In this regard, AEP and GKRSE state that the goal should be to use the process that is likely to yield the best results, procedurally, economically and environmentally, and that if the integrated process appears to satisfy this goal, potential applicants and stakeholders will use it.

37. A few industry commenters assert that the traditional process, either in its current form or with the proposed modifications, should be the default because it has been tested by years of experience and is satisfactory in most cases.[33] They add that it works best for small projects, which are a substantial portion of licensed projects.[34]

38. Several non-industry commenters favor making the integrated process the default with the potential applicant's choice requiring Commission approval.[35] The Minnesota DNR, while not apparently objecting to the integrated process as the default, states that there should also be a means for other entities to oppose an applicant's election to use the default process.

39. We continue to think the integrated process should be the default because it addresses as fully as we can within the confines of the statutory scheme the problems that participants in licensing from every perspective have identified with the traditional process. It merges pre-filing consultation and the NEPA process, brings finality to pre-filing study disputes, and maximizes the opportunity for the Federal and state agencies to coordinate their respective processes.

40. The best means of gaining acceptance for the integrated process however is to demonstrate that it works. We agree with commenters that some period of transition is appropriate. Accordingly, we have decided that the integrated process should become the default process on July 23, 2005. During this two year period, potential license applicants will be able to select the integrated process or the traditional process as it currently exists, or request authorization to use the ALP. At the end of the two-year period, the integrated process will become the default process, and potential applicants will have to obtain approval to use the traditional process.

41. We disagree with those who believe we should defer to the potential applicant's process choice on the ground that it has the most relevant knowledge. The comprehensive development standard of the FPA requires us to consider all issues pertaining to the public interest and establishes important roles and responsibilities for other federal and state agencies. We also have a trust responsibility to Indian tribes. The appropriate process must be selected with the interests of these entities and other members of the public, not simply those of the potential applicant, in mind.

2. Standard for Approval of Traditional Process

42. The NOPR proposed to grant requests to use the traditional process upon a showing of ''good cause.'' [36] Several commenters state that this standard should be replaced by specified criteria, or at least that certain factors should be considered before the Director acts on a request to use the traditional process.[37] Alabama Power and WUWC, however, state that ''good cause'' is sufficient if construed liberally and with deference to the potential applicant.

43. The recommended criteria predictably differ depending on whether they come from industry commenters or others. Industry commenters suggest that the traditional process should be readily approved for small projects with relatively few issues. This, they suggest, includes some or all of: a project operated in run-of-river mode; no substantial changes are proposed in operations or structures; there are no anadromous fish; generating capacity is modest; or the existing project boundary includes little or no land above the high water mark.[38] Other recommended criteria for approving the traditional process include where the potential applicant and stakeholders are too polarized to work well together; [39] if, all things considered, it appears likely that the licensing process can be completed before the license expires; [40] and the potential applicant thinks the integrated process would be too costly.[41]

44. Non-licensees contend that the bar for approval of the traditional process should be set high. Criteria for approval recommended by these commenters include: (1) A consensus favoring the traditional process; [42] (2) lack of opposition from any Federal or state agency; [43] (3) the public or resources affected by the project will benefit from using the traditional process compared to the integrated process; [44] (4) the traditional process will maximize coordination of all pertinent regulatory processes and more timely resolve potential disputes; [45] (5) it will be the most efficient process with the highest level of resource protection; [46] (6) the project does not have significant environmental impacts; [47] or (7) the

[31] NHA, EEI, SCE, Long View, PG&E, B&B, M&H.

[32] NHA, Long View, PG&E, B&B.

[33] Xcel, WPSR, Alabama Power. Other industry commenters, while not recommending the traditional process as a default, also assert that it generally works well. GKRSC, AEP, CHI, Long View, Consumers, WPSC.

[34] Approximately half of Commission-licensed projects are 5 MW or less.

[35] RAW, ADK, CHRC, Whitewater, SC League, IRU, California, AmRivers. PFMC recommends that approval of the applicant's process proposal should remain with the full Commission, rather than be delegated to the Director of the Office of Energy Projects. California states that an applicant may show good cause to use the traditional process, yet other reasons may exist to deny the request, so the regulation should read ''may'' approve, instead of ''shall.'' Any good cause determination will take account of any objections raised by commenters.

[36] Proposed 18 CFR 5.2(f)(5). The criteria for approval of the ALP would not change. Proposed 18 CFR 5.2(f)(5) states that requests to use the traditional process or ALP will be granted ''for good cause shown.'' NHA asserts that the good cause standard is something new and unnecessary as applied to the ALP. While the regulatory text of 18 CFR part 4, from which the requirements for support of a request to use the ALP were transposed, do not explicitly state that a good cause standard applies, it should be obvious that good cause is the minimum standard for Commission approval of any authorization not subject to a more specific standard. We are merely making explicit what is plainly implicit.

[37] Interior, PG&E, NF Rancheria, NPS, Washington, AmRivers, Wisconsin DNR, CHRC, Whitewater, NOAA Fisheries, HRC, SC League, TU, VANR, PFMC, AW/FLOW.

[38] GKRSC, AEP, CHI, Long View, Consumers, WPSC.

[39] NHA, Idaho Power, EEI, WUWC, SCE.

[40] Consumers.

[41] M&H.

[42] CHRC, Interior, Whitewater, NOAA Fisheries, AmRivers.

[43] HRC. HRC, consistent with its recommendation for one flexible process, would also apply these criteria to requests to use the ALP.

[44] SC League, Wisconsin DNR.

[45] TU, VANR.

[46] PFMC, HRC.

[47] NOAA Fisheries. California agrees that the bar for using the traditional process should be very

licensing is uncontroversial.[48] Others factors identified by Washington and American Rivers for consideration include the potential for time savings, benefits to the environment, and public participation needs.[49]

45. Regarding original license applications, Consumers contends that the traditional process is appropriate because there is likely to be little relevant data available, which will cause the information gathering and study period to be extended, which is incompatible with the compressed time frames of the integrated process. NOAA Fisheries states that the same circumstances cited by Consumers should bar an applicant from using the traditional process.

46. The Process Group agreed that the ''good cause'' standard is vague, but did not identify criteria that would favor or disfavor use of the traditional process. Instead, they identified various factors for the Director to consider in each case in light of the goal of a timely, well-informed decision that protects the public interest. These factors include:

- Project size;[50]
- Characteristics of the river basin, including the presence or absence of other dams;[51]
- The likely level of controversy, including disputes over studies;
- The level of involvement and interest by resource agencies, any expressed intent on their part to exercise applicable mandatory conditioning authority, and the anticipated resource issues, including ESA;
- Whether there are tribal issues;
- The physical characteristics of the project and known biological impacts of project operations;
- Stakeholder and tribal views on process choice;[52]
- Resource constraints on Commission staff and participants;
- Reasonableness of project costs;[53]
- Whether the potential applicant has a history of positive or negative relationships with stakeholders and Indian tribes; and
- The amount and usefulness of existing, relevant information.

47. Although there was general agreement in the Process Group about which factors should be considered, this does not reflect a consensus on how the factors should be considered. For instance, industry commenters tend to think small projects are better suited to the traditional process because they are likely to have fewer environmental impacts, be less controversial, and be less well able to bear the transaction costs of relicensing. Agencies, NGOs, and Indian tribes, tend to think project size is only coincidently related to environmental impacts and controversy, and view transaction costs as a cost of doing business and a much lower concern than development of a complete record and improvements in environmental protection.

48. This fundamental difference of viewpoints leads us to conclude that the Process Group approach, somewhat modified, is the most sensible approach to this issue. We conclude that five factors are most likely to bear on whether use of the traditional process is appropriate. These are: (1) Likelihood of timely license issuance; (2) complexity of the resource issues; (3) level of anticipated controversy; (4) the amount of available information and potential for significant disputes over studies, and (5) the relative cost of the traditional process compared to the integrated process. The more likely it appears from the participants' filings that an application will have relatively few issues, little controversy, can be expeditiously processed, and can be processed less expensively under the traditional process, the more likely the Commission is to approve such a request. In recognition of the uniqueness of licensing proceedings, participants who comment on requests to use the traditional process may identify other factors they think are pertinent to the proceeding in question.[54]

3. Timing Issues

49. The NOPR proposed to require a potential applicant to serve a copy of its request, if any, to use the traditional process or ALP on all affected resource agencies, Indian tribes, and members of the public likely to be interested in the proceeding, and to give appropriate newspaper notice to the general public. Responses would be due to the Commission within 15 days.[55]

50. Many commenters respond that this is insufficient time to respond on a matter of such importance.[56] We agree that additional time may be appropriate for this step because it relies in part on newspaper notice and occurs at the commencement of the proceeding. Accordingly, we have increased the time allowed to respond to these requests to 30 days.

*E. Pre-Application Document*

51. The NOPR concluded that NEPA scoping will be greatly assisted by the availability to the participants of as much relevant existing information as possible when scoping begins. To this end, we proposed to supplant the current requirements for existing licensees to make project information available to the public when the NOI is filed, and for all potential license applicants to provide an initial consultation document (ICD) to consulted entities during first stage consultation, with the PAD.[57]

52. The PAD should include all engineering, economic, and environmental information relevant to licensing the project that is reasonably available when the NOI is filed. It is a tool for identifying issues and information needs, including NEPA scoping, developing study requests and study plans, and providing information for the Commission's NEPA document. The PAD would be a precursor to Exhibit E, the environmental exhibit in the license application. In the integrated process, the PAD would evolve directly into a new Exhibit E that has the form and contents of an applicant-prepared draft NEPA document.[58]

53. The PAD proposal was widely supported, and many comments were received concerning the appropriate contents, format, and distribution requirements.[59]

1. In General

54. Industry commenters generally agree that the PAD is a good idea in principle, but that the requirements need to be significantly reduced to ensure that the contents are relevant to the licensing proceeding and useful to the participants. Some industry commenters believe the PAD requires significantly more information and a

high, but makes no specific recommendations in this regard.

[48] AW/FLOW.

[49] Washington, AmRivers.

[50] Also suggested by NF Rancheria and NPS.

[51] Also suggested by Wisconsin DNR.

[52] Also suggested by Washington and AmRivers.

[53] Also suggested by Washington, AmRivers, and PG&E.

[54] *See* 18 CFR 5.3(d)(1). PFMC states that this decision should be made by the Commission rather than delegated to the Office Director.

[55] Proposed 18 CFR 5.1(f).

[56] NPS, NYSDEC, Interior, AmRivers, Wisconsin DNR, Consumers.

[57] 68 FR at pp. 13993–994; IV FERC Stats. & Regs. ¶ 32,568 at pp. 34,699, 34,730.

[58] *See* proposed 18 CFR 5.16(b). Applicants using the traditional process would continue to use the existing Exhibit E in their license application, and applicants using the ALP could use the existing Exhibit E or file with their application in lieu thereof an applicant-prepared environmental analysis. As discussed in Section III.U.5, we are changing our policy to permit applicant using the traditional process to file an applicant-prepared environmental assessment.

[59] A great many specific recommendations regarding the detailed requirements of the PAD were filed. All of these have been considered, but it would be needless and impractical to discuss each comment individually.

higher level of effort than the existing public information and ICD requirements,[60] and suggest that the incremental burden on applicants is unnecessary.[61] Several commenters also indicate that much or all of the historical information currently required to be made available to the public is never requested and represents a needless burden and expense.[62]

55. Consumers recommends that we allow any applicant that uses the traditional process to meet only the existing public information and ICD requirements instead of filing the PAD. NEU makes the same recommendation for existing projects of 5 MW or less. Consumers also recommends that information requirements be made flexible to accommodate different types of projects; for instance, some data that is useful for unconstructed projects greater than 5 MW may not be needed to evaluate a smaller existing project. MWH and WPSR similarly indicate the PAD requirements should be reduced for small projects because of the asserted connection between small projects with minor impacts.

56. Various industry commenters also seek affirmation or clarification of our intention that only existing information relevant to project impacts is required, and that the scope of and level of effort to obtain existing data should be commensurate with project impacts.[63]

57. Resource agencies and NGOs support the PAD and state that a high quality PAD is essential to the success of the integrated process in light of the short time frames contemplated in the NOPR, and that an applicant's failure in this connection would interfere with the ability of other parties to timely and effectively participate in licensing.[64]

58. California agencies and a few other commenters believe that the PAD contents should not be limited to existing information, but should include all information needed to evaluate potential effects of project operations, and that the applicant should be required to conduct whatever studies or information searches are necessary to fill in any gaps in the existing information before the PAD is filed. They assert generally that NEPA scoping cannot be done unless there already exists a complete baseline of existing environmental data, and suggest that existing licensees should have acquired such data during the term of the existing license.[65]

59. HRC similarly states that the PAD should include a systematic discussion of the project's resource impacts, so that post-NOI information gathering and studies are minimal, even if that requires potential applicants to conduct environmental monitoring or original studies not required under the existing license.

60. Agency and NGO commenters generally recognize however that complete information on all resource impacts attributable to a project is unlikely to be available when the NOI is issued and the PAD is filed. These commenters recommend that potential applicants be subject to a due diligence standard with respect to obtaining existing information; that is, make a good faith effort to determine what relevant information is available and to obtain it.[66]

61. We agree that a due diligence standard will apply to the development of the PAD. The regulations we are adopting provide some guidance on what constitutes due diligence, but we are not able to provide a detailed definition. Rather, the determination of whether due diligence is exercised will have to be made on case-by-case basis.

2. PAD Contents, Format, and Distribution

a. Contents

62. There is a considerable gap between the industry and other commenters on the range and level of detail that should be required in the PAD. PG&E and Georgia Power for instance, suggest that instead of specific requirements, the content requirements should be stated as broad subject matter categories, with information required to the extent reasonably known, available, and applicable. Troutman similarly recommends that specific requirements in the regulations be replaced by a policy statement or guidance document from which applicants would determine what information is relevant and appropriate.

63. In contrast, agencies and NGOs generally prefer explicit and detailed requirements. For example, Wisconsin DNR and VANR recommend that the PAD include the original license order and all amendment orders and management plans; any document that explains the existing license requirements; a layman's summary of all of the license and management plan requirements; and a list of every entity consulted by the potential applicant prior to filing the NOI and the issues those entities raised. Another recommendation is that the PAD include study plans for restoration of essential fish habitat; data needed for water quality certification; information on cumulative environmental impacts throughout the river basin; and studies of fish passage conditions and plans for improvements thereto, including restoration of historic fish habitat. CHRC states that flow data should be provided on the finest available scale, even to daily or hourly flow for the entire historical record.

64. HRC suggests that licensee compliance with the requirements can best be ensured by having the Commission evaluate whether the PAD meets certain standards for completeness and commiting to taking measures to enforce compliance with the standards beyond finding that an application is deficient. These might include requiring the applicant to file a revised PAD before the proceeding continues, and interim environmental measures in annual licenses, or civil penalties.

65. Because these disagreements relate to how the document is formatted and distributed, we will defer their resolution to the conclusion of the following section concerning those matters.

b. Distribution

66. Several industry commenters made recommendations with respect to the format and distribution requirements for the PAD.[67] NHA proposes that the PAD be reformatted, some of the content requirements be deferred to the license application, and the distribution requirements modified. The PAD itself would contain basic information about the licensee, project description and existing and proposed operations, a general description of the river basin, including pertinent information about land use, other dams, and management plans, a discussion of environmental impacts based on existing information, a list of issues in the form of a scoping document, and a plan and schedule for pre-application activities.[68] Exhibits showing project structures and features, historical information on amendments,

[60] The initial consultation document is required by 18 CFR 4.38(b) and 16.8(b)(1). The public information requirement for existing licensees seeking a new license is at 18 CFR 16.7(d).

[61] SCE, Alabama Power, NEU, Xcel, Consumers, Oroville.

[62] PG&E, SCE, Consumers.

[63] Consumers, Long View, MWH, WPSR, EEI, NHA, Xcel, NEU, SCE, CHI.

[64] VANR, WUWC, Interior, California, CHRC, Whitewater, SC League, IRU, NYSDEC, CSWRCB, Long View, HRC, AmRivers, SC League, Oregon, AMC.

[65] CDWR, Cal A–G, CSWRCB, AMC.

[66] CDFG, HRC. At least one licensee, PG&E, agrees that a due diligence standard is reasonable.

[67] Duke, PG&E, Troutman, WPPD, Xcel, CHI, Sullivan, NHA, SCE.

[68] *See* proposed 18 CFR 5.4(c)(2)(A)–(B), (D)–(G), (J) and (P).

compliance, and generation, and information pertaining to dam and project safety would be located in the potential applicant's project files and would be provided to anyone who requested it at a reasonable cost of production.[69] Distribution of other generally uncontroversial information would be deferred until the license application is filed.[70] NHA contends that these changes would reduce the burden on applicants, make the document better suited to its purpose, and make it more accessible to stakeholders. Georgia Power and Duke support NHA's proposal.

67. NHA's concerns are shared and the essence of its proposal supported by many licensees. They acknowledge the importance of explaining the current license requirements based on the original license and any amendments, existing management plans, and other requirements, but state that the expense of producing, packaging and distributing the underlying licensing documents and existing studies to many recipients will be burdensome in general and enormous in some cases. They say that study results are generally useful only to a few stakeholders with appropriate expertise, such as resource agencies. The common thread of these comments is that general information about existing project facilities and operations would be broadly distributed, while more detailed information would be identified and made available on request, via the internet or another means of distribution.[71]

68. SCE has a somewhat different proposal. It recommends that the PAD be limited to: (1) A general description of the project, similar to existing Exhibit A;[72] (2) monthly energy data for the prior five years;[73] (3) five years of existing streamflow data;[74] (4) a description of existing recreation facilities and use based on the most recent Form 80, and of the applicant's policies, if any, with respect to management of project lands and waters; (5) a single line diagram showing the electrical path between all project components; (6) existing and available environmental data obtainable from resource agencies or in the applicant's possession.[75]

69. Long View and Xcel recommend that the PAD have the same format as license application requirements for the classification of the project; *e.g.*, major unconstructed project, major project-existing dam, or major water power project-5 megawatts or less, with the gaps to be filled in as the prefiling consultation and information gathering process proceeds.[76]

70. Agency and NGO commenters appear to be less concerned with the format of the document than with its contents. They generally contend that the range of data and level of detail set forth in the NOPR should be affirmed in the final rule.

71. WPSR opposes having to provide the PAD at all. It recommends instead that the existing requirement to make public information viewable by the public in various locations, such as company headquarters and public libraries, be retained.

72. AW/FLOW states that internet or CD distribution is good in theory, but that people attending meetings generally have paper, so this means of distribution would unfairly force cash-strapped NGOs to bear the cost of printing materials.

73. The Documents Group agreed that it makes sense for a potential applicant to incorporate into the PAD by reference voluminous information such as raw data and existing studies. They agreed that the substantial effort and expense does not necessarily make the document more useful and may, owing to sheer volume, make it less useful. This information could be summarized in the relevant section of the PAD using appropriate methods. In addition, the PAD would contain an appendix describing all materials summarized in the text, and explaining how to obtain those materials from the potential applicant.

74. The Documents Group agreed that the goal is to target insofar as is practicable the needs of various stakeholders, agencies, and Indian tribes. To that end, the potential applicant would have to deliver the summarized information upon request to any agency, Indian tribe, NGO, or other stakeholder within 20 days of the request, in a mutually agreeable format that does not require conversion by the potential applicant from paper to an electronic format. Potential applicants would have to be able to deliver electronically formatted materials in a variety of formats.

75. We are adopting requirements for the PAD that substantially incorporate the recommendations of the Documents Group. The purpose of the PAD is to provide the Commission and the consulted entities with existing information relevant to the project proposal that is in the potential applicant's possession or that it can obtain with the exercise of due diligence. Distribution of the information will enable the consulted entities to identify issues and related information needs, develop study requests and study plans, and help the Commission to analyze any application that may be filed. We will not require a potential applicant to conduct studies in order to generate information for inclusion in the PAD. The basic content requirements will be a description of the existing and proposed project facilities and operations, a description of the existing environment, existing data or studies relevant to the existing environment, and any known and potential impacts of the proposed project on relevant resources.

76. A potential applicant will not be required to include all of the studies and information sources on which the descriptions in the PAD are based, but will be required to provide these materials upon request to recipients of the PAD. Potential applicants and participants in pre-filing consultation are encouraged to accomplish such distribution by electronic means, including compact disks, but a requester is entitled to receive such materials in hard copy form. The PAD will also be required to include a process plan and schedule, a preliminary issues and studies list, and an appendix summarizing any contacts with agencies, Indian tribes, and others in obtaining relevant information. We think that the foregoing format, content, and distribution provisions should result in PADs that serve the purpose for which this document is established and

[69] *See* proposed 18 CFR 5.4(c)(2)(H), (I), (K), and (L). NHA adds that critical energy infrastructure information (CEII) would be viewable only at the potential applicant's offices. CEII is discussed in Section III. X below.

[70] *See* proposed 18 CFR 5.4(c)(2) (M) and (O), and (G)(xi).

[71] PG&E, Suloway, Normandeau, M&H, Consumers, Long View, Reliant, AEP, Oroville, SCE.

[72] *See e.g.*, 18 CFR 4.41(b).

[73] SCE states that licensee's methods of maintaining information on dependable capacity are not consistent and would therefore be misleading if required to be included. At the least, SCE suggests, the term should be defined if it is required to be reported.

[74] SCE does not specify how the required information would be reported; for instance the vintage of the data or its periodicity (*e.g.*, hourly, daily, monthly).

[75] SCE's rewrite of proposed 18 CFR 5.4 is at pp. 8–18 of its comments. SCE would also have us put language in the regulations encouraging agencies to cooperate in the development of the PAD by providing available environmental data to the applicant. Given the concerns expressed by agency commenters about the potential for an incomplete PAD and, in general, the importance of a quality evidentiary record, we think agencies and other potential participants have sufficient incentive to assist potential applicants in this regard.

[76] Long View, Xcel.

reasonably balance the competing interests of the participants.[77]

*F. NEPA Scoping and Study Plan Development*

1. In General

77. Most commenters support having a Commission-approved study plan in the integrated process,[78] but many request clarifications of or modifications to the proposed study plan development process. Only Idaho Power objects to this feature. It asserts that the current study planning and dispute resolution provisions generally work well, and are less costly and labor-intensive than what is included in the integrated process. We do not dispute that there are instances where the current study planning and dispute resolution processes are adequate. They undeniably contribute in many cases however to the undue length of the licensing process by deferring identification and resolution of fundamental issues about what information gathering and studies are necessary until after the application is filed. The integrated process is designed to eliminate that problem.

78. HRC requests that we affirm that the purpose of an approved study plan is to develop a record that allows for the adequate evaluation of reasonable alternatives to mitigate ongoing impacts to resources from project operations, and not to prejudge potential mitigation measures. The purpose of an approved study plan is to bring, to the extent possible, pre-filing finality to the issue of what information gathering and studies will be required by the Commission to provide a sound evidentiary basis on which the Commission and other participants in the process can make recommendations and provide terms and conditions. The study plan is developed in conjunction with NEPA scoping, and the latter inevitably involves judgments about which potential alternatives are reasonable to consider, and which alternatives will be eliminated from detailed consideration. It therefore follows that the Commission-approved study plan will reflect those determinations.

79. Washington states that study requests should not be rejected merely because they do not employ generally accepted practices, because new methodologies or techniques may be appropriate in some cases. We agree. As noted elsewhere, with the exception of the establishment of a nexus between the study request and operation of the project, no one criteria establishes a ''litmus test'' for study requests.

80. Georgia DNR states that study plans should be project-specific and that the study criteria should not be interpreted so as to mandate standard form study plans. We agree. Although we would expect specific study plans for projects with features identical or similar to one another to have the same or similar components, every project is likely to have unique features that need to be accounted for in the development of the study plan.

81. NYSDEC states that the unique aspects of individual projects make extrapolated data acceptable, if at all, only if it is technically infeasible to produce site-specific data. We do not agree with blanket assertions of this nature. We agree with Oregon that the appropriateness of extrapolated data is a decision properly made on a case-by-case and issue-by-issue basis.

82. Under the proposed rule, the NEPA scoping meeting and site visit would be followed by an opportunity for participants to make comments and preliminary study requests before the potential applicant files its draft study plan.[79] Interior would insert after the comments and preliminary study requests a six-month period for the participants to negotiate a mutually agreeable study plan. Interior reasons that this might permit elimination of the following steps up to the potential applicant filing a revised study plan for approval,[80] and thereby minimize the need for formal dispute resolution, eliminating as much as 200 days from the pre-filing process. PG&E and SCE think the proposed study plan development process is weighted too heavily toward notice and comment and not enough toward interaction between the participants. PG&E and SCE would also like to see more time for the participants to resolve their study differences. The Process Group agreed in general with these commenters that there should be more time in the process for such interaction.

83. As discussed below, we have modified the process to extend the time for participants to discuss the potential applicant's proposed study plan and to provide more flexibility concerning interactions during that period.[81]

2. Study Criteria

84. The NOPR proposed that an information-gathering or study request be required to address seven criteria:

(1) Describe the goals and objectives of the study and the information to be obtained;

(2) If applicable, explain the relevant resource management goals of the agencies or Indian tribes with jurisdiction over the resource to be studied;

(3) If the requester is not a resource agency, explain any relevant public interest considerations in regard to the proposed study;

(4) Describe existing information concerning the subject of the study proposal, and the need for additional information;

(5) Explain any nexus between project operations and effects (direct, indirect, and/or cumulative) on the resource to be studied;

(6) Explain how any proposed study methodology (including any preferred data collection and analysis techniques, or objectively quantified information, and a schedule including appropriate field season(s) and the duration) is consistent with generally accepted practice in the scientific community or, as appropriate, considers relevant tribal values and knowledge;

(7) Describe considerations of cost and practicality, and why any proposed alternatives would not be sufficient to meet the stated information needs.[82]

a. General Comments

85. Commenters generally approved of the proposed study criteria subject to various recommendations for minor changes.[83] With the exception of issues concerning what consideration should be given to study costs, few had criterion-specific comments. Commenters also offered a variety of more general comments on how the study criteria should be applied. We consider the general comments first.

86. PG&E, SCE, and Duke request that we affirm in the preamble that the study criteria are not a check list; rather, they need to be considered as a whole, with each criterion addressed, and that no single criterion is determinative. The Studies Group agreed. We so stated in

[77] We cannot do away with the ''library'' requirement, as it is required by FPA Section 15(b)(2). In part 5, it appears at 18 CFR 5.2(a).

[78] *E.g.*, NYSDEC, S–P, California, Interior. S–P states that approved study plans are needed to ensure confidential treatment of tribal cultural practices. This matter is addressed in Section III.N.

[79] Proposed 18 CFR 5.5 and 5.6.

[80] Interior refers to proposed 18 CFR 5.7 through 5.12.

[81] *See* Section III.T below, and 18 CFR 5.12.

[82] *See* proposed 18 CFR 5.10.

[83] VANR, Normandeau, HRC, NHA, Long View, Duke, PG&E, Advisory Council, Oregon. In contrast to the broad expression of support from all stakeholder perspectives, Minnesota DNR states that Criteria (2), (5), (6), and (7) are either exceedingly general or unduly specific and speculates that they were designed to obstruct or limit resource agency study requests.

the NOPR,[84] and affirm that statement here.

87. Long View states that the preamble should clarify that requesters' desires for information must be tempered by practical considerations of relevancy, the value of the information sought in the context of the proceeding, and the complexity and effort required to obtain the information. NHA states that requesters should be required to explain the merits of their requests in the context of the case and the FPA. We think a practical application of the proposed criteria, with the minor modifications we are making in this rule, should result in the adoption of study requests that have merit, and the exclusion of those that do not. As we stated in the NOPR, ''the * * * criteria implicitly require that study requests not be frivolous and add some appreciable evidentiary value to the record.'' [85]

88. HRC asks us to clarify how ongoing environmental impacts will be considered in light of our policy that the baseline for environmental analysis is current conditions.[86] The study criteria should be applied in the same manner regardless of whether an impact from project operations on a resource is characterized as ongoing or otherwise. The requesting party would have to reasonably demonstrate the nexus between project operations and resource impacts and, in the context of addressing the other criteria, show how the proposed study reasonably relates to the development of potential mitigation or enhancement measures.

89. Duke wants us to emphasize that decisions on study requests will be consistent with Commission policy and practice. We think the regulation text is sufficiently clear in this regard.[87]

90. The Advisory Council states that it would be helpful to include a more complete definition of what cultural resources studies are needed. The Advisory Council makes no specific suggestions in this connection, and we continue to believe that the best forum for determining appropriate data needs and study requirements is in individual cases.

91. Oregon suggests, particularly in light of the time frames, that participants' study requests should only need to be general in nature, with the burden on potential applicants to produce detailed study plans. We disagree. As discussed below,[88] we have modified the process in response to comments by moving NEPA scoping, including the issuance of Scoping Document 1, to a place prior to the participants' submittal of their study requests. Under the revised process, these study requests should be as detailed as possible.

92. The NOPR states that judgment calls on study requests will be made ''in light of the principle that the integrated licensing process should to the extent reasonably possible serve to establish an evidentiary record upon which the Commission and all agencies or Indian tribes with mandatory conditioning authority can carry out their responsibilities.''[89] Duke states that this is inconsistent with a prior order in which Duke asserts that the Commission stated that it will not require data that other agencies deem necessary to support the exercise of their mandatory conditioning authority. In fact, in the order cited by Duke, *Curtis/Palmer Hydroelectric Company LP and International Paper Company,*[90] we merely restated our judicially affirmed position that the Commission has no statutory obligation to provide a record to support other agencies' decision making, or to require studies that it does not deem necessary to evaluate the public interest in light of the record evidence and argument provided by other parties.[91] The principle underlying the integrated process expressed above is not inconsistent with that position.

93. No comments were filed on proposed criteria (1), (4), and (6). Comments on the other proposed criteria are considered below.

b. Criterion (2)

(2) *If applicable, explain the relevant resource management goals of the agencies or Indian tribes with jurisdiction over the resource to be studied.*

94. NYSDEC states that the relationship of a study request to agency management goals should not be the sole or even the primary measure of the need for a study because agencies may request studies that do not relate directly to agency management objectives, but do relate to mandates established in law or regulation or derive from agency policy. A statement by an agency connecting its study request to a legal, regulatory, or policy mandate is, of course, entitled to appropriate consideration. Any requester should however appreciate that the more broadly stated the legal, regulatory, or policy mandate is, the more clearly the requester needs to explain how the mandate relates to the study request and, in turn, project impacts.

95. Massachusetts DER states that only a resource agency may appropriately determine what study requests apply to its management goals, so neither the Commission nor potential applicants should make determinations of applicability. As explained in the NOPR, the Commission does not intend to second guess the appropriateness or applicability of resource agency management goals.[92] A requesting agency is required however to establish the connection, if any, between its study request and its management goals. In the great majority of cases, the connection should be obvious.

c. Criterion (3)

(3) *If the requester is not a resource agency, explain any relevant public interest considerations in regard to the proposed study.*

96. NYSDEC states that the requirement to explain relevant public interest considerations should also apply to agencies. It would be desirable for any entity requesting a study to explain how its study request relates to the public interest, but it should suffice for an agency requester to explain the connection of the study request to its resource management goals.

d. Criterion (5)

(5) *Explain any nexus between project operations and effects (direct, indirect, and/or cumulative) on the resource to be studied.*

97. EEI requests us to state that a nexus between project operations and effects on the resource in question is a threshold requirement that must be demonstrated in every case.[93] This issue was discussed by the Studies Group, which agreed with EEI's request, as do we. Otherwise, the door would be open

[84] 68 FR at p. 13995; IV FERC Stats. & Regs. ¶ 32,568 at p. 34,705.

[85] 68 FR at p. 13996; IV FERC Stats. & Regs. ¶ 32,568 at p. 34,706.

[86] S–P and PFMC state that the environmental baseline for studies should be pre-project conditions. Georgia DNR states that pre-project baseline studies may be appropriate in some cases. SCE, Duke, and PG&E ask us to restate in the regulations our policy that the baseline is current conditions. We are not changing our well-established and judicially approved policy, and see no need for it to be written into our procedural regulations.

[87] *See* 18 CFR 5.14(l).

[88] *See* Section III.T and 18 CFR 5.8(c).

[89] 68 FR at p. 13995; IV FERC Stats. & Regs. ¶ 32,568 at p. 34,705.

[90] 92 FERC ¶ 61,037 (2000).

[91] 92 FERC at p. 61,089.

[92] 68 FR at p. 13995; IV FERC Stats. & Regs. ¶ 32,568 at p. 34,705.

[93] Duke and PG&E similarly state that the Commission should affirm that it will strictly apply this criterion.

to study requests having nothing to do with project impacts.[94]

98. CHRC counters that a study might be required to establish the existence of a nexus. Taken to its extreme, CHRC's position would have us approving study proposals that amount to mere speculation. We think a common sense approach to demonstrating a nexus between project operations and resource impacts, informed by the professional judgment of qualified agency, Commission, and tribal staff, should ensure that this criterion is reasonably applied.

99. Oregon approaches the nexus issue from a different perspective; that is, if a nexus is demonstrated between project operations and resource impacts (*e.g.*, fish entrainment mortality), then related study requests must be approved. We do not agree. As stated above, the criteria are to be considered as a whole, in light of the circumstances of the individual proceeding, and any applicable Commission policies and practices.

100. NHA and PG&E also request that we add an additional criterion requiring requesters to describe how the information would be used in the proceeding in relation to resource management measures. This proposed criterion appears to be intended to elicit an explanation how the information could be used to develop protection, mitigation, or enhancement measures by the Commission or agencies with conditioning authority. The Studies Group discussed this matter and recommended that the following phrase be added to the end of Criterion (5): ''and how study results would inform the development of license conditions.'' We agree that this is an important aspect of study requests and are adopting the proposed modification.

e. Criterion (7)

(7) *Describe considerations of cost and practicality, and why any proposed alternatives would not be sufficient to meet the stated information needs.*[95]

101. This proposed criterion received the most comments. Several state agencies state that resource agencies should not be required to provide detailed cost estimates of proposed studies because specific knowledge concerning study costs lies with applicants or their contractors. They contend that potential applicants should have the burden of addressing cost and practicality. They also add that this may be a difficult matter on which to reach a merits conclusion, because the value of the information developed is not always known until after a study is completed.[96]

102. NYSDEC states that the criterion should be modified to require a requester to address the proposed study's scope and level of effort. We conclude the proposed modification is not necessary because there is a built-in incentive for requesters to do so. It is implicit that cost and practicality can be addressed only to the extent the study request includes a description of the scope and level of effort. The less specificity a requester provides, the more difficult it will be to apply the criterion in its favor.

103. Finally, various Indian tribes and agencies state that where protection of tribal trust resources is at issue, the Commission's trust responsibility prohibits it from considering factors of cost and practicality, or that such factors are entitled to minimal weight. They state that the only applicable considerations are consistency with treaties, statutes, and case law defining obligations to protect the trust resources. Some add that the FPA requires the Commission to protect non-developmental resources, so matters of study cost and practicality are entitled under that Act to minimum weight.[97] As we stated in the NOPR, our responsibility to balance all aspects of the public interest with respect to any project proposal necessarily encompasses the exercise of independent judgment concerning the relative cost and value of obtaining information.[98]

104. The NOPR also discussed certain additional criteria proposed by NHA and SCE,[99] and requested comments on whether their proposed criterion (3) (''The cost of the study must be justified relative to the value of the incremental information provided'') or the Commission's proposed Criterion (7) more appropriately deals with the issue of study costs.[100]

105. Industry commenters preferred the NHA/SCE language because it requires a conclusion concerning whether the cost of the study is justified by the expected value of the information.[101] Agency and NGO commenters aver that the NHA/SCE language is more theoretical than practical and likely to cause more disputes than it prevents because the full value of a study cannot be known until it is completed. They add that any criterion that purports to measure study results against dollars is an apples to oranges comparison and prejudices everyone's interests but the applicant's. They therefore favor the Commission's Criterion (7).[102] Interior and MPRB state that scientific standards should be paramount. Interior adds that cost and practicality can be assessed by the proposed Advisory Panel, if the study request goes to dispute resolution.

106. California recommends that if Criterion (7) is not adopted, a better alternative than the NHA/SCE language would be to follow California's requirement that the burden of studies, including their costs, must bear a reasonable relationship to the need for the study and the benefits to be obtained therefrom. PG&E and NHA in their comments also attempt to find some middle ground by recommending that NHA/SCE criterion (3) be revised to require the requester to ''Assess the relative value of the anticipated incremental information compared to the effort, including time and cost, required to obtain it.'' There is clearly no agreement between the industry on the one hand, and agencies, Indian tribes, and NGOs on the other hand about how to consider cost and practicality.

107. The Studies Group considered this question at length and agreed that this criterion is not concerned solely with cost, but also generally with the level of effort the potential applicant should have to make to gather information or conduct studies with respect to an issue. They proposed to insert the words ''and/or level of effort'' after the word ''cost'' to reflect that agreement. After considering all the comments, we conclude Criterion (7), modified as recommended by the Studies Group, provides an appropriate basis for consideration of cost and

[94] Geosyntec appears to state that a requester should only have to show a nexus between the study request and an issue, rather than a nexus between a study request and the project. We think this is a distinction without a difference, because the impacts of the project on resources creates the issues, which in turn are the basis for study requests.

[95] *See* proposed 18 CFR 5.10.

[96] Georgia DNR, Minnesota DNR, NCWRC, PFBC, MPRB. MPRB would eliminate this criterion altogether on the ground that once a need for information is established, cost is irrelevant. We rejected such assertions in the NOPR. 68 FR at p. 13995; IV FERC Stats. & Regs. ¶ 32,568 at p. 34,705.

[97] Menominee, Wisconsin DNR, MPRB, Interior, Skokomish.

[98] 68 FR at p. 13995; IV FERC Stats. & Regs. ¶ 32,568 at p. 34,705.

[99] 68 FR at pp. 13995–996; IV FERC Stats. & Regs. ¶ 32,568 at p. 34,706.

[100] 68 FR at p. 13995; IV FERC Stats. & Regs. ¶ 32,568 at p. 34,706.

[101] NHA, Normandeau, WPPD, SCE, PFMC, EEI, NEU, Duke, PG&E, CSWC.

[102] California, Oregon, HRC, NCWRC, Interior, MPRB.

practicality in weighing the merits of any study request.[103]

f. Proposed Additional Criteria

108. Various industry commenters recommend that we add a criterion requiring a requester to discuss whether or a not a resource problem has been identified that relates to the request.[104] This proposed criterion is too subjective. A principal feature of hydroelectric licensing in recent decades has been disagreements between license applicants and others concerning the extent to which proposed or existing projects have negative effects on natural and other resources. Whether an identified impact is or is not a problem, and the extent of the problem, are often matters of perspective. Moreover, the finding of a ''problem'' is not a required predicate for Commission action under the comprehensive development standard of FPA Section 10(a)(1). Rather, that standard contemplates license conditions for the ''protection, mitigation, and *enhancement*'' of fish and wildlife * * *, and for other beneficial public uses, including irrigation, flood control, water supply, and recreational and other resources.'' [emphasis supplied] [105]

109. Normandeau suggests that we consider adding a criterion that requires a requester to address the effect the information gathering or study would have on timely completion of the overall process. Criterion (6) requires each proposed study to include a schedule, including appropriate field season(s) and the study duration, so all parties should be able to assess the potential effect of the request on the timeliness of the proceeding. The appropriate length of a proposed study will, of course, be a matter best determined in the context of the specific case.

110. Menominee recommends that we add a criterion to recognize study requests made in connection with the Federal government's trust responsibility to protect the resources of Indian tribes. This does not appear to be necessary because the relationship between a study request and the trust responsibility can be addressed in Criteria (2) or (6).

111. The study criteria, modified in accordance with the foregoing discussion and as set forth in the regulations we are adopting, are set forth here:

(1) Describe the goals and objectives of each study proposal and the information to be obtained;

(2) If applicable, explain the relevant resource management goals of the agencies or Indian tribe with jurisdiction over the resource to be studied;

(3) If the requester is a not resource agency, explain any relevant public interest considerations in regard to the proposed study;

(4) Describe existing information concerning the subject of the study proposal, and the need for additional information;

(5) Explain any nexus between project operations and effects (direct, indirect, and/or cumulative) on the resource to be studied, and how the study results would inform the development of license requirements;

(6) Explain how any proposed study methodology (including any preferred data collection and analysis techniques, or objectively quantified information, and a schedule including appropriate filed season(s) and the duration) is consistent with generally accepted practice in the scientific community or, as appropriate, considers relevant tribal values and knowledge; and

(7) Describe considerations of level of effort and cost, as applicable, and why any proposed alternative studies would not be sufficient to meet the stated information needs.

3. Progress and Study Reports and Additional Study Requests

a. Progress Reports and Initial and Updated Study Reports

112. The proposed rule would have required the potential applicant to file an initial status report with study results and analyses following the first season of studies, or at another appropriate time following the date of the study plan order. The report would be followed by a meeting with parties and Commission staff. The potential applicant would file a meeting summary and, if necessary, a request to modify the study plan and schedule. The request to modify the plan, if any, would be deemed approved unless any party filed a notice of disagreement. Disagreements would be resolved based on written submissions to the Director. Any request for new information or studies following the initial status report would have to address the study criteria and show good cause why the request should be approved.[106]

113. An updated status report would follow after a second season of studies or at another appropriate time. It would be subject to the same review, comment, and disagreement resolution procedures, except that any request for new information or studies must address the study criteria and show extraordinary circumstances why the request should be approved.[107]

114. SCE states that this is unduly burdensome for all participants. It questions the practicality of one report at a specified time because of the likelihood of multiple studies conducted on different schedules, and states that preliminary results could lead participants to false conclusions. SCE also objects to sending study results to entities that have not previously requested to be involved in the issue under study. SCE and NHA would instead require the potential applicant to distribute a status report explaining actions taken to date, any unexpected findings, and a schedule for completing the studies.

115. SCE adds that the meeting following the initial status report would be unworkable because of the large numbers of studies required to be reported in detail, and because most participants will be interested in a limited number of studies. SCE would have the potential applicant determine the need for study review meetings based on comments received on the abbreviated status report, unless a majority of participants requested a meeting with respect to a particular study. NHA would also make the meeting optional for the potential applicant. If participants wanted a meeting not proposed by the potential applicant, they would so request in their comments on the initial status report, and the Commission staff would decide if it is needed.

116. Long View shares NHA's and SCE's concerns about the status reports and meetings. It would modify the rule to allow potential applicants to issue study-specific status reports and hold study-specific meetings at appropriate times with appropriate people.

117. NYSDEC would modify the rule to state that the potential applicant's meeting summary must include a brief statement that the meeting summary is deemed to be approved unless a party files a notice of disagreement.

118. These and other concerns about the status report proposal were considered at length by the Studies Group, including the fundamental issue of whether it makes more sense to have one status report and meeting, or to issue separate reports for each study or group of related studies at different

[103] *See* 18 CFR 5.9(b)(7).

[104] PG&E, SCE, NHA, WPPD, EEI. Other additional criteria were suggested, which were considered above in the context of modifications to the existing proposed criteria.

[105] 16 U.S.C. 803(a)(1).

[106] Proposed 18 CFR 5.14 (Conduct of studies).

[107] *Id.*

times. The Studies Group concluded that it would be best for the participants to negotiate the timing of periodic progress reports on studies,[108] including the manner and extent to which information will be shared, which may include meetings, and sufficient time for technical review of the analysis and results, when the study plan and schedule is developed. The progress reports would have to describe the study progress and data collected to date in a manner that enables participants to determine if the study plan is being followed, and to describe any proposed changes. Documentation of study results would be provided to participants upon request. An annual study report would be issued, but would be in the form of a summary of the overall progress of study plan implementation and would serve as a trigger point for requests, if any, to modify existing studies or conduct additional studies.

119. These modifications should make it easier for individual participants to focus on issues of concern to them, should result in early identification of any implementation issues, and should ease the distribution and consultation burden on the potential applicant. Accordingly, this is a reasonable approach to the matter of study plan implementation and is reflected in the final rules.[109]

120. Finally, the Studies Group and Minnesota DNR recommend that parties have 30 days to respond to the initial and updated study reports, instead of the 15 days proposed. We have so provided.[110]

b. Modified Study Requests

121. NHA also addressed the standard for requesting modifications to the approved study plan in response to the initial study report. NHA would require a requester to address each of the study criteria and subject the request to the same good cause standard as a request for new information or new studies. We think such a requirement is unnecessary. Requests for modifications to an ongoing study are likely to be focused on specific concerns about how the study was conducted, or straight forward matters such as whether to extend the study for an additional field season because of drought conditions. A participant with such concerns should not have to reestablish the need for the study in the first instance. Rather, it should only be required to show good cause for the proposed modification.

122. We also think good cause standard should apply to proposals to modify ongoing studies following the updated study report. The proposed regulation text was not clear on the distinction between the standards applicable to requests for modifications to existing studies versus requests for new information gathering or studies. We have modified the regulation text to make the applicable standards clear.[111]

c. New Study Requests

123. We requested comments on whether participants should be permitted to make new information-gathering or study requests (as opposed to requests for modification of, or disputes concerning the implementation of, existing studies) following the updated study report.[112]

124. NHA and Long View would like the rules to provide more certainty regarding the potential applicant's study obligations. They propose that after the updated study report participants would be permitted to make recommendations regarding the implementation of previously approved studies, but not permitted to make new information gathering or study requests. They state that participants should know when the initial study report is made whether any new studies are needed, and allowing new study requests after the updated study report would make participants less likely to focus their efforts on developing study requests at the beginning of the process.

125. Other licensees share the desire for certainty, but support the ''extraordinary circumstances'' standard as an alternative to a prohibition on new study requests.[113] SCE would permit a new study request only if: first year studies reveal unexpected results that require further review not possible under the current study plan; a change in applicable law that requires another goal to be considered; or there is a valid dispute regarding implementation of the plan.

126. Agencies and NGOs support the opportunity to request new studies at this point.[114] Interior and MPRB state that many unanticipated events could cause a change in circumstances or that study results could show that more information is needed. Oregon and PFBC similarly state that studies may reveal specific sources of project impacts, and that follow-up studies may be needed to determine if negative impacts can be corrected without extensive mitigation.

127. Some agencies and NGOs accept the premise that the standard for new study requests should increase as the proceeding progresses, and do not oppose an extraordinary circumstances standard at this point.[115] Examples of extraordinary circumstances proffered by these entities include:

- A finding late in the study of a listed species in the area affected by the project;[116]
- Initial studies uncover information that must be considered to ensure agency mandates and important management objectives are met.[117]
- A nexus between project impacts and the study request is shown;
- A good reason is offered why the study was not previously requested;
- Circumstances have changed;
- Study results indicate a new study is necessary; or
- There are changes in laws, regulations, or environment.[118]

128. After considering the comments, we have decided to adopt the proposed rule in this regard. We appreciate the desire of potential applicants for certainty when the study plan is approved, but until the study plan is completed, it appears premature to prohibit any additional study requests. An extraordinary circumstances standard, conscientiously applied, is sufficiently strict to provide ample incentive for participants to make their study requests early on, during development of the study plan. We will not attempt to further specify in the rules what constitutes extraordinary circumstances. This is the kind of decision that needs to be made in the context of a specific proceeding.[119]

129. Finally, HRC, apparently fearing that the ''good cause'' standard will be too restrictive, requests clarification of that term. Troutman, apparently fearing that ''good cause'' and ''extraordinary circumstances,'' will be interpreted too broadly, requests clarification of both terms. We think it inadvisable to attempt more specificity at this point. The only practical approach is to apply

[108] For clarification, here and in the regulations we are referring to the potential applicant's comprehensive annual report as the ''study report,'' and to other periodic reports on studies as ''progress reports.''

[109] 18 CFR 5.11 and 5.15.

[110] 18 CFR 5.15.

[111] *See* 18 CFR 5.15.

[112] 68 FR at p. 14010; IV FERC Stats. & Regs. ¶ 32,568 at p. 34,731.

[113] PG&E, Springer, NEU, Idaho Power, EEI.

[114] California, Oregon, PFMC, Menominee, Interior, MPRB, Skagit.

[115] California, HRC, NYSDEC, NCWRC.

[116] NCWRC, PFBC, Georgia DNR.

[117] NCWRC, PFBC, Georgia DNR.

[118] The last five examples were provided by NYSDEC. Minnesota DNR states that study requests should not be foreclosed simply because they may not have been identified early in the consultation process, and MPRB contends that the proposed limitations should be relaxed to ensure that project proposals are fully understood.

[119] New study requests made at later points in the process are considered in Section III.L.2 below.

these standards in the light of case-specific facts.

d. Comments on Study Reports

130. We also requested comments on whether parties should be required to file written comments on the potential applicant's initial and updated study reports prior to the required meeting to discuss the report(s).[120] Most commenters oppose such a requirement. Long View, Oregon, and ADK say that the written comments are likely to reflect misunderstandings or misinterpretations and the best place to clear such things up is in a face-to-face meeting. These parties suggest that written comments be filed after the meeting. California, PFBC, ADK, Georgia DNR also think it would be unproductive and would allow anyone who cannot attend the meeting to file their comments in lieu thereof. On the other hand, HRC, PFMC, and NEU think such a requirement would encourage effective preparation by the potential applicant for the meeting. Interior and Skokomish think pre-meeting comments should be optional.

131. In light of these comments, we will not impose such a requirement. Instead, we will leave it to the parties to determine individually whether they think the time and effort to file comments before the meeting will be beneficial in the circumstances of the proceeding.

132. Finally, S–P seeks assurance that the study development process will include consultation on means of keeping confidential sensitive Indian cultural practices. Our regulations and practices ensure that Indian tribes' confidentiality concerns will be appropriately addressed.[121]

*G. Study Dispute Resolution Process*

133. The NOPR proposed to establish a dispute resolution process that serves two purposes. In the informal stage, the applicant files a draft study plan for comment; the participants (including Commission staff) meet to discuss the draft plan and attempt to informally resolve differences. The Commission then approves a study plan with any needed modifications after considering the applicant's proposed plan and the participants' comments (study plan order).[122]

134. In the formal dispute resolution process, resource agencies with mandatory conditioning authority under FPA sections 4(e) and 18, and states or Indian tribes with water quality certification authority under Clean Water Act section 401, would be able to file a notice of study dispute with respect to studies pertaining directly to the exercise of their authorities under the aforementioned sections of the FPA or CWA. An Advisory Panel considers the dispute and makes recommendations to the Director of Energy Projects, who resolves the dispute.

135. We also proposed that the applicant, by virtue of the fact that it must conduct any studies required by the Commission and implement the license, has a special interest in the outcome of study dispute resolution, and should be afforded the opportunity to submit to the panel information and arguments with respect to a dispute.[123]

136. The NOPR requested comments on what modifications, if any, should be made to the proposed study dispute resolution process and, in particular, the proposed advisory panel.[124] Responses were received on nearly every aspect of the proposed process. Most commenters supported the proposed study dispute resolution process, but nearly all requested clarifications or modifications to cure perceived deficiencies. A few commenters opposed the panel and made alternative recommendations. All of these comments are considered in this section.

1. Informal Dispute Resolution

137. NHA and WPPD recommend that a peer review process be added for study disagreements prior to issuance of the study plan determination, to provide unbiased expert opinion on establishment of study request goals and objectives, technical design in relation to goals and objectives and the state of the art, and the anticipated utility of the study results to meeting the study goals and objectives. If the disagreement was not resolved as a result of consultation with the peer reviewers, the peer reviewers' comments would become part of the record, which would be available to the panel in formal dispute resolution, if any.

138. We will not adopt this recommendation. A peer review process would add additional time and expense to the process, and would largely replicate the formal dispute resolution process, which would be inconsistent with our goal of having a study plan development process that ensures, as best the Commission can, that the participants come together for the purpose of resolving study disagreements themselves.

2. Formal Dispute Resolution—Subject Matter and Eligibility

139. Many commenters recommend that the formal process be made available to any participant for study requests regarding any matter.[125] California states that the formal process should be available for all study disputes raised by agencies and Indian tribes. Some agencies suggest that the fact that they have a statutorily established role in licensing process, such as making fish and wildlife agency recommendation pursuant to FPA Section 10(j), establishes an obligation on the part of the Commission to ensure that the record contains information to support their recommendations.[126] Others suggest that eligibility for informal dispute resolution only undermines state agency management of state fish and wildlife resources.[127]

140. The NOPR explained that agencies and Indian tribes with mandatory conditioning authority, to extent they are exercising that authority, are differently situated than participants whose role is to make recommendations pursuant to FPA sections 10(a) and 10(j), National Historic Preservation Act (NHPA) Section 106,[128] or other applicable statutes. The former have a duty to make reasoned decisions based on substantial evidence, and their decisions are subject to judicial review. Those making recommendations have no such responsibility.[129] None of the proponents of broadening eligibility for the formal process addresses this fundamental distinction. They also gloss over the fact that the study plan determination is the culmination of the study plan development process in which potential applicants, study requesters, and the Commission staff consult intensively on what information gathering and studies are needed, study requests and responses thereto are accompanied by discussion of the study criteria, and the study plan determination must explain its decision

[120] 68 FR at p. 14010; IV FERC Stats. & Regs. ¶ 32,568 at pp. 34,732–733.

[121] *See* discussion of this issue in the NOPR; 68 FR at p.14002; IV FERC Stats. & Regs. ¶ 32,568 at p. 34,717.

[122] This was referred to in the NOPR as the ''Preliminary Determination.'' We have change the name to Study Plan Order to recognize that it is not preliminary with respect to study requests that do not directly involve the exercise by agencies or Indian tribes of mandatory conditioning authority.

[123] Proposed 18 CFR 5.1213(i).

[124] 68 FR at p. 13998; IV FERC Stats. & Regs. ¶ 32,568 at p. 34,711.

[125] Interior, ODFW, Duke, Nez Perce, S-P, AW/FLOW, AMC, MDEP, Washington, AmRivers, ADK, RAW, EPA, MPRB, PFBC, CRITFC, SC League, MPRB, WGA, Skagit.

[126] Interior, IDFG, Oregon, Washington.

[127] Oregon, IDPR, PFMC, WGA, California, IDFG.

[128] 16 U.S.C. 470f.

[129] *See* 68 FR at p. 13998; IV FERC Stats. & Regs. ¶ 32,568 at p. 34,710.

on each disputed study with reference to the study criteria and any applicable Commission policies and practices. We think this provides ample opportunity for development of the record and consideration of study requests related to recommendations.

141. Interior contends that the National Park Service should be eligible for formal dispute resolution with respect to study recommendations that relate to potential project impacts on a unit of the National Park System or other areas of special management concern, such as National Recreation Areas. Interior offers no basis for distinguishing these studies related to FPA Section 10(a) recommendations from those of other entities, and we *see* none.

142. GLIFWC, Menominee, and Nez Perce suggest that the Commission's trust responsibility requires Indian tribes to be eligible for formal dispute resolution with respect to studies related to impacts to reservation lands within the project boundary and ceded lands on which tribes have treaty reserved rights. We do not agree. The study plan development and formal dispute resolution components of the integrated process are not required by any treaty or statute, and are being created solely to provide a means of creating an evidentiary record to support, to the extent reasonably possible, the actions of agencies or Indian tribes with decisional authority.

143. Finally, NHA and PG&E request that the regulations make more clear that the formal process is available only to agencies or Indian tribes with respect to their study requests related directly to exercise of their mandatory conditioning authority, and not for study requests relating to matters wherein these entities may only make recommendations, such as FPA Section 10(j) fish and wildlife agency recommendations. We have clarified the regulatory text in this regard.[130]

3. Advisory Panel

a. Need for Panel

144. Several commenters object to, or express concerns about, the efficacy of, the Advisory Panel. Some licensee commenters assert that the existing dispute resolution provisions work well enough.[131] They assert generally that allowing the disputing agency to be represented on the panel violates fundamental fairness, accepted notions of due process, and the Administrative Procedure Act (APA).[132]

145. Some commenters also fear that the panel proposal is not practical, citing the lack of monetary compensation for the third-party panelist's time and effort; and the short time frames, particularly in light of the panelists' lack of familiarity with the project and background of the issues.[133] They recommend instead a technical conference, narrowly focused on the specific dispute, with input from the potential applicant and any other interested participant, and that the record of the technical conference be filed with Director to inform his decision on the dispute. The Skokomish Tribe fears that the panel process will be unwieldy, take longer than the existing process, and increase costs. VANR recommends that eligible study disputes be resolved by the Director using the existing process and, if the panel is used at all, it be only as a forum for appeals from the Director's decision. Duke recommends instead a modified version of the existing dispute resolution process; written submissions followed by a technical conference including Commission staff, or a panel including a representative of the applicant. PFBC recommends that the formal process be used only after the disputants have first attempted to resolve the matter using the ALP dispute resolution process.

146. These alternative recommendations generally have the virtue of being less complicated than the Advisory Panel proposal. They lack however the presence of a third party technical expert and panelists from Commission staff and the disputing agency who have no prior connection to the proceeding, and must work cooperatively with the third party expert and one another. We have also provided for a technical conference, discussed below, at which the potential applicant may directly address the Advisory Panel. For these reasons, we will adopt the Advisory Panel proposal.

b. Panel Membership

147. Many comments were received on the membership of the Advisory Panel. Various licensee commenters contend that the Advisory Panel is unfair because it includes a panelist from the disputing agency, but not the potential applicant.[134] They assert that requiring the agency representative to be someone not previously involved with the proceeding,[135] or even from another agency, will not obviate an institutional bias that resource agency staff have in favor of other resource agency staff.[136] Others contend that the panel would be more fair without a disputing agency representative because the disputing agency is a party to the dispute, while the Commission is the decisional authority.[137] Troutman expresses skepticism that resource agencies will be able to find qualified representatives who have not been involved in the proceeding and suggests that agency representatives will be unwilling to act independently of higher level agency officials who support the agency's position in the dispute.

148. Suggested remedies for this alleged bias include having two Commission staff members not previously associated with the proceeding and one third party expert,[138] replacing the disputing agency on the panel with a licensee representative,[139] adding a licensee representative to the panel,[140] and replacing the third party expert with a third member designated by the potential applicant.[141]

149. We do not agree that the proposal for panel membership is unfair to potential applicants. Again we remind industry commenters that the purpose of the Advisory Panel is to help resolve a dispute between the Commission staff and an agency or Indian tribe with mandatory conditioning authority concerning the adequacy of the record to support agency decision-making. Potential applicants will have ample opportunity through their written submission and participation in the technical conference to make their case to the Advisory Panel and the Office Director. A potential applicant that believes the Advisory Panel recommendation and study plan determination are not based on substantial evidence or are otherwise improper may file a request for rehearing.

150. EEI states that the agency representatives are not bound by the

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[130] *See* 18 CFR 5.14(a). EPA requests that we modify the regulation text to make eligible any agency that has water quality certification authority, so as to permit EPA to file notices of dispute in instances where it, rather than the state, is responsible for issuing water quality certification. We agree to this modification, and modified the regulatory text accordingly.

[131] EEI, Idaho Power, Alabama Power, Xcel, NEU.

[132] 5 U.S.C. 551–559.

[133] Suloway, NPS, Long View, VANR.

[134] Duke, Long View, Xcel, Snohomish. These entities reiterate assertions previously made that the Advisory Panel abdicates the Commission's responsibility to decide the issues before it. The Advisory Panel has no decisional authority; it is limited to making recommendations concerning the consistency of the study request with the study criteria.

[135] This is required by 18 CFR 5.14(d).

[136] WPSC, WPSR.

[137] Duke, Progress, Troutman.

[138] Duke, Progress, Troutman.

[139] WPSR.

[140] Xcel.

[141] Snohomish.

Commission's *ex parte* rules and suggest that they will consult in private with the agency staff who filed the dispute. The Process Group considered this issue and agreed that as a condition of serving on a panel, all panelists would have to agree to be strictly bound by the Commission's prohibition on *ex parte* communications. This is unnecessary however, as the regulations state that all communications to and from the Commission staff concerning the merits of the potential application shall be filed with the Commission.[142]

151. The few agency commenters on panel membership state that fairness and balance require the disputing agency to be on the panel because that is the only way to ensure that its position on biological and technical issues is properly represented.[143] Their principal concern is that the panel members have appropriate technical expertise relative to the specific issues in dispute.[144] NOAA Fisheries, for instance, contends that the expertise must be very specific to the issues; for instance, a study dispute involving gas bubble disease in fish would require experts on that topic, not merely general expertise in fisheries or other related specialized knowledge. Wisconsin DNR similarly argues that regional-specific expertise is needed; for instance, an expert in west coast anadromous fish would be unsuitable for a dispute concerning the study of resident, freshwater fish in Wisconsin.

152. We think it would be a sterile exercise to try to craft regulatory language that more precisely defines the type or degree of expertise that may be necessary for the myriad of potential dispute resolution issues. The most practical approach is to leave the selection of an appropriate third party expert from the list of technical experts to the agency or tribe and Commission staff panel members in light of the facts of the case.

153. Interior requests that the requirement that the Commission and disputing agency panel members be ''not otherwise involved in the proceeding'' [145] be modified to bar only persons not ''directly'' involved. In this way, Interior would make eligible a supervisor in the same office as the agency staff who invoked the formal dispute resolution process. California would exclude only those who have not been ''actively involved in the proceeding as an advocate or negotiator for the agency or tribe's position.'' [146] This, too, would allow supervisory employees with direct responsibility for the agency's participation in the case to serve as a panel member. We decline to add this qualification because it would blur the line between those who are eligible to serve and those who are not, and would undercut the appearance, and probably the reality, that the panel is composed of technical experts using their independent judgment. The best way to ensure acceptance of the Advisory Panel approach is to ensure that the panel members are working on a clean slate with respect to the specific proceeding.

154. Oregon and IDPR state that the Advisory Panel should not be limited to three members because every agency that objects to the study plan determination on a particular study needs to have its own representative. We have limited the panel to three for two reasons. First, we seek to minimize the possibility of deadlock. Second, the larger the panel is, the greater are the logistical challenges associated with the panel convening, meeting, and making a recommendation. To these we add the concern that the panel not appear to be weighted in favor of disputing agencies. We see moreover no reason why two Federal agencies with disputes concerning the same or similar study requests cannot be represented by one individual with the requisite expertise.

155. The NOPR proposed that if there is no timely agreement on a third party expert, the two existing panel members carry out the panel's functions.[147] Mr. Groznik recommends that in such a case the Director should be required to appoint a third party expert. Interior contends that three panel members are needed to ensure that there is either a majority or unanimous recommendation. Oregon states that the panel should not be allowed to proceed in the absence of a technically-qualified third party, principally to ensure that there is appropriate technical expertise on the panel.

156. We expect instances where a third panel member cannot timely be selected by the Commission staff and disputing agency representatives to be rare. We recognize however the importance of the third panel member in providing assurance that the impartiality of the panel's recommendations. We have therefore amended the rule to provide that in such an event, an appropriate third panel member will be selected at random from the list of experts maintained by the Commission.[148]

157. Washington thinks a state agency expert should be able to serve on the Advisory Panel. We agree. A Federal agency or Indian tribe that initiates a dispute resolution could request a state agency expert to represent it on the Advisory Panel. Likewise, for instance, a state water quality certification agency could certainly appoint as its representative a member from its own ranks, or from another state or Federal agency, or Indian tribe. There is also no reason a qualified state agency employee could not serve as a third party expert if that person was selected by the other panel members and the state's regulations and policies permit that person to engage in such activities. We think this flexibility should make it easier to quickly assemble panels with the right expertise.

158. The Studies Group agreed that it would be appropriate for the Commission staff representative to initially organize the Advisory Panel and serve as chair. We think this makes sense because the notice of dispute will first be filed with the Commission, which will maintain the list of eligible technical experts, and some individual needs to be responsible to ensure that the process starts quickly and stays on track. We have so provided in the regulation text.[149]

c. Non-Member Participation

159. Some commenters contend that parties other than the potential applicant should be allowed to respond to the notice of dispute, even if they cannot initiate a dispute resolution, because they may have an interest in the outcome of the process not represented by the disputing agency or the potential applicant.[150] To do otherwise, suggests HRC, violates fundamental due process. SCE asserts that a potential applicant should be permitted to meet face-to-face with the Advisory Panel instead of being limited to written submissions. We believe the concerns of these parties are addressed by our decision in the following section to include the technical advisory meeting in the formal dispute resolution process.

160. The Advisory Council, citing 36 CFR 800.4, seeks assurance that State Historic Preservation Officers (SHPO), Tribal Historic Preservation Officers (THPO), and Indian tribes have an

[142] 18 CFR 5.8(b)(3)(v).

[143] Catawba, SC League, Wisconsin DNR.

[144] Interior, Oregon, NOAA Fisheries.

[145] 18 CFR 5.14(d).

[146] California, p. 13.

[147] Proposed 18 CFR 5.13(d).

[148] 18 CFR 5.14(d).

[149] *See* 18 CFR 5.14(d)(1). To further assist the rapid formation of the panel, the disputing agency is required to identify its panel member in its notice of dispute. 18 CFR 5.14(b).

[150] HRC, CHRC, Whitewater, Advisory Council, TU.

opportunity to participate in formal dispute resolution before any dispute pertaining to implementation of NHPA Section 106 is resolved. Subsection 800.4(a) provides for the action agency to determine whether the action could result in changes to any historic properties located in the area of potential effects. If so, the agency is to review existing information on potentially affected historic properties, request the views of the SHPO or THPO on further action to identify historic properties that may be affected, and seek relevant information from local governments, Indian tribes and others. Based on its assessment, the action agency is to determine the need for further actions, such as field surveys, to identify historic properties. Subsection 800.4(b) requires the action agency to make a good faith effort to identify potentially affected historic properties and to evaluate their eligibility for the National Register in consultation with the SHPO or THPO.

161. The integrated process is fully consistent with this requirement. The study plan and schedule development process discussed above contemplates the active participation of the SHPO or THPO, local governments, Indian tribes, and any interested agency or member of the public in determining what information needs to be gathered or studies conducted with respect to historic properties. Because these entities do not have mandatory conditioning authority, they would not be eligible to initiate the formal dispute resolution process. They would however have the benefit of informal dispute resolution and be eligible to participate in the technical conference.

162. We emphasize in this connection that the study plan development process merely determines, in consultation with the participants in the Section 106 process, which information gathering and studies the potential applicant should undertake. It assists the Commission in obtaining the information needed to identify what historic properties may be present. It makes no determination whether any aspect of the potential license application or reasonable alternatives would have an adverse effect on historic properties. That determination is made later in the context of the environmental document and other elements of the Section 106 process; specifically, the Commission must, when applying the criteria of effect and, if necessary, consult with the SHPO/THPO on ways to avoid or mitigate these effects, usually by entering into a PA.

d. Technical Conference

163. NHA recommended inclusion of an ''Advisory Technical Conference (ATC),'' which would convene just prior to the meeting of the Advisory Panel. The ATC would include representatives of the Commission staff, the agency or Indian tribe with the dispute, the potential applicant, and a neutral expert or experts. It is not clear from NHA's submission how the Advisory Panel would interact with the conferees. Commission staff with appropriate expertise would moderate the ATC,[151] and the Commission staff would be responsible for maintaining a conference record.

164. Prior to the ATC, the potential applicant and the resource agency that filed the dispute would file information and arguments. During the ATC, the agency or Indian tribe would summarize its arguments based on the study criteria, the potential applicant would respond, and the conferees would then discuss the issue in dispute relative to the study criteria. NHA would, to the extent feasible, have all studies in dispute addressed at one ATC. Following the ATC, the Advisory Panel would meet without the applicant, then make its recommendation to the Director, who would also have available the record of the ATC, including the opinions of the third party technical experts.

165. The Studies Group agreed that it would assist the formal dispute resolution process to add a technical conference, to be presided over by the Advisory Panel. This meeting would be held after the written submissions to the Advisory Panel by the disputing agency and the potential applicant are made by disputing agencies and the Commission staff, and just prior to the deliberative meeting(s) of the Advisory Panel. The meeting would be open to all parties, but the topics would be restricted to the specific studies in dispute and the applicability to them of the study criteria. The Advisory Panel would determine how it wished to receive information, but we anticipate that a question and answer format would work well.

166. The NHA proposal has merit in the sense that it would bring in additional technical expertise, but it also would entail additional steps requiring more time, additional Commission resources to provide a moderator and to keep a record, and would add to the overall burden by creating additional written record material of questionable incremental utility. NHA's proposal also does not provide an avenue for other participants with an interest in the outcome of the dispute to participate in the process.

167. We conclude that a technical conference based on the Studies Group's recommendation would benefit the process. The opportunity for the members of the Advisory Panel to hear directly from and be able to question the disputing agency or Indian tribe, the potential applicant, or other participants who have an interest in the outcome of the dispute should enable them to clear up any questions about the written submissions and quickly focus on the most important elements of the dispute. This should, in turn, assist the Advisory Panel to develop its recommendation in a timely fashion.[152]

e. Activities of the Advisory Panel

168. Various comments were received about the role of the Advisory Panel and how it should go about its work. EEI urges us to require the Advisory Panel to specifically address the potential applicant's submissions. An explicit direction in this regard is unnecessary; particularly in light of our decision to include the technical conference.

169. Troutman and Oregon request generally more definition of how the Advisory Panel will do its work, including with whom it will communicate, and how. The technical conference proposal and clarification that strict application of the prohibition on *ex parte* communications will apply should address these commenters' concerns. Also, as discussed above, we have determined that the Commission staff panel member should chair the panel. These provisions provide sufficient guidance to panelists and assurance to others that the panel will make its recommendations through procedures that are fair and reasonable.

170. EEI believes the disputing agency representative should be barred from writing the Advisory Panel's report on the ground that this person is likely to be biased in favor the disputing agency's position and, by having control over the drafting, will wield undue influence. We reject this suggestion. First, we trust that the panelists will apply their expertise in a professional manner consistent with the purpose of the

[151] It is not clear if NHA intends for the Commission staff moderator to be someone other than the Commission staff panel member.

[152] *See* 18 CFR 5.14(j). EEI recommended that we consider turning over disputes to the Commission's Dispute Resolution Service (DRS). The DRS is not an appropriate alternative to the formal dispute resolution process because the DRS is not a decision-making body and cannot ensure a resolution of the dispute through voluntary mediation. The DRS' role as a mediator or facilitator is more appropriate at other points in the process.

panel. We are moreover confident that no single panelist will be able to dictate the recommendation to the other panelists. The panel chair should have the leeway to make this assignment in consultation with the other panelists.

171. California contends that it is important for the Advisory Panel to convene in the vicinity of the project (and perhaps to visit the project) in order for the panel to better understand the disputed issues and so that state agencies and local entities with limited budgets are more likely to be able to appear before the panel. Whether it is necessary for the panel to meet in the project vicinity or visit the project is a matter best determined in light of the facts and circumstances of each case.

5. Timing Issues

172. Some commenters state that some or all of the time frames for the formal dispute resolution process are insufficient.[153] OWRC is particularly concerned that if more than one agency brings the same dispute, insufficient time is allowed for the agencies to agree on who should represent both of them. We disagree. This is a matter that agencies should be able to quickly settle over the telephone.

173. HRC suggests that the response times can be alleviated and the panel's deliberations better focused if the notice of dispute and potential applicant's responsive comments, if any, are required to include proposed findings and recommendations. The agency or Indian tribe's notice of dispute is already required to address the study criteria, which we expect would encompass its proposed findings and recommendations, but only from its own perspective. Any response from the potential applicant is likely to similarly address the criteria from its perspective. The task of the Advisory Panel will be to discuss and attempt to resolve differences between the submissions. The addition of the technical conference is also likely to result in clarifications to the written submissions that will influence the opinions of individual panelists. Thus, the proposed findings and recommendations are largely included in the record. Although we are not inclined to require the disputing agency or Indian tribe, or the potential applicant, to separately state its proposed findings and recommendations, they are encouraged to do so if they think it will benefit the record.

174. The NOPR proposes to require a notice of study dispute resolution to be filed within 20 days of the study plan determination.[154] NYSDEC and Interior state that this is not sufficient time to assemble the supporting evidence. NYSDEC would give the disputing agency at least the 25 days afforded to the potential applicant to submit responsive comments.[155] Interior recommends 30–60 days. Twenty days is not a great deal of time, but a disputing agency will have written out the support for its notice of dispute when it makes its study request prior to the study plan determination.

175. IDEQ recommends a 90-day period for the participants to informally resolve remaining differences after the study plan determination before a notice of dispute must be filed. We decline to adopt this recommendation. As discussed below, we have modified the rules to provide a 90-day period before comments are filed on the potential applicant's draft study plan for this purpose.[156] Participants in the formal dispute resolution process may also try to resolve differences during that process as a result of reviewing one another's written submissions, or following the technical conference.

6. Third Party Technical Expert

176. The principal concern raised about the third party technical expert is whether qualified persons will be willing to serve. Some commenters think the absence of compensation for professional time beyond reimbursement of expenses will make recruiting difficult.[157] Washington states that this is inequitable, but does not explain why, in light of the fact that panelists would be volunteers. Others suggest that unpaid panelists won't invest the necessary time and effort to result in a well-reasoned recommendation. They also think that a compensated third party expert is more likely to be truly neutral. These commenters recommend that third party experts be paid for their services as part of the cost of the hydropower program.[158] SCE recommends that the Commission and the disputing agency share the cost to compensate the third party expert.

177. We believe potential third party technical experts may be motivated to volunteer their services for reasons other than financial gain. One reason would be that service on the panel would enhance that person's professional standing as a technical expert, or in the area of alternative dispute resolution. It would also be an opportunity to provide a public service.

178. IDFG is concerned that there may not be a sufficient number of qualified people in the pool for certain issues due to lack of familiarity with local resources or limited field level experience with the resources. We think the Commission staff and disputing agency panelists will be competent to determine who among the pool of experts is qualified to serve.

179. The other principal concern of commenters is how to ensure that third party experts are truly neutral. Minnesota DNR indicates that technical experts employed by consulting firms are biased in favor of the industry and recommends using only experts from academia who have no recent ties to the industry. EEI, on the other hand, would have us prohibit the use of academics, on the ground that they are biased in favor of expansive and expensive studies. We decline to make any such blanket characterizations about large and very diverse classes of persons. This is the kind of concern that is best dealt with by the Commission staff and agency representatives to the panel in the context of a specific proceeding.

7. Multiple Panels and Multi-Issue Panels

180. A few commenters favor the use of multiple panels. NOAA Fisheries, for instance, states that there should be a separate panel for each issue relating to each study dispute; *e.g.*, if NOAA Fisheries and the U.S. Fish and Wildlife Service each had different issues with respect to the same study, they would file separate notices and there would be separate panels.

181. We hope that the formal dispute resolution process will rarely be invoked, but must take care to structure it so as to ensure that when it is, it can accomplish its purpose of timely bringing finality to study disputes. The regime favored by NOAA Fisheries is simply not practical. A contentious case with multiple study requests and disputes could paralyze the dispute resolution process for months. The more resources, studies, and agencies involved in a proceeding, and the more integrated processes being undertaken in the same general time frame, the more panels would be required, and the more difficult it would be to timely recruit panel members.

[153] OWRC, California, NYSDEC, IDEQ, HRC.

[154] Proposed 18 CFR 5.13(a).

[155] The 25-day period for potential applicants to respond to the notice was not selected to give the potential applicant an advantage, but to provide time following convening of the panel for the service addresses of the panelists to be posted on the Commission's Web site in order that the potential applicant will be able to serve the panel members. *See* proposed 18 CFR 5.13(h).

[156] 18 CFR 5.12 and Section III.T.

[157] Wisconsin DNR, Washington, HRC, Idaho Power, EEI, NEU, SCE.

[158] HRC, Washington.

182. The majority of commenters on this issue, and the Process Group, support the use of a single panel to deal with related resource issues in the same proceeding, subject to various caveats. They indicate that it may be necessary to reduce costs, avoid delay, and prevent sequential disputes over the same study. For instance, one panel would consider all issues relating to fishery studies in a single proceeding or, perhaps, in a multi-project proceeding.[159] A few commenters suggest that one panel ought to suffice for all disputes in a proceeding, without regard to resource differences.[160] In this regard, Troutman likens the role of the panelists to that of judges in a court, and states that expertise is less important than a good record.

183. The most frequent caveat of those who agree that a single panel may consider more than one dispute is that the panelists have appropriate expertise.[161] Interior adds that the decision to have one panel for multiple disputes needs to be made on a case-by-case basis, and that it needs to be clear at the outset what issues the panel will consider so that disputing agencies can appoint an appropriate representative and identify appropriate technical experts. We agree.

184. California would have the panel chair determine which disputes the panel will hear. In light of the goal of expeditious resolution, we think it falls to the Commission staff, under the direction of the Director of Energy Projects, to quickly assess the disputes and determine how many panels are needed and which issues each will consider.

185. Oregon requests clarification as to whether there will be standing panels for various resources that are likely to be the subject of many study requests at many projects, such as anadromous fisheries, or project-specific panels. Oregon does not appear to support this, but rather to recommend project-specific panels in order to help ensure that appropriate technical expertise is brought to bear. We agree.[162]

186. GLIFWC indicates that if a panel is to consider issues pertaining to different resources, it should be supplemented with a technical expert for each resource. We do not envision that the same panel would consider issues relating to, for instance, the need for a requested turbine entrainment study and the need for additional or modified recreational use surveys. The same panel might however consider disputes concerning studies requested on turbine entrainment and bypass reach flows for fishery habitat purposes. It would be a matter for the Commission staff and agency or tribal panel members to determine which persons on the list of potential technical experts are qualified and able to serve with respect to the subject of the dispute(s).

8. Panel Recommendation

187. The proposed rule provides for the Advisory Panel to make a finding ''as to whether the criteria * * * are met or not, and why.''[163] PG&E and GLIFWC state that the Advisory Panel should be required to determine whether each of the study criteria has been met. This is a reasonable recommendation, and we are modifying the regulation text accordingly. We make however two observations. First, not all the criteria necessarily apply to all the requesters. For instance, a requester may not be an agency or Indian tribe with established resource management goals for the relevant resource (Criterion 2). There is moreover no bright line by which to determine if some of the criteria have been met.

188. PG&E also suggests that the Advisory Panel should address, in addition to the study criteria, ''any other relevant consideration.''[164] SCE recommends that panel's recommendation be explicitly limited to whether the criteria have been satisfied. We agree with SCE. The study criteria were carefully developed with the intention that every participant in a dispute resolution proceeding would understand the criteria by which study requests should be formulated and would be judged. PG&E's recommendation would introduce substantial uncertainty into the process.

189. NEU states that if all three panelists do not support a recommendation, the disagreeing panel member should be required to provide a statement of the reason for their disagreement, in order to ensure a more complete record. We think this decision is best left to individual panelists. We could not, in any case, require compliance with such a provision.

9. Director's Determination

190. The Director's determination is to be made ''with reference to the study criteria * * * and any applicable law or Commission policies and practices.''[165] Several commenters think the Director has too much discretion regarding whether or not to accept a panel's recommendation.[166] NOAA Fisheries, Interior, and MPRB would have the Director bound by a majority vote of the panel. GLIFWC indicates that a requirement for deference to panel recommendations should be written into the rules. The commenters identify no deficiency with these requirements or other specific concern, but evince only a desire to make the panel recommendation binding. The Commission cannot delegate its decisional authority to the Advisory Panel. We have however modified the regulations to clarify that the Director will take into account the technical expertise of the panel, and will explain why any panel recommendation was rejected if that occurs.

191. Some licensee commenters suggest that a potential applicant should be permitted to file a response to the panel recommendation before the Director's determination is made.[167] We think that the study plan development process, plus the right in formal dispute resolution to make a written submission to the Advisory Panel and to participate in the technical conference provide sufficient opportunities for potential applicants to plead the merits of their study proposals.

192. Interior recommends that the Director be required to obtain Commission approval before issuing a decision that does not adopt the Advisory Panel's recommendation. We *see* no reason why such a decision needs to be elevated to the full Commission.

193. Interior also states that it does not know which technical experts the Director may consult before the decision is issued, which could result in the Director's objectivity being compromised. The regulations provide that all communications to or from the Commission staff, which includes the Director, related to the merits of the potential application shall be placed into the record.[168]

194. Finally, several states request that we reaffirm that the Commission's dispute resolution process does not bind state water quality certification agencies

[159] HRC, NYSDEC, NCWRC, PFMC, NEU, SCE, Alabama Power, GLIFWC, IDFG, Troutman, Interior, California.

[160] B&B, Troutman, Alabama Power.

[161] Interior, IDFG, NYSDEC, NCWRC.

[162] We note however that the concept of standing panels is worth considering, as it may be more administratively efficient. As experience is gained with the integrated process we will further consider this idea and, if experience indicates that it would be beneficial, will consult with stakeholders concerning whether modifications to the rule are necessary.

[163] Proposed 18 CFR 5.13(j).

[164] PG&E, p. 24.

[165] *See* proposed 18 CFR 5.13(k).

[166] NOAA Fisheries, Interior, MPRB, GLIFWC, FWS.

[167] CWRC, NEU, SCE.

[168] 18 CFR 5.8(b)(3)(v).

in the sense that participation by a such agencies in the Commission's processes does not affect whatever independent authority it has to require a potential license applicant to produce data or information in the context of the water quality certification application.[169] Alaska states that this holds for state CZMA processes as well. We affirm our prior statement.[170]

10. Study Plan Implementation

195. Several commenters [171] state that a dispute resolution panel should be convened to resolve any disagreements over the interpretation of study results, whether study plans need to be modified, and whether any additional studies are needed. They contend that such disagreements are no less important than disputes over what the study plan requirements should be in the first instance. Interior and RAW add that disagreements concerning a matter which was previously the subject of a panel recommendation should be considered by the same panel.

196. Our decision to limit formal study dispute resolution to development of the study plan does not imply that any subsequent decisions with respect to studies are less important. Rather, it reflects the fact that convening an Advisory Panel at every point in the overall process where there are likely to be disagreements would severely hamper the timely conclusion of the proceeding. Subsequent resolution of disagreements over study results, modifications to the approved plan, and additional study needs are also not likely to result in substantial changes to the overall study plan. Interior's and RAW's recommendation to reconvene an Advisory Panel for later disagreements pertaining to matters previously considered by that panel is impractical. There is no assurance that the same panelists would be available in a timely manner, or at all, and it would likely hamper the recruitment of third party technical experts if by committing to serve on one panel they were also committing to serve on an undetermined number of future panels at undetermined times.

*H. Compliance With Study Plan*

197. As proposed, the study plan order would require the potential applicant to proceed with the approved study plan. The Director's order in formal dispute resolution could amend the study plan order and, if so, would require the potential applicant to carry out the study plan as modified.[172]

198. SCE and others [173] request that we clarify in the rules whether the proposed study plan order (if no dispute resolution is initiated) and the proposed Director's order following formal dispute resolution are final orders to which rehearing applies. SCE seeks certainty on this point so that it may know whether a potential license applicant is subject to the compliance provisions of FPA Section 31. Duke and SCE request that we make these orders non-binding so that potential applicants are not forced to file requests for rehearing or judicial review to protect themselves against the possibility of sanctions under Section 31 [174] or, at least, that we permit the plan and schedule to be modified based on unforeseen circumstances. PG&E suggests that the rules state that an application lacking the required information ''may'' be found deficient, rather than ''will'' be found deficient, since an existing licensee might want to avoid doing pre-filing studies to prevent potential competitors from copying the results. WUWC similarly requests that we make clear that any failure to comply with a study plan determination will not result in civil penalties, but will be treated as a deficiency in the application.

199. California, Interior, and AmRivers request that the rule be amended to ensure that there are consequences for the potential applicant if study requirements, objectives, and expectations are not met. Menominee requests that applicants be required to develop a ''Quality Assurance Project Plan'' prior to implementation of the study plan.

200. Orders regarding studies plans will be binding on potential license applicants, and we expect that they will comply with them. Failure to do so will put potential applicants at risk of having their applications, when filed, found to be deficient or rejected. The question of whether such orders are subject to rehearing and appellate review may have differing answers, based on the facts of individual cases. In addition, review of study plan orders could significantly lengthen the licensing process, and thus is to be avoided to the extent possible.

201. More to the point, it is crucial to the success of the integrated process that issues regarding development of the record be identified and resolved at an early stage in the licensing proceeding. To this end, the process has been designed to give all participants the opportunity to examine existing information, make proposals regarding necessary studies, work with other participants to achieve consensus regarding information-gathering and, on matters that cannot otherwise be resolved, to obtain the opinion of a three-person panel of experts and a determination from the Director based on the record compiled by the participants. It is our hope and expectation that this consensus-building process will succeed, as has the collaborative alternative licensing process, in keeping disputes regarding studies to an absolute minimum, such that all participants can meet their information needs with the study plan as approved by the Director, without the need for further proceedings.

202. Some licensee commenters [175] state that it is unfair that an existing licensee which is a potential applicant could be sanctioned under Section 31 for failing to comply with study plan determinations, while non-licensee potential competitors for the same project license could not.[176] PG&E and others fear that non-licensee potential competitors might fail to comply with the study orders, then submit an application that relies on the studies undertaken by the existing licensee. They recommend that the Commission address this imbalance by specifying that the penalty for failure to comply with the study plan determinations will be the same for licensee and non-licensee potential applicants; that is, the application will be found deficient.[177] Alternatively, SCE states that a non-licensee potential competitor should also be required to have a formal study plan and schedule, and that its

[169] Washington, Massachusetts DER, Georgia DNR, NYSDEC, California, WGA.

[170] California requested that this statement be included in the regulations. We think it is unnecessary to do so, as the authority of states and Indian tribes in this connection is not affected by anything in our regulations.

[171] HRC, AmRivers, Wisconsin DNR, Interior, and RAW.

[172] Proposed 18 CFR 5.13(k).

[173] Long View and PG&E recommend that the Director's decision in formal study dispute resolution be appealable to the Commission or an administrative law judge. PG&E would extend this right to agencies, tribes, and the potential applicant, but states that it should be limited to alleged errors of fact. Long View would allow an appeal in ''extraordinary circumstances,'' which it indicates would include a study recommendation that significantly increases the cost of the study plan over the applicant's budget.

[174] Duke adds that if rehearing is requested, the Commission would have to suspend the study requirements in dispute pending rehearing or judicial review in order to preserve the potential applicant's rights.

[175] Duke, PG&E, NHA, SCE.

[176] SCE evidently has in mind Wolverine Power Co. v. FERC, 963 F.2d 446 (D.C. Cir. 1992), which holds that the civil penalty provisions of FPA section 31 apply only to licensees, permittees, and exemptees, not to unlicensed project operators.

[177] They refer to 18 CFR 4.38(b)(6)(I) and 16.8(b)(6)(I).

application should be found deficient and rejected if it attempts to use the licensee's studies for that purpose.

203. Given that the thrust of Section 31 is the enforcement of Commission requirements with respect to the construction, operation, and maintenance of licensed projects, and not the license application process, it is not clear that the section is applicable to licensees as potential applicants. In any event, we consider imposing civil penalties to be inappropriate in this context and do not propose to do so.

204. With respect to the concern raised by PG&E about the unfair use by a competitor of another competitor's work product, the Commission has pointed out that any improper use of a copyrighted filing is subject to remedy in an appropriate judicial forum.[178] There has not been an instance of a potential competitor copying another applicant's license application since the late 1980s,[179] and since ECPA was enacted in 1986, there have been but two instances of competing applications for a new license.[180] We are aware of only one instance where a potential competitor and an existing licensee have been involved in a dispute over whether an existing licensee should have to share with a potential competitor information required to be made public.[181]

205. In any event, as discussed below, we are requiring non-licensee potential applicants for a new license to file the NOI and PAD no later than the statutory deadline for an existing licensee to file its NOI.[182] Under these circumstances, it will be difficult for a potential non-licensee competitor to game the regulations.

206. NHA similarly requests that we add to the regulations a requirement that as a condition of invoking the formal dispute resolution process agencies must agree to be bound by the Director's decision. This, NHA states, would ensure that the cost and effort of formal dispute resolution is not wasted. As just stated, we cannot bind states or Indian tribes with respect to the administration of their water quality certification programs under the Clean Water Act. NHA does not moreover speak for a united industry on this issue. Several licensee commenters indicate that they may feel compelled to seek rehearing of the Director's decision, and we can see no distinction between a potential applicant, agency, or Indian tribe in this regard.

207. Finally, PG&E and SCE request that we modify the proposed rule to make clear that agencies and Indian tribes with mandatory conditioning authority may not invoke the Commission's dispute resolution processes and then use authorities they have under other statutes to require potential applicants to do information gathering or studies in addition to those the Commission requires. We cannot do this, for we have no authority to control the activities of these entities under other statutes. We do however fully expect these entities to participate in the integrated process in good faith in order that the Commission's decisional record will, to the extent reasonably possible, serve as the basis for the decisions of entities with conditioning authority, and that any additional information these entities may require is known early in the process.

*I. Other Uses for Dispute Resolution*

208. Washington DNR recommends that the Commission establish a conflict resolution process for disputes between potential applicants and the owners of lands on which a project would be located, and that the license application not be accepted until the conflict resolution process has run its course. Such a conflict is likely to occur only in the case of a new project proposal. We think it is inappropriate to hold processing of the application in abeyance until the concerns of one party are resolved. Affected landowners, like all interested entities, are encouraged to participate in the pre-filing consultation process and to intervene if a license application is filed. If the potential applicant and the landowner are not able to resolve any differences,[183] the Commission will do so in the context of its public interest analysis under the FPA.

209. Skagit recommends that we require tribal approval of consultants engaged by potential applicants for tribal cultural resources analysis. Nez Perce recommends that a dispute resolution process be made available for disagreements between Indian tribes and potential applicants over the identity of consultants engaged by the potential applicant to do information gathering or studies related to tribal cultural resources because potential applicants sometimes engage persons who are not acceptable to the Indian tribe. As discussed in the NOPR, we agree that it is appropriate for potential applicants to consult with interested tribes concerning the identity of consultants and, indeed, it is in their best interest to do so, but we also think that applicants need flexibility in this regard and should not be required to obtain tribal approval before engaging a consultant.[184] We note however that our regulations require potential applicants and those in their service to protect sensitive cultural resources information from disclosure.[185]

*J. Evidentiary Hearings*

210. A few licensee commenters[186] want the rules to provide that a party is entitled to an evidentiary hearing before an administrative law judge (ALJ) whenever there are disputed issues of fact.[187] They indicate that such hearings would not be for resolving study disputes, but for ''disputed issues of fact material to disputed mandatory terms and conditions.''[188] They state that such hearings would help foster settlements, and improve the quality and probative value of the record by encouraging resource agencies to support their terms and conditions, and help to limit post-license litigation. They add that such hearings should not delay the process because they would be narrowly focused on specified factual disputes and an ALJ decision could be rendered in about six months.

211. Substantially the same recommendation was made by some of the same commenters prior to the NOPR. We there stated that while we do not intend to change our general practice of resolving most hydroelectric licensing matters by means of notice and comment procedures, we are open to setting discrete issues of fact for hearing before an ALJ in appropriate circumstances, and will give due

[178] *See* WV Hydro, Inc. and the City of St. Mary's, WV, 45 FERC ¶ 61,220 (1988).

[179] *Id.*

[180] One case was N.E.W. Hydro, Inc. and City of Oconto Falls, WI, 81 FERC ¶ 1,238 (1997), *order on reh'g*, 85 FERC ¶ 61,222 (1998), *aff'd, sub nom.* City of Oconto Falls, WI v. FERC, 204 F.3d 1154 (D.C. Cir. 2000). The other was Holyoke Water and Power Co., *et al.*, 88 FERC ¶ 61,186 (1999). In neither case did the competitor prevail.

[181] *See* P.U.D. No. 2 of Grant County, WA, 96 FERC ¶ 61,211 (2001) and ¶ 61,362 (2001). In that instance, the non-licensee potential competitor elected not to file a license application.

[182] *See* Section III.S and 18 CFR 5.5(a).

[183] We note that the Commission's Dispute Resolution Service is available to assist willing parties to resolve disagreements.

[184] 68 FR at p. 14003; IV FERC Stats. & Regs. ¶ 32,568 at p. 34,718.

[185] *See* discussion of this issue in the NOPR; 68 FR at p. 14002; IV FERC Stats. & Regs. ¶ 32,568 at p. 34,717.

[186] NHA, WPPD, Idaho Power, EEI, NEU.

[187] EEI recommends that the regulations include the following language from APA Section 556(d): ''a party is entitled to present his case or defense by oral or documentary evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts.''

[188] EEI, p.15. Such a rule would however also logically apply to disputed facts pertaining to license conditions originating with the Commission staff.

consideration to such requests.[189] We also included a provision in the proposed rules providing for such hearings.[190]

212. In the Final Rule, we retain the proposed language on this issue. Resolving factual disputes before an ALJ is a time-tested means of decision making; factual records developed in such hearings are useful to courts which may be called upon to review the final decision on the license.

*K. Draft License Application Replaced*

213. The integrated process was proposed to include the filing for comment of a draft license application containing, insofar as possible, the same contents as a final license application.[191] Exhibit E, the environmental report, would be significantly different from the traditional Exhibit E because it would be prepared following the guidelines for preparation of an applicant-prepared environmental analysis.[192] Any entity requesting additional information or studies in its comments on the draft application would be required to show extraordinary circumstances, and to address in its request certain criteria, as applicable to the facts of that case.[193]

1. Need for Draft Application

214. We requested comments on whether, in lieu of filing a draft license application for comment, it would be a better use of the participants' time to continue informally working on the resolution of any outstanding issues, or whether other considerations weigh for or against a draft license application.[194]

215. Several industry commenters state that the potential applicant should decide if a draft license application is needed, because many potential applicants feel the time and effort devoted to it would be better spent on other matters such as settlement discussions and completing study requirements.[195] They state that the draft application requirement is burdensome and redundant because of the cost of creating, reproducing and distributing the document to many stakeholders, and then quickly revising and again reproducing and distributing a final application. Some state that other Federal agencies, such as the U.S. Army Corps of Engineers, do not require draft applications, and that it causes no problems.

216. These commenters contend that the other participants do not need to see the potential applicant's proposed resource protection, mitigation, and enhancement (PM&E) measures until the application is filed, and that they should have a good general idea of what the potential applicant is likely to propose from the PAD, NEPA scoping, and study plan requirements. NHA would have the potential applicant consult with the parties with the objective of an agreement on whether a draft application should be circulated.[196] NHA and Long View also suggest that the draft license application may be eliminated for relatively simple cases, such as small projects that operate run-of-river or have no anadromous fish issues.

217. Resource agencies and NGOs urge us to retain the draft license application. They state that it is the first time the potential applicant's whole proposal, including PM&E measures, is consolidated and revealed to agencies, which helps them to understand the entire effect of the project and to prepare for filing of the application in final. Some indicate that the draft application is necessary to ensure that potential applicants consider all participants' comments. Others state that it is an important last pre-filing chance to influence the potential applicant's proposed PM&E measures, and to identify areas where additional information may be needed, including for water quality certification purposes. Some also suggest that the draft license application fosters settlement negotiations. Finally, some commenters indicate that the time required to review a draft license application will not prevent parties from continuing to work on outstanding issues, such as settlements or the completion of studies.[197]

218. Agency and NGO commenters also suggest that the cost of a draft application should be modest because it is circulated so close to the filing deadline that the draft must very closely resemble the final application, and some favor permitting control of costs by e-filing.[198] AMC would retain the draft application if there are no settlement negotiations taking place when it would otherwise be due. Interior suggests that the burden entailed by a draft license application could be minimized by permitting the potential application to incorporate by reference information from the PAD or study results that have not changed.

219. As indicated above, much of the disagreement about whether to require a draft license application turns on the contrast between the industry view that it is burdensome and of questionable utility, and the agency and NGO view that it is helpful to the participants. Our task then is to devise a document that reduces the burden imposed on the potential applicant but retains the features of the draft license application that the agencies and NGOs find useful. To that end, we must consider the commenters' views on the appropriate contents of a draft license application.

2. Contents of Draft Application

220. The NOPR requested comments on whether a draft application, if required to be filed, should track the contents of the final license application, or whether it would be preferable to require it only to include a revised Exhibit E or other materials.[199]

221. NHA and others [200] state that if a draft application is required it should be limited to a description and analysis of the potential applicant's proposal, plus Exhibit E or an abbreviated version thereof. They state that most recipients are only interested in those parts of the draft application and rarely comment on any other part of it.[201] They add that any other information in the record will already have been filed with the Commission and served on the parties, and may be incorporated in a draft application or comments by reference.[202] They conclude that the comments are seldom useful because of

[189] 68 FR at p. 13998; IV FERC Stats. & Regs. ¶ 32,568 at p. 34,711.

[190] *See* proposed 18 CFR 5.28(e). The provision is now at 18 CFR 5.29(e).

[191] Proposed 18 CFR 5.15 (Draft license application).

[192] Proposed 18 CFR 5.17 (Application content).

[193] Proposed 18 CFR 5.15.

[194] 68 FR at p. 14010; IV FERC Stats. & Regs. ¶ 32,568 at p. 34,732.

[195] NHA, Suloway, Long View, SCE, Snohomish.

[196] PFBC, viewing the matter from the opposite side of the coin, would eliminate the draft license application only if most or all parties agree.

[197] MDEP, FWS, ADK, Wisconsin DNR, IDFG, VANR, NEU, Oregon, HRC, PFMC, NCWRC, California, Interior, GLIFWC, Skokomish, Skagit. One industry commenter, PG&E recommends against eliminating the draft application, at least Exhibit E. PG&E states that the comment deadline on the draft application tends to focus participants on the matters most important to them.

[198] Oregon, HRC, PFMC, NCWRC, ADK, California, Interior, VANR, GLIFWC, Skokomish.

[199] 68 FR at p. 14010; IV FERC Stats. & Regs. ¶ 32,568 at p. 34,732.

[200] Oregon, HRC, PFMC, NCWRC, ADK, California, Interior, VANR, GLIFWC, Skokomish, Long View, Acres.

[201] Long View, Acres. Acres indicates that Exhibits A (project description) and B (description of proposed project operation and alternatives considered) may also be appropriate if the potential applicant for a new license is proposing material changes in project operation.

[202] Longview, Acres. These commenters state that the contents of Exhibits A, B, C (proposed construction schedule), and G (project map) would already have been circulated in the PAD or a PAD supplement, or already provided for in the study plan and schedule. They recommend reference to the Commission's EA Handbook as the guidance for preparing Exhibit E.

the limited time available to review the draft, but the potential applicant nonetheless must revise the draft application to respond to them before it files the application in final form.[203]

222. Long View states that if a draft license application contains the potential applicant's specific proposal, then commenting agencies should be required to provide preliminary terms and conditions. This, it states, would allow the potential applicant to refine its proposal and help make Commission action more timely.

223. Agencies and NGOs, on the other hand, recommend that the draft license application continue to follow the format and content of the final application. They wish particularly to have a requirement for a specific operating proposal, and stress the need for a quality Exhibit E.[204] They contend that these are essential for a thorough review and opportunity to comment, and emphasize the importance of the potential applicant's response to comments in the final application. One of the few industry proponents of the existing draft license application format, NEU adds that having a consistent format between draft and final license applications will make reading and comprehension of the documents easier than if the draft application is in a different format.

224. Several commenters also state that the draft license application should include all the data and information needed for the state to consider the potential applicant's clean water act certification application.[205] Oregon states that its process is complex and iterative, so this requirement would help to expedite the state process. IDEQ states that if a state has specific information requirements for the application, the information should be included in the draft application, or the potential applicant should be required to explain when the information will be supplied.

225. Clearly, there is no meeting of the minds on this issue in the written comments. The Process Group however discussed this issue at length and agreed that, in lieu of a draft license application, an applicant could be permitted to file a document discussing its proposal for operation of the project facilities, a range of PM&E measures under consideration by the potential applicant,[206] and a summary of the environmental analysis of the impacts of the range of PM&E's and proposed project operations. This document would be called the potential applicant's ''Preliminary Licensing Proposal.''

226. The underlying premise of the Process Group's compromise is that sufficient information is available through the PAD and completion of information gathering and studies under the approved study plan to support development of a range of PM&E measures and a draft environmental document.[207] The Process Group further agreed that, if the participants are amenable, this filing could be waived by the Commission. The issue of whether to request a waiver would be initially considered in the development of the study plan and schedule.[208] A potential applicant would also have the option to prepare a complete draft license application with the format and contents of the final application.

227. We think the Process Group's agreement is by and large a reasonable attempt to bridge the gap between license applicants and other participants because the proposed document should be less burdensome for potential applicants, yet provide the specificity sought by agencies and NGOs with respect to the potential applicant's proposal and environmental impacts analysis. We have two concerns with this recommendation however. First, a document which contains a ''range'' of potential PM&E measures will not be very helpful to commenters, who will not know which of the potential PM&E measures the potential applicant is seriously considering. It would also needlessly complicate commenting on the draft environmental analysis. We will therefore require the Preliminary Licensing Proposal to include one set of proposed PM&E measures. Second, the utility of the Preliminary Licensing Proposal would also be compromised if the potential applicant merely provided a ''summary'' of its draft environmental analysis. The term ''summary'' is quite elastic and we do not intend to further complicate the process by trying to specify the contents of the summary. Instead, we will require the Preliminary Licensing Proposal to include the potential applicant's draft environmental analysis of its preliminary licensing proposal.

3. Preliminary Draft Terms and Conditions

228. The NOPR states that in most cases the updated study report should indicate that all of the information required by the approved study plan, or all of the information required to support the filing of FPA Section 10(j) recommendations or mandatory terms and conditions or fishways, has been collected and distributed to the relevant agencies at the draft application stage. We suggested that in such circumstances, it may be appropriate for the parties to file preliminary draft 10(j) recommendations, terms and conditions, or fishway prescriptions, and for the Commission staff to make a preliminary response, including initial 10(j) consistency findings, to those filings. Modified recommendations, and terms and conditions would be filed in response to the Commission's ready for environmental analysis (REA) notice.[209] In this regard, we requested comments on whether we should in each case make a determination following the updated study report of whether the record is sufficiently complete to require the filing of preliminary draft recommendations and terms and conditions with comments on the draft license application.[210]

229. A few licensee commenters responded affirmatively. SCE states that under these circumstances we should require draft PM&E measures to be filed 45 days after the license application is filed because the record will be complete. SCE would have final PM&E measures filed 60 days after the REA notice. Idaho Power and EEI suggest that if parties are not required to provide recommendations and terms and conditions when the studies are completed, the goals of the integrated process will not be realized. NEU also supports earlier filing of draft PM&E measures.

[203] Long View, NPS, SCE.

[204] HRC, NCWRC, PFBC, Georgia DNR, California, NYSDEC, Interior.

[205] Oregon, HRC, PFMC, NCWRC, ADK, California, Interior, VANR, GLIFWC, Skokomish.

[206] As we understand the Process Group's recommendation, a ''range'' of PM&E measures encompasses measures with respect to each of the affected resources, and could include potential alternative PM&E measures with respect to a particular issue. An example of the latter might be enhancing bypassed reach flows to benefit aquatic resources or, alternatively, providing enhancements to wetlands in the project reservoir.

[207] In recognition of the fact that information gathering and studies will not always be complete at this stage of the proceeding, we have moved acceptance of the application to the point were the study plan is completed.

[208] The Preliminary Licensing Proposal is issued for comments, which could include requests for new or modified studies. The Process Group's expectation appeared to be that this opportunity would be preserved even if the Preliminary Licensing Proposal were waived. We disagree. Since the purpose of that document is to obtain comments with respect to the potential applicant's proposal, waiver of the requirement to distribute that document should likewise eliminate the opportunity to request new or modified studies at this point.

[209] 68 FR at p. 14010; IV FERC Stats. & Regs. ¶ 32,568 at p. 34,732. The proposed regulation test inadvertently states that the modified PM&E measures would be final.

[210] 68 FR at p. 14010; IV FERC Stats. & Regs. ¶ 32,568 at p. 34,732.

230. One state agency, IDFG also supports this idea, at least with respect to fish and wildlife agency recommendations made pursuant to FPA Section 10(j).[211] Under IDFG's proposal, the Commission staff would not respond to the preliminary 10(j) recommendations. IDFG states that this would enable potential applicants to consider the preliminary 10(j) measures without being influenced by the Commission staff's preliminary response. IDFG thinks this might provide an incentive to the parties to enter into settlement negotiations.

231. Nearly all respondents however opposed this idea for various reasons. Wisconsin DNR and NCWRC state that the potential applicant needs to make its licensing proposal, at least in draft, in order for agencies to assess the potential impacts so that they can develop mitigation measures or craft water quality certification conditions.[212] NCWRC adds that the time frames provided in the proposed rule are already too tight, and it would be unreasonable to require another document from the commenters in the same overall time frame.[213]

232. NOAA Fisheries and HRC indicate that completion of the study plan does not complete the record because, at a minimum, the license application including the applicant's proposal needs to be filed.[214] NOAA Fisheries indicates that the lack of complete information would require it to file prescriptions and recommendations based on a worst case scenario. California and PG&E agree that it would be unproductive for parties to file anything before the Commission declares that the application is ready for environmental analysis. California adds that, in any event, if the studies are complete, parties will soon be making the same filing in response to an REA notice and after the Commission has reviewed the application.[215] NHA similarly indicates that agencies would need to respond on a case-by-case basis, depending on their view of whether the record is complete.

233. GLIFWC and Skokomish state that preliminary draft conditions before the REA notice would not afford Indian tribes sufficient time to consult with Federal agencies that have authority pursuant to FPA Section 4(e) to require mandatory conditions for projects located on Indian reservations.

234. Among agencies and NGOs, only NYSDEC and Oregon do not object to filing preliminary draft PM&E measures. Oregon's tentative assent however assumes a period of one year between the draft and final license applications, in contrast to the approximate period of 150 days in the proposed rule.[216] We are not inclined, particularly in light of our decision to adopt the Preliminary Licensing Proposal, to extend the comment period.

235. Finally, Interior states that this might be acceptable, but only at the option of the entity filing the PM&E measures. Interior also questions the purpose of this proposal on the ground that the Commission's draft environmental document is likely to provide significant information and analysis not found in the studies or applicant's proposal. Interior adds that filing preliminary PM&E measures before the REA notice is pointless since modified PM&E measures are not due until 60 days after the comments are due on the draft NEPA document.[217]

236. We conclude that the arguments against requiring preliminary draft PM&E measures are persuasive and will not require them to be filed.

*L. License Applications*

1. Contents

237. Only a few comments were filed on the contents of the final license application. Long View seeks clarification that Exhibit C (proposed construction schedule) applies only to proposed construction, and need not discuss any previous construction. Long View's understanding is correct.

238. Long View requests an explanation of why the maps required in Exhibit G need to be stamped by a Registered Land Surveyor. This ensures accuracy in the maps because Registered Land Surveyors are accountable for the accuracy of their work.

239. Nez Perce indicates that the license application should include a map showing the political boundaries of any Indian reservation that may be affected, and identifying ceded and non-ceded territories where treaty rights apply. In our view, this is information that can best be provided to a potential applicant by the Indian tribe itself or with the assistance of Interior.

240. Nez Perce also states that the Exhibit E should be prepared after consultation with affected Indian tribes on the scope of cumulative environmental impacts, and should be prepared on a watershed basis. The integrated process provides ample opportunity for Indian tribes to participate in pre-filing consultation and NEPA scoping. In addition, the Commission staff's Scoping Document 1 will state what the Commission staff considers to be the geographical and temporal scope of the analysis.

241. Some commenters requested changes to the license application requirements that touch on economic analysis. Nez Perce and NOAA Fisheries request that Exhibit E include, in addition to discussion of the cost of PM&E measures, a dollar valuation of the benefits of environmental and cultural resources PM&E measures. This analysis would include, among others things, potential increases in revenues from commercial and sport fishing, increased non-fishing recreation, and potential property value increases resulting from better environmental protection.

242. Our views concerning the attachment of dollar values to natural and cultural resource benefits are set forth in *Great Northern Paper, Inc.*[218] and *City of Tacoma, Washington*.[219]

The public-interest balancing of environmental and economic impacts cannot be done with mathematical

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[211] 16 U.S.C. 803(j).

[212] Wisconsin DNR, NOAA Fisheries, and HRC also indicate that this would needlessly create an additional step in the process, and Wisconsin DNR states that it does not have the necessary resources.

[213] PFMC suggests that the Commission and the agencies should negotiate dates for filing of PM&E measures. That would be inconsistent with a central goal of the integrated process, reducing the time required to process license applications.

[214] HRC adds that if preliminary PM&E measures are required, then the record should also be complete enough for the Commission staff to provide draft license articles. Draft license articles are however based on the Commission's evaluation of the reasonable alternatives, which may consist largely of the alternatives recommended by agencies, Indian tribes, and NGOs.

[215] California adds that in the context of its water quality certification, state law requires a final environmental document before its final certification conditions can be issued, and that it would have to repeat the entire water quality certification process. We did not however suggest that the state should issue water quality certification at this juncture.

[216] 90 days to comment on the Preliminary Licensing Proposal or draft license application, followed by 60 days for the applicant to file the final application.

[217] Proposed 18 CFR 5.22.

[218] 85 FERC ¶ 61,316 (1998), *reconsideration denied,* 86 FERC ¶ 61,184 (1999), *aff'd,* Conservation Law Foundation v. FERC, 216 F.3d 41 (DC Cir. 2000) (nothing in the FPA requires the Commission to place a dollar value on nonpower benefits; nor does the fact that the Commission assigned dollar figures to the licensee's economic costs require it to do the same for nonpower benefits.). *See also,* Namekegon Hydro Co., 12 FPC 203, 206 (1953), *aff'd,* Namekegon Hydro Co. v. FPC, 216 F.2d 509 (7th Cir. 1954) (when unique recreational or other environmental values are present such as here, the public interest cannot be evaluated adequately only by dollars and cents); and Eugene Water & Electric Board, 81 FERC ¶ 61,270 (1997) *aff'd,* American Rivers v. FERC, 187 F.3d 1007 (9th Cir. 1999) (rejecting request for economic valuation of environmental resources that were the subject of 10(j) recommendations).

[219] 84 FERC ¶ 61,107 (1998), *order on reh'g,* 86 FERC ¶ 61,311 (1999), *appeal pending, City of Tacoma* v. *FERC,* DC Cir. No. 99–1143, *et al.*

precision, nor do we think our statutory obligation to weigh and balance all public interest considerations is served by trying to reduce it to a mere mathematical exercise. Where the dollar cost of enhancement measures, such as diminished power production, can be reasonably ascertained, we will do so. However, for non-power resources such as aquatic habitat, fish and wildlife, recreation, and cultural and aesthetic values, to name just a few, the public interest cannot be evaluated adequately only by dollars and cents.[220]

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In the context of public interest balancing for long-term authorizations, it is inappropriate to rely too heavily on the accuracy of current dollar estimates of non-power resource values, calculated using any number of reasonably disputable assumptions and methods.[221]

243. AW/FLOW and FWS state that the final application should include projections of project revenues for the purpose of testing applicant assertions that proposed PM&E measures are too costly. That would be inconsistent with the fundamental determination underlying our policy of using current costs to value project power; that is, the futility of attempts to estimate power values on a long-term basis.[222]

244. Long View and PG&E state that Exhibit E (which is in the form of a draft environmental document) which requires an economic analysis of ''any other action alternative'' [223] would unreasonably require an applicant to conduct an economic analysis of every PM&E measure recommended by any participant in pre-filing consultation. They would like for the applicant to determine which such measures are reasonable to analyze.

245. The action alternatives typically include PM&E measures proposed by agencies, Indian tribes, and NGOs. If such measures are not provided before the application is filed, the potential applicant has little to work with and a commensurately minor obligation in this regard. In such cases Exhibit E then will contain an economic analysis of the existing project as it currently operates and the license applicant's proposal. We expect however there will also be cases in which preliminary action alternatives or individual PM&E measures will exist when the application is filed. We share PG&E's concern about license applicants being held responsible for developing cost information about or analyses of PM&E measures of varying specificity and practicality, or those that involve long-term activity not easily translated into current costs. We would only expect a potential applicant to provide an analysis of preliminary PM&E measures if they were sufficiently specific to make that possible.[224] We have modified the regulation text to reflect this view.[225]

2. Post-Application Study Requests

246. The proposed rule makes no provision for new information-gathering or study requests after a license application is filed, based on the premise that participants are provided ample opportunity before the application is filed and during the study period to make such requests. Industry commenters agree with this proposal.[226]

247. Some agency and NGO commenters do not agree. They appear to concede that if such requests are permitted, the bar should be set high, but assert that to prohibit them entirely would exclude from the record information warranted by unforeseen circumstances. They cite as examples unexpected study results which establish a need for a new study; failure of the applicant to meet document production and disclosure obligations during the pre-filing period or in the application; and material changes in circumstance with respect to the environment, the applicant's license proposal or information contained therein, and applicable laws or regulations.[227]

248. The mere fact that study results are unexpected does not indicate that a new study is needed. It is possible for study results to be so different from what was expected that questions arise concerning whether it was properly conducted, but such events are exceedingly rare in our experience. The failure of an applicant to satisfy the terms of the study plan or filing requirements is not a cause for new study requests. It is rather the cause of a deficiency that must be remedied, and may also raise compliance issues.

249. It is also possible for a material change in circumstances to occur between the completion of the study plan and the conclusion of a licensing proceeding that requires additional information to be provided. That has always been the case, and the Commission has always exercised its authority to require applicants to provide additional information for the record in appropriate cases. We will continue to do so. However, we remain convinced that the multiple opportunities to request information and studies and to resolve any study disputes during the pre-filing phase of the integrated process will ensure that the application will include all information needs.

*M. Consultation and Coordination With States*

1. General Comments

250. PFMC requests that we clarify the relationship between licensing and other Federal and state processes. The relationships between licensing and state and tribal water quality certification and consistency certification under the Coastal Zone Management Act (CZMA) are discussed in this section.[228]

251. Minnesota DNR asks us to affirm that the changes we are adopting are not designed to weaken the authority of state fish and wildlife agencies. We have carefully developed the final rule to ensure that the rights and views of all participants, including all state agencies, are accorded the full consideration to which they are entitled by law, and in many instances have provided procedural rights exceeding any legal requirements.[229] Indeed, our expansive approach to stakeholder participation in this rulemaking, which greatly exceeds the notice and comment requirements of the APA, is indicative of our approach to stakeholder participation in our processes.

252. Long View requests that the Commission designate specific members of staff to be familiar with the water quality certification requirements of

[220] 85 FERC at p. 62,244–245. Interior states that environmental and cultural resource benefits of PM&E measures need to be better articulated by the Commission to counter the cost arguments of applicants, but does not seek to have them translated into dollar values. We agree that it is important to explain the benefits, economic or otherwise, of the PM&E measures we approve, and believe our NEPA documents and orders do so. By the same token, agencies that provide mandatory conditions or recommendations have the same obligation with respect to the PM&E measures they sponsor.

[221] 84 FERC at pp. 61,571–72.

[222] *See* Mead Corporation, Publishing Paper Division., 72 FERC ¶ 61,027 (1995), *order on reh'g,* 76 FERC ¶ 61,352 (1996).

[223] *See* proposed 18 CFR 5.17(b)(1)(E).

[224] For instance, the cost of a specific recommendation for instream flows in a bypassed reach can be determined. A fishway prescription, on the other hand, may be too vague, particularly as a preliminary measure, for the costs to be reasonably determined. *See* the discussion in Section III.O.2.

[225] 18 CFR 5.18(b)(5)(i)(B).

[226] We infer this from the fact that the only industry member to comment on the matter was NHA, which endorsed the proposal.

[227] NYSDEC, HRC, Interior, MPRB, NJDEP.

[228] The relationship of ESA consultation to the licensing process is discussed in Section III.O.3.

[229] Georgia DNR states that all state agencies should receive equal consideration in the licensing process. If, by this, Georgia DNR means each agency should receive the full consideration to which it is entitled by the law and implementing regulations, we agree.

each state for the purpose of coordinating with the state at various milestones in the process to ensure that its information needs are being met. Long View expects that this would minimize post-application requests by states for additional information. We decline to adopt this recommendation. State or tribal officials are the persons responsible for administering water quality certification programs, and the integrated process we are establishing includes opportunities and inducements for them to participate in the licensing process and make their information gathering and study needs known early. We also expect the water quality certification process will be coordinated with the licensing process through the development of the process plan and schedule.[230]

2. Timing of Water Quality Certification Application

253. The existing regulations require license applicants to file an application for a water quality certification for both the traditional process and ALP no later than the date on which the application is filed.[231] In the NOPR, we noted that this assumes that the potential applicant has consulted with the water quality certification agency, determined what data is required, and obtained that data before the license application is filed.[232] This premise however frequently does not reflect reality.

254. We proposed to make the license application date the deadline date for filing the water quality certification application in the integrated process because the integrated process is designed to better ensure that water quality certification data needs are timely identified and met.[233] We proposed to change the deadline date for the traditional process from the license application date to 60 days after the REA notice is issued because there is less assurance under the traditional process that water quality certification matters will be resolved when the application is filed. We requested comments on that proposal and on an appropriate deadline date for this filing in the ALP.[234]

255. Commenters on this issue seldom distinguished between processes, and opined that it would be confusing for participants to have a different deadline date depending on the process selection. They recommended a deadline date for all processes based on their views of how the Commission's processes should be coordinated with state water quality certification processes.

256. Only PFMC, NEU, and NJDEP recommended that the deadline date continue to be the filing date of the license application. Several commenters recommended that the deadline for filing of the water quality certification application should be 30–60 days following the Commission's REA notice.[235] The rationale for this recommendation is that the REA notice establishes that the record is complete, so there is sufficient data to support the water quality certification application, and the state should be able to act on the application within one year. NHA also suggests that allowing additional time after the license application is filed would afford time for the state and the applicant to work together in ways that may lead to earlier issuance of water quality certification.

257. In this connection, the Process Group agreed that the integrated process will work best when states and Indian tribes recognize and are actively involved throughout the pre-filing process, and that the Commission, state or Indian tribe, and applicant should discuss schedules and procedures for their respective processes early on. We wholeheartedly agree, and if this is done the integrated process should result in all parties knowing what water quality-related data the Commission will require the potential applicant to produce when the study plan determination is issued or, at the latest, the conclusion of any relevant formal dispute resolution process. This should leave ample time before the license application is filed, about two and one-half years, for the potential applicant to consult with the state regarding what, if any, additional data is required for certification, and to collect that data. If the potential applicant and the state or Indian tribe are diligent in this regard, the potential applicant should be able to file the water quality certification application by the time the license application is filed.[236]

258. There may however be instances where the license application is required to be filed, but some information required by the Commission-approved study plan or by the water quality certification agency has not yet been obtained. In these circumstances, the REA notice will not be issued until the study plan is completed, so using the REA notice as the triggering date to file the water quality certification application allows an additional increment of time past the license application date in case there is also outstanding water quality data.[237]

259. California, VANR, and the Process Group propose that the deadline date be negotiated by the state or Tribe and the license applicant. As a default in the event there is no agreement, California proposes a deadline of 60 days following issuance of the Commission's draft NEPA document.[238] EPA thinks there may be merit in California's proposal. This recommendation is based on the concept that one environmental document should serve for all Federal and state authorizations; *e.g.*, water quality certification, CZMA consistency certification, and Clean Water Act Section 404 [239] dredge and fill permits issued by the U.S. Army Corps of Engineers. California explains that it must prepare an environmental document akin to the Federal NEPA document after an opportunity for public notice and comment (SEQA analysis). It does not consider a water quality certification application to be complete until its SEQA analysis is complete, and it would prefer that the SEQA analysis be the same document as the Commission's NEPA document. It states that by waiting until after the Commission's draft NEPA document is issued, it may be able to use the comments filed on that document to satisfy its own public notice and comment requirements, and still have sufficient time to take substantive action on the water quality certification application within a one-year period.[240] Although VANR supports the single environmental document concept, it

[230] *See* 18 CFR 5.8(d)(4).

[231] 18 CFR 4.38(f)(7) and 16.8(f)(7).

[232] 68 FR at p. 14010; IV FERC Stats. & Regs. ¶ 32,568 at p. 34,714.

[233] Proposed 18 CFR 5.17(f) and 68 FR at p. 14000; IV FERC Stats. & Regs. ¶ 32,568 at p. 34,714.

[234] Proposed 18 CFR 4.34(b)(5) and 68 FR 13988 at p. 14000; IV FERC Stats. & Regs. ¶ 32,568 at p. 34,714.

[235] NHA, PG&E, MDEP, SCE, EPA, NYSDEC.

[236] We hasten to add that this is a minimum time. We are aware of no reason why a potential applicant cannot consult with the water quality certification agency when the NOI and PAD are filed and begin collecting required data before the Commission's study plan determination is issued.

[237] The Process Group agreed that the license application should include the information required by the water quality certification agency. That would of course be desirable, but we cannot impose such a requirement since new license applications must be filed on a schedule determined by the FPA, and we cannot control the timing of the state's process. We likewise decline to tie issuance of the REA notice to a state's determination that the record in its separate process is complete. The Commission cannot delegate its procedural or substantive responsibilities to other entities.

[238] Alaska suggests that for projects in that state an even later time may be appropriate if at some time it exercises water quality certification authority, because a CZMA consistency certification in that state would have to precede issuance of water quality certification.

[239] 33 U.S.C. 1344.

[240] California, WGA, EPA.

concludes that either the license application or REA notice deadline should generally be late enough to ensure that its processes can be concluded before an existing license expires.

260. Oregon and HRC similarly recommend that the deadline date should be established by agreement between the participants and the state on a project-by-project basis. They state that the best time to file the water quality certification application is when the studies are sufficiently complete to provide reasonable assurance of a supportable decision, so long as there is sufficient remaining time to complete the Commission's NEPA analysis and other steps and issue a new license before an existing license expires. Other factors Oregon would take into account include whether the state has public participation and SEPA requirements that rely on the federal environmental analysis.

261. We cannot accept an open-ended deadline date to be negotiated in each proceeding. That would introduce an enormous element of uncertainty into the process and subordinate the Commission's license process to the convenience of the parties or the processes of the water quality certification agency. Neither can we accept a deadline of 60 days following issuance of the draft NEPA document. First, this would be well over three years after the Commission-approved study plan is finalized. Second, in some states the potential license applicant may learn from pre-filing consultation with the certifying agency or tribe all of the data it will be required to produce, but in others this is not determined until an application has been filed. The draft NEPA document is issued at a point approximately 14 months prior to expiration of an existing license. Even if the state promptly determines what additional information is required, it is highly unlikely that the data could be gathered and a certification issued within the remaining time before license expiration. If the state does not act promptly, as much as a year could be lost from the remaining time.

262. California does not explain how the Commission's draft NEPA document could serve that state's public notice and comment requirements when there is no application pending for water quality certification. Absent that application, there would be no reason to think the state would consider the evidentiary record complete, or that the alternatives considered in the Commission's NEPA document would resemble the contents of a water quality certification. In this connection, New York states that it requires water quality certification applicants to submit studies or data based on pre-project conditions. Maine states that its water quality certification agency will not participate in the Commission's study dispute resolution process because of state sovereignty concerns and because an unfavorable decision in the Commission's process would make it more difficult to require the requested data through its own processes.

263. California indicates that the Commission need not establish a water quality application deadline because states have an incentive to informally consult with the potential applicant before the water quality application is filed to ensure that they have the data necessary to issue water quality certification before the existing license expires and thereby ensure that the environmental improvements included in the certification will timely go into effect. That incentive exists now, yet the single most common cause of new licenses not being issued prior to expiration of the existing license is the absence of water quality certification.

264. In sum, the latest date we can accept for filing of the water quality certification application is 60 days following the REA notice for all processes. This provides two to two and one-half years following issuance of the Commission-approved study plan for the potential applicant and the state agency or Indian tribe to determine what, if any, additional information will be required for a complete water quality certification application, and for the applicant to collect the data and file an application before the Commission issues its REA notice.[241] If an application is filed at that point and the state has not yet determined what additional information it will require, it is highly unlikely that the certification will be issued before an existing license expires.

265. Since 1991, our policy has been to deem a water quality certification agency to have waived certification if it has not denied or granted a request for certification within one year after the request is filed. A few commenters recommend that we change the policy so that the statutory one-year period for action established by CWA Section 401 is deemed to begin when the state deems the application to be complete.[242] We decline to do so. This was our practice prior to 1991, but it was found to be unduly burdensome because it put the Commission in the frequently difficult posture of trying to ascertain and construe the requirements of many and divergent state statutes and regulations. The existing rule, in contrast, is clear and simple.[243]

3. Coastal Zone Management Act

266. Alaska seeks assurance that our consideration of coordination and consultation with states includes CZMA issues. Coordination with state agencies that issue consistency certifications under the states' approved Coastal Zone Management Plans should begin with development of the process plan and schedule, in the same manner as coordination with the water quality certification process. We have added state agencies with CZMA authorities to the list of agencies with which a potential applicant must consult,[244] and strongly encourage such agencies to participate in the pre-filing consultation process.

*N. Tribal Issues*

267. In the NOPR we proposed to establish the position of Tribal Liaison as a single, dedicated point of contact and a resource to which Native Americans can turn for assistance in dealing with the Commission regardless of the proceeding or issue. We also proposed to contact Indian tribes likely to be interested in a relicense proceeding in a time frame consistent with the advance notification to initiate discussions concerning consultation procedures.[245]

1. Consultation Policy

268. Indian tribes offered many comments on the Commission's trust responsibility as it relates to treaty rights, legislation, and executive orders. Several tribes state that as sovereign entities, they have government-to-government consultation rights which differ from those applicable to agencies and the general public, because they must be determined by mutual agreement between the Commission and individual tribes in a case-specific and issue-specific context.[246]

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[241] As discussed above in this section, this is a minimum time that assumes the certification agency has not previously made its information requirements known to the potential applicant.

[242] VANR, PFBC, IDEQ, EPA.

[243] *See* Order No. 533, Regulations Governing Submittal of Proposed Hydropower License Conditions and other Matters, 55 FR 23108 (May 20, 1991); FERC Stats. & Regs. Regulations Preambles 1991–1996 ¶ 32,921 at p. 30,135 (May 8, 1991).

[244] 18 CFR 5.1(d).

[245] 68 FR at p. 14002; IV FERC Stats. & Regs. ¶ 32,568 at p. 34,717.

[246] S–B, S–P, CRITFC, NW Indians, Nez Perce, Umatilla, GLIFWC, NF Rancheria.

269. Many commenters [247] also noted their appreciation for the Commission's discussion, but stated that the government-to-government consultation process should be specifically defined in the regulations, so as to clarify the role of tribes in the licensing process and to prevent confusion between tribal consultation and consultation with other entities. They state that the rules should be sufficiently flexible to accommodate case-specific circumstances and incorporate recognition of treaty rights into decisions on studies, resource impact analyses, and license conditions.

270. Various specific suggestions were also made regarding tribal consultation. For instance, the Tribal Group indicates that tribal consultation should begin when the Commission sends the licensee the advance notice of license expiration. GLIFWC, citing tribal government decision-making processes, and NF Rancheria, asserting a need for as complete a record as possible when the NOI is filed, support pre-NOI contacts between the Tribal Liaison and the potentially affected tribes. Catawba and Choctaw state that consultation needs to begin with the chief or governing body, rather than other tribal members or employees. Catawba also recommends that Commission staff visit tribal lands in order to understand local issues. The Tribal Group recommends including in the regulations a requirement for a meeting between the Commission, potentially affected tribes, and other concerned Federal agencies shortly after notice of the NOI and PAD is issued. The Tribal Group and others [248] also recommend that certain points in the licensing process be designated at which the Commission and tribes would assess consultation to date and seek agreement on next steps to ensure that appropriate communication takes place throughout the process.[249] Maidu states that the regulations must specifically recognize the tribes' right to comment on cultural and historical resources study proposals.

271. Concerns were also expressed about the timing of consultation. One example is that some tribes require any agreement with another entity to be ratified by an executive board, while some require only the agreement of the tribal chief.[250] Another concern is that tribal councils don't meet according to Commission schedules, but have their own schedules. This may involve meetings on a monthly, quarterly, or other basis, so that advance notice of schedules is very important.[251]

272. S–P states that tribal sovereignty requires issues scoping to be separate for tribes. NW Indians, on the other hand, suggest that tribes need to be in the same scoping process with other entities because they are likely to have overlapping issues and because the interests of other participants (such as recreational users of project lands) may be adverse to those of the tribes.

273. In light of these comments, we have decided to take a three-pronged approach to better fulfill our trust responsibility. The first prong is to publish in our regulations a policy statement on tribal consultation. The policy statement was developed from our review of the written policies of other Federal agencies concerning the trust responsibility and government-to-government consultation.[252] The policy statement is being issued contemporaneous with this final rule in a separate docket [253] and will appear in part 2 of the Commission's regulations, ''General Policy and Interpretations.'' [254] The policy statement will apply to all of the Commission's program areas and, for hydroelectric licensing, to all licensing proceedings, regardless of which process is used.

274. The policy statement recognizes the unique relationship between the Federal government and Indian tribes as defined by treaties, statutes, and judicial decisions. It acknowledges the Commission's trust relationships. It states that the Commission will endeavor to work with the tribes on a government-to-government basis pursuant to trust responsibilities, the FPA, and any other statutes governing the Commission's authority. It notes that the Commission functions as a neutral, quasi-judicial body and as such is bound by the APA and Commission rules regarding off-the-record communications. It states that the Commission will assure tribal issues and interests are considered in making decisions. Specifically to the hydroelectric program, it states that the Commission will notify tribes at the time of the NOI and will consider comprehensive plans prepared by tribes or intertribal organizations.

275. The second prong of our approach is to establish the Tribal Liaison position, discussed below. The third prong is inclusion in the regulations of a meeting with willing Indian tribes no later than 30 days after filing of the NOI.[255]

276. NW Indians and S–B state that the Commission's rules must acknowledge that the trust responsibility supersedes public interest balancing under the FPA. We do not agree. The Commission carries out its trust responsibility towards Indian tribes in the context of the FPA, and the trust responsibility does not require the Commission to afford tribes greater rights than they would otherwise have under the FPA.[256]

277. We will not attempt to further define the government-to-government consultation process in the regulations. The review of tribal comments above makes clear that there is no consensus on what such specific provisions might be. The one consistent comment is that an effective process needs to be established in consultation with individual tribes. Under these circumstances, we conclude that the most effective way to move forward is to issue the policy statement; include a provision in the integrated process regulations to ensure that tribal consultation begins, at the latest, no later than 30 days after issuance of the NOI; and establish the Tribal Liaison.

278. Although some other Federal agencies have done so, we will also not include a more general definition of tribal consultation in the regulations. BIA, for instance, is guided by the definition of the Advisory Council in the latter's regulations governing

[247] Nez Perce, Menominee, NF Rancheria, Maidu, NW Indians, CRITFC, S–P, CRITFC. NHA and Interior agree.

[248] Nez Perce, Umatilla, Interior.

[249] Interior recommends that, in addition to a pre-NOI check, there should be a check point when the parties receive the potential applicant's proposed study plan and another when the application has been filed.

[250] Fort Peck, NF Rancheria.

[251] Catawba, Choctaw.

[252] We reviewed the policies of other independent agencies, including the Federal Communications Commission, FCC No. 00–207 (June 8, 2000), 16 FCC Rcd 4078; 2000 FCC LEXIS 3245; 20 Comm. Reg. (P&F) 1316; the Federal Emergency Management Agency, ''Final Agency Policy for Government-to-Government Relations with American Indian and Alaska Native Tribal Governments (Sept. 25, 1998), 64 Fed. Reg. 2096 (Jan. 12, 1999); the Environmental Protection Agency (EPA), Memorandum to all EPA Employees from Christine Todd Whitman, EPA Administrator, dated July 12, 2001; and the Nuclear Regulatory Commission (NRC), Memorandum to NRC Commissioners from William D. Travers, Executive Director for Operations, dated February 2, 2001.

[253] Order No. 635 Policy Statement on Consultation with Indian Tribes in Commission Proceedings (PL03–4–000), III FERC Stats. & Regs., Regulations Preambles 104 FERC ¶ 61,108 (July 23, 2003).

[254] 18 CFR 2.1(c).

[255] 18 CFR 5.7.

[256] City of Tacoma, WA, 71 FERC ¶ 61,381 at p. 62,493 (1995); Skokomish Indian Tribe, 72 FERC ¶ 61,268 (1995); *See also* FPC v. Tuscarora Indian Nation, 362 U.S. 99 at p. 118 (1960), *reh. denied*, 362 U.S. 956; and City of Tacoma, WA, 89 FERC ¶ 61,275 (1999). In this regard, we note particularly that the Tribal Group agreed that government-to-government consultation must be consistent with the Commission's *ex parte* regulations.

consultation under Section 106 of the NHPA, 36 CFR 800.16(f). This regulation, which is not specific to tribal consultation, defines consultation as ''the process of seeking, discussing and considering the views of other participants, and, where feasible, seeking agreement with them regarding matters arising in the Section 106 process.'' It adds that ''[The Secretary of Interior's] 'Standards and Guidelines for Federal Agency Preservation Programs pursuant to the National Historic Preservation Act' provide further guidance on consultation.''

279. In our view, tribal consultation pursuant to our trust responsibility encompasses far more than implementation of NHPA Section 106. It includes every issue of concern to an Indian tribe related to a treaty, statute, or executive order where the Commission can, through the exercise of its authorities under the FPA, fulfill its trust responsibility. That is a very broad concept, and we are convinced that establishing the consultation process with respect to any particular case through direct communications with the affected tribes will be more meaningful than any general language we could put in the regulations.[257]

2. Tribal Liaison

280. Our proposal to establish a Tribal Liaison was supported by all of the commenting tribes and the Advisory Council.[258] There is a consensus among the commenters that the liaison should not be merely a clerical position, but should also not have decisional authority.[259]

281. Commenters suggest various roles and responsibilities for the Tribal Liaison. These include facilitating government-to-government consultation by directing tribes to the right person or persons to deal with substantive or policy issues; ensuring that communications are maintained between tribal representatives and Commission staff throughout the proceeding;[260] assisting tribal knowledge of and participation in the Commission's processes;[261] educating Commission staff about tribes and the trust responsibility and treaty obligations,[262] assisting tribes in learning how to access and effectively use the informational resources of the Commission's Web site;[263] and informing tribes of activities at a project during licensing and throughout the term of a license that may affect tribal resources on or off the reservation.[264]

282. GLIFWC and Menominee state that because the process for government-to-government consultation needs to be developed in agreement with each tribe, the roles and responsibilities of the Tribal Liaison cannot be fully determined at the outset, but must evolve in response to the development of tribal-specific agreements.

283. The Tribal Group essentially endorsed all of these recommended responsibilities and added the following:

- Coordinate with tribal liaisons at other agencies;
- Help determine which tribes may be affected by likely future relicensing applications or original license applications;
- Inform potentially affected tribes about potential future relicensing applications and facilitate tribal participation in rulemaking proceedings;
- Become educated about the rights of Indians;
- Assist tribes in making known their issues and views on compliance with treaties and the trust responsibility;
- Ensure that tribes are informed of studies and information with cultural resources or treaty rights implications;
- Manage communications between the Commission and tribes when the *ex parte* rule is in effect;
- Facilitate communications between applicants and tribes; and
- Facilitate informal dispute resolution between the applicant and a tribe.

284. Only Skokomish and NW Indians suggest that the Tribal Liaison should play an active role in the substantive resolution of licensing proceedings. NW Indians recommend that the Tribal Liaison or Liaisons should be educated about individual tribes and their interests in specific proceedings and act as their advocate within the Commission.

285. We agree with the majority of the commenters that the Tribal Liaison should be a facilitator of government-to-government consultation, and should not be responsible for resolution of substantive issues. The latter requires expertise with specific resources, plus a thorough knowledge of the facts relevant to a specific case. The Commission employs technical experts for such matters, as do many tribes. The Tribal Liaison will provide expertise with respect to matters of process.

286. Regarding the specific responsibilities of the position, the Tribal Liaison will seek to educate Commission staff about tribal governments and cultures and to educate tribes about the Commission's various statutory functions and programs. The Tribal Liaison will work with the tribes during Commission proceedings, to ensure that the tribes' views are appropriately considered at every step of the process. The Tribal Liaison will act as a guide for the tribes to Commission processes, and will strive to ensure that consultation requirements are met The Tribal Liaison will have considerable flexibility in carrying out these responsibilities, consistent with the evolving nature of tribal consultation.

287. Various commenters indicate that there are too many tribes and too many tribe-specific, case-specific, and interrelated regional or watershed issues for one person to understand and act upon. Some suggestions in this regard include multiple liaison positions based on regions of the country, watersheds or river basins, or sub-regions within a state.[265] Pacific Legacy suggests that the efforts of the Commission's liaison should be complemented by a liaison from each tribe for each project, to be funded by the applicant. The Tribal Group stated that the Tribal Liaison should be a regional position, with an overall coordinator position at the Commission's headquarters.

288. Our decision on the number of Commission staff serving as Tribal Liaison involves two basic considerations; the responsibilities of the position and the level of effort necessary to effectively carry out the responsibilities. At this point we can define the responsibilities of the position, but only time and experience will tell us with certainty what level of effort is necessary.

[257] S–P states that the rules should require each license proceeding to include an assessment of treaty rights and an agreement with the tribe on how those rights will be honored. Although treaty rights need to be considered, S–P appears to suggest that the Commission and the tribe must reach agreement on the substantive disposition of the license application. That is something we cannot do consistent with our statutory responsibilities.

[258] S–P, Nez Perce, NW Indians, CRITFC, Umatilla, GLIFWC, HRC, Advisory Council, Menominee, Skokomish, Interior, NF Rancheria.

[259] S–P, Nez Perce, NW Indians, CRITFC, Umatilla, GLIFWC, Menominee.

[260] NW Indians, Nez Perce, Umatilla, GLIFWC, Menominee. They indicate that the correct person would depend on the issues under consideration; *e.g.*, a technical issue dealing with a fisheries study would be dealt with by a fishery biologist, while an issue concerning the appropriate elements of government-to-government consultation with the tribe might be directed to senior Commission staff. We agree.

[261] SCE.

[262] GLIFWC, Menominee.

[263] GLIFWC.

[264] Interior.

[265] Pacific Legacy, GLIFWC, Menominee, CRITFC, S–P, California, Interior.

3. NHPA Section 106

289. In response to licensee requests, the NOPR clarified how the Commission meets its responsibilities to Indian tribes under NHPA Section 106.[266] The Advisory Council states that this discussion is accurate. NHA however states that while the Historic Resources Management Plan (HPMP) guidance document issued jointly by the Commission and the Advisory Council [267] is useful, the documentation requirements for license applications are inconsistently applied. It states that some staff require a draft Programmatic Agreement (PA) when the application is filed, others want the HPMP to be complete before the application and prior to the PA, and in other cases these documents are allowed to be completed after the license is issued. NHA states that the proposed integrated process regulations are clear that a draft HPMP needs to be filed with the application when the potential applicant has been designated as the Commission's non-Federal representative, but that the traditional process and ALP regulations need to provide the same clarity.

290. NHA and others [268] also request that we explain how the Section 106 consultation process relates to the overall licensing process. Section 106 consultation begins at the same time as the licensing process; that is, when the NOI and PAD are filed and distributed. 18 CFR § 5.8(b)(2) provides for the license applicant to request to initiate consultation at the beginning the pre-filing consultation or, if it is not designated as the Commission's representative for this purpose, for the Commission to initiate consultation.[269] The Commission-approved study plan and schedule provided for in 18 CFR 5.11 through § 5.13 should include studies pertaining to issues raised pursuant to Section 106. The PA must be completed prior to license issuance, but the HPMP can be prepared prior to or following issuance of the license.

291. They also request that the Commission undertake in such circumstances to do any necessary studies itself. The fact that a potential applicant does not become the Commission's non-Federal representative, for whatever reason, does not relieve it, as the project proponent, of the responsibility to undertake the information gathering or studies the Commission determines are necessary to provide the evidentiary record to support a reasoned decision.

4. Other Matters

292. The Tribal Group recommended that the regulations require each potential applicant to designate one person as its point of contact for Indian tribes. We think this is a matter best worked out via consultation between potential applicants and individual tribes.

293. Finally, Washington, Maidu, and Skagit indicate that participation in licensing is costly and that the Commission should work with states and tribes to identify and develop sources for funding of tribal participation that will foster consistent, active participation and rapid turn-around times by tribes. CRITFC recommends that the Commission require applicants to fund liaisons under the control and direction of tribes. NW Indians add that even if the Commission cannot require applicants to fund tribal participation, it should encourage them to do so.

294. The Commission is aware that participation in licensing proceedings can entail significant expense. Federal funding for Indian tribes is however the responsibility of other Federal agencies. We note however that some applicants have found such funding to be beneficial in specific circumstances, and we encourage applicants to consider whether it may be beneficial in the context of their potential applications.

*O. Environmental Document Preparation*

1. Cooperating Agencies Policy

295. The NOPR proposed to modify, as to federal agencies, the Commission's policy that an agency which has served as a cooperator in the preparation of a NEPA document may not thereafter intervene in the same proceeding, and to make conforming revisions to our *ex parte* rule. The rationale for the existing policy is that cooperating agency staff will necessarily engage in off-the-record communications with the Commission staff concerning the merits of issues in the proceeding, so that, if the agency is allowed to become an intervenor, it will then have access to information that is not available to other parties, in violation of the prohibition in the APA and our rule against on *ex parte* communications.[270]

296. In the NOPR, we concluded that the likely benefits of better coordination between federal agencies in the exercise of their responsibilities, a more complete record, and reduced duplication of effort outweighed the potential for prejudice to other parties that would not have access to some information and decisional communications between the Commission and the cooperating agency. To minimize the potential for prejudice to other parties, we proposed to require that any cooperating agency that provides the Commission with study results or other information also serve such materials on parties to the proceeding.

297. State agencies and NGOs generally support this proposal, and request that we also reverse the policy for state agencies, including water quality certification agencies.[271] SCE also supports the proposed change, provided that cooperating agencies are precluded from challenging the content and completeness of a jointly-prepared environmental document.

298. NHA does not take a position on the proposed policy change, but suggests that any change in policy occur after the transition period, so as not to disrupt ongoing proceedings. PG&E and Duke assert that if the policy change is to apply to gas certification proceedings as well, the Commission should first provide public notice and an opportunity for comment.

299. Several commenters strongly oppose the proposed change in policy.[272] They assert that the changed policy would make cooperating agencies who also intervene ''super parties'' with

[266] 68 FR at pp. 14001–003; IV FERC Stats. & Regs. ¶ 32,568 at pp. 34,716–718.

[267] This document provides guidance to applicants and licensees for preparing their historic resource management plans. It is available on the Commission's Web site at *http://www.ferc.gov/hydro/docs/hpmp.pdf*.

[268] *E.g.,* Spiegel.

[269] The Advisory Council and NHA requested this provision.

[270] *See, e.g.*, Rainsong Company, 79 FERC ¶ 61,338 at 62,457 n.18 (1997).

[271] Washington, Georgia DNR, Wisconsin DNR, Washington DNR, California, CSWRCB, Interior, NOAA, HRC. California asserts that the prohibition on *ex parte* communications would not be an issue with respect to states if the Commission were to change its practice of preparing NEPA documents that include, in addition to an environmental impact analysis, analysis and recommendations to the Commission concerning which of the reasonable alternatives considered is the preferred alternative. California would have us put all such analysis in a separate document. California further suggests that the *ex parte* issue could be obviated if the Commission staff who process the application and prepare the NEPA document were separate from the decisional staff that advised the Commission. We will not adopt California's suggestions because preparing two environmental documents in each case and requiring that two separate sets of Commission staff be assigned to every proceeding would likely add expense and delay to proceedings, and would place an undue burden on our resources. Moreover, given that decisions about the scope and conduct of the environmental analysis may have a significant bearing on the ultimate outcome of a proceeding, we are unsure that California's proposals would obviate concerns about fairness and *ex parte* requirements.

[272] *See, e.g.*, Alabama, Duke, EEI, Idaho, Spiegel.

access to more information than others, and thus would violate the APA's prohibition against *ex parte* communications.[273] In support of their contentions, these commenters cite the Commission's statement when it amended its *ex parte* rule that ''a hearing is not fair when one party has private access to the decision maker and can present evidence or argument that other parties have no opportunity to rebut,''[274] as well as case law. *See e.g.*, *Home Box Office* v. *FCC*, 567 F.2d 9 (D.C. Cir. 1997) (*HBO*); *Portland Audubon Society* v. *Endangered Species Committee*, 984 F.2d 1534 (9th Cir. 1993) (*Audubon*); *Professional Air Traffic Controllers Organization* v. *Federal Labor Relations Authority*, 685 F.2d 547 (D.C. Cir. 1982) (*PATCO*).[275]

300. We continue to believe strongly that maximizing cooperation between the Commission and the federal resource agencies will lead to optimal results in the licensing process. However, we conclude that precedent indicates that allowing federal agencies to serve both as cooperators and intervenors in the same case would violate the APA. Our proposal to change the existing policy rested on a plain meaning reading of the APA provisions which the courts have not adopted. Rather, the courts have interpreted the APA more broadly on this point in order to ensure that the purposes of the statute are fulfilled. We therefore will not change the policy precluding cooperating agencies from also being intervenors.

2. NEPA Document Contents

301. California and PFBC state that the filing requirements for license applications include information on the costs of the applicant's proposed PM&E measures, but not information on the economic benefits of those measures. They assert that the NEPA document should contain a much expanded discussion of the latter. Our policy concerning this matter was discussed above.[276]

302. NOAA Fisheries recommends that the regulations include a standard methodology ''to calculate project economics.''[277] Economic evaluations in the context of our public interest analysis cannot be reduced to a formula. For example, one component is a comparison of the current cost of project power under each reasonable alternative to the current cost of the most likely alternative source of power. The comparison helps to support an informed decision concerning what is in the public interest.[278] The estimated current cost of project power under each alternative is of course the sum of many other estimates, principally of the costs of PM&E measures proposed by applicants, agencies, Indian tribes, and NGOs. PM&E measures are moreover not standardized in any way, but are made on a site-specific basis, and often require, in addition to capital cost estimates, annualized estimates of long-term operation and maintenance expenses. Such estimates rest on myriad debatable assumptions upon which reasonable people often disagree.

303. The means of determining the current cost of the most likely alternative source of power also cannot be reduced to a formula. It is based on the project-specific operating regime (*e.g.*, run-of-river or peaking) and is made in the context of regional power markets. For instance, the most likely alternative to baseload hydroelectric capacity in some regions is baseload power from a coal-fired plant. The most likely alternative to hydroelectric energy is typically a combined cycle gas-fired combustion turbine. The value of such power varies from region-to-region and time-to-time. Each NEPA document fully explains the determination of the most likely alternative source of power and the basis for its valuation.

304. The NOPR proposed to accompany draft NEPA documents and environmental assessments with draft special license articles (*i.e.*, articles specific to a project).[279] NHA supports this, but states that standard form license articles should also be included in order to enable the U.S. Forest Service to address concerns it purportedly has about the Commission's administration of projects on National Forest lands. The U.S. Forest Service did not raise this issue. In any event, the standard form license articles are a matter of public record[280] and anyone may request the Commission to modify them.

305. The NOPR proposed to revise our practice in preparing NEPA documents to more clearly separate resource impact analysis from decisional analysis.[281] California reiterates its prior assertion that we should issue NEPA documents containing only resource impact analysis on the ground that it would eliminate any *ex parte* problem associated with state agencies acting as cooperating agencies. We rejected this argument in the NOPR[282] and above.[283]

306. NHA, SCE, HRC and others support our proposal to better separate the environmental impact analysis from decisional analysis; that is, decisional analysis will appear only in the comprehensive development section of the NEPA document. NHA and SCE ask that we make clear that discussion of alternatives and potential mitigation measures in the NEPA document is part of the resource impact analysis under NEPA. We are not entirely clear what these commenters are requesting. We think it is self-evident that the environmental impact analysis under NEPA will cover alternatives and potential mitigation measures. These things are however also likely to be considered, or at the least referred to, in the decisional analysis.

307. HRC requests that a NEPA document prepared in cooperation with another agency include in the environmental analysis the views of each agency where there is a disagreement in the agencies' conclusions concerning impacts to resources. We think the cooperating agencies should decide how best to present the resource impact analysis in such a case.

308. RAW continues to assert that the baseline for environmental analysis on relicensing should be pre-project conditions. We rejected such assertions in the NOPR,[284] and RAW offers no new arguments that would cause us to change our well-established and judicially-approved policy in this regard.

309. Finally, VANR opposes our practice of issuing a single

[273] *See* 5 U.S.C. 557(d)(1)(A) & (B).

[274] Order No. 607, Regulations Governing Off-the-Record Communications, 64 FR 51222 (Sept. 22, 1999); FERC Stats. & Regs. ¶ 31,079 at 30,878 (Sept.15, 1999).

[275] APA Section 557(d)(1) bans *ex parte* communications to or from ''interested persons'' outside the agency. The *PATCO* court held that the ban is not intended to have limited application and that ''[t]he term 'interested person' is intended to be a wide, inclusive term covering any individual or other person with an interest in the agency proceeding that is greater than the general interest the public as a whole may have.'' 685 F.2d at 562. *Audubon*, which holds that the President and White House staff are not exempt from Section 557(d)(1), similarly notes that the legislative history of the provision confirms the ban is to be broadly construed in order to achieve the appearance and reality of open decision-making. 984 F.2d at 1543–44. *HBO* holds that all relevant information must be disclosed in order to ensure the efficacy of judicial review. 567 F.2d at 54.

[276] *See* Section III.L.1.

[277] NOAA Fisheries, p. 8.

[278] *See* Mead Corporation, Publishing Paper Division, 72 FERC ¶ 61,027 at pp. 61,068–069 (1995).

[279] 68 FR at pp. 14004–005; IV FERC Stats. & Regs. ¶ 32,568 at p. 34,722.

[280] The current standard form articles are published at 54 FPC 1799–1928 (1975).

[281] 68 FR at p. 14004; IV FERC Stats. & Regs. ¶ 32,568 at pp. 34,721–722.

[282] 68 FR p. 14004; IV FERC Stats. & Regs. ¶ 32,568 at p. 34,721.

[283] Section III.O.1.

[284] 68 FR at p. 13995; IV FERC Stats. & Regs. ¶ 32,568 at p. 34,706.

environmental assessment in some cases. VANR believes this increases the likelihood of process delay in the form of requests for rehearing. A single environmental assessment is issued only when the Commission is able to make a finding of no significant impacts, which is generally in cases where there is little or no controversy. The parties are in any event afforded an opportunity to comment before the order acting on the license application is issued. The integrated process makes no change in this practice.[285]

3. Endangered Species Act Consultation

310. NOAA Fisheries and Interior state that the integrated process regulations should clearly identify points at which ESA consultation occurs, such as initiation of formal and informal consultation.[286] NOAA Fisheries also recommends language to encourage either the potential applicant or the Commission staff to initiate informal or formal consultation when the process begins.

311. The part 5 regulations are replete with references to ESA consultation. The section on the NOI states that the NOI may include a request by the potential applicant to be the Commission's designated non-Federal representative for this purpose.[287] The notice of commencement of proceeding will contain, if appropriate, a request by the Commission to initiate informal consultation and, if applicable, designate a non-Federal representative.[288] The PAD must include existing information on threatened and endangered species.[289] One of the specified topics for the scoping meeting is a schedule for ESA consultation in the process plan and schedule.[290] Study requests following this meeting should include requests related to threatened and endangered species.[291] The application contents include a discussion of the status of ESA consultation.[292] The tendering notice will update the processing schedule, if required, including ESA consultation.[293]

312. In addition, although it is not reflected in the regulations, our well-established practice is to issue a biological assessment with the draft NEPA document, and the joint agency ESA regulations[294] are clear concerning how and when Interior and Commerce are to respond to that document. In sum, we think the regulations we are adopting provide sufficient clarity concerning the interaction between the licensing process and ESA consultation.

313. Interior, citing the Interagency Task Force report on ESA consultation,[295] also implies that information gathering and studies for ESA purposes should be conducted independent of the rules for information gathering and studies in the licensing process. Interior offers no reason why this should be so, and it would be inconsistent with the entire thrust of the integrated process, which is to maximize coordination of Federal, state, and tribal processes.

314. Finally, Washington DNR states a license or license amendment might be inconsistent with an existing Habitat Conservation Plan (HCP) approved by the USFWS and NOAA Fisheries for various species in Washington State and, if that were the case, the HCP would have to be amended.[296] Washington DNR indicates that the Commission should require the licensee in such circumstances to reimburse Washington State for any costs associated with the HCP amendment. Decisions concerning funding of state agencies are however a legislative responsibility.

4. Fish and Wildlife Agency Recommendations

315. The NOPR proposed to modify our regulations which set forth procedures for consideration under FPA Section 10(j)[297] of recommendations made by Federal and state fish and wildlife agencies pursuant to the Fish and Wildlife Coordination Act.[298] The proposed modifications would, with one minor exception, not change the existing procedures, but would simply restate the existing practices with more clear reference to the statutory standards. The only change in procedure would be that Federal and state fish and wildlife agencies would no longer receive separate notice by letter of the preliminary consistency determination that is made in the Commission's draft NEPA document (or single environmental assessment). In the future, service of the draft NEPA document would serve as notice.

316. Oregon objects to the proposal to give notice of preliminary consistency determination in the draft NEPA document. Oregon suggests that notice by letter is necessary to ensure that state agencies do not miss the opportunity for 10(j) negotiations.[299] This should not be a matter of concern. We are not aware of any case in which a Federal or state fish and wildlife agency has failed to receive the Commission's draft or final NEPA document.

317. Interior proposes that the regulations include criteria for the acceptance of 10(j) recommendations, based on a ''team'' approach in which the Commission staff and fish and wildlife agencies would confer before issuance of any preliminary consistency determination. However, at the point where the draft NEPA document or single environmental assessment is ready to be issued there has already been substantial consultation on these matters. Interior's proposal would also, for all practical purposes, be a pre-draft NEPA document 10(j) negotiation procedure. It would be inconsistent with our goal of expeditious resolution of licensing applications to provide an additional, duplicative process step.[300]

318. Snohomish states that the regulations should specify the step in the integrated process at which the 10(j) process begins. The regulations state that the process begins when federal and state agencies submit their 10(j) recommendations in response to the REA notice.[301]

319. California asserts that it cannot reasonably be asked to make final 10(j)

[285] *See* 18 CFR 5.24(d).

[286] Washington and Washington DNR state that ESA consultation should begin with the NOI and be completed before the application is accepted for filing.

[287] 18 CFR 5.5(e).

[288] 18 CFR 5.8(b)(2).

[289] 18 CFR 5.6(d)(3)(v).

[290] 18 CFR 5.8(b)(3)(viii).

[291] 18 CFR 5.9(a).

[292] 18 CFR 5.18(b)(3)(ii).

[293] 18 CFR 5.19(b).

[294] 50 CFR part 402.

[295] This report provides guidance for integrating and coordinating the procedural steps of the licensing and ESA Section 7 consultation processes. The intent of the agreement report is to incorporate ESA issues into prefiling consultation on study needs, the filing of a draft biological assessment with the license application when possible, and integrating ESA issues with the NEPA document and 10(j) negotiations, so that all processes are on the same track. The ITF's guidance documents are posted on the Commission's Web site at *http://www.ferc.gov* on the hydro page.

[296] The PAD is required to describe any applicable HCPs, so that any potential conflicts with a license or amendment proposal are brought to light early.

[297] 16 U.S.C. 803(j).

[298] 16 U.S.C. 661 *et seq.*

[299] Oregon also urges us to defer to state agency recommendations instead of requesting additional support for recommendations that the Commission staff believes are not adequately supported on the record. Such deference would be inconsistent with the Commission's obligation to independently analyze all public interest issues. Our approach to consideration of 10(j) recommendations is moreover long-established and judicially approved. *See National Wildlife Federation* v. *FERC,* 912 F.2d 1471 (D.C. Cir. 1990); *accord, American Rivers* v. *FERC,* 187 F.3d 1007 (9th Cir. 1999).

[300] Implementation of section 10(j) has been discussed by the Interagency Task Force on hydropower, which consists of staff from the Commission and other Federal agencies. Additional discussions may be conducted in the future, if necessary.

[301] 18 CFR 5.26(a).

recommendations without the benefit of the Commission's NEPA analysis. It recommends that we provide for preliminary 10(j) recommendations, which would be due 60 days after the REA notice, and final recommendations, which would accompany the agency's comments on the draft NEPA document. The 10(j) process however already includes a response by Commission staff to the 10(j) recommendations (the preliminary consistency determination), which initiates an opportunity for agencies to file responsive comments, including modifications to their 10(j) recommendations.[302] That is not changed. We *see* no need to burden the process with a second opportunity to modify these recommendations.

320. The NOPR proposes that modified mandatory terms and conditions be filed 60 days following the deadline date for comments on the draft NEPA document or environmental assessment. Washington suggests that the time frames for the 10(j) process should be on the same track as the track for mandatory conditions because there may be related issues. It states, for example, that a modified fishway prescription might be inconsistent with an earlier-filed 10(j) recommendation. The 10(j) recommendations and the Commission's preliminary consistency determination are in the public record and served on all parties to the proceeding. If a Federal or state agency or Indian tribe with mandatory conditioning authority elects to impose a condition inconsistent with a state agency's 10(j) recommendation, the mandatory condition would prevail.

321. NOAA Fisheries states that the Commission's determinations that 10(j) recommendations are inconsistent with the FPA often rest on the conclusion that a recommended measure is too costly relative to the expected environmental benefits. NOAA Fisheries states that these determinations appear to be arbitrary because there is no standard formula for determining the cost of 10(j) recommendations. It asks that we establish a standard methodology for these determinations and include it in the regulations. NOAA Fisheries' concerns in this regard were addressed above.[303]

322. In a related vein, Interior recommends that the regulations specify in detail procedures for determining pursuant to the comprehensive development standard of FPA Section 10(a) whether to accept the recommendations of parties to licensing proceedings, including 10(j) recommendations. The procedures for processing all aspects of a license application are set forth in the integrated process rules or in parts 4 and 16, as applicable. To the extent Interior may be requesting the establishment of a formula for determining the public interest, public interest determinations are made with reference to a myriad of statutory and regulatory provisions and case-specific factual circumstances and cannot be reduced to a formula.

323. HRC does not request the establishment of a formula for acceptance or rejection of 10(j) recommendations, but does request that our consistency determinations provide a more specific explanation of how cost figures into each decision. The Commission is committed to providing a full explanation of how all relevant considerations are factored into its decisions.[304]

324. Georgia DNR requests that we include in the integrated process formal guidelines to address state-listed threatened and endangered species. We do not believe there is a need for any additional guidelines concerning state-listed species, as consideration of them is already built into the integrated process. State fish and wildlife agencies should participate in development of the study plan and schedule, including NEPA scoping, then make recommendations concerning protection of state-listed species pursuant to FPA Section 10(j) in response to the REA notice.

### *P. Time Frame for Integrated Process*

325. The NOPR included a detailed, sequential description of the process steps in the proposed integrated process, including time frames for each of the process steps.[305] We requested comments on which process steps might need to be adjusted, and which time frames, if any, should be specified in the regulations for purposes of guiding development of a process plan and schedule (including studies), and which may not be appropriate for specification in the regulations, but should be developed entirely in the context of case-specific facts.[306] Many comments were filed on the proposed time frames. In this section we consider comments on the overall process.[307] Comments on the time frames for specific steps are discussed with the relevant subject matter.

326. Many commenters state that the overall process time frame of 5.5 years is unrealistic.[308] They cite the complex, multi-party, multi-jurisdictional nature of the proceeding; study requirements that often require more than one or two years of data; [309] the likelihood of one or more occurrences that could impair the timely development of the evidentiary record, such as droughts; weather conditions such as heavy snowpack that can cause lengthy delays in the initiation of field work or may force the revision of planned studies; newly listed threatened and endangered species; the possibility that potential applicants may not adequately fulfill the study plan; the likelihood that some applications will be considered in the context of multi-project environmental analyses covering projects in the same river basis with different expiration dates; [310] and potential difficulties melding the integrated process with the processes of Indian tribal governments, particularly those with modest resources.[311]

327. California and others state that strict adherence to a 5.5-year time frame emphasizes speed at the expense of sound science and quality decision-making, will stifle meaningful public and agency participation, and will cause the process to break down, resulting in needless rehearings and appeals.

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[302] Although the process has always been conducted in a manner that contemplates modifications to 10(j) recommendations, the regulations may not be entirely clear in this respect. We have therefore clarified the regulation text. *See* 18 CFR 5.25(c).

[303] Section III.O.2.

[304] HRC suggests that not making formal dispute resolution available for study disputes related to possible 10(a) and 10(j) recommendations increases the risk of disputes over the recommendations themselves. It urges us to increase the use of neutrals to resolve such disputes. We have not traditionally used neutrals in disputes between Commission staff and the parties to proceedings following the issuance of draft NEPA documents, but we are not categorically opposed to HRC's suggestion. As experience is developed with the formal pre-filing study dispute resolution process, it may make sense to further consider whether neutral technical experts could play a useful role in this area as well.

[305] NOPR Section III.E.2 and Appendix C.

[306] 68 FR at p. 14011; IV FERC Stats. & Regs. ¶ 32,568 at p. 34,733.

[307] The Commission received several hundred specific recommendations regarding modifications to the regulation text. These recommendations may be discussed in the preamble in the context of a significant issue, but many recommendations are redundant of the recommendations of other commenters, or are technical corrections, or while meritorious and incorporated into revised regulatory text, do not require discussion in the preamble.

[308] California, SCE, Oregon, PFMC, MPRB, PFMC, VANR, Oregon, GLIFWC, NHA, WPPD, S–P, CRITFC, Noe, Wisconsin DNR, Long View, PG&E, Snohomish, Xcel, Washington, ADK, IDEQ, Minnesota DNR, Interior, HRC, Menominee.

[309] California, Oregon, NOAA Fisheries, Interior, PFMC, and CRITFC point to such examples as mortality studies of anadromous fish, which require multiple release groups over as much as five years to obtain data from just one brood year.

[310] California.

[311] S–P, Menominee, GLIFWC, CRITFC.

California recommends that we assume a process requiring at least 6.5 years. Interior agrees and, if we adopt the 5.5-year process, change all of the 15–30 day time frames to 45–90 days. California also recommends that we modify the rule to provide for negotiated schedules.

328. We are aware that there may be instances in which factors such as those cited above or others, such as lack of water quality certification, will prevent a license application from being developed and processed within the 5.5-year time frame, and that there will continue to be cases where annual licenses are issued. That said, we continue to think the best approach the Commission can take is to design a process that, to the greatest extent possible under the existing statutory scheme, addresses the causes of delay and disputes over the sufficiency of the record. The proposed integrated process was designed to do so. We are confident that the integrated process, with modifications based on the post-NOPR comments and consultation activities, offers the best means of meeting our goals.

*Q. Settlement Agreements*

1. Time Outs

329. Many commenters urge us to reconsider our decision not to include specific provisions in the regulations for a ''time out'' period during which processing of a license application could be suspended while settlement discussions take place.[312] Oregon suggests a period of 12–18 months would be appropriate. HRC similarly suggests that the processing schedule could be developed to include time for settlement discussions, with the schedule for the Commission's NEPA document adjusted upon the request of the parties to ensure that any settlement agreement which may be filed is one of the action alternatives.

330. These commenters do not disagree that the integrated process should help to foster settlements by ensuring early issue identification and production of information. They contend however that the labor intensive nature of the integrated process and settlement discussions, and the tight time frames in the integrated process, will prevent participants from participating simultaneously in both activities. They add that settlement agreements enhance the strength and durability of the license, help to avoid conflicting Federal and state license conditions, and minimize litigation.

331. They also challenge our statement that the pressure a firm processing schedule places on the parties is an incentive to reach settlement. They argue that time outs increase the likelihood of settlements because it often takes significant time for all parties to fully understand the implications of various potential provisions, which is needed for complete buy-in to an agreement. They add that enforcement of strict deadlines, such as for responses to REA notices, will force parties to take adversarial positions.[313] We continue to adhere to our conclusion in this regard, which is based on our experience.

332. In response to the concerns expressed in the NOPR about maintaining timeliness, the commenters indicate that reaching settlement is more important than strict adherence to a schedule, and that the Commission can place reasonable limits on the amount of time that processing will be suspended while the parties negotiate and require periodic status reports. These comments essentially restate comments made prior to the NOPR.

333. We are not inclined to grant requests for regulatory language that guarantees time outs or implies that they should be routinely granted. We think however there is benefit to codifying the considerations that should be addressed by parties who seek suspension of the procedural schedule to pursue settlement agreements. The provisions we are adopting in this connection make clear that a lack of progress toward the timely filing of a settlement agreement may cause the Commission to terminate any suspension of the procedural schedule that it has granted.[314]

2. Other Matters Pertaining to Settlements

334. The NOPR responded to many commenters who requested guidance in the regulations on what kinds of settlement provisions are or are not acceptable, including adaptive management programs, mitigation measures in lieu of additional studies, mitigation measures outside of existing project boundaries, and confidentiality agreements. In declining to adopt this recommendation, we explained our policies and practices in this regard, with citations to relevant orders. We further explained that it is inappropriate to put general guidance in the regulations because each settlement agreement measure must be evaluated individually in light of the entire record and factors identified in the FPA and other relevant legislation.[315]

335. Several commenters renew their requests for guidance. Some essentially repeat their earlier submissions. Others state that the Commission's response in the NOPR, while helpful, is insufficient. Interior and Oregon, for example, request that we provide additional guidance by compiling case studies and examples of successful agreements.[316] Regarding the second point, Interior and Oregon appear to be asking for guidance on the substantive content of settlement agreements. The best general guidance we can give is that we strive to approve and give effect to all uncontested settlement agreements to the maximum feasible extent, within the bounds of the law and consistent with the public interest. Instances where the Commission has rejected a substantive provision of a hydroelectric licensing settlement that is lawful and within our jurisdiction to enforce are quite rare. If there is any question concerning whether a potential settlement provision has been previously rejected by the Commission or is likely to be rejected, we encourage the parties to confer with the Commission staff.

336. HRC acknowledges that decisions on settlement agreements are based on the law and the record of individual cases, but requests periodically updated guidance on the boundaries of the law concerning what is acceptable, formatted similarly to the Council on Environmental Quality's ''Forty Most Asked Questions Concerning CEQ's NEPA

[312] OWRC, Long View, Reliant, Oregon, CRITFC, Xcel, NHA, VANR, IDFG, GKRSE, Interior, Process Group. NYSDEC states that explicit provisions for time outs are not needed, but that the Commission should grant reasonable requests for suspensions that will help advance settlement talks. Georgia DNR supports a brief suspension of the schedule only where the Commission determines it is ultimately likely to expedite the licensing process. Only Alabama Power opposes a time out provision.

[313] Interior states in this connection that it cannot engage in settlement negotiations that compromise its authorities, presumably by causing it to lose its conditioning authority by failing to meet deadlines in the licensing process. It states that if it agrees to participate in settlement discussions, the Commission must agree to accept as mandatory conditions any resulting settlement provisions, or to accept as timely filed any conditions that Interior may file if settlement negotiations fail. We cannot strike such a bargain, which would compromise the Commission's control of its own processes. Interior must weigh the risks of participation in settlement negotiations in each case.

[314] 18 CFR 5.29(g).

[315] 68 FR at p. 14008; IV FERC Stats. & Regs. ¶ 32,568 at p. 34,727–728.

[316] Interior makes the same request with respect to scientific studies and adaptive management plans.

Regulations.'' [317] We think the statements concerning what the law requires are better made in formal orders or regulations than in guidance documents. The Commission staff stands ready to assist parties if there are questions pertaining to a particular case.

337. NHA states that guidance on formats and components of acceptable settlement agreements would be beneficial. As a general matter, the parties are the persons best able to determine what issues they wish to address in a settlement document and to organize the document. Parties may find it particularly useful to review other settlement documents and use as models those which address the same or similar matters to their proceeding and that have a format useful to them. As with other matters pertaining to settlement documents, there have been several instances in which parties have requested informal staff review of draft documents, a practice we encourage.

338. NOAA Fisheries states that the regulations should require a communications protocol and ground rules for settlement discussions, and should prohibit discussions until the record is complete. NYSDEC disagrees. We responded to NOAA Fisheries' comment in the NOPR [318] and it advances no new facts or arguments.

339. The NOPR also explained the various means of dispute resolution available to parties to proceedings before the Commission, including the use of administrative law judges and Commission staff as facilitators, mediators, and neutrals.[319] ADK states that to succeed in these capacities, Commission staff need to be experienced in hydroelectric licensing. While prior licensing experience is unquestionably beneficial to anyone serving in one of these capacities, it is not a prerequisite. What is essential is training and experience in the relevant discipline. Our Alternative Dispute Resolution training program provides the necessary training to Commission staff.

340. We also explained in the NOPR that we include in licenses settlement agreement provisions that are beyond our authority to enforce if they are included in mandatory terms and conditions.[320] Interior states that there is confusion about how such settlement provisions are to be enforced, and that the confusion would be cleared up if each approved settlement provision the Commission can enforce was incorporated into a numbered license article, and other provisions clearly identified. Interior would like to see this done before issuance of the license order, and the parties given time to amend the settlement agreement in the light thereof.

341. In many cases, settlement agreement provisions approved by the Commission are reformatted into numbered license articles.[321] In other cases, however, it makes more sense from the standpoint of license administration to append the settlement agreement to the license order and include numbered license articles which require the licensee to provide plans to implement various components of the settlement agreement. This is most often the case when the settlement agreement is extremely lengthy or complex.[322]

342. In either case, if there are provisions the Commission cannot enforce, they are identified in the body of the license order.[323] Also, as we have pointed out, the parties are free to include in their agreements other means of enforcing those provisions the Commission itself cannot enforce. Some settlement agreements, for instance, include language characterizing the agreement as a contract.

343. We think it would be inadvisable to amend the regulations to add a time period for the parties to renegotiate the settlement agreement if it contains provisions the Commission cannot enforce. As we have stated, such provisions are almost always procedural and involve the conduct of non-jurisdictional entities, and the precedent [324] is clear, so there is little likelihood of the parties being surprised by such a finding. We are also aware of no case where the settling parties in a hydroelectric licensing proceeding have modified the agreement as a result of the Commission's statement that portions of it are not enforceable by the Commission. Nevertheless, the Commission believes that there may be merit in certain cases to allowing parties a limited opportunity to renegotiate before the Commission issues a license that would not include a critical component of a settlement, or that would include a critical settlement component in a mandatory condition, but that the Commission could not enforce. Therefore, the Commission remains open to considering this approach on a case-by-case basis.

344. Finally, we requested comments on whether the integrated process regulations should encourage potential applicants to include with their draft license application a non-binding statement of whether or not they intend to engage in settlement discussions.[325] Most commenters agreed that this would be beneficial because it would confirm the applicant's intentions with respect to settlement negotiations, which would better enable the parties to assess the prospects for settlement.[326] One commenter suggested that it might also help the Commission to determine the appropriate processing schedule. HRC states that the Commission should also require any such statement to be preceded by discussions with the participants so the intentions of all parties are made clear. A few commenters responded that such encouragement would be meaningless, since it requires the applicant to do nothing, a statement of intent does not commit the applicant to anything, or because the applicant cannot unilaterally decide to conduct negotiations.[327]

345. We have concluded that this is a matter best left to the discretion of the potential applicant because it is likely that there will be many situations in which the potential applicant has not discussed the possibility of a settlement with the other participants when the Preliminary Licensing Proposal or draft license application is filed, or is only able to assess the prospects for settlement after receiving comments on that document.

*R. Original License Applications*

346. We proposed to make the integrated process applicable to original as well as new license applications, and requested comments on that proposal.[328] Most of the few commenters who addressed this issue responded in the affirmative.[329] NHA, California, and NOAA Fisheries state

[317] 55 FR 18026 (Mar. 23, 1981). NYSDEC indicates that generic guidance on such matters unnecessary.

[318] 68 FR at p. 14007; IV FERC Stats. & Regs. ¶ 32,568 at p. 34,727.

[319] 68 FR at p. 14007; IV FERC Stats. & Regs. ¶ 32,568 at p. 34,727.

[320] 68 FR at p. 14008; IV FERC Stats. & Regs. ¶ 32,568 at p. 34,728.

[321] *See, e.g.*, Hudson River-Black River Regulating District, 100 FERC ¶ 61,319 (2002).

[322] *See, e.g.*, Central Nebraska Public Power and Irrigation District and Nebraska Public Power District, 84 FERC ¶ 61,077 (1998).

[323] *See, e.g.*, Avista Corporation, 90 FERC ¶ 61,167 at p. 61,512 n.25 (2000).

[324] Erie Boulevard Hydropower, L.P., 88 FERC ¶ 61,176 (1999).

[325] 68 FR at p. 14007; IV FERC Stats. & Regs. ¶ 32,568 at p. 34,726.

[326] PG&E, Oregon, HRC, IDFG, PFMC, GLIFWC, Menominee, NCWRC, PFBC, Georgia DNR, NYSDEC.

[327] NHA, Long View, NEU, Interior.

[328] 68 FR at p. 14009; IV FERC Stats. & Regs. ¶ 32,568 at p. 34,729.

[329] NHA, California, HRC, PFBC, PFMC, GLIFWC, Interior. NEU would, however, only apply the integrated process to projects greater than 5 MW, which is about one third of all projects.

that it is important for the integrated process to be coordinated with the issuance of preliminary permits, and offer specific proposals for doing so.

347. NHA's proposal is detailed. An applicant for a permit for a project at an existing non-federal dam would be required to demonstrate ownership of the dam or evidence of authorization from the existing dam owner to evaluate the dam for potential generation. If the permit applicant could not satisfy this requirement, the Commission would issue an order to show cause why the permit application should not be dismissed. If good cause to issue the permit was not shown, the permit application would be declared patently deficient and dismissed. This, states NHA, would prevent the issuance of permits to entities that do not own the site or who lack real intent to construct a project.

348. Under NHA's proposal, six months before expiration of a first permit, the permit holder would have to file its NOI,[330] but would not have to file a PAD. A public notice of the NOI would be issued inviting potential competitors to also file an NOI. Thereafter, the permittee and any potential competitors would have to file a skeletal PAD, with both documents due on the same day in order to prevent either party from copying the other's PAD. The Commission would also bar the competitor from using the permittee's materials in any subsequent filings.[331] A PAD that did not meet minimum content standards would be declared patently deficient and rejected, with no opportunity to remedy the deficiency. The new permittee would have a specified period of time to file a new NOI and the same PAD required of all other potential license applicants. Thereafter the same integrated process applicable to relicenses would apply.

349. NHA's proposal would impede development applications at existing dams by entities other than the dam owner. That would be fundamentally inconsistent with Congress' intent to promote competition in hydropower development.[332]

350. California and NOAA Fisheries make much simpler proposals. California would have us require each new permittee to begin prefiling consultation within 30 days from issuance of the preliminary permit and to file an NOI and PAD within 60 days. NOAA Fisheries would require permit applicants to simultaneously file the NOI and PAD.

351. The California and NOAA Fisheries recommendations do not account for the many uncertainties associated with developing an unconstructed project, a lack of existing project-specific information and studies, or the need to obtain other permits, such as a dredge and fill permit under Section 404 of the Clean Water Act. These factors can add significant time to the period needed to prepare a new development application, or even an original license application for a project at an existing dam. For this reason, successive permits are typical in such circumstances. Other commenters recognize this,[333] and some suggest that the labor-intensive and time-sensitive integrated process may be incompatible with original licenses.

352. We affirm our proposal to apply the integrated process to original license applications. We conclude that the existing preliminary permit program and the integrated process can exist side-by-side and do not need any special provisions for coordination. There is no need for the permit term and pre-filing consultation to begin contemporaneously because a permit holder can file a license application any time during the term of the permit, and pre-filing consultation can and does go forward regardless of whether the potential applicant has a preliminary permit.

*S. Competition for New Licenses*

353. The FPA requires an existing licensee that is a potential applicant for a new license to file an NOI.[334] Neither the FPA nor our regulations require a non-licensee that is a potential competitor for a new license to file an NOI. In the NOPR we rejected requests from some licensees to require a potential non-licensee competitor to file an NOI.[335]

354. PG&E and NHA state that they are not concerned about this, as long as we require a potential non-licensee competitor to file its PAD no later than five years prior to license expiration. In effect, this would ensure that the potential non-licensee competitor must show its hand no later than the existing licensee. Likewise, an existing licensee concerned about potential competitors could ensure that any potential competitor may not copy its PAD by also issuing its NOI and PAD at the statutory deadline.[336]

355. Upon further reflection, we have decided that it is appropriate for a potential non-licensee competitor to file both the NOI and the PAD. We previously rejected the NOI requirement for non-licensee potential competitors in order to encourage competition on relicensing.[337] Over two hundred new license applications have been filed since the current rules were promulgated in 1989, but just a few applications have been filed by a non-licensee in competition with a timely-filed application by an existing licensee. It is clear that relieving non-licensee potential applicants of the NOI requirement has not had any effect or competition.

356. More important, the existing policy was developed when only the traditional licensing process existed. The adoption of the integrated process and the requirement for Commission approval to use the traditional process change the landscape considerably. The integrated process is based on clearly delineated steps designed to be completed before the license application is filed. The traditional process is much less prescriptive. If there were competing applications, it is mostly likely that we would require them to be developed using the same process in the same time frame. In any event, we would want to ensure that stakeholders have the same opportunity to comment on both potential applicants' process proposals, and the process proposal is required to be included with the PAD.[338]

357. The remaining question is whether a non-licensee potential competitor should be required to file its NOI and PAD within the same six month window applicable to existing licensees. The importance of process selection to efficient processing, discussed above, persuades us that a potential non-licensee competitor should also be required to file its NOI

[330] NHA states that the permit regulations would have to be modified to permit this.

[331] We have previously held that an application will not be rejected because it contains materials duplicated from another application, even if the material is copyrighted. WV Hydro, Inc. and City of St. Mary's, WV, 45 FERC ¶ 61,220 (1988).

[332] Order No. 496, Information to be Made Available by Hydroelectric Licenses under Section 4(c) of the Electric Consumers Protection Act of 1986, 53 FR 15804 (May 4, 1989), FERC Stats. & Regs., Regulations Preambles 1986–1990 ¶ 30,812 at p. 31,105 (Apr. 28, 1988).

[333] Long View, Troutman, ADK, Wisconsin DNR.

[334] 16 U.S.C. 15(b)(1).

[335] 68 FR at p. 14009; IV FERC Stats. & Regs. ¶ 32,568 at p. 34,729. PG&E notes that the text of proposed 18 CFR 5.3(a) is consistent with the body of the NOPR in this regard, but that proposed 18 CFR 5.3(c) appears to require any potential applicant, whether or not an existing licensee, to file an NOI. We are modifying the language concerning this requirement in accordance with our decision here to require any potential applicant for a new license to file an NOI.

[336] This would if adopted, take care of Long View's concern that a competing non-licensee applicant could photocopy an existing licensee's PAD.

[337] Order No. 513, IV FERC Stats. & Regs. ¶ 30,854 at p. 31,415.

[338] 18 CFR 5.6(d)(1).

and PAD no later than five years before expiration of the existing license.[339]

*T. Summary of Changes to Integrated Process—Regulation Text*

358. In this section, we summarize the changes we are making to the integrated process. The changes are discussed in the order in which they occur in the part 5 regulations. A flowchart of the integrated process with significant modifications in boldface print is posted on the Commission's Web site.

359. The content and distribution requirements for the PAD have been substantially modified.[340]

360. At the time of the notice of commencement of proceeding, the Commission will request commencement of informal ESA consultation if the potential applicant is not designated as the Commission's non-federal representative for this purpose.[341]

361. We are accepting the Tribal Group's request that early tribal consultation be specifically acknowledged in the regulations. To that end, we have added a new section providing for a meeting no later than 30 days following the filing of the NOI between each willing Indian tribe likely to be affected by the potential license application and the Commission staff and other relevant Federal agencies.[342]

362. The NOPR proposed to have the Commission's NEPA Scoping Document 1 issued following the potential applicant's issuance of a revised PAD with a draft study plan. The Process Group concluded that because the study plan should be issue-driven, and because the PAD and other factors should enable participants to begin issue identification from the beginning of the process, the integrated process would work better if NEPA scoping begins earlier. Accordingly, we have modified the rule to provide for the issuance of Scoping Document 1 at the same time the Commission issues the notice that the proceeding has commenced.[343]

363. The proposed rule provided that comments on the PAD ''may'' include initial information and study requests. In light of the fact that the beginning of NEPA scoping has been advanced to the same date as notification that the proceeding has commenced, the regulations have been modified to state that comments on the PAD ''shall'' include the commenters' information and study requests, and should include information and studies needed for consultation under ESA Section 7 or water quality certification.[344] Agencies or Indian tribes with authority to issue water quality certification are strongly urged to participate in this and all other aspects of the development of a Commission-approved study plan and schedule.

364. The proposed rule would have required the potential applicant to file a revised PAD and a proposed study plan. The Process Group concluded that there is no need for a revised PAD if the process is modified to provide additional time for the participants to address the potential applicant's draft study plan. As we are modifying the rule for that purpose, as discussed below, the revised PAD has been eliminated. We stress once again, however, the importance of potential applicant's exercising due diligence in obtaining information and preparing all components of the PAD. It is central to the success of the enterprise.

365. At the same time the potential applicant files its draft study plan, the Commission staff will issue, if necessary, Scoping Document 2.[345] This previously occurred when the study plan determination is issued.

366. Comments on the draft study plan were proposed to be due 60 days after the draft study plan was filed, during which period the Commission staff would have issued Scoping Document 1, with the draft study plan appended.[346] As recommended by the Process Group, Scoping Document 1 has been advanced, and the draft study plan will be served directly on the participants. The comment period on the draft study plan has also been extended to 90 days, and provisions made for the applicants and participants to hold meetings on the study plan during the 90-day period, in order to encourage as much discussion and negotiation as possible among the participants.[347]

367. As proposed, the potential applicant would file a revised study plan for Commission approval, followed by the Commission's study plan order.[348] The Process Group recommended that we add an opportunity for participants to file comments on the revised study plan prior to the study plan order. We have added a 15-day period for this purpose.[349]

368. The formal dispute resolution rules have been modified to include a technical conference open to all parties, before the Advisory Panel begins deliberations.[350]

369. We have clarified the standards for requesting changes to ongoing studies, and for requesting new information gathering or studies following the initial and updated study reports.[351] In brief, requests made following the initial study report are subject to a good cause standard, and requests made following the updated study report are subject to an extraordinary circumstances standard.

370. The requirement to file for comment a draft license application has been replaced by a requirement to file a ''Preliminary Licensing Proposal,'' although a potential applicant may elect to file a draft application.'' [352]

371. The proposed rule provided for comments, interventions, and the filing of preliminary recommendations and terms and conditions 60 days following issuance of the REA notice,[353] to be followed by the issuance of a draft EA or EIS, or an environmental assessment. We have, consistent with our current rules, added a 45-day period for reply comments, which would not affect the proposed time periods for issuance of NEPA documents.[354]

*U. Changes to Traditional Process and ALP*

372. The NOPR proposed four significant changes to the traditional process: (1) Full public participation; (2) mandatory, binding pre-filing dispute resolution; (3) the requirement to file an NOI and PAD; and (4) extending the deadline for filing the water quality certification application until 60 days after the REA notice. The NOI and PAD and related discussion of process selection and transition provisions were discussed above.[355] The water quality certification deadline was also discussed previously.[356]

373. As discussed in this section, we are adopting the changes to ensure full public participation, but have decided to maintain the existing pre-filing dispute resolution process.

[339] 18 CFR 5.5(d).

[340] 18 CFR 5.6 and Section III.E.

[341] 18 CFR 5.8(b)(2) and Section III.O.3.

[342] 18 CFR 5.7 and Section III.N.

[343] *See* 18 CFR 5.8(c).

[344] *See* 18 CFR 5.9(a).

[345] *See* 18 CFR 5.10 (Scoping Document 2).

[346] Proposed 18 CFR 5.9 and 5.10.

[347] 18 CFR 5.11(c).

[348] Proposed 18 CFR 5.12.

[349] 18 CFR 5.13(b).

[350] 18 CFR 5.14(j) and Section III.G.3.d.

[351] 18 CFR 5.15.

[352] 18 CFR 5.16 and Section III.K.

[353] Proposed 18 CFR 5.22.

[354] 18 CFR 5.23(a).

[355] *See* Sections III.D. and III.F.

[356] *See* Section III.M.2.

1. Traditional Process—Public Participation

374. In the NOPR we proposed to modify the traditional process pre-filing consultation regulations to require potential applicants to make reasonable efforts to bring into pre-filing consultation as early as possible NGOs and other members of the public, and for these entities to be involved in the development of the potential applicant's study plans.[357]

375. Non-industry commenters favor this proposal. NHA and SCE oppose it. NHA states that it could significantly increase the cost and time of the process. It recommends that we maintain the existing provisions for public participation, except that the public would be encouraged to provide the potential applicant with comments on its proposal following the public meeting required during stage one consultation,[358] and the potential applicant and agencies would be required to respond contemporaneously to those comments. NHA indicates that the availability of the PAD on the Commission's Web site should enable the public to effectively participate in the public meeting, and the potential applicant could decide what level of pre-filing public participation was appropriate for the project. SCE also cites increased costs and burdens and states that the public is already adequately represented by the Commission and resource agencies.[359]

376. We are strongly inclined to adopt the rule as proposed. Under NHA's proposal, the potential applicant would not be required to distribute the PAD to members of the public likely to be interested in any license application proceeding or include the public in the joint meeting with agencies and Indian tribes. There would also be no requirement for the public to provide comments and study requests following the joint meeting, and they would not be eligible to participate in the joint meeting following comments on the draft license application.[360] This would exacerbate the contribution that lack of public input during pre-filing consultation now makes to licensing delays. The proposal in the NOPR to include the public in all aspects of pre-filing consultation substantially resolves this problem for the traditional process.

2. Traditional Process—Mandatory, Binding Dispute Resolution

377. The principal reasons the existing study dispute resolution process is not used are that it is not required to be used and the result is advisory only.[361] We proposed to require consulted entities in the traditional process who oppose a potential applicant's information-gathering and study proposals to file a request for dispute resolution during pre-filing consultation. Consulted entities that do not request dispute resolution would thereafter be precluded from contesting the potential applicant's study plan or results with respect to the issue in question.

378. We also proposed to make the outcome of dispute resolution binding on all participants; that is, the Director's order resolving the dispute would, if information or a study is determined to be necessary, direct the potential applicant to gather the information or conduct the study. Consulted entities would not be permitted to revisit the dispute after the application is filed. We further proposed to eliminate from the traditional process the opportunity to request additional scientific studies after the license application is filed.[362]

379. NHA and EEI support the proposed change.[363] NHA would also modify the proposed rule by requiring study requesters to address the study criteria applicable to the integrated process, and by requiring the Director to address those criteria in his decision.

380. Agency and NGO commenters were less enthusiastic. HRC and Interior contend the proposed change could make the problem of post-application study disputes worse and, along with TU urge that if pre-filing binding dispute resolution is adopted, it be the same as formal dispute resolution in the integrated process. Interior argues that study disputes cannot be resolved without the aid of a panel of technical experts and the views of Commission staff, so the goal of developing a record during pre-filing consultation that will support the actions of all agencies with decisional authority would be thwarted. NYSDEC appears to support mandatory, binding dispute resolution, but opposes elimination of post-application study requests. HRC, echoing the concerns of commenters on binding dispute resolution in the integrated process, adds that if the traditional process dispute resolution is to be mandatory and binding, then the Commission must permit rehearing of the Director's decisions. Finally, Interior and NOAA Fisheries state that the Commission does not have authority to issue a binding pre-filing dispute resolution in the traditional process because in that process no formal proceeding commences until the application is filed. We think Interior and NOAA Fisheries are correct and will therefore not adopt this proposal.

381. Finally, NOAA Fisheries recommends that we modify the traditional process by requiring applicants to submit for Commission approval a study plan under conditions similar to development of the study plan in the integrated process. Since we are not adopting mandatory, binding dispute resolution in the traditional process, a Commission-approved study plan would serve no purpose, and would blur the distinction between the integrated and traditional process.

3. Traditional Process—Other Recommendations

382. Interior recommends that we make no changes in the traditional process until the integrated process has become established and shown to be effective because it opposes mandatory, binding dispute resolution in the traditional process. As just discussed, we are not adopting that proposal. Because Interior does not specifically oppose increased public participation, we presume it has no objection to that aspect of the proposed rule.

383. SCE states that the best way to streamline the process would be to eliminate pre-filing consultation altogether for any project that has previously been issued a license in which a NEPA document was prepared, or for small projects where no operational or ground-disturbing changes are contemplated. Under SCE's scenario, the pre-NOI notice to the applicant would be published in a local newspaper. The potential applicant would file the NOI and an abbreviated version of the PAD, then file an application based on whatever pre-filing consultation it decides is needed. In support, SCE states that it already has relationships with the resource agencies and that anyone is welcome to make

[357] 68 FR at p. 14011; IV FERC Stats. & Regs. ¶ 32,568 at p. 34,734.

[358] *See* 18 CFR 4.38(b)(3) and 16.8(b)(3).

[359] Acres does not oppose the proposal, but states that the Commission should help individual members of the public organize themselves so that public participation is efficient and structured. Participation by individuals may be inconvenient for applicants in certain respects, but individuals are capable of determining for themselves whether joint action is consistent with their individual interests.

[360] *See* proposed 18 CFR 4.38(b) (1)(3)(4) and (5); 4.38(c)(2) and (6); 4.38(d)(2); analagous sections of proposed 18 CFR part 16, and proposed 18 CFR 5.4.

[361] 68 FR at p. 13996; IV FERC Stats. & Regs. ¶ 32,568 at p. 34,707.

[362] *See* proposed changes to 18 CFR 4.38(b)(5), (c)(1), and (c)(2); and 16.38(b)(5), (c)(1), and (c)(2) and related NOPR discussion, 68 FR at p. 13996; IV FERC Stats. & Regs. ¶ 32,568 at pp. 34,734–735.

[363] SCE supports mandatory pre-filing dispute resolution, but states that it should be the same for all processes and should be available only to agencies with mandatory conditioning authority.

comments before an application is filed. It adds that Interior's Bureau of Land Management and the U.S. Forest Service do not require pre-filing consultation.

384. We think leaving pre-filing consultation to the discretion of potential applicants is unlikely to result in any gains in the timeliness or efficiency of the licensing process, and reject the qualifying criteria proposed by SCE. A NEPA document issued many years before a new license application is filed is likely to be of very little value. Nor is a proposal to maintain the *status quo* as an operating regime necessarily a guarantee that a new license application will not raise substantial issues. Changes are likely to have occurred over the term of the license with respect to recreational use of the reservoir and shoreline, threatened and endangered species listings, water quality standards, resource agency management goals, standards for protection of cultural and historical resources, and others. That SCE has established relations with certain agencies has no bearing on this issue of general applicability.

385. SCE adds that if the PAD is required it should be scaled back for applications using the traditional process because it is too burdensome for small projects and the required amount of information is not needed at the beginning because NEPA scoping will follow filing of the application. SCE overlooks two important facts. First, the PAD is one of the tools used to inform the opinions of the participants and the Commission concerning whether to approve use of the traditional process. Second, the PAD is only required to include existing relevant information that can be obtained with the exercise of due diligence. An existing licensee already has a substantially similar obligation to produce information under the traditional process regulations.[364]

4. Streamlined Process for Small Projects

386. The NOPR declined to adopt a proposal by NHA under which applicants could file a request for waiver of all or part of the pre-filing consultation requirements. We did so largely because the existing regulations already provide for consensual waiver by agencies and Indian tribes and owing to concerns about NHA's proposed criteria.[365] Nonetheless, in recognition of the important place of small hydropower in the nation's energy infrastructure and in the hope of eliminating potentially unnecessary costs of relicensing, we requested comments on other approaches to streamlining the licensing process for small projects that would not compromise the interests of other stakeholders.[366]

387. NHA responds that we should not have rejected its proposal because no other agency requires pre-filing consultation, it is not required by NEPA, and it is less important for licenses issued after enactment of the Electric Consumers Protection Act[367] because such licenses were the subject of a recent NEPA document and are likely to include many environmental protection measures. NHA adds that it does not seek an exemption from NEPA, or to preclude analysis based on new issues such as threatened or endangered species listings, but only wants recognition that some impacts will already have been adequately addressed. NHA also stresses that the existence of the PAD would enable interested entities to comment prior to the license application even if there is no formal opportunity to comment.

388. We remain unpersuaded. That other agencies may not require pre-filing consultation, or that it is not required by NEPA, has no bearing on whether it makes sense for license applications. The FPA licensing scheme is unique, and commenters were nearly unanimous that the key to timely and efficient processing of applications is combining pre-filing consultation with NEPA scoping. NHA may be correct that post-ECPA licenses are likely to contain a greater level of resource protection than pre-ECPA licenses. However, as noted in our response to SCE's proposal in the preceding section, many factors are likely to change over the term of any license, regardless of when it was issued.[368]

389. NEU recommends that projects under 5 MW with minor licenses should have the right to elect the traditional process without Commission approval, and to file the initial consultation document currently required by the regulations instead of the PAD. We think the approval requirement has been framed so that licensees of small projects will have a reasonable opportunity to make their case for using the traditional process and, as noted, we have made the PAD less burdensome for all potential applicants.

390. Agencies and NGOs continue to recommend that no special allowances be made for projects of any size unless there has been consultation with agencies, Indian tribes, and the public. They reiterate that size is no indicator of environmental impacts, case-by-case consideration of the issues is not unduly burdensome, and that if there really are few issues or little controversy, then the study design can reflect that.[369]

391. Notwithstanding our rejection of NHA's and NEU's recommendations, we think there are likely to be instances where relicensing of a small project will be uncontroversial, and for which study requirements should be modest. For such cases, waiver of part or all of pre-filing consultation may not prejudice the timely and thorough consideration of a relicense application. We are therefore modifying Section 16.8(e) of the regulations that requires the consent of a resource agency or Indian tribe in order to waive pre-filing consultation with respect to that entity. We will now permit non-consensual requests for waivers, but will require any such request to be preceded by discussions with these other entities and for the request to include documentation of the discussions and a response to any objections to the waiver request. We will also provide an opportunity for responses to the waiver request.[370]

5. Draft Applicant-Prepared Environmental Analyses

392. Under the current rules, a license applicant may include a draft EA with its application if it uses the ALP (applicant-prepared EA, or APEA). The NOPR declined to adopt recommendations that we permit license applicants to include a draft EA or draft EIS with their application even if they use the existing traditional process. We stated that the limits on pre-filing public participation and the history of post-application continuation of pre-filing study disputes would likely make such documents no more useful, or even less useful, than the existing Exhibit E. We did however note that by proposing full public participation in pre-filing consultation and adding mandatory, binding study dispute resolution, the problem of an incomplete record when the application is filed should be alleviated. We requested comments on whether, in light of these proposed changes, we

[364] *See* 18 CFR 16.7(d) and 16.8(b).

[365] 68 FR at p. 14012; IV FERC Stats. & Regs. ¶ 32,568 at pp. 34,735–736.

[366] 68 FR at p. 14012; IV FERC Stats. & Regs. ¶ 32,568 at p. 34,736.

[367] Public Law 99–495, 100 Stat. 1243 (Oct. 16, 1986) (codified at 16 U.S.C. 791a *et seq.*).

[368] We note in this regard that the minimum term for a new license is 30 years, and the first relicenses of projects with post-ECPA licenses are still approximately 15 years away.

[369] S–P, MPRB, NCWRC, Interior, Georgia DNR, Wisconsin DNR, Oregon, California, HRC, NYSDEC.

[370] 18 CFR 16.8(e).

should change our rules in this regard.[371]

393. Agencies and NGO commenters opposed this idea.[372] HRC and Interior state that this would not achieve the goals of the rulemaking because there would still be no requirement comparable to the ALP or even the integrated process to consult on a study plan or the APEA. Thus, the APEA would reflect only the positions and interests of the applicant, making it highly unlikely that the Commission could adopt it without major revisions. California adds that even if the factual record was satisfactory, the objectivity of the applicant's analysis would be suspect.

394. EEI and NEU favor this idea. EEI states that APEAs work well in the gas pipeline certificates program.

395. We have decided to permit a license applicant to include a draft EA with its application. The agency and NGO commenters may be correct that an APEA prepared under the traditional process is less likely to account for the views of all participants and may require significant revisions pursuant to the Commission's independent review. That however is not the central issue. The adequacy of an APEA for purposes of filing a license application is determined by whether it contains the information required in Exhibit E, the environmental exhibit. If it contains that information, we are not concerned that it appears in a nontraditional format. The parties will retain the same rights they now enjoy to comment on the full application and make any additional information requests. Regardless of whether an applicant includes an APEA or a traditional Exhibit E in its application, the Commission will issue its own independently prepared draft NEPA document or single environmental assessment.

6. ALP—Applicability of Dispute Resolution

396. We proposed to leave the existing, non-mandatory and non-binding dispute resolution procedures applicable to the ALP in place because mandatory, binding dispute resolution appears to be incompatible with the collaborative nature of the ALP. We did however request comments on whether there may be circumstances in which binding dispute resolution could be conducted in a manner that safeguards the collaborative process.[373]

397. SCE recommends that the ALP include binding dispute resolution. Most commenters however state that a binding process would be inconsistent with the concept of a collaborative process and would therefore have a chilling effect on participation.[374] California and PFMC state that there should be a negotiated dispute resolution mechanism in the communications protocol for each ALP. PFBC recommends that if the existing ALP dispute resolution process[375] fails, the proposed formal dispute resolution process for the integrated licensing process should be used, modified to make it available to all parties.[376]

398. After considering the comments, we have decided not to change the existing ALP dispute resolution provision. Mandatory, binding dispute resolution still seems to us inconsistent with the collaborative process. For the same reason we decline to import into the ALP the formal dispute resolution procedures of the integrated process. The negotiated dispute resolution procedure contemplated by California and PFMC could however be encompassed within a communications protocol, if the participants agreed to request waiver of the process provided for in the regulations.

**V. Ancillary Matters**

1. Intervention by Federal and State Agencies

399. We proposed to permit Federal agencies that commonly intervene in Commission proceedings, and state fish and wildlife and water quality certification agencies, to intervene by filing a notice instead of the current requirement to file a motion to intervene.[377]

400. No commenter objected to this proposal. Various commenters request that we clarify that the intervention by notice policy extends to, or will be expanded to include, state water rights agencies[378] and Indian tribes with authority to issue water quality certification.[379] These requests are reasonable and will be granted.[380]

401. NYSDEC requests that late interventions also be allowed by notice unless there is prejudice to others. We deny this request. The best means of determining whether other parties would be prejudiced is for the entity seeking untimely intervention to address that issue and for potentially prejudiced parties to respond. Our regulations on this matter make clear that this is one of the matters the Commission may consider in acting on a late motion to intervene.[381]

402. NOAA Fisheries and Interior renew their request for automatic intervenor status, or for the ability to file one notice of intervention good for all proceedings throughout the term of a license. They advance no arguments that were not considered and rejected in the NOPR.

2. Information Technology

403. In the NOPR we denied requests by a few commenters to require that documents filed in a proceeding or required to be available to the public be served or otherwise made available on the internet. We acknowledged that there are many instances where this is very efficient and more useful for participants than distribution of paper. We also noted that many license applicants and others are taking advantage of these benefits. We concluded however that such a requirement might be an undue cost burden on licensees that are small enterprises, and noted that we have granted waiver of the ''licensing library'' requirement where the applicant agreed to make all of the information available on the Internet and to provide hard copies by mail on request.[382]

404. SCE requests that we reconsider and allow applicants to use Web sites and e-mail to disseminate information and effect service in the ordinary course.[383] The applicant would determine whether and to what extent to employ this means of service and information dissemination. SCE states that entities without access to the internet would be accommodated by service of physical documents. HRC notes in a similar vein that electronic service is critical to the tight deadlines

[371] 68 FR at p. 14012; IV FERC Stats. & Regs. § 32,568 at p. 34,736.

[372] HRC, Interior, PFMC, MPRB, NCWRC, California.

[373] 68 FR at p. 14012; IV FERC Stats. & Regs. ¶ 32,568 at p. 34,735.

[374] Interior, HRC, NYSDEC, NEU.

[375] Under 18 CFR 4.34(i)(6)(vii), participants in an ALP may file a request with the Commission to resolve any disagreement concerning the ALP (*i.e.*, not limited to studies) after reasonable efforts have been made by the participants to resolve the dispute.

[376] CSWC recommends that numerous elements of the integrated process be incorporated into ongoing ALP processes. Imposing such requirements would be inconsistent with the collaborative nature of these processes and would upset the settled expectations of the potential applicants and stakeholders who have already established the means by which they will work together.

[377] 68 FR at p. 14013; IV FERC Stats. & Regs. ¶ 32,568 at p. 34,737, and proposed 18 CFR 385.214.

[378] Alaska DNR, EPA.

[379] Interior, EPA.

[380] *See* 18 CFR 385.214.

[381] 18 CFR 385.214(d)(1)(iv).

[382] 68 FR at pp. 14013–014; IV FERC Stats. & Regs. ¶ 32,568 at p. 34,737–738.

[383] SCE states that oversized documents that are not compatible with e-mail would be served by mail, and that critical energy infrastructure information could be excluded.

in the integrated process. It requests that we make electronic service the presumptive form of service, as long as the potential applicant agrees to paper service for anyone who requests it.

405. We continue to be concerned with the situation of small enterprises that operate jurisdictional projects, as well as small NGOs or individuals that may lack the sophistication to fully participate without physical service. We do however *see* the potential for great savings in electronic service and the Commission is continuously reviewing its filing and distribution requirements with a view toward maximizing the use of electronic filing and distribution of information. Thus, as noted above, the final rule encourages potential applicants to distribute on-line information and analyses referenced in the PAD, while preserving the right of a participant to receive these materials in hard copy form. One recent innovation in this connection is the advent of our e-subscription service, in which an entity may sign up to receive e-mail notification of, and a link to our Commission-wide information database (FERRIS [384]) for, every filing made in a specified proceeding.[385] Finally, we will also continue to consider waiver requests in individual cases, and participants in collaborative processes are free to negotiate agreements which take advantage of e-mail and other Internet capabilities.

406. ADK states that the Commission should permit meeting notices and other short documents to be served by facsimile machine instead of by e-mail on the ground that facsimile service is more reliable. This would be an extremely inefficient, if not impossible, means for the Commission to issue public notices. ADK is however free to request that license applicants or other participants in individual proceedings serve documents on it in this manner.

407. GLIFWC states that all documents filed in the licensing process should be made available on the Commission's Web site and an applicant's Web site in both portable document format (pdf) and a word processing format. All documents filed with the Commission are already available to the public on the Commission's Web site via FERRIS in various formats, including pdf. For this reason, there is no need to impose this burden on a potential applicant.

[384] FERRIS stands for Federal Energy Regulatory Records and Information System.

[385] Entities wishing to establish e-subscriptions can find instructions on the Commission's Web site at http://www.ferconline@ferc.gov.

3. Project Boundaries and Maps

408. The NOPR stated that for historical reasons the current regulations do not require minor projects occupying non-federal lands to have an established project boundary, although the boundary for such projects has been considered to be the reservoir shoreline. We further observed that this situation is inconsistent with our ongoing effort to modernize project boundary mapping by conversion of such maps into highly accurate, georeferenced electronic maps, and therefore proposed to require all future license and exemption applicants, regardless of license or exemption type, to provide a project boundary with each application. We requested comments on this proposal.[386]

409. Agencies and NGOs support the proposal. They state that it is important for compliance purposes because the Commission has said the geographical limit of its compliance authority is the project boundary.[387] They state that the project boundary should include generating facilities, bypass reaches, the reservoir to the high water mark, all shoreline lands needed to meet project purposes other than the generation of power, and all lands needed to implement mitigation measures.[388] All of these are required to be included in the project boundary with the exception of bypassed reaches, which we have explained may or may not be jurisdictional depending on case-specific facts.[389]

410. NHA is not opposed to consistent standards for project boundary maps, but objects to imposing the new standards on existing minor licenses for which project boundary maps are already on file, or on exemptions. NHA states that it would cost thousands of dollars for field survey and drafting and that the Commission can obtain all the information it needs under the current rules. NHA, SCE, and NEU also state that licensees should only be required to revise their project boundaries when a new license application is filed or the licensee otherwise seeks approval to revise a particular Exhibit G drawing, because requiring georeferenced, electronically-formatted maps for all projects would be costly and extremely burdensome.

411. These commenters may misapprehend the proposed rule in this regard. It is not our intention to require all existing licensees or exemptees to file a georeferenced map of the project boundary. The project boundary data would only be required when an application is filed for a license or an exemption, or when an application to amend either authorization already requires a revised Exhibit G.

412. SCE adds that standards similar to the electronic standards required for project maps should also be established for design drawings required in a license application. Duke requests clarification of which electronic format is required for Exhibit G maps. It recommends widely used formats such as JPG, TIFF, or PDF, which do not require specialized software.

413. The revised regulations do not require Exhibit G maps to be in a GIS format. The project boundary is only one feature of Exhibit G maps, which also include the location of project features such as the reservoir, powerhouse, and other facilities. An applicant can file the Exhibit G map in a JPG, TIFF, or PDF file, or any other graphic format, the project boundary data however, must be filed in a GIS format.

4. Miscellaneous Filing Requirements

414. The NOPR proposed minor additions to the application filing requirements of §§ 4.41, 4.51, and 4.61. These are: monthly flow duration curves;[390] minimum and maximum hydraulic capacities for the powerplant;[391] estimated capital and operating and maintenance (O&M) expenses for each proposed PM&E measures;[392] estimates of the costs to develop the license application;[393] on-peak and off-peak values of project power, and the basis for the value determinations;[394] estimated annual increase or decrease in generation at existing projects;[395] remaining undepreciated net investment or book value of project;[396] a single-line electrical diagram;[397] and a statement of

[386] 68 FR at p. 14014; IV FERC Stats. & Regs. ¶ 32,568 at p. 34,738.

[387] *See* PacifiCorp, 80 FERC ¶ 61,334 (1997).

[388] HRC, IDFG, NCWRC, PFBC, NYSDEC, PFMC, Menominee, Interior, MPRB.

[389] *See* Duke Power, a Division of Duke Energy Corporation, 100 FERC ¶ 61,294 (2002), in which we stated that where a license requires ongoing programs in a bypassed reach (*e.g.*, a habitat restoration program) such that continued Commission oversight is necessary to meet the program requirements, the reach is considered to be part of the project.

[390] *See* proposed modifications to 18 CFR 4.41(c)(2)(i), 4.51(c)(2)(i), and 4.61(c)(1)(vii).

[391] Proposed modifications to 18 CFR 4.41(c)(4)(iii); 4.51(c)(2)(iii), and 4.61(c)(1)(vii).

[392] Proposed 18 CFR 4.41(e)(4)(v); 4.51(e)(4), and 4.61(c)(1)(x).

[393] Proposed 18 CFR 4.41(e)(9); 4.51(e)(7); and 4.61(c)(3).

[394] Proposed 18 CFR 4.41(e)(10); 4.51(e)(8); and 4.61(c)(4).

[395] Proposed 18 CFR 4.51(e)(9) and 4.61(c)(5).

[396] Proposed 18 CFR 4.61(c)(6).

[397] Proposed 18 CFR 4.61(c)(8).

measures taken or planned to ensure safe management, operation, and maintenance of the project.[398]

415. These are items of information not specifically required to be included by the current regulations, but which the Commission staff requests as additional information in nearly every license proceeding in order to complete its NEPA and comprehensive development analyses. The NOPR found that obtaining this information with the application instead of via an additional information request will enable the staff to move forward more expeditiously to process license applications. No opposing comments were received on these proposed changes, and we are adopting them. A few commenters raised other miscellaneous filing requirement issues.

416. NOAA Fisheries requests a reduction in the number of paper copies that are required to be filed, and that we consider allowing filings to be made on compact disks (CDs) and by other electronic means. The Commission allows, indeed strongly encourages, electronic filing. Parties may also request waiver of the filing requirements in order to substitute a compact disk or CD-ROM for a hard copy filing.[399] We are also reviewing our filing and distribution requirements Commission-wide with a view toward maximizing the use of e-filing and distribution of information, but that review is not complete at this time.

417. Interior requests that we require applicants to provide aerial photographs and/or satellite images to provide an overview of the project area. We think this is excessive in light of the requirements we are already imposing for electronically formatted maps, and the ready availability of United States Geological Survey and other maps.

5. Technical Changes

418. We are also taking this opportunity to correct various sections of the regulations to update them, or to cure incorrect cross-references, misspellings, or misstatements.[400]

*W. Delegations of Authority*

419. The proposed rule contemplated certain new delegations of authority to the Director, Office of Energy Projects, in the context of the proposed integrated process. Specifically, these are authority to issue: (1) Act on requests to use the traditional licensing process; (2) issue a study plan determination; (3) resolve formal study disputes; and (4) resolve disagreements brought during the conduct of studies. Consistent with our decision to adopt the integrated process as described herein, we are adopting conforming modifications to our delegations to the Director.[401]

*X. Critical Energy Infrastructure Information*

1. Order No. 630

420. In Order No. 630,[402] the Commission established standards and procedures for the handling of Critical Energy Infrastructure Information (CEII) submitted to or created by the Commission. CEII is information about existing or proposed critical infrastructure that relates to the production, generation, transportation, transmission, or distribution of energy; that could be useful to a person planning an attack on critical infrastructure; is exempt from mandatory disclosure under the Freedom of Information Act;[403] and that does not simply give the location of the critical infrastructure.[404] Critical infrastructure refers to existing or proposed systems and assets, the damage or destruction of which would harm the national security of the public health and safety.[405] The purpose of the rule is to protect information on critical energy infrastructure that could be used by terrorists, while continuing to make public the information necessary for participation in the Commission's processes.

421. CEII is required to be redacted from filings made with the Commission. A hydroelectric license application could contain various kinds of information that are CEII. The preamble to the rule gives examples of such information, including: (1) General design drawings of the principal project works, such as those found in Exhibit F; (2) Maps, such as those found in Exhibit G; (3) Drawings showing technical details of a project, such as plans and specifications, supporting design reports, part 12 independent consultant reports,[406] facility details, electrical transmission systems, communication and control center information; and (4) GPS coordinates of any project features.

422. Of particular concern to the Commission in defining CEII was location information. Such information is particularly relevant, for example, to participants in the NEPA process. Consequently, the following types of location information were not considered to be CEII: (1) USGS 7.5-minutes topographic maps showing the location of pipelines, dams, or other aboveground facilities; (2) alignment sheets showing the location of pipeline and aboveground facilities, right of way dimensions, and extra work areas; (3) drawings showing site or project boundaries, footprints, building locations and reservoir extent; and (4) general location maps. Such information is classified as ''non-Internet public access,'' that is, information to be included in paper filings with the Commission and made be available in hard copy and through the Commission's public reference room, but which will not be available for viewing or downloading from Commission databases.[407]

423. Order No. 630 establishes procedures for persons to request CEII that has been filed with the Commission or to challenge CEII status.[408]

2. Conforming Rulemaking

424. Several commenters in the CEII rulemaking and on the NOPR in this proceeding[409] noted that the Commission also requires regulated entities to provide directly to agencies, Indian tribes, and the public certain information that is CEII. The Commission agreed and stated that it would issue conforming rules to ensure consistent treatment of CEII by the Commission and regulated entities. A proposed conforming rule was issued on April 9, 2003.[410] Comments were due on May 16, 2003, and a final rule is being issued concurrent with this rule.[411]

425. The final conforming rule identifies various sections of 18 CFR Parts 4 and 16 that require direct disclosure of information that could include CEII. Public disclosure requirements in part 4 include: (1) Notification of applications to affected

[398] Proposed 18 CFR 4.61(c)(9).

[399] Such waivers are granted under the Commission Secretary's delegated authority in 18 CFR 375.302(i).

[400] Corrections have been made to 18 CFR 2.1(a)(1); 2.7(b); 4.30(b)(9)(ii); 4.30(b)(23); 4.32(a)(5)(vi); 4.32(e)(2); 4.32(h); 4.33(a); 4.33(b); 4.37 introductory text; 4.37(b)(1); 4.39(a); 4.39(b); 4.40(b); 4.41(f)(6)(v); 4.41(f)(9)(i); 4.60(b); 4.61(f)(2); 4.70; 4.90; 4.91; 4.92; 4.93; 4.101; 4.200(c); 9.1; 9.10; 375.308(d)(11), (k)(1), (k)(2)(ii), and (k)(3).

[401] 18 CFR 375.308(aa).

[402] 68 FR 9857 (Mar. 3, 2003); IV FERC Stats. & Regs. ¶ 31,140 (Feb. 21, 2003).

[403] 5 U.S.C. 552.

[404] 18 CFR 388.113(c)(1).

[405] 18 CFR 388.113(c)(2).

[406] *See* 18 CFR part 12, Subpart D.

[407] 68 FR at p. 9862.

[408] 18 CFR 388.113.

[409] Consumers, PSE, WPSR, NHA, WPPD, Oroville, EEI.

[410] Critical Energy Infrastructure Information (RM02–4–001, PL02–1–001), 68 FR 18538–18544 (Apr. 16, 2003); III FERC Stats. & Regs. ¶ 32,569 (Apr. 9, 2003).

[411] Order No. 643, III FERC Stats. & Regs. Regulations Preambles 104 FERC ¶ 61,107 (July 23, 2003).

property owners, which must include Exhibit G to the application;[412] (2) a copy of the application and all exhibits, available to the public for inspection and reproduction at specified locations;[413] (3) an applicant using alternative procedures must distribute an information package and maintain a public file of all relevant documents, including scientific studies;[414] and (4) in pre-filing consultation for an original license application, the requirement to make available for public inspection various items,[415] including detailed maps[416] and a general engineering design.[417]

426. Public disclosure requirements in part 16 include: (1) When the NOI is issued, a number of items, including the original application, as-built drawings, diagrams, emergency action plans, and operation and maintenance reports;[418] and (2) during pre-filing consultation, detailed maps and a general engineering design must be made available for public inspection.[419] Parts 4 and 16 also in several instances require applicants to serve CEII on Indian tribes, resource agencies, and other government offices.[420]

427. The NOPR proposed to provide that regulated entities subject to the disclosure requirements of Parts 4 and 16 omit CEII from the information made available to agencies, Indian tribes, and the public. Instead, they would include with their filing a statement briefly describing the omitted information, without revealing CEII, and referring the reader to the procedures for challenging CEII claims and for requesting CEII under the procedures adopted in Order No. 630.[421] Therefore, a member of the public could still obtain the information, but would have to follow procedures different from those applicable now. That proposal is adopted in the final rule.

428. Neither the regulations promulgated in Order No. 630 nor the proposals contained in the proposed conforming rule are intended to require companies to withhold CEII. Instead, they are intended to ensure that the Commission's regulations do not require companies to reveal CEII. Consequently, the Commission anticipates that, in most instances, companies will share CEII with participants in the licensing process without requiring those entities to request access to CEII through the Commission.

429. The rules also do not alter the ability of state agencies to obtain data directly from regulated companies pursuant to whatever authorities those agencies have. State agencies are also presumed to have a need to know information involving issues that are within there are of responsibility. They may submit requests for information regarding entities outside their jurisdictions with an explanation of the need.

3. CEII in the Integrated Process

430. Several commenters stated that the final rule needs to clarify how the information filing and distribution aspects of the license application process would work in concert with the CEII regulations.[422] They observe that some of the information in the PAD required to be filed and distributed appears to be non-Internet public information and CEII.[423]

431. The information filing and disclosure requirements of part 5 are not covered by Order No. 630, or the proposed conforming rule. We are therefore including in the new part 5 regulations a provision consistent with the revisions to Parts 4 and 16 promulgated in Order Nos. 630 and 630–A.[424]

432. Long View recommends that the requirements of Exhibit F to the license application be made consistent with the CEII rules. This is not a matter of conforming Exhibit F to the CEII rules, but rather making Exhibit F subject to the rules, which it is.

433. One commenter stated that the form which entities requesting CEII are to use is not available on the Commission's Web site and that the form does not provide a name or office number for the person to whom the submission is to be made. These omissions will shortly be remedied.[425]

*Y. Transition Provisions*

434. Nearly all the comments on the proposed transition provisions were made by industry representatives. Only Idaho Power found the three-month transition period to be reasonable, as long as flexibility is provided for the few existing licensees who would be immediately affected. HRC and NYSDEC agree.

435. Requests for extension of the transition period range from six months to six years, during which time applicants would have complete choice of process.[426] The commenters assert that more time is needed to fully consider the rule after it is finalized and to switch from the initial consultation document and public information requirements of the current rules to the PAD, and that a three-month period reduces the six-month window provided by the rules for submittal of the NOI to three months for some licensees.[427] The Process Group recommended a one to two year transition period.

436. In light of these comments, we have concluded that the integrated process should become the default process on July 23, 2005. Until that time, potential license applicants will be able to select the integrated process or the traditional process as it currently exists (except for increased public participation, changes in miscellaneous filing requirements, and a later deadline date for filing of the water quality certification application). At the end of the two-year period, the integrated process will become the default process. All potential applicants will have to file the NOI and PAD, and obtain Commission authorization to use the traditional process.[428]

437. All other proposed changes to the regulations will, as proposed, take effect on October 23, 2003.

438. EEI requests that changes to the *ex parte* rule in connection with reversal of the policy on intervention by cooperating agencies should not apply to any projects for which an NOI has

[412] 18 CFR 4.32(a)(3)(ii).

[413] 18 CFR 4.32(b)(3)(i), (b)(4)(ii)–(iv).

[414] 18 CFR 4.34(i)(4)(i) and (i)(6)(iii).

[415] 18 CFR 4.38(g).

[416] 18 CFR 4.38(b)(1)(i).

[417] 18 CFR 4.38(b)(1)(ii).

[418] 18 CFR 16.7(d)(1)–(2).

[419] 18 CFR 16.8(b)(2)(i)–(ii).

[420] 18 CFR 4.32(b)(1)–(2); 4.38(b)(1), (c)(4), (d); 16.8(b)(1), (c)(4), (d).

[421] *See* proposed 18 CFR 4.32(k), 4.34(i)(10), 4.38(i), 16.7(d)(7), and 16.8(k).

[422] Consumers, PSE, WPSR, NHA, WPPD, Oroville, EEI.

[423] They cite proposed 18 CFR 5.4(c)(2)(H), (I), (K) and (L).

[424] 18 CFR 5.30 (Critical Energy Infrastructure Information).

[425] The CEII request form is being developed and will soon be posted on the Commission's Web site at *http://www.ferc.gov*.

[426] Six months to one year (NHA); one year (Troutman, EEI, PG&E, SCE, Georgia Power); one to two years (Process Group); and five-six years (Long View).

[427] This would be the case when the effective date of the rule falls within the six-month window. In this regard, Georgia Power and Troutman recommend against making the NOI deadline date the trigger date for applicability of the rule. They recommend instead the six-month period of five to five and one-half years before license expiration. A licensee for whom the six-month period includes the effective date of the rule could choose the traditional process by filing its NOI prior to the effective date of the rule, or choose the integrated process by filing its NOI after the effective date (and not making a request to use the traditional process). Alternatively, Georgia Power, Duke, and NEU request that guidance and special consideration be given to requests for waiver of the rule for the few projects for which the NOI is due very close to the effective date of the rule.

[428] The two-year period is irrelevant for purposes of the ALP because the requirements for approval do not change.

already been filed, because those potential applicants relied on the existing rules. As we have decided to retain the existing cooperating agencies policy, EEI's request is moot.

439. California asserts that any change in the deadline for applying for water quality certification from the date of the application to a later time should apply immediately. California states that this would give all licensees that have filed an NOI, but not yet filed the license application, the benefit of additional time to resolve data requirements before filing their certification request.[429] We agree in general that licensee applicants should have the benefit of our decision to move back the deadline date to 60 days following issuance of the REA notice. To minimize confusion, however, we will make that change effective October 23, 2003. Thus, a license application filed after that date under any process will benefit from the changed deadline date for filing the water quality certification application.

440. SCE and the Process Group request that we ''grandfather'' any potential applicant that has already been authorized to use the ALP, even if the NOI date has not arrived. This request is reasonable and we will grant it.

441. Duke requests that we grandfather ''existing licensing proceedings,'' by which it apparently means that the potential applicant has commenced pre-filing consultation. This request is moot with respect to the process selection rules because a potential new license applicant by definition begins pre-filing consultation when the NOI and PAD are filed, and only those for whom the deadline date is two years away will be affected. With respect to the miscellaneous filing requirements, we think the three month transition period is sufficient.

442. Duke also states that potential applicants already engaged in the traditional pre-filing process should be permitted to employ features of the integrated process in the traditional process. We proposed changes to the regulatory text which enable a potential applicant to file a request to do so during first stage consultation after consulting with potentially affected entities.[430] No commenter opposed the proposed provisions, which we are including in the final rule.

[429] California cites changes to 18 CFR 4.34(j) and 4.38(h).

[430] Proposed 18 CFR 4.38(e)(4).

## IV. Environmental Analysis

443. The Commission is required to prepare an Environmental Assessment or an Environmental Impact Statement for any action that may have significant adverse effect on the human environment.[431] The Commission has categorically excluded certain actions from this requirement as not having a significant effect on the human environment. Included in the exclusions are rules that are clarifying, corrective, or procedural or that do not substantively change the effect of the regulations being amended.[432] This proposed rule is procedural in nature and therefore falls under this exception. Consequently, no environmental consideration is necessary.

## V. Regulatory Flexibility Act

444. The Regulatory Flexibility Act of 1980 (RFA)[433] generally requires a description and analysis of final rules that will have a significant economic impact on a substantial number of small entities, or a certification that the rule will not have a significant economic impact on a substantial number of small entities.[434] Pursuant to section 605(b) of the RFA, the Commission hereby certifies that the proposed licensing regulations, if promulgated, would not have a significant economic impact on a substantial number of small entities. We justify our certification on the fact that the efficiency and timeliness of the proposed integrated licensing process (early Commission assistance, early issue identification, integrated NEPA scoping with application development, and better coordination among federal and state agencies) will benefit small entities by minimizing redundancy and waste in the processes of the Commission and the various federal and state agencies associated with the hydroelectric licensing process.

## VI. Information Collection Statement

445. The Office of Management and Budget's (''OMB's'') regulations require that OMB approve certain information collection requirements imposed by agency rule.[435] This Final Rule does not make any substantive or material changes to the information collection requirements specified in the NOPR, which was previously submitted to OMB for approval. OMB has elected to take no action on the NOPR. Thus, the information collection requirements in this rule are pending OMB approval.

446. The following collections of information contained in this proposed rule will be submitted to the Office of Management and Budget for review under section 3507(d) of the Paperwork Reduction Act of 1995, 44 U.S.C. 3507(d). The Commission identifies the information provided for under parts 4, 5, and 16 and FERC–500 ''Application for License/Relicense for Water Projects greater than 5 MW Capacity,'' and FERC–505, ''Application for License for Water Projects less than 5 MW Capacity.''

447. This Final Rule responds to comments concerning the information collections requirements specified in the NOPR, and has changed the PAD that was previously submitted to OMB. The changes make the document less burdensome on potential applicants and easier for all recipients to use. OMB did not make substantive comments on the NOPR, but directed the Commission to calculate the burden for each of the three available licensing processes and to estimate the proportion of licensees that would select each process. The burden calculation is based on the collection, dissemination of, and recordkeeping for information in the licensing process, and does not include any costs of license terms and conditions.

448. *Public Reporting Burden:* The Commission provided burden estimates for the proposed requirements. Several commenters stated that the PAD as proposed was unduly burdensome. These comments are addressed elsewhere in the Final Rule. In summary, we have clarified that the PAD requirements are limited to existing information and do not include any requirement to conduct studies, are substantially similar to existing requirements, and that the format and content requirements have been modified to reduce the burden on potential applicants.[436]

449. *Estimated Annual Burden*

[431] Order No. 486, Regulations Implementing the National Environmental Policy Act, 52 FR 47897 (Dec. 17, 1987), FERC Stats. & Regs. Preambles 1986–1990 ¶30,783 (Dec. 10, 1987).

[432] 18 CFR 380.4(a)(2)(ii).

[433] 5 U.S.C. 601–612 (2000).

[434] Section 601(c) of the RFA defines a ''small entity'' as a small business, a small not-for-profit enterprise, or a small governmental jurisdiction. A ''small business'' is defined by reference to Section 3 of the Small Business Act as an enterprise which is ''independently owned and operated and which is not dominant in its field of operation'' 15 U.S.C. 632(a).

[435] 5 CFR part 1320.

[436] *See* Section III.E.

TABLE 1. TRADITIONAL LICENSING PROCESS

| Data collection | No. of respondents * | No. of responses | Hours per response | Percent use ** | Total annual hours |
|---|---|---|---|---|---|
| FERC–500 | 26 | 1 | 46,000 | 10 | 119,600 |
| FERC–505 | 15 | 1 | 10,000 | 10 | 15,000 |

* Estimated number of licenses subject to renewal through 2009.
** Estimate of the percentage of applications that may use the Traditional Licensing Process.

*Total Annual Hours for Collection:* (Reporting + Recordkeeping, (if appropriate)) = 1,356,000 hours

TABLE 2. ALTERNATIVE LICENSING PROCESS

| Data collection | No. of respondents* | No. of responses | Hours per response | Percent use** | Total annual hours |
|---|---|---|---|---|---|
| FERC–500 | 26 | 1 | 39,000 | 30 | 304,000 |
| FERC–505 | 15 | 1 | 8,600 | 30 | 38,700 |

* Estimated number of licenses subject to renewal through 2009.
** Estimate of the percentage of applications that may use the Alternative Licensing Process.

*Total Annual Hours for Collection:* (Reporting + Recordkeeping, (if appropriate)) = 1,152,000 hours

TABLE 3. INTEGRATED LICENSING PROCESS

| Data collection | No. of respondents * | No. of responses | Hours per response*** | Percent use ** | Total annual hours |
|---|---|---|---|---|---|
| FERC–500 | 26 | 1 | 32,200 | 60 | 502,320 |
| FERC–505 | 15 | 1 | 7,000 | 60 | 63,000 |

* Estimated no. of licenses subject to renewal through FY 2009.
** Estimate of the percentage of applicants that may use the Integrated Licensing Process.
***Based on a 30% reduction through concomitant processes.

*Total Annual Hours for Collection:*

(Reporting + Recordkeeping, (if appropriate)) = 942,200 hours

*Information Collection Costs:* The Commission requested comments on the cost to comply with these requirements. None were received. The Commission has projected the average annualized cost per respondent to be the following:

*Annualized Costs:*

(1) Using Traditional Licensing Process
  (a) Projects less than 5 MW (average)— $500,000.00
  (b) Projects greater than 5 MW (average)—$2,300,000.00.
(2) Using Proposed Integrated Licensing Process
  (a) Projects less than 5MW average—$350,000.00.
  (b) Projects greater than 5 MW—$1,610,000.00.

*Total Annualized Costs:*

(1) Traditional Licensing Process—$67,300,000 ($59.8 mil. + $7.5 mil.).
(2) Proposed Integrated Licensing Process— $47,110,000 ($41.8 mil. + ($5.25 mil.)

The Office of Management and Budget's (OMB) regulations [437] require OMB to approve certain information collection requirements imposed by agency rule. The Commission is submitting notification of this proposed rule to OMB.

*Title:* FERC–500 ''Application for License/Relicense for Water Projects greater than 5 MW Capacity,'' and FERC–505, ''Application for License for Water Projects less than 5 MW Capacity.''

*Action:* Proposed Collections.

*OMB Control No:* 1902–0058 (FERC 500) and 1902–0115 (FERC 505).

*Respondents:* Business or other for profit, or non-profit.

*Frequency of Responses:* On occasion.

*Necessity of the Information:* The final rule revises the Commission's regulations regarding applications for licenses to construct, operate, and maintain hydroelectric projects. Specifically, the revisions establish a new process for the development and processing of license applications that combines during the pre-filing consultation phase activities that are currently conducted during pre-filing consultation and after the license application is filed. The information to be collected is needed to evaluate the license application pursuant to the comprehensive development standard of FPA Sections 4(e) and 10(a)(1), to consider in the comprehensive development analysis certain factors with respect to new licenses set forth in FPA Section 15, and to comply with NEPA, ESA, and NHPA. Most of the information is already being collected under the existing regulations, and the new regulations would for the most part affect only the timing of the collection and the form in which it is presented.

*Internal Review:* The Commission has reviewed the requirements pertaining to evaluation of hydroelectric license applications and has determined that the revisions are necessary because the hydroelectric licensing process is unnecessarily long and costly.

450. These requirements conform to the Commission's plan for efficient information collection, communication, and management within the hydroelectric power industry. The Commission has assured itself, by means of internal review, that there is

[437] 5 CFR 1320.11.

specific, objective support for the burden estimates associated with the information requirements.

451. Interested persons may obtain information on the reporting requirements by contacting the following: Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426 (Attention: Michael Miller, Office of the Executive Director, 202–502–8415 or *michael.miller@ferc.gov*) or from the Office of Management and Budget (OMB), Room 10202 NEOB, 725 17th Street, NW., Washington, DC 20503. (Attention: Desk Officer for the Federal Energy Regulatory Commission, fax: 202–395–7285.)

452. Comments on the collection of information and the associated burden estimates should be submitted to the contact listed above and to OMB. (Attention: Desk Officer for the Federal Energy Regulatory Commission, fax: 202–395–7285 or by e-mail to *pamelabeverly.oirasubmissions @omb.eop.gov*.)

## VII. Effective Date and Congressional Notification

453. This final rule will take effect on October 23, 2003. The Commission has determined, with the concurrence of the Administrator of the Office of Information and Regulatory Affairs of the Office of Management and Budget, that this rule is not a ''major rule'' within the meaning of Section 251 of Small Business Regulatory Enforcement Fairness Act of 1996.[438] The Commission will submit the Final Rule to both houses of Congress and the General Accounting Office.

## VIII. Document Availability

454. In addition to publishing the full text of this document in the **Federal Register**, the Commission also provides all interested persons an opportunity to view and/or print the contents of this document via the Internet through the Commission's Home Page (*http://www.ferc.gov* ) and in the Commission's Public Reference Room during regular business hours (8:30 a.m. to 5 p.m. Eastern time) at 888 First Street, NE., Room 2A, Washington, DC 20426.

455. From the Commission's Home Page on the Internet, this information is available in the Federal Energy Regulatory Records Information System (FERRIS). The full text of this document is available on FERRIS in PDF and WordPerfect format for viewing, printing, and/or downloading. To access this document in FERRIS, type the docket number of this docket, excluding the last three digits, in the docket number field. User assistance is available for FERRIS and the Commission's Web site during regular business hours. For assistance, contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll-free at (866) 208–3676, or for TTY, contact (202) 502–8659.

[438] 5 U.S.C. 804(2).

### List of Subjects

*18 CFR Part 2*

Administrative practice and procedures, Electric power, Natural Gas, Pipelines, Reporting, and recordkeeping requirements.

*18 CFR Part 4*

Administrative practice and procedure, Electric power, Reporting and recordkeeping requirements.

*18 CFR Part 5*

Administrative practice and procedure, Electric power, Reporting and recordkeeping requirements.

*18 CFR Part 9*

Electric power, Reporting, and recordkeeping requirements.

*18 CFR Part 16*

Administrative practice and procedure, Electric power, Reporting and recordkeeping requirements.

*18 CFR Part 375*

Authority delegations (Government agencies).

*18 CFR Part 385*

Administrative practice and procedure, Electric power, Penalties, Pipelines, Reporting and recordkeeping requirements.

By the Commission.

**Magalie R. Salas,**

*Secretary.*

■ In consideration of the foregoing, the Commission amends parts 2, 4, 9, 16, 375, and 385, and adds a new part 5 to, Chapter I, Title 18, *Code of Federal Regulations,* as follows.

### Regulatory Text

## PART 2—GENERAL POLICY AND INTERPRETATIONS

■ 1. The authority citation for part 2 continues to read as follows:

**Authority:** 5 U.S.C. 601; 15 U.S.C. 717–717w, 3301–3432; 16 U.S.C. 792–825y, 2601–2645; 42 U.S.C. 4321–4361, 7101–7352.

■ 2. Amend § 2.1 as follows:

■ a. Redesignate existing paragraph (a)(1)(xi)(K) as paragraph (a)(1)(xi)(L).

■ b. Add a new paragraph (a)(1)(xi)(K).

The added text reads as follows:

**§ 2.1 Initial notice; service; and information copies of formal documents.**

(a) * * *

(1) * * *

(xi) * * *

(K) Proposed penalties under section 31 of the Federal Power Act.

**§ 2.7 [Amended]**

■ 3. Amend § 2.7 by removing ''physically handicapped individuals'' in paragraph (b) and adding ''persons with disabilities'' in its place.

## PART 4—LICENSES, PERMITS, EXEMPTIONS, AND DETERMINATION OF PROJECT COSTS

■ 4. The authority citation for part 4 continues to read as follows:

**Authority:** 16 U.S.C. 791a–825r, 2601–2645; 42 U.S.C. 7101–7352.

■ 5. Amend § 4.30 as follows:

■ a. Paragraph (a) is revised.

■ b. In paragraph (b)(9)(ii), remove ''§§ 4.34(e)(2)'' and add ''§ 4.34(e)(1)'' in its place.

■ c. In paragraph (b)(23), remove ''§ 4.31(c)(2)'' and add ''§ 4.31(b)(2)'' in its place.

The revised text of paragraph (a) reads as follows:

**§ 4.30 Applicability and definitions.**

(a) (1) This subpart applies to applications for preliminary permit, license, or exemption from licensing.

(2) Any potential applicant for an original license for which prefiling consultation begins on or after July 23, 2005 and which wishes to develop and file its application pursuant to this part, must seek Commission authorization to do so pursuant to the provisions of part 5 of this chapter.

* * * * *

■ 6. Amend § 4.32 as follows:

■ a. In § 4.32, remove ''Office of Hydropower Licensing'' each place it appears and add ''Office of Energy Projects'' in its place.

■ b. The second sentence of paragraph (b)(1) is revised.

■ c. Paragraph (b)(2) is revised.

■ d. In paragraph (h), remove ''Division of Engineering and Environmental Review'' and add ''Division of Hydropower—Environment and Engineering'' in its place.

The revised text reads as follows:

**§ 4.32 Acceptance for filing or rejection; information to be made available to the public; requests for additional studies.**

* * * * *

(b) * * *

(1) * * * The applicant or petitioner must serve one copy of the application or petition on the Director of the

Commission's Regional Office for the appropriate region and on each resource agency, Indian tribe, and member of the public consulted pursuant to § 4.38 or § 16.8 of this chapter or part 5 of this chapter. * * *

(2) Each applicant for exemption must submit to the Commission's Secretary for filing an original and eight copies of the application. An applicant must serve one copy of the application on each resource agency consulted pursuant to § 4.38. For each application filed following October 23, 2003, maps and drawings must conform to the requirements of § 4.39. The originals (microfilm) of maps and drawing are not to be filed initially, but will be requested pursuant to paragraph (d) of this section.

* * * * *

■ 7. Amend § 4.33 as follows:

■ a. In paragraph (a), redesignate paragraph (a)(2) as (a)(3), and add a new paragraph (a)(2).

■ b. Paragraph (b) is revised.

The added and revised text reads as follows:

**§ 4.33 Limitations on submitting applications.**

(a) * * *

(2) Would interfere with a licensed project in a manner that, absent the licensee's consent, would be precluded by Section 6 of the Federal Power Act.

* * * * *

(b) *Limitations on submissions and acceptance of a license application.* The Commission will not accept an application for a license or project works that would develop, conserve, or utilize, in whole or part, the same water resources that would be developed, conserved, and utilized by a project for which there is:

* * * * *

(1) An unexpired preliminary permit, unless the permittee has submitted an application for license; or

(2) An unexpired license, as provided for in Section 15 of the Federal Power Act.

* * * * *

■ 8. Amend § 4.34 as follows:

■ a. In paragraph (b)(1), revise the third sentence to read as follows: ''In the case of an application prepared other than pursuant to part 5 of this chapter, if ongoing agency proceedings to determine the terms and conditions or prescriptions are not completed by the date specified, the agency must submit to the Commission by the due date:''

■ b. In paragraph (b)(4)(i): In the first sentence remove ''impact statement'' and add ''document'' in its place. In the second sentence remove ''statement'' and add ''document'' in its place.

■ c. Paragraph (b)(5) is added.

■ d. Paragraph (e) is revised.

■ e. In paragraph (h), remove ''consist of an original and eight copies'' and add ''conform to the requirements of subpart T of part 385 of this chapter'' in its place.

■ f. Paragraph (i)(5) is revised.

■ g. Paragraph (i)(9) is removed.

The revised and added text reads as follows:

**§ 4.34 Hearings on applications; consultation on terms and conditions; motions to intervene; alternative procedures.**

* * * * *

(b) * * *

(5)(i) With regard to certification requirements for a license applicant under section 401(a)(1) of the Federal Water Pollution Control Act (Clean Water Act), an applicant shall file within 60 days from the date of issuance of the notice of ready for environmental analysis:

(A) A copy of the water quality certification;

(B) A copy of the request for certification, including proof of the date on which the certifying agency received the request; or

(C) Evidence of waiver of water quality certification as described in paragraph (b)(5)(ii) of this section.

(ii) A certifying agency is deemed to have waived the certification requirements of section 401(a)(1) of the Clean Water Act if the certifying agency has not denied or granted certification by one year after the date the certifying agency received a written request for certification. If a certifying agency denies certification, the applicant must file a copy of the denial within 30 days after the applicant received it.

(iii) Notwithstanding any other provision in title 18, chapter I, subchapter B, part 4, any application to amend an existing license, and any application to amend a pending application for a license, requires a new request for water quality certification pursuant to paragraph (b)(5)(i) of this section if the amendment would have a material adverse impact on the water quality in the discharge from the project or proposed project.

* * * * *

(e) *Consultation on recommended fish and wildlife conditions; Section 10(j) process.* (1) In connection with its environmental review of an application for license, the Commission will analyze all terms and conditions timely recommended by fish and wildlife agencies pursuant to the Fish and Wildlife Coordination Act for the protection, mitigation of damages to, and enhancement of fish and wildlife (including related spawning grounds and habitat) affected by the development, operation, and management of the proposed project. Submission of such recommendations marks the beginning of the process under section 10(j) of the Federal Power Act.

(2) The agency must specifically identify and explain the recommendations and the relevant resource goals and objectives and their evidentiary or legal basis. The Commission may seek clarification of any recommendation from the appropriate fish and wildlife agency. If the Commission's request for clarification is communicated in writing, copies of the request will be sent by the Commission to all parties, affected resource agencies, and Indian tribes, which may file a response to the request for clarification within the time period specified by the Commission. If the Commission believes any fish and wildlife recommendation may be inconsistent with the Federal Power Act or other applicable law, the Commission will make a preliminary determination of inconsistency in the draft environmental document or, if none, the environmental assessment. The preliminary determination, for any recommendations believed to be inconsistent, shall include an explanation why the Commission believes the recommendation is inconsistent with the Federal Power Act or other applicable law, including any supporting analysis and conclusions, and an explanation of how the measures recommended in the environmental document would adequately and equitably protect, mitigate damages to, and enhance, fish and wildlife (including related spawning grounds and habitat) affected by the development, operation, and management of the project.

(3) Any party, affected resource agency, or Indian tribe may file comments in response to the preliminary determination of inconsistency, including any modified recommendations, within the time frame allotted for comments on the draft environmental document or, if none, the time frame for comments on the environmental analysis. In this filing, the fish and wildlife agency concerned may also request a meeting, telephone or video conference, or other additional procedure to attempt to resolve any preliminary determination of inconsistency.

(4) The Commission shall attempt, with the agencies, to reach a mutually

acceptable resolution of any such inconsistency, giving due weight to the recommendations, expertise, and statutory responsibilities of the fish and wildlife agency. If the Commission decides, or an affected resource agency requests, the Commission will conduct a meeting, telephone, or video conference, or other procedures to address issues raised by its preliminary determination of inconsistency and comments thereon. The Commission will give at least 15 days' advance notice to each party, affected resource agency, or Indian tribe, which may participate in the meeting or conference. Any meeting, conference, or additional procedure to address these issues will be scheduled to take place within 90 days of the date the Commission issues a preliminary determination of inconsistency. The Commission will prepare a written summary of any meeting held under this subsection to discuss section 10(j) issues, including any proposed resolutions and supporting analysis, and a copy of the summary will be sent to all parties, affected resource agencies, and Indian tribes.

(5) The section 10(j) process ends when the Commission issues an order granting or denying the license application in question. If, after attempting to resolve inconsistencies between the fish and wildlife recommendations of a fish and wildlife agency and the purposes and requirements of the Federal Power Act or other applicable law, the Commission does not adopt in whole or in part a fish and wildlife recommendation of a fish and wildlife agency, the Commission will publish the findings and statements required by section 10(j)(2) of the Federal Power Act.

* * * * *

(i) * * *

(5)(i) If the potential applicant's request to use the alternative procedures is filed prior to July 23, 2005, the Commission will give public notice in the **Federal Register** inviting comment on the applicant's request to use alternative procedures. The Commission will consider any such comments in determining whether to grant or deny the applicant's request to use alternative procedures. Such a decision will not be subject to interlocutory rehearing or appeal.

(ii) If the potential applicant's request to use the alternative procedures is filed on or after July 23, 2005 and prior to the deadline date for filing a notification of intent to seek a new or subsequent license required by § 5.5 of this chapter, the Commission will give public notice and invite comments as provided for in paragraph (i)(5)(i) of this section. Commission approval of the potential applicant's request to use the alternative procedures prior to the deadline date for filing of the notification of intent does not waive the potential applicant's obligation to file the notification of intent required by § 5.5 of this chapter and Pre-Application Document required by § 5.6 of this chapter.

(iii) If the potential applicant's request to use the alternative procedures is filed on or after July 23, 2005 and is at the same time as the notification of intent to seek a new or subsequent license required by § 5.5, the public notice and comment procedures of part 5 of this chapter shall apply.

* * * * *

**§ 4.35 [Amended]**

■ 9. Amend § 4.35 as follows:

■ In paragraph (f)(1)(iii) remove the word ''or'' and add the word ''of'' in its place.

**§ 4.37 [Amended]**

■ 10. Amend § 4.37 as follows:

■ a. In the introductory sentence, remove ''§ 4.33(f)'' and add ''§ 4.33(e)'' in its place.

■ b. In paragraph (b)(1), remove ''If both of two'' and add ''If both or neither of two'' in its place.

■ 11. Amend § 4.38 as follows:

■ a. In § 4.38, remove ''Office of Hydropower Licensing'' each place it appears and add ''Office of Energy Projects'' in its place.

■ b. In paragraph (a), redesignate existing paragraphs (a)(2) through (a)(7) as paragraphs (a)(4) through (a)(9), add new paragraphs (a)(2) and (a)(3), and revise newly redesignated paragraph (a)(4).

■ c. Paragraph (b) is revised.

■ d. In paragraph (c)(1), remove ''(b)(5)'' and add ''(b)(6)'' in its place.

■ e. In paragraph (c)(1)(ii), remove ''(b)(1)'' and add ''(b)(2)'' in its place.

■ f. In paragraph (c)(2): remove ''(b)(6)'' and add ''(b)(7)'' in its place; remove ''(b)(4)(i)–(vi)'' and add ''(b)(5)(i)–(vi)'' in its place; and remove ''(b)(5)'' and add ''(b)(6)'' in its place.

■ g. In paragraph (c)(4)(ii), remove ''(b)(1)(vii)'' and add ''(b)(2)(vii)'' in its place.

■ h. In paragraph (d)(1), remove ''Indian tribes, and other government offices'' and add ''Indian tribes, other government offices, and consulted members of the public'' in its place.

■ i. In paragraph (d)(2), remove ''resource agency and Indian tribe consulted and on other government offices'' and add ''resource agency, Indian tribes, and member of the public consulted, and on other government offices'' in its place.

■ j. In paragraph (e), a new paragraph (e)(4) is added.

■ k. In paragraph (f), paragraph (7) is removed, and paragraphs (8) and (9) are redesignated (7) and (8), respectively, and in newly redesignated paragraph (7), remove ''(b)(2)'' and add ''(b)(3)'' in its place.

■ l. In paragraph (g)(1), remove the phrase ''(b)(2)'' and add the phrase ''(b)(3)'' in its place.

■ m. In paragraph (g)(1), ''(b)(2)'' is removed and ''(b)(3)'' is added in its place.

■ n. Paragraph (g)(2) is revised.

■ o. Paragraph (h) is removed.

The revised and added text reads as follows:

**§ 4.38 Consultation requirements.**

(a) * * *

(2) Each requirement in this section to contact or consult with resource agencies or Indian tribes shall be construed to require as well that the potential applicant contact or consult with members of the public.

(3) If a potential applicant for an original license commences first stage pre-filing consultation on or after July 23, 2005 it shall file a notification of intent to file a license application pursuant to § 5.5 and a pre-application document pursuant to the provisions of § 5.6.

(4) The Director of the Energy Projects will, upon request, provide a list of known appropriate Federal, state, and interstate resource agencies, Indian tribes, and local, regional, or national non-governmental organizations likely to be interested in any license application proceeding.

* * * * *

(b) *First stage of consultation.* (1) A potential applicant for an original license that commences pre-filing consultation on or after July 23, 2005 must, at the time it files its notification of intent to seek a license pursuant to § 5.6 of this chapter and a pre-application document pursuant to § 5.6 of this chapter and, at the same time, provide a copy of the pre-application document to the entities specified in § 5.6(a) of this chapter.

(2) A potential applicant for an original license that commences pre-filing consultation under this part prior to July 23, 2005 or for an exemption must promptly contact each of the appropriate resource agencies, affected Indian tribes, and members of the public likely to be interested in the proceeding; provide them with a description of the proposed project and supporting information; and confer with them on project design, the impact of the proposed project (including a

description of any existing facilities, their operation, and any proposed changes), reasonable hydropower alternatives, and what studies the applicant should conduct. The potential applicant must provide to the resource agencies, Indian tribes and the Commission the following information:

(i) Detailed maps showing project boundaries, if any, proper land descriptions of the entire project area by township, range, and section, as well as by state, county, river, river mile, and closest town, and also showing the specific location of all proposed project facilities, including roads, transmission lines, and any other appurtenant facilities;

(ii) A general engineering design of the proposed project, with a description of any proposed diversion of a stream through a canal or penstock;

(iii) A summary of the proposed operational mode of the project;

(iv) Identification of the environment to be affected, the significant resources present, and the applicant's proposed environmental protection, mitigation, and enhancement plans, to the extent known at that time;

(v) Streamflow and water regime information, including drainage area, natural flow periodicity, monthly flow rates and durations, mean flow figures illustrating the mean daily streamflow curve for each month of the year at the point of diversion or impoundment, with location of the stream gauging station, the method used to generate the streamflow data provided, and copies of all records used to derive the flow data used in the applicant's engineering calculations;

(vi) (A) A statement (with a copy to the Commission) of whether or not the applicant will seek benefits under section 210 of PURPA by satisfying the requirements for qualifying hydroelectric small power production facilities in § 292.203 of this chapter;

(B) If benefits under section 210 of PURPA are sought, a statement on whether or not the applicant believes diversion (as that term is defined in § 292.202(p) of this chapter) and a request for the agencies' view on that belief, if any;

(vii) Detailed descriptions of any proposed studies and the proposed methodologies to be employed; and

(viii) Any statement required by § 4.301(a) of this part.

(3) (i) A potential exemption applicant and a potential applicant for an original license that commences pre-filing consultation;

(A) On or after July 23, 2005 pursuant to part 5 of this chapter and receives approval from the Commission to use the license application procedures of part 4 of this chapter; or

(B) Elects to commence pre-filing consultation under part 4 of this chapter prior to July 23, 2005; must:

(*1*) Hold a joint meeting at a convenient place and time, including an opportunity for a site visit, with all pertinent agencies, Indian tribes, and members of the public to explain the applicant's proposal and its potential environmental impact, to review the information provided, and to discuss the data to be obtained and studies to be conducted by the potential applicant as part of the consultation process;

(*2*) Consult with the resource agencies, Indian tribes and members of the public on the scheduling and agenda of the joint meeting; and

(*3*) No later than 15 days in advance of the joint meeting, provide the Commission with written notice of the time and place of the meeting and a written agenda of the issues to be discussed at the meeting.

(ii) The joint meeting must be held no earlier than 30 days, but no later than 60 days, from, as applicable;

(A) The date of the Commission's approval of the potential applicant's request to use the license application procedures of this part pursuant to the provisions of part 5 of this chapter; or

(B) The date of the potential applicant's letter transmitting the information required by paragraph (b)(2) of this section, in the case of a potential exemption applicant or a potential license applicant that commences pre-filing consultation under this part prior to July 23, 2005.

(4) Members of the public must be informed of and invited to attend the joint meeting held pursuant to paragraph (b)(3) of this section by means of the public notice provision published in accordance with paragraph (g) of this section. Members of the public attending the meeting are entitled to participate in the meeting and to express their views regarding resource issues that should be addressed in any application for license or exemption that may be filed by the potential applicant. Attendance of the public at any site visit held pursuant to paragraph (b)(3) of this section will be at the discretion of the potential applicant. The potential applicant must make either audio recordings or written transcripts of the joint meeting, and must promptly provide copies of these recordings or transcripts to the Commission and, upon request, to any resource agency, Indian tribe, or member of the public.

(5) Not later than 60 days after the joint meeting held under paragraph (b)(3) of this Section (unless extended within this time period by a resource agency, Indian tribe, or members of the public for an additional 60 days by sending written notice to the applicant and the Director of the Office of Energy Projects within the first 60 day period, with an explanation of the basis for the extension), each interested resource agency and Indian tribe must provide a potential applicant with written comments:

(i) Identifying its determination of necessary studies to be performed or the information to be provided by the potential applicant;

(ii) Identifying the basis for its determination;

(iii) Discussing its understanding of the resource issues and its goals and objectives for these resources;

(iv) Explaining why each study methodology recommended by it is more appropriate than any other available methodology alternatives, including those identified by the potential applicant pursuant to paragraph (b)(2)(vii) of this section;

(v) Documenting that the use of each study methodology recommended by it is a generally accepted practice; and

(vi) Explaining how the studies and information requested will be useful to the agency, Indian tribe, or member of the public in furthering its resource goals and objectives that are affected by the proposed project.

(6)(i) If a potential applicant and a resource agency or Indian tribe disagree as to any matter arising during the first stage of consultation or as to the need to conduct a study or gather information referenced in paragraph (c)(2) of this section, the potential applicant or resource agency or Indian tribe may refer the dispute in writing to the Director of the Office of Energy Projects (Director) for resolution.

(ii) At the same time as the request for dispute resolution is submitted to the Director, the entity referring the dispute must serve a copy of its written request for resolution on the disagreeing party and any affected resource agency or Indian tribe, which may submit to the Director a written response to the referral within 15 days of the referral's submittal to the Director.

(iii) Written referrals to the Director and written responses thereto pursuant to paragraphs (b)(6)(i) or (b)(6)(ii) of this section must be filed with the Commission in accordance with the Commission's Rules of Practice and Procedure, and must indicate that they are for the attention of the Director pursuant to § 4.38(b)(6).

(iv) The Director will resolve the disputes by letter provided to the

potential applicant and all affected resource agencies and Indian tribes.

(v) If a potential applicant does not refer a dispute regarding a request for a potential applicant to obtain information or conduct studies (other than a dispute regarding the information specified in paragraph (b)(2) of this section), or a study to the Director under paragraph (b)(6) of this section, or if a potential applicant disagrees with the Director's resolution of a dispute regarding a request for information (other than a dispute regarding the information specified in paragraph (b)(2) of this section) or a study, and if the potential applicant does not provide the requested information or conduct the requested study, the potential applicant must fully explain the basis for its disagreement in its application.

(vi) Filing and acceptance of an application will not be delayed, and an application will not be considered deficient or patently deficient pursuant to § 4.32(e)(1) or (e)(2) of this part, merely because the application does not include a particular study or particular information if the Director had previously found, under paragraph (b)(6)(iv) of this section, that each study or information is unreasonable or unnecessary for an informed decision by the Commission on the merits of the application or use of the study methodology requested is not a generally accepted practice.

(7) The first stage of consultation ends when all participating agencies and Indian tribes provide the written comments required under paragraph (b)(5) of this section or 60 days after the joint meeting held under paragraph (b)(3) of this section, whichever occurs first, unless a resource agency or Indian tribe timely notifies the applicant and the Director of Energy Projects of its need for more time to provide written comments under paragraph (b)(5) of this section, in which case the first stage of consultation ends when all participating agencies and Indian tribes provide the written comments required under paragraph (b)(5) of this section or 120 days after the joint meeting held under paragraph (b)(5) of this section, whichever occurs first.

* * * * *

(e) * * *

(4) Following October 23, 2003, a potential license applicant engaged in pre-filing consultation under part 4 may during first stage consultation request to incorporate into pre-filing consultation any element of the integrated license application process provided for in part 5 of this chapter. Any such request must be accompanied by a:

(i) Specific description of how the element of the part 5 license application would fit into the pre-filing consultation process under this part; and

(ii) Demonstration that the potential license applicant has made every reasonable effort to contact all resource agencies, Indian tribes, non-governmental organizations, and others affected by the applicant's proposal, and that a consensus exists in favor of incorporating the specific element of the part 5 process into the pre-filing consultation under this part.

* * * * *

(g) * * *

(2)(i) A potential applicant must make available to the public for inspection and reproduction the information specified in paragraph (b)(2) of this section from the date on which the notice required by paragraph (g)(1) of this section is first published until a final order is issued on any license application.

(ii) The provisions of § 4.32(b) will govern the form and manner in which the information is to be made available for public inspection and reproduction.

(iii) A potential applicant must make available to the public for inspection at the joint meeting required by paragraph (b)(3) of this section at least two copies of the information specified in paragraph (b)(2) of this section.

■ 12. Amend § 4.39 as follows:

■ a. Paragraph (a) is revised.

■ b. Paragraph (b), introductory text, is revised.

■ c. Paragraph (e) is added.

The revised and added text reads as follows:

**§ 4.39 Specifications for maps and drawings.**

* * * * *

(a) Each original map or drawing must consist of a print on silver or gelatin 35mm microfilm mounted on Type D (3¼″ by 7⅜″) aperture cards. Two duplicates must be made on sheets of each original. Full-sized prints of maps and drawings must be on sheets no smaller than 24 by 36 inches and no larger than 28 by 40 inches. A space five inches high by seven inches wide must be provided in the lower right hand corner of each sheet. The upper half of this space must bear the title, numerical and graphical scale, and other pertinent information concerning the map or drawing. The lower half of the space must be left clear. Exhibit G drawings must be stamped by a registered land surveyor. If the drawing size specified in this paragraph limits the scale of structural drawings (exhibit F drawings) described in paragraph (c) of this section, a smaller scale may be used for those drawings.

(b) Each map must have a scale in full-sized prints no smaller than one inch equals 0.5 miles for transmission lines, roads, and similar linear features and no smaller than one inch equals 1,000 feet for other project features, including the project boundary. Where maps at this scale do not show sufficient detail, large scale maps may be required.

* * * * *

(e) The maps and drawings showing project location information and details of project structures must be filed in accordance with the Commission's instructions on submission of Critical Energy Infrastructure Information in §§ 388.112 and 388.113 of subchapter X of this chapter.

**§ 4.40 [Amended]**

■ 13. Amend § 4.40 as follows:

In paragraph (b), remove ''Division of Hydropower Licensing'' and add ''Office of Energy Projects'' in its place.

■ 14. Amend § 4.41 as follows:

■ a. In paragraph (c)(4)(i), remove ''a flow duration curve'' and add ''monthly flow duration curves'' in its place. After the phrase ''deriving the'', remove ''curve'' and add ''curves'' in its place.

■ b. In paragraph (c)(4)(iii), add ''minimum and maximum'' between ''estimated'' and ''hydraulic''.

■ c. In paragraph (e)(4)(iii), remove ''and'' the first place it appears.

■ d. In paragraph (e)(4)(iv), add ''and'' after the word ''contingencies;''.

■ e. Paragraph (e)(4)(v) is added.

■ f. In paragraph (e)(7), remove ''and'' after ''constructed;''.

■ g. In paragraph (e)(8), remove the period after ''section'' and add a semi-colon in its place.

■ h. Paragraphs (e)(9) and (e)(10) are added.

■ i. In paragraph (f)(9)(i), remove ''Soil Conservation Service'' and add ''Natural Resources Conservation Service'' in its place.

■ j. Paragraph (h), introductory text, is revised.

■ k. In paragraph (h)(2), second sentence, remove ''license'' from ''the license application''.

■ l. Paragraph (h)(3)(iv) is added.

■ m. Paragraph (h)(4)(ii) is revised.

The revised and added text reads as follows.

**§ 4.41 Contents of application.**

* * * * *

(e) * * *

(4) * * *

(v) The estimated capital cost and estimated annual operation and maintenance expense of each proposed environmental measure;

* * * * *

(9) An estimate of the cost to develop the license application; and

(10) The on-peak and off-peak values of project power, and the basis for estimating the values, for projects which are proposed to operate in a mode other than run-of-river.

* * * * *

(h) *Exhibit G* is a map of the project that must conform to the specifications of § 4.39. In addition, each exhibit G boundary map must be submitted in a geo-referenced electronic format—such as ArcView shape files, GeoMedia files, MapInfo files, or any similar format. The electronic boundary map must be positionally accurate to + 40 feet, in order to comply with the National Map Accuracy Standards for maps at a 1:24,000 scale (the scale of USGS quadrangle maps). The electronic exhibit G data must include a text file describing the map projection used (*i.e.*, UTM, State Plane, Decimal Degrees, etc.), the map datum (*i.e.*, feet, meters, miles, etc.). Three copies of the electronic maps must be submitted on compact disk or DVD. If more than one sheet is used for the paper maps, the sheets must be numbered consecutively, and each sheet must bear a small insert sketch showing the entire project and indicate that portion of the project depicted on that sheet. Each sheet must contain a minimum of three known reference points. The latitude and longitude coordinates, or state plane coordinates, or each reference point must be shown. If at any time after the application is filed there is any change in the project boundary, the applicant must submit, within 90 days following the completion of project construction, a final exhibit G showing the extent of such changes. The map must show:

* * * * *

(3) * * *

(iv) The project location must include the most current information pertaining to affected Federal lands as described under § 4.81(b)(5).

(4) * * *

(ii) Lands over which the applicant has acquired or plans to acquire rights to occupancy and use other than fee title, including rights acquired or to be acquired by easement or lease.

■ 15. Amend § 4.51 as follows:

■ a. In paragraph (c)(2)(i), remove ''a flow duration curve'' and add ''monthly flow duration curves'' in its place and remove ''curve'' the second place it appears and add ''curves'' in its place.

■ b. In paragraph (c)(2)(iii), before the word ''maximum'', add ''minimum and''.

■ c. Paragraph (e)(4) is revised.

■ d. Paragraphs (e)(7)–(9) are added.

■ e. Paragraph (g) is revised.

■ f. Paragraph (h) is revised.

The revised and added text reads as follows:

**§ 4.51 Contents of application.**

* * * * *

(e) * * *

(4) A statement of the estimated average annual cost of the total project as proposed specifying any projected changes in the costs (life-cycle costs) over the estimated financing or licensing period if the applicant takes such changes into account, including:

(i) Cost of capital (equity and debt);

(ii) Local, state, and Federal taxes;

(iii) Depreciation and amortization;

(iv) Operation and maintenance expenses, including interim replacements, insurance, administrative and general expenses, and contingencies; and

(v) The estimated capital cost and estimated annual operation and maintenance expense of each proposed environmental measure.

* * * * *

(7) An estimate to develop the cost of the license application;

(8) The on-peak and off-peak values of project power, and the basis for estimating the values, for projects which are proposed to operate in a mode other than run-of-river; and

(9) The estimated average annual increase or decrease in project generation, and the estimated average annual increase or decrease of the value of project power, due to a change in project operations (*i.e.*, minimum bypass flows; limits on reservoir fluctuations).

* * * * *

(g) Exhibit F. *See* § 4.41(g) of this chapter.

(h) Exhibit G. *See* § 4.41(h) of this chapter.

* * * * *

**§ 4.60 [Amended]**

■ 16. Amend § 4.60 as follows:

■ In paragraph (b), remove ''Division of Public Information'' and add ''Public Reference Room'' in its place.

■ 17. Amend § 4.61 as follows:

■ a. In paragraph (c)(1)(vii), after the first appearance of ''estimated'' add ''minimum and maximum''. After ''1.5 megawatts,'' remove ''a'' and add ''monthly'' in its place. Remove ''curve'' and add in its place ''curves''.

■ b. Paragraph (c)(1)(x) is added.

■ c. Paragraphs (c) (3) through (9) are added.

■ d. Paragraph (e) is revised.

■ e. Paragraph (f) is revised.

The revised and added text reads as follows:

**§ 4.61 Contents of application.**

* * * * *

(c) * * *

(1) * * *

(x) The estimated capital costs and estimated annual operation and maintenance expense of each proposed environmental measure.

* * * * *

(3) An estimate of the cost to develop the license application; and

(4) The on-peak and off-peak values of project power, and the basis for estimating the values, for project which are proposed to operate in a mode other than run-of-river.

(5) The estimated average annual increase or decrease in project generation, and the estimated average annual increase or decrease of the value of project power due to a change in project operations (*i.e.*, minimum bypass flows, limiting reservoir fluctuations) for an application for a new license;

(6) The remaining undepreciated net investment, or book value of the project;

(7) The annual operation and maintenance expenses, including insurance, and administrative and general costs;

(8) A detailed single-line electrical diagram;

(9) A statement of measures taken or planned to ensure safe management, operation, and maintenance of the project.

* * * * *

(e) *Exhibit F.* See § 4.41(g) of this chapter.

(f) *Exhibit G.* See § 4.41(h) of this chapter.

**§ 4.70 [Amended]**

■ 18. In § 4.70, remove ''or other hydroelectric power project authorized by Congress''.

**§ 4.81 [Amended]**

■ 19. In § 4.81, paragraph (b)(5) is revised to read as follows:

The revised text reads as follows:

**§ 4.81 Contents of application.**

* * * * *

(b) * * *

(5) All lands of the United States that are enclosed within the proposed project boundary described under paragraph (e)(3) of this section, identified and tabulated on a separate sheet by legal subdivisions of a public land survey of the affected area, if available. If the project boundary includes lands of the United States, such lands must be identified on a completed land description form, provided by the Commission. The

project location must identify any Federal reservation, Federal tracts, and townships of the public land surveys (or official protractions thereof if unsurveyed). A copy of the form must also be sent to the Bureau of Land Management state office where the project is located;

* * * * *

**§ 4.90 [Amended]**

■ 20. In § 4.90, remove ''§ 4.30(b)(26)'' and add ''§ 4.30(b)(28)'' in its place.

■ 21. Amend § 4.92 as follows:

■ a. In § 4.92 remove ''§ 4.30(b)(26)'' wherever it appears and add ''§ 4.30(b)(28)'' in its place.

■ b. Paragraph (a)(2) is revised.

■ c. In paragraph (c), introductory text, remove ''Exhibit B'' and add ''Exhibit F'' in its place.

■ d. Paragraph (d) is revised.

■ e. Paragraph (f) is revised.

The revised text reads as follows:

**§ 4.92 Contents of exemption application.**

(a) * * *

(2) Exhibits A, E, F, and G.

* * * * *

(d) *Exhibit G.* Exhibit G is a map of the project and boundary and must conform to the specifications of § 4.41(h) of this chapter.

* * * * *

(f) *Exhibit F.* Exhibit F is a set of drawings showing the structures and equipment of the small conduit hydroelectric facility and must conform to the specifications of § 4.41(g) of this chapter.

**§ 4.93 [Amended]**

■ 22. In § 4.93, remove from paragraph (a) ''§ 4.30(b)(26)(v)'' and add ''§ 4.30(b)(28)(v)'' in its place.

**§ 4.101 [Amended]**

■ 23. In § 4.101, remove ''4.30(b)(27)'' and add ''4.30(b)(29)'' in its place.

■ 24. Amend § 4.107 as follows:

■ a. Paragraph (d) is revised.

■ b. Paragraph (f) is revised.

The revised text reads as follows:

**§ 4.107 Contents of application for exemption from licensing.**

* * * * *

(d) *Exhibit G.* Exhibit G is a map of the project and boundary and must conform to the specifications of § 4.41(h) of this chapter.

* * * * *

(f) *Exhibit F.* Exhibit F is a set of drawings showing the structures and equipment of the small hydroelectric facility and must conform to the specifications of § 4.41(g) of this chapter.

**§ 4.200 [Amended]**

■ 25. In § 4.200, remove from paragraph (c) ''on'' and add ''in'' in its place.

■ 26. Add part 5 to read as follows:

## PART 5—INTEGRATED LICENSE APPLICATION PROCESS

Sec.



**Authority:** 16 U.S.C. 791a-825r, 2601–2645; 42 U.S.C. 7101–7352.

**§ 5.1 Applicability, definitions, and requirement to consult.**

(a) This part applies to the filing and processing of an application for an:

(1) Original license;

(2) New license for an existing project subject to Sections 14 and 15 of the Federal Power Act; or

(3) Subsequent license.

(b) *Definitions.* The definitions in § 4.30(b) of this parte and § 16.2 of this part apply to this part.

(c) *Who may file.* Any citizen, association of citizens, domestic corporation, municipality, or state may develop and file a license application under this part.

(d) *Requirement to consult.* (1) Before it files any application for an original, new, or subsequent license under this part, a potential applicant must consult with the relevant Federal, state, and interstate resource agencies, including as appropriate the National Marine Fisheries Service, the United States Fish and Wildlife Service, Bureau of Indian Affairs, the National Park Service, the United States Environmental Protection Agency, the Federal agency administering any United States lands utilized or occupied by the project, the appropriate state fish and wildlife agencies, the appropriate state water resource management agencies, the certifying agency or Indian tribe under Section 401(a)(1) of the Federal Water Pollution Control Act (Clean Water Act), 33 U.S.C. 1341(c)(1)), the agency that administers the Coastal Zone Management Act, 16 U.S.C. § 1451–1465, any Indian tribe that may be affected by the project, and members of the public. A potential license applicant must file a notification of intent to file a license application pursuant to § 5.2 and a pre-application document pursuant to the provisions of § 5.3.

(2) The Director of the Office of Energy Projects will, upon request, provide a list of known appropriate Federal, state, and interstate resource agencies, Indian tribes, and local, regional, or national non-governmental organizations likely to be interested in any license application proceeding.

(e) *Purpose.* The purpose of the integrated licensing process provided for in this part is to provide an efficient and timely licensing process that continues to ensure appropriate resource protections through better coordination of the Commission's processes with those of Federal and state agencies and Indian tribes that have authority to condition Commission licenses.

(f) *Default process.* Each potential original, new, or subsequent license applicant must use the license application process provided for in this part unless the potential applicant applies for and receives authorization from the Commission under this part to use the licensing process provided for in:

(1) 18 CFR part 4, Subparts D–H and, as applicable, part 16 (*i.e.*, traditional process), pursuant to paragraph (c) of this section; or

(2) Section 4.34(i) of this chapter, *Alternative procedures.*

**§ 5.2 Document availability.**

(a) *Pre-application document.* (1) From the date a potential license applicant files a notification of intent to

seek a license pursuant to § 5.5 until any related license application proceeding is terminated by the Commission, the potential license applicant must make reasonably available to the public for inspection at its principal place of business or another location that is more accessible to the public, the pre-application document and any materials referenced therein. These materials must be available for inspection during regular business hours in a form that is readily accessible, reviewable, and reproducible.

(2) The materials specified in paragraph (a)(1) of this section must be made available to the requester at the location specified in paragraph (a)(1) of this section or through the mail, or otherwise. Except as provided in paragraph (a)(3) of this section, copies of the pre-application document and any materials referenced therein must be made available at their reasonable cost of reproduction plus, if applicable, postage.

(3) A potential licensee must make requested copies of the materials specified in paragraph (a)(1) of this section available to the United States Fish and Wildlife Service, the National Marine Fisheries Service, the state agency responsible for fish and wildlife resources, any affected Federal land managing agencies, and Indian tribes without charge for the costs of reproduction or postage.

(b) *License application.* (1) From the date on which a license application is filed under this part until the licensing proceeding for the project is terminated by the Commission, the license applicant must make reasonably available to the public for inspection at its principal place of business or another location that is more accessible to the public, a copy of the complete application for license, together with all exhibits, appendices, and any amendments, pleadings, supplementary or additional information, or correspondence filed by the applicant with the Commission in connection with the application. These materials must be available for inspection during regular business hours in a form that is readily accessible, reviewable, and reproducible at the same time as the information is filed with the Commission or required by regulation to be made available.

(2) The applicant must provide a copy of the complete application (as amended) to a public library or other convenient public office located in each county in which the proposed project is located.

(3) The materials specified in paragraph (b)(1) of this section must be made available to the requester at the location specified in paragraph (b)(1) of this section or through the mail. Except as provided in paragraph (b)(4) of this section, copies of the license application and any materials referenced therein must be made available at their reasonable cost of reproduction plus, if applicable, postage.

(4) A licensee applicant must make requested copies of the materials specified in paragraph (b)(1) of this section available to the United States Fish and Wildlife Service, the National Marine Fisheries Service, and the state agency responsible for fish and wildlife resources, any affected Federal land managing agencies, and Indian tribes without charge for the costs of reproduction or postage.

(c) *Confidentiality of cultural information.* A potential applicant must delete from any information made available to the public under paragraphs (a) and (b) of this section, specific site or property locations the disclosure of which would create a risk of harm, theft, or destruction of archeological or native American cultural resources or of the site at which the sources are located, or would violate any Federal law, include the Archeological Resources Protection Act of 1979, 16 U.S.C. 470w–3, and the National Historic Preservation Act of 1966, 16 U.S.C. 470hh.

(d) *Access.* Anyone may file a petition with the Commission requesting access to the information specified in paragraphs (a) or (b) of this section if it believes that the potential applicant or applicant is not making the information reasonably available for public inspection or reproduction. The petition must describe in detail the basis for the petitioner's belief.

### § 5.3 Process selection

(a)(1) Notwithstanding any other provision of this part or of parts 4 and 16 of this chapter, a potential applicant for a new, subsequent, or original license may until July 23, 2005 elect to use the licensing procedures of this part or the licensing procedures of parts 4 and 16.

(2) Any potential license applicant that files its notification of intent pursuant to § 5.5 and pre-application document pursuant to § 5.6 after July 23, 2005 must request authorization to use the licensing procedures of parts 4 and 16, as provided for in paragraphs (b)–(f) of this section.

(b) A potential license applicant may file with the Commission a request to use the traditional licensing process or alternative procedures pursuant to this Section with its notification of intent pursuant to § 5.5.

(c)(1)(i) An application for authorization to use the traditional process must include justification for the request and any existing written comments on the potential applicant's proposal and a response thereto.

(ii) A potential applicant requesting authorization to use the traditional process should address the following considerations:

(A) Likelihood of timely license issuance;

(B) Complexity of the resource issues;

(C) Level of anticipated controversy;

(D) Relative cost of the traditional process compared to the integrated process;

(E) The amount of available information and potential for significant disputes over studies; and

(F) Other factors believed by the commenter to be pertinent

(2) A potential applicant requesting the use of § 4.34(i) *alternative procedures* of this chapter must:

(i) Demonstrate that a reasonable effort has been made to contact all agencies, Indian tribes, and others affected by the applicant's request, and that a consensus exists that the use of alternative procedures is appropriate under the circumstances;

(ii) Submit a communications protocol, supported by interested entities, governing how the applicant and other participants in the pre-filing consultation process, including the Commission staff, may communicate with each other regarding the merits of the potential applicant's proposal and proposals and recommendations of interested entities; and

(iii) Provide a copy of the request to all affected resource agencies and Indian tribes and to all entities contacted by the applicant that have expressed an interest in the alternative pre-filing consultation process.

(d)(1) The potential applicant must provide a copy of the request to use the traditional process or alternative procedures to all affected resource agencies, Indian tribes, and members of the public likely to be interested in the proceeding. The request must state that comments on the request to use the traditional process or alternative procedures, as applicable, must be filed with the Commission within 30 days of the filing date of the request and, if there is no project number, that responses must reference the potential applicant's name and address.

(2) The potential applicant must also publish notice of the filing of its notification of intent, of the pre-application document, and of any request to use the traditional process or alternative procedures no later than the

filing date of the notification of intent in a daily or weekly newspaper of general circulation in each county in which the project is located. The notice must:

(i) Disclose the filing date of the request to use the traditional process or alternative procedures, and the notification of intent and pre-application document;

(ii) Briefly summarize these documents and the basis for the request to use the traditional process or alternative procedures;

(iii) Include the potential applicant's name and address, and telephone number, the type of facility proposed to be applied for, its proposed location, the places where the pre-application document is available for inspection and reproduction;

(iv) Include a statement that comments on the request to use the traditional process or alternative procedures are due to the Commission and the potential applicant no later than 30 days following the filing date of that document and, if there is no project number, that responses must reference the potential applicant's name and address;

(v) State that comments on any request to use the traditional process should address, as appropriate to the circumstances of the request, the:

(A) Likelihood of timely license issuance;

(B) Complexity of the resource issues;

(C) Level of anticipated controversy;

(D) Relative cost of the traditional process compared to the integrated process; and

(E) The amount of available information and potential for significant disputes over studies; and

(F) Other factors believed by the commenter to be pertinent; and

(vi) State that respondents must submit an electronic filing pursuant to § 385.2003(c) or an original and eight copies of their comments to the Office of the Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

(e) Requests to use the traditional process or alternative procedures shall be granted for good cause shown.

### § 5.4 Acceleration of a license expiration date.

(a) *Request for acceleration.* (1) No later than five and one-half years prior to expiration of an existing license, a licensee may file with the Commission, in accordance with the formal filing requirements in subpart T of part 385 of this chapter, a written request for acceleration of the expiration date of its existing license, containing the statements and information specified in § 16.6(b) of this chapter and a detailed explanation of the basis for the acceleration request.

(2) If the Commission grants the request for acceleration pursuant to paragraph (c) of this section, the Commission will deem the request for acceleration to be a notice of intent under § 16.6 of this chapter and, unless the Commission directs otherwise, the licensee must make available the Pre-Application Document provided for in § 5.6 no later than 90 days from the date that the Commission grants the request for acceleration.

(b) *Notice of request for acceleration.* (1) Upon receipt of a request for acceleration, the Commission will give notice of the licensee's request and provide a 45-day period for comments by interested persons by:

(i) Publishing notice in the **Federal Register**;

(ii) Publishing notice once in a daily or weekly newspaper published in the county or counties in which the project or any part thereof or the lands affected thereby are situated; and

(iii) Notifying appropriate Federal, state, and interstate resource agencies and Indian tribes, and non-governmental organizations likely to be interested.

(2) The notice issued pursuant to paragraphs (b)(1)(A) and (B) and the written notice given pursuant to paragraph (b)(1)(C) will be considered as fulfilling the notice provisions of § 16.6(d) of this chapter should the Commission grant the acceleration request and will include an explanation of the basis for the licensee's acceleration request.

(c) *Commission order.* If the Commission determines it is in the public interest, the Commission will issue an order accelerating the expiration date of the license to not less than five years and 90 days from the date of the Commission order.

### § 5.5 Notification of intent.

(a) *Notification of intent.* A potential applicant for an original, new, or subsequent license, must file a notification of its intent to do so in the manner provided for in paragraphs (b) and (c) of this section.

(b) *Requirement to notify.* In order for a non-licensee to notify the Commission that it intends to file an application for an original, new, or subsequent license, or for an existing licensee to notify the Commission whether or not it intends to file an application for a new or subsequent license, a potential license applicant must file with the Commission pursuant to the requirements of subpart T of part 385 of this chapter a letter that contains the following information:

(1) The potential applicant or existing licensee's name and address.

(2) The project number, if any.

(3) The license expiration date, if any.

(4) An unequivocal statement of the potential applicant's intention to file an application for an original license, or, in the case of an existing licensee, to file or not to file an application for a new or subsequent license.

(5) The type of principal project works licensed, if any, such as dam and reservoir, powerhouse, or transmission lines.

(6) The location of the project by state, county, and stream, and, when appropriate, by city or nearby city.

(7) The installed plant capacity, if any.

(8) The names and mailing addresses of:

(i) Every county in which any part of the project is located, and in which any Federal facility that is used or to be used by the project is located;

(ii) Every city, town, or similar political subdivision;

(A) In which any part of the project is or is to be located and any Federal facility that is or is to be used by the project is located, or

(B) That has a population of 5,000 or more people and is located within 15 miles of the existing or proposed project dam;

(iii) Every irrigation district, drainage district, or similar special purpose political subdivision:

(A) In which any part of the project is or is proposed to be located and any Federal facility that is or is proposed to be used by the project is located; or

(B) That owns, operates, maintains, or uses any project facility or any Federal facility that is or is proposed to be used by the project;

(iv) Every other political subdivision in the general area of the project or proposed project that there is reason to believe would be likely to be interested in, or affected by, the notification; and

(v) Affected Indian tribes.

(c) *Requirement to distribute.* Before it files any application for an original, new, or subsequent license, a potential license applicant proposing to file a license application pursuant to this part or to request to file a license application pursuant to part 4 of this chapter and, as appropriate, part 16 of this chapter (*i.e.*, the ''traditional process''), including an application pursuant to § 4.34(i) *alternative procedures* of this chapter must distribute to appropriate Federal, state, and interstate resource agencies, Indian tribes, and members of the public likely to be interested in the

proceeding the notification of intent provided for in paragraph (a) of this section.

(d) *When to notify.* An existing licensee or non-licensee potential applicant must notify the Commission as required in paragraph (b) of this section at least five years, but not more than five and one-half years, before the existing license expires.

(e) *Non-Federal representatives.* A potential license applicant may at the same time it files its notification of intent and distributes its pre-application document, request to be designated as the Commission's non-Federal representative for purposes of consultation under section 7 of the Endangered Species Act and the joint agency regulations thereunder at 50 CFR part 402, Section 305(b) of the Magnuson-Stevens Fishery Conservation and Management Act and the implementing regulations at 50 CFR 600.920. A potential license applicant may at the same time request authorization to initiate consultation under section 106 of the National Historic Preservation Act and the implementing regulations at 36 CFR 800.2(c)(4).

(f) *Procedural matters.* The provisions of subpart F of part 16 of this chapter apply to projects to which this part applies.

(g) *Construction of regulations.* The provisions of this part and parts 4 and 16 shall be construed in a manner that best implements the purposes of each part and gives full effect to applicable provisions of the Federal Power Act.

**§ 5.6 Pre-application document.**

(a) *Pre-application document.* (1) Simultaneously with the filing of its notification of intent to seek a license as provided for in § 5.5, and before it files any application for an original, new, or subsequent license, a potential applicant for a license to be filed pursuant to this part or part 4 of this chapter and, as appropriate, part 16 of this chapter, must file with the Commission and distribute to the appropriate Federal, state, and interstate resource agencies, Indian tribes, local governments, and members of the public likely to be interested in the proceeding, the pre-application document provided for in this section.

(2) The agencies referred to in paragraph (a)(1) of this section include: Any state agency with responsibility for fish, wildlife, and botanical resources, water quality, coastal zone management plan consistency certification, shoreline management, and water resources; the U.S. Fish and Wildlife Service; the National Marine Fisheries Service; Environmental Protection Agency; State Historic Preservation Officer; Tribal Historic Preservation Officer; National Park Service; local, state, and regional recreation agencies and planning commissions; local and state zoning agencies; and any other state or Federal agency or Indian tribe with managerial authority over any part of project lands and waters.

(b) *Purpose of pre-application document.* (1) The pre-application document provides the Commission and the entities identified in paragraph (a) of this section with existing information relevant to the project proposal that is in the potential applicant's possession or that the potential applicant can obtain with the exercise of due diligence. This existing, relevant, and reasonably available information is distributed to these entities to enable them to identify issues and related information needs, develop study requests and study plans, and prepare documents analyzing any license application that may be filed. It is also a precursor to the environmental analysis section of the Preliminary Licensing Proposal or draft license application provided for in § 5.16, Exhibit E of the final license application, and the Commission's scoping document(s) and environmental impact statement or environmental assessment under the National Environmental Policy Act (NEPA).

(2) A potential applicant is not required to conduct studies in order to generate information for inclusion in the pre-application document. Rather, a potential applicant must exercise due diligence in determining what information exists that is relevant to describing the existing environment and potential impacts of the project proposal (including cumulative impacts), obtaining that information if the potential applicant does not already possess it, and describing or summarizing it as provided for in paragraph (d) of this section. Due diligence includes, but is not limited to, contacting appropriate agencies and Indian tribes that may have relevant information and review of Federal and state comprehensive plans filed with the Commission and listed on the Commission's Web site at *http://www.ferc.gov*.

(c) *Form and distribution protocol.*—(1) *General requirements.* As specifically provided for in the content requirements of paragraph (d) of this section, the pre-application document must describe the existing and proposed (if any) project facilities and operations, provide information on the existing environment, and existing data or studies relevant to the existing environment, and any known and potential impacts of the proposed project on the specified resources.

(2) *Availability of source information and studies.* The sources of information on the existing environment and known or potential resource impacts included in the descriptions and summaries must be referenced in the relevant section of the document, and in an appendix to the document. The information must be provided upon request to recipients of the pre-application document. A potential applicant must provide the requested information within 20 days from receipt of the request. Potential applicants and requesters are strongly encouraged to use electronic means or compacts disks to distribute studies and other forms of information, but a potential applicant must, upon request, provide the information in hard copy form. The potential applicant is also strongly encouraged to include with the pre-application document any written protocol for distribution consistent with this paragraph to which it has agreed with agencies, Indian tribes, or other entities.

(d) *Content requirements.*—(1) *Process plan and schedule.* The pre-application document must include a plan and schedule for all pre-application activity that incorporates the time frames for pre-filing consultation, information gathering, and studies set forth in this part. The plan and schedule must include a proposed location and date for the scoping meeting and site visit required by § 5.8(b)(3)(viii).

(2) *Project location, facilities, and operations.* The potential applicant must include in the pre-application document:

(i) The exact name and business address, and telephone number of each person authorized to act as agent for the applicant;

(ii) Detailed maps showing lands and waters within the project boundary by township, range, and section, as well as by state, county, river, river mile, and closest town, and also showing the specific location of any Federal and tribal lands, and the location of proposed project facilities, including roads, transmission lines, and any other appurtenant facilities;

(iii) A detailed description of all existing and proposed project facilities and components, including:

(A) The physical composition, dimensions, and general configuration of any dams, spillways, penstocks, canals, powerhouses, tailraces, and other structures proposed to be included

as part of the project or connected directly to it;

(B) The normal maximum water surface area and normal maximum water surface elevation (mean sea level), gross storage capacity of any impoundments;

(C) The number, type, and minimum and maximum hydraulic capacity and installed (rated) capacity of any proposed turbines or generators to be included as part of the project;

(D) The number, length, voltage, and interconnections of any primary transmission lines proposed to be included as part of the project, including a single-line diagram showing the transfer of electricity from the project to the transmission grid or point of use; and

(E) An estimate of the dependable capacity, average annual, and average monthly energy production in kilowatt hours (or mechanical equivalent);

(iv) A description of the current (if applicable) and proposed operation of the project, including any daily or seasonal ramping rates, flushing flows, reservoir operations, and flood control operations.

(v) In the case of an existing licensed project;

(A) A complete description of the current license requirements; *i.e.*, the requirements of the original license as amended during the license term;

(B) A summary of project generation and outflow records for the five years preceding filing of the pre-application document;

(C) Current net investment; and

(D) A summary of the compliance history of the project, if applicable, including a description of any recurring situations of non-compliance.

(vi) A description of any new facilities or components to be constructed, plans for future development or rehabilitation of the project, and changes in project operation.

(3) *Description of existing environment and resource impacts.*—(i) *General requirements.* A potential applicant must, based on the existing, relevant, and reasonably available information, include a discussion with respect to each resource that includes:

(A) A description of the existing environment as required by paragraphs (d)(3)(ii)–(xiii) of this section;

(B) Summaries (with references to sources of information or studies) of existing data or studies regarding the resource;

(C) A description of any known or potential adverse impacts and issues associated with the construction, operation or maintenance of the proposed project, including continuing and cumulative impacts; and

(D) A description of any existing or proposed project facilities or operations, and management activities undertaken for the purpose of protecting, mitigating impacts to, or enhancing resources affected by the project, including a statement of whether such measures are required by the project license, or were undertaken for other reasons. The type and amount of the information included in the discussion must be commensurate with the scope and level of resource impacts caused or potentially caused by the proposed project. Potential license applicants are encouraged to provide photographs or other visual aids, as appropriate, to supplement text, charts, and graphs included in the discussion.

(ii) *Geology and soils.* Descriptions and maps showing the existing geology, topography, and soils of the proposed project and surrounding area. Components of the description must include:

(A) A description of geological features, including bedrock lithology, stratigraphy, structural features, glacial features, unconsolidated deposits, and mineral resources at the project site;

(B) A description of the soils, including the types, occurrence, physical and chemical characteristics, erodability and potential for mass soil movement;

(C) A description of reservoir shorelines and streambanks, including:

(*1*) Steepness, composition (bedrock and unconsolidated deposits), and vegetative cover; and

(*2*) Existing erosion, mass soil movement, slumping, or other forms of instability, including identification of project facilities or operations that are known to or may cause these conditions.

(iii) *Water resources.* A description of the water resources of the proposed project and surrounding area. This must address the quantity and quality (chemical/physical parameters) of all waters affected by the project, including but not limited to the project reservoir(s) and tributaries thereto, bypassed reach, and tailrace. Components of the description must include:

(A) Drainage area;

(B) The monthly minimum, mean, and maximum recorded flows in cubic feet per second of the stream or other body of water at the powerplant intake or point of diversion, specifying any adjustments made for evaporation, leakage, minimum flow releases, or other reductions in available flow;

(C) A monthly flow duration curve indicating the period of record and the location of gauging station(s), including identification number(s), used in deriving the curve; and a specification of the critical streamflow used to determine the project's dependable capacity;

(D) Existing and proposed uses of project waters for irrigation, domestic water supply, industrial and other purposes, including any upstream or downstream requirements or constraints to accommodate those purposes;

(E) Existing instream flow uses of streams in the project area that would be affected by project construction and operation; information on existing water rights and water rights applications potentially affecting or affected by the project;

(F) Any federally-approved water quality standards applicable to project waters;

(G) Seasonal variation of existing water quality data for any stream, lake, or reservoir that would be affected by the proposed project, including information on:

(*1*) Water temperature and dissolved oxygen, including seasonal vertical profiles in the reservoir;

(*2*) Other physical and chemical parameters to include, as appropriate for the project; total dissolved gas, pH, total hardness, specific conductance, cholorphyll a, suspended sediment concentrations, total nitrogen (mg/L as N), total phosphorus (mg/L as P), and fecal coliform (E. Coli) concentrations;

(H) The following data with respect to any existing or proposed lake or reservoir associated with the proposed project; surface area, volume, maximum depth, mean depth, flushing rate, shoreline length, substrate composition; and

(I) Gradient for downstream reaches directly affected by the proposed project.

(iv) *Fish and aquatic resources.* A description of the fish and other aquatic resources, including invasive species, in the project vicinity. This section must discuss the existing fish and macroinvertebrate communities, including the presence or absence of anadromous, catadromous, or migratory fish, and any known or potential upstream or downstream impacts of the project on the aquatic community. Components of the description must include:

(A) Identification of existing fish and aquatic communities;

(B) Identification of any essential fish habitat as defined under the Magnuson-Stevens Fishery Conservation and Management Act and established by the National Marine Fisheries Service; and

(C) Temporal and spacial distribution of fish and aquatic communities and any associated trends with respect to:

(*1*) Species and life stage composition;

(*2*) Standing crop;

(*3*) Age and growth data;

(*4*) Spawning run timing; and

(*5*) The extent and location of spawning, rearing, feeding, and wintering habitat.

(v) *Wildlife and botanical resources.* A description of the wildlife and botanical resources, including invasive species, in the project vicinity. Components of this description must include:

(A) Upland habitat(s) in the project vicinity, including the project's transmission line corridor or right-of-way and a listing of plant and animal species that use the habitat(s); and

(B) Temporal or spacial distribution of species considered important because of their commercial, recreational, or cultural value.

(vi) *Wetlands, riparian, and littoral habitat.* A description of the floodplain, wetlands, riparian habitats, and littoral in the project vicinity. Components of this description must include:

(A) A list of plant and animal species, including invasive species, that use the wetland, littoral, and riparian habitat;

(B) A map delineating the wetlands, riparian, and littoral habitat; and

(C) Estimates of acreage for each type of wetland, riparian, or littoral habitat, including variability in such availability as a function of storage at a project that is not operated in run-of-river mode.

(vii) *Rare, threatened and endangered species.* A description of any listed rare, threatened and endangered, candidate, or special status species that may be present in the project vicinity. Components of this description must include:

(A) A list of Federal- and state-listed, or proposed to be listed, threatened and endangered species known to be present in the project vicinity;

(B) Identification of habitat requirements;

(C) References to any known biological opinion, status reports, or recovery plan pertaining to a listed species;

(D) Extent and location of any federally-designated critical habitat, or other habitat for listed species in the project area; and

(E) Temporal and spatial distribution of the listed species within the project vicinity.

(viii) *Recreation and land use.* A description of the existing recreational and land uses and opportunities within the project boundary. The components of this description include:

(A) Text description illustrated by maps of existing recreational facilities, type of activity supported, location, capacity, ownership and management;

(B) Current recreational use of project lands and waters compared to facility or resource capacity;

(C) Existing shoreline buffer zones within the project boundary;

(D) Current and future recreation needs identified in current State Comprehensive Outdoor Recreation Plans, other applicable plans on file with the Commission, or other relevant local, state, or regional conservation and recreation plans;

(E) If the potential applicant is an existing licensee, its current shoreline management plan or policy, if any, with regard to permitting development of piers, boat docks and landings, bulkheads, and other shoreline facilities on project lands and waters;

(F) A discussion of whether the project is located within or adjacent to a:

(*1*) River segment that is designated as part of, or under study for inclusion in, the National Wild and Scenic River System; or

(*2*) State-protected river segment;

(G) Whether any project lands are under study for inclusion in the National Trails System or designated as, or under study for inclusion as, a Wilderness Area.

(H) Any regionally or nationally important recreation areas in the project vicinity;

(I) Non-recreational land use and management within the project boundary; and

(J) Recreational and non-recreational land use and management adjacent to the project boundary.

(ix) *Aesthetic resources.* A description of the visual characteristics of the lands and waters affected by the project. Components of this description include a description of the dam, natural water features, and other scenic attractions of the project and surrounding vicinity. Potential applicants are encouraged to supplement the text description with visual aids.

(x) *Cultural resources.* A description of the known cultural or historical resources of the proposed project and surrounding area. Components of this description include:

(A) Identification of any historic or archaeological site in the proposed project vicinity, with particular emphasis on sites or properties either listed in, or recommended by the State Historic Preservation Officer or Tribal Historic Preservation Officer for inclusion in, the National Register of Historic Places;

(B) Existing discovery measures, such as surveys, inventories, and limited subsurface testing work, for the purpose of locating, identifying, and assessing the significance of historic and archaeological resources that have been undertaken within or adjacent to the project boundary; and

(C) Identification of Indian tribes that may attach religious and cultural significance to historic properties within the project boundary or in the project vicinity; as well as available information on Indian traditional cultural and religious properties, whether on or off of any federally-recognized Indian reservation (A potential applicant must delete from any information made available under this section specific site or property locations, the disclosure of which would create a risk of harm, theft, or destruction of archaeological or Native American cultural resources or to the site at which the resources are located, or would violate any Federal law, including the Archaeological Resources Protection Act of 1979, 16 U.S.C. 470w-3, and the National Historic Preservation Act of 1966, 16 U.S.C. 470hh).

(xi) *Socio-economic resources.* A general description of socio-economic conditions in the vicinity of the project. Components of this description include general land use patterns (*e.g.*, urban, agricultural, forested), population patterns, and sources of employment in the project vicinity.

(xii) *Tribal resources.* A description of Indian tribes, tribal lands, and interests that may be affected by the project Components of this description include:

(A) Identification of information on resources specified in paragraphs (d)(2)(ii)–(xi) of this section to the extent that existing project construction and operation affecting those resources may impact tribal cultural or economic interests, *e.g.*, impacts of project-induced soil erosion on tribal cultural sites; and

(B) Identification of impacts on Indian tribes of existing project construction and operation that may affect tribal interests not necessarily associated with resources specified in paragraphs (d)(3)(ii)–(xi) of this Section, *e.g.*, tribal fishing practices or agreements between the Indian tribe and other entities other than the potential applicant that have a connection to project construction and operation.

(xiii) *River basin description.* A general description of the river basin or sub-basin, as appropriate, in which the proposed project is located, including information on:

(A) The area of the river basin or sub-basin and length of stream reaches therein;

(B) Major land and water uses in the project area;

(C) All dams and diversion structures in the basin or sub-basin, regardless of function; and

(D) Tributary rivers and streams, the resources of which are or may be affected by project operations;

(4) *Preliminary issues and studies list.* Based on the resource description and impacts discussion required by paragraphs (d)(1) and (d)(2) of this section; the pre-application document must include with respect to each resource area identified above, a list of:

(i) Issues pertaining to the identified resources;

(ii) Potential studies or information gathering requirements associated with the identified issues;

(iii) Relevant qualifying Federal and state or tribal comprehensive waterway plans; and

(iv) Relevant resource management plans.

(5) *Summary of contacts.* An appendix summarizing contacts with Federal, state, and interstate resource agencies, Indian tribes, non-governmental organizations, or other members of the public made in connection with preparing the pre-application document sufficient to enable the Commission to determine if due diligence has been exercised in obtaining relevant information.

(e) If applicable, the applicant must also provide a statement of whether or not it will seek benefits under section 210 of the Public Utility Regulatory Policies Act of 1978 (PURPA) by satisfying the requirements for qualifying hydroelectric small power production facilities in § 292.203 of this chapter. If benefits under section 210 of PURPA are sought, a statement of whether or not the applicant believes the project is located at a new dam or diversion (as that term is defined in § 292.202(p) of this chapter), and a request for the agencies' view on that belief, if any.

**§ 5.7 Tribal consultation.**

A meeting shall be held no later than 30 days following issuance of the notification of intent required by § 5.5 between each Indian tribe likely to be affected by the potential license application and the Commission staff if the affected Indian tribe agrees to such meeting.

**§ 5.8 Notice of commencement of proceeding and scoping document, or of approval to use traditional licensing process or alternative procedures.**

(a) *Notice.* Within 60 days of the notification of intent required under § 5.5, filing of the pre-application document pursuant to § 5.6, and filing of any request to use the traditional licensing process or alternative procedures, the Commission will issue a notice of commencement of proceeding and scoping document or of approval of a request to use the traditional licensing process or alternative procedures.

(b) *Notice contents.* The notice shall include:

(1) The decision of the Director of the Office of Energy Projects on any request to use the traditional licensing process or alternative procedures.

(2) If appropriate, a request by the Commission to initiate informal consultation under section 7 of the Endangered Species Act and the joint agency regulations thereunder at 50 CFR part 402, section 305(b) of the Magnuson-Stevens Fishery Conservation and Management Act and implementing regulations at 50 CFR 600.920, or section 106 of the National Historic Preservation Act and implementing regulations at 36 CFR 800.2, and, if applicable, designation of the potential applicant as the Commission's non-federal representative.

(3) If the potential license application is to be developed and filed pursuant to this part, notice of:

(i) The applicant's intent to file a license application;

(ii) The filing of the pre-application document;

(iii) Commencement of the proceeding;

(iv) A request for comments on the pre-application document (including the proposed process plan and schedule);

(v) A statement that all communications to or from the Commission staff related to the merits of the potential application must be filed with the Commission;

(vi) The request for other Federal or state agencies or Indian tribes to be cooperating agencies for purposes of developing an environmental document;

(vii) The Commission's intent with respect to preparation of an environmental impact statement; and

(viii) A public scoping meeting and site visit to be held within 30 days of the notice.

(c) *Scoping Document 1.* At the same time the Commission issues the notice provided for in paragraph (a) of this Section, the Commission staff will issue Scoping Document 1. Scoping Document 1 will include:

(1) An introductory section describing the purpose of the scoping document, the date and time of the scoping meeting, procedures for submitting written comments, and a request for information or study requests from state and Federal resource agencies, Indian tribes, non-governmental organizations, and individuals;

(2) Identification of the proposed action, including a description of the project's location, facilities, and operation, and any proposed protection and enhancement measures, and other alternatives to the proposed action, including alternatives considered but eliminated from further study, and the no action alternative;

(3) Identification of resource issues to be analyzed in the environmental document, including those that would be cumulatively affected along with a description of the geographic and temporal scope of the cumulatively affected resources;

(4) A list of qualifying Federal and state comprehensive waterway plans;

(5) A list of qualifying tribal comprehensive waterway plans;

(6) A process plan and schedule and a draft outline of the environmental document; and

(7) A list of recipients.

(d) *Scoping meeting and site visit.* The purpose of the public meeting and site visit is to:

(1) Initiate issues scoping pursuant to the National Environmental Policy Act;

(2) Review and discuss existing conditions and resource management objectives;

(3) Review and discuss existing information and make preliminary identification of information and study needs;

(4) Review, discuss, and finalize the process plan and schedule for pre-filing activity that incorporates the time periods provided for in this part and, to the extent reasonably possible, maximizes coordination of Federal, state, and tribal permitting and certification processes, including consultation under section 7 of the Endangered Species Act and water quality certification or waiver thereof under section 401 of the Clean Water Act; and

(5) Discuss the appropriateness of any Federal or state agency or Indian tribe acting as a cooperating agency for development of an environmental document pursuant to the National Environmental Policy Act.

(e) *Method of notice.* The public notice provided for in this section will be given by:

(1) Publishing notice in the **Federal Register**;

(2) Publishing notice in a daily or weekly newspaper published in the county or counties in which the project or any part thereof or the lands affected thereby are situated, and, as appropriate, tribal newspapers;

(3) Notifying appropriate Federal, state, and interstate resource agencies, state water quality and coastal zone management plan consistency certification agencies, Indian tribes, and non-governmental organizations by mail.

**§ 5.9 Comments and information or study requests.**

(a) *Comments and study requests.* Comments on the pre-application document and the Commission staff's Scoping Document 1 must be filed with the Commission within 60 days following the Commission's notice of consultation procedures issued pursuant to § 5.8. Comments, including those by Commission staff, must be accompanied by any information gathering and study requests, and should include information and studies needed for consultation under section 7 of the Endangered Species Act and water quality certification under Section 401 of the Clean Water Act.

(b) *Content of study request.* Any information or study request must:

(1) Describe the goals and objectives of each study proposal and the information to be obtained;

(2) If applicable, explain the relevant resource management goals of the agencies or Indian tribes with jurisdiction over the resource to be studied;

(3) If the requester is a not resource agency, explain any relevant public interest considerations in regard to the proposed study;

(4) Describe existing information concerning the subject of the study proposal, and the need for additional information;

(5) Explain any nexus between project operations and effects (direct, indirect, and/or cumulative) on the resource to be studied, and how the study results would inform the development of license requirements;

(6) Explain how any proposed study methodology (including any preferred data collection and analysis techniques, or objectively quantified information, and a schedule including appropriate filed season(s) and the duration) is consistent with generally accepted practice in the scientific community or, as appropriate, considers relevant tribal values and knowledge; and

(7) Describe considerations of level of effort and cost, as applicable, and why any proposed alternative studies would not be sufficient to meet the stated information needs.

(c) *Applicant seeking PURPA benefits; estimate of fees.* If a potential applicant has stated that it intends to seek PURPA benefits, comments on the pre-application document by a fish and wildlife agency must provide the potential applicant with a reasonable estimate of the total costs the agency anticipates it will incur and set mandatory terms and conditions for the proposed project. An agency may provide a potential applicant with an updated estimate as it deems necessary. If any agency believes that its most recent estimate will be exceeded by more than 25 percent, it must supply the potential applicant with a new estimate and submit a copy to the Commission.

**§ 5.10 Scoping Document 2.**

Within 45 days following the deadline for filing of comments on Scoping Document 1, the Commission staff shall, if necessary, issue Scoping Document 2.

**§ 5.11 Potential Applicant's proposed study plan and study plan meetings.**

(a) Within 45 days following the deadline for filing of comments on the pre-application document, including information and study requests, the potential applicant must file with the Commission a proposed study plan.

(b) The potential applicant's proposed study plan must include with respect to each proposed study:

(1) A detailed description of the study and the methodology to be used;

(2) A schedule for conducting the study;

(3) Provisions for periodic progress reports, including the manner and extent to which information will be shared; and sufficient time for technical review of the analysis and results; and

(4) If the potential applicant does not adopt a requested study, an explanation of why the request was not adopted, with reference to the criteria set forth in § 5.9(b).

(c) The potential applicant's proposed study plan must also include provisions for the initial and updated study reports and meetings provided for in § 5.15.

(d) The applicant's proposed study plan must:

(1) Describe the goals and objectives of each study proposal and the information to be obtained;

(2) Address any known resource management goals of the agencies or Indian tribes with jurisdiction over the resource to be studied;

(3) Describe existing information concerning the subject of the study proposal, and the need for additional information;

(4) Explain any nexus between project operations and effects (direct, indirect, and/or cumulative) on the resource to be studied;

(5) Explain how any proposed study methodology (including any preferred data collection and analysis techniques, or objectively quantified information, and a schedule including appropriate field season(s) and the duration) is consistent with generally accepted practice in the scientific community or, as appropriate, considers any known tribal interests;

(6) Describe considerations of level of effort and cost, as applicable.

(e) The potential applicant's proposed study plan must be accompanied by a proposal for conducting a study plan meeting or meetings during the 90-day period provided for in § 5.12 for the purpose of clarifying the potential applicant's proposed study plan and any initial information gathering or study requests, and to resolve any outstanding issues with respect to the proposed study plan. The initial study plan meeting must be held no later than 30 days after the deadline date for filing of the potential applicant's proposed study plan.

**§ 5.12 Comments on proposed study plan.**

Comments on the potential applicant's proposed study plan, including any revised information or study requests, must be filed within 90 days after the proposed study plan is filed. This filing must also include an explanation of any study plan concerns and any accommodations reached with the potential applicant regarding those concerns. Any proposed modifications to the potential applicant's proposed study plan must address the criteria in § 5.9(b).

**§ 5.13 Revised study plan and study plan determination.**

(a) Within 30 days following the deadline for filing comments on the potential applicant's proposed study plan, as provided for in § 5.12, the potential applicant must file a revised study plan for Commission approval. The revised study plan shall include the comments on the proposed study plan and a description of the efforts made to resolve differences over study requests. If the potential applicant does not adopt a requested study, it must explain why the request was not adopted, with

reference to the criteria set forth in § 5.9(b).

(b) Within 15 days following filing of the potential applicant's revised study plan, participants may file comments thereon.

(c) Within 30 days following the date the potential applicant files its revised study plan, the Director of Energy Projects will issue a Study Plan Determination with regard to the potential applicant's study plan, including any modifications determined to be necessary in light of the record.

(d) If no notice of study dispute is filed pursuant to § 5.14 within 20 days of the Study Plan Determination, the study plan as approved in the Study Plan Determination shall be deemed to be approved and the potential applicant shall proceed with the approved studies. If a potential applicant fails to obtain or conduct a study as required by Study Plan Determination, its license application may be considered deficient.

**§ 5.14 Formal study dispute resolution process.**

(a) Within 20 days of the Study Plan Determination, any Federal agency with authority to provide mandatory conditions on a license pursuant to FPA Section 4(e), 16 U.S.C. 797(e), or to prescribe fishways pursuant to FPA Section 18, 16 U.S.C. 811, or any agency or Indian tribe with authority to issue a water quality certification for the project license under section 401 of the Clean Water Act, 42 U.S.C. 1341, may file a notice of study dispute with respect to studies pertaining directly to the exercise of their authorities under sections 4(e) and 18 of the Federal Power Act or section 401 of the Clean Water Act.

(b) The notice of study dispute must explain how the disputing agency's or Indian tribe's study request satisfies the criteria set forth in § 5.9(b), and shall identify and provide contact information for the panel member designated by the disputing agency or Indian tribe, as discussed in paragraph (d) of this section.

(c) Studies and portions of study plans approved in the Study Plan Determination that are not the subject of a notice of dispute shall be deemed to be approved, and the potential applicant shall proceed with those studies or portions thereof.

(d) Within 20 days of a notice of study dispute, the Commission will convene one or more three-person Dispute Resolution Panels, as appropriate to the circumstances of each proceeding. Each such panel will consist of:

(1) A person from the Commission staff who is not otherwise involved in the proceeding, and who shall serve as the panel chair;

(2) One person designated by the Federal or state agency or Indian tribe that filed the notice of dispute who is not otherwise involved in the proceeding; and

(3) A third person selected by the other two panelists from a pre-established list of persons with expertise in the resource area. The two panelists shall make every reasonable effort to select the third panel member. If however no third panel member has been selected by the other two panelists within 15 days, an appropriate third panel member will be selected at random from the list of technical experts maintained by the Commission.

(e) If more than one agency or Indian tribe files a notice of dispute with respect to the decision in the preliminary determination on any information-gathering or study request, the disputing agencies or Indian tribes must select one person to represent their interests on the panel.

(f) The list of persons available to serve as a third panel member will be posted, as revised from time-to-time, on the hydroelectric page of the Commission's Web site. A person on the list who is requested and willing to serve with respect to a specific dispute will be required to file with the Commission at that time a current statement of their qualifications, a statement that they have had no prior involvement with the proceeding in which the dispute has arisen, or other financial or other conflict of interest.

(g) All costs of the panel members representing the Commission staff and the agency or Indian tribe which filed the notice of dispute will be borne by the Commission or the agency or Indian tribe, as applicable. The third panel member will serve without compensation, except for certain allowable travel expenses as defined in 31 CFR part 301.

(h) To facilitate the delivery of information to the dispute resolution panel, the identity of the panel members and their addresses for personal service with respect to a specific dispute resolution will be posted on the hydroelectric page of the Commission's Web site.

(i) No later than 25 days following the notice of study dispute, the potential applicant may file with the Commission and serve upon the panel members comments and information regarding the dispute.

(j) Prior to engaging in deliberative meetings, the panel shall hold a technical conference for the purpose of clarifying the matters in dispute with reference to the study criteria. The technical conference shall be chaired by the Commission staff member of the panel. It shall be open to all participants, and the panel shall receive information from the participants as it deems appropriate.

(k) No later than 50 days following the notice of study dispute, the panel shall make and deliver to the Director of the Office of Energy Projects a finding, with respect to each information or study request in dispute, concerning the extent to which each criteria set forth in § 5.9(b) is met or not met, and why, and make recommendations regarding the disputed study request based on its findings. The panel's findings and recommendations must be based on the record in the proceeding. The panel shall file with its findings and recommendations all of the materials received by the panel. Any recommendation for the potential applicant to provide information or a study must include the technical specifications, including data acquisition techniques and methodologies.

(l) No later than 70 days from the date of filing of the notice of study dispute, the Director of the Office of Energy Projects will review and consider the recommendations of the panel, and will issue a written determination. The Director's determination will be made with reference to the study criteria set forth in § 5.9(b) and any applicable law or Commission policies and practices, will take into account the technical expertise of the panel, and will explain why any panel recommendation was rejected, if applicable. The Director's determination shall constitute an amendment to the approved study plan.

**§ 5.15 Conduct of studies.**

(a) *Implementation.* The potential applicant must gather information and conduct studies as provided for in the approved study plan and schedule.

(b) *Progress reports.* The potential applicant must prepare and provide to the participants the progress reports provided for in § 5.11(b)(3). Upon request of any participant, the potential applicant will provide documentation of study results.

(c) *Initial study report.* (1) Pursuant to the Commission-approved study plan and schedule provided for in § 5.13 or no later than one year after Commission approval of the study plan, whichever comes first, the potential applicant must prepare and file with the Commission an initial study report describing its overall progress in implementing the

study plan and schedule and the data collected, including an explanation of any variance from the study plan and schedule. The report must also include any modifications to ongoing studies or new studies proposed by the potential applicant.

(2) Within 15 days following the filing of the initial study report, the potential applicant shall hold a meeting with the participants and Commission staff to discuss the study results and the potential applicant's and or other participant's proposals, if any, to modify the study plan in light of the progress of the study plan and data collected.

(3) Within 15 days following the meeting provided for in paragraph (c)(2) of this section, the potential applicant shall file a meeting summary, including any modifications to ongoing studies or new studies proposed by the potential applicant.

(4) Any participant or the Commission staff may file a disagreement concerning the applicant's meeting summary within 30 days, setting forth the basis for the disagreement. This filing must also include any modifications to ongoing studies or new studies proposed by the Commission staff or other participant.

(5) Responses to any filings made pursuant to paragraph (c)(4) of this section must be filed within 30 days.

(6) No later than 30 days following the due date for responses provided for in paragraph (c)(5) of this section, the Director will resolve the disagreement and amend the approved study plan as appropriate.

(7) If no participant or the Commission staff files a disagreement concerning the potential applicant's meeting summary and request to amend the approved study plan within 15 days, any proposed amendment shall be deemed to be approved.

(d) *Criteria for modification of approved study.* Any proposal to modify an ongoing study pursuant to paragraphs (c)(1)–(4) of this section must be accompanied by a showing of good cause why the proposal should be approved, and must include, as appropriate to the facts of the case, a demonstration that:

(1) Approved studies were not conducted as provided for in the approved study plan; or

(2) The study was conducted under anomalous environmental conditions or that environmental conditions have changed in a material way.

(e) *Criteria for new study.* Any proposal for new information gathering or studies pursuant to paragraphs (c)(1)–(4) of this section must be accompanied by a showing of good cause why the proposal should be approved, and must include, as appropriate to the facts of the case, a statement explaining:

(1) Any material changes in the law or regulations applicable to the information request;

(2) Why the goals and objectives of any approved study could not be met with the approved study methodology;

(3) Why the request was not made earlier;

(4) Significant changes in the project proposal or that significant new information material to the study objectives has become available; and

(5) Why the new study request satisfies the study criteria in § 5.9(b).

(f) *Updated study report.* Pursuant to the Commission-approved study plan and schedule provided for in § 5.13, or no later than two years after Commission approval of the study plan and schedule, whichever comes first, the potential applicant shall prepare and file with the Commission an updated study report describing its overall progress in implementing the study plan and schedule and the data collected, including an explanation of any variance from the study plan and schedule. The report must also include any modifications to ongoing studies or new studies proposed by the potential applicant. The review, comment, and disagreement resolution provisions of paragraphs (c)(4)–(7) of this section shall apply to the updated study report. Any proposal to modify an ongoing study must be accompanied by a showing of good cause why the proposal should be approved as set forth in paragraph (d) of this section. Any proposal for new information gathering or studies is subject to paragraph (e) of this section except that the proponent must demonstrate extraordinary circumstances warranting approval. The applicant must promptly proceed to complete any remaining undisputed information-gathering or studies under its proposed amendments to the study plan, if any, and must proceed to complete any information-gathering or studies that are the subject of a disagreement upon the Director's resolution of the disagreement.

### § 5.16 Preliminary licensing proposal.

(a) No later than 150 days prior to the deadline for filing a new or subsequent license application, if applicable, the potential applicant must file for comment a preliminary licensing proposal.

(b) The preliminary licensing proposal must:

(1) Clearly describe, as applicable, the existing and proposed project facilities, including project lands and waters;

(2) Clearly describe, as applicable, the existing and proposed project operation and maintenance plan, to include measures for protection, mitigation, and enhancement measures with respect to each resource affected by the project proposal; and

(3) Include the potential applicant's draft environmental analysis by resource area of the continuing and incremental impacts, if any, of its preliminary licensing proposal, including the results of its studies conducted under the approved study plan.

(c) A potential applicant may elect to file a draft license application which includes the contents of a license application required by § 5.18 instead of the Preliminary Licensing Proposal. A potential applicant that elects to file a draft license application must include notice of its intent to do so in the updated study report required by § 5.15(f).

(d) A potential applicant that has been designated as the Commission's non-Federal representative may include a draft Biological Assessment, draft Essential Fish Habitat Assessment, and draft Historic Properties Management Plan with its Preliminary Licensing Proposal or draft license application.

(e) Within 90 days of the date the potential applicant files the Preliminary Licensing Proposal or draft license application, participants and the Commission staff may file comments on the Preliminary Licensing Proposal or draft application, which may include recommendations on whether the Commission should prepare an Environmental Assessment (with or without a draft Environmental Assessment) or an Environmental Impact Statement. Any participant whose comments request new information, studies, or other amendments to the approved study plan must include a demonstration of extraordinary circumstances, pursuant to the requirements of § 5.15(f).

(f) A waiver of the requirement to file the Preliminary Licensing Proposal or draft license application may be requested, based on a consensus of the participants in favor of such waiver.

### § 5.17 Filing of application.

(a) *Deadline—new or subsequent license application.* An application for a new or subsequent license must be filed no later than 24 months before the existing license expires.

(b) *Subsequent licenses.* An applicant for a subsequent license must file its application under part I of the Federal Power Act. The provisions of section 7(a) of the Federal Power Act do not

apply to licensing proceedings involving a subsequent license.

(c) *Rejection or dismissal of application.* If the Commission rejects or dismisses an application for a new or subsequent license filed under this part pursuant to the provisions of § 5.20, the application may not be refiled after the new or subsequent license application filing deadline specified in paragraph (a) of this section.

(d)(1) *Filing and service.* Each applicant for a license under this part must submit the application to the Commission's Secretary for filing pursuant to the requirements of subpart T of part 385 of this chapter. The applicant must serve one copy of the application on the Director of the Commission's Regional Office for the appropriate region and on each resource agency, Indian tribe, or member of the public consulted pursuant to this part.

(2) An applicant must publish notice twice of the filing of its application, no later than 14 days after the filing date in a daily or weekly newspaper of general circulation in each county in which the project is located. The notice must disclose the filing date of the application and briefly summarize it, including the applicant's name and address, the type of facility applied for, its proposed location, and the places where the information specified in § 5.2(b) is available for inspection and reproduction. The applicant must promptly provide the Commission with proof of the publication of this notice.

(e) *PURPA benefits.* (1) Every application for a license for a project with a capacity of 80 megawatts or less must include in its application copies of the statements made under § 4.38(b)(1)(vi).

(2) If an applicant reverses a statement of intent not to seek PURPA benefits:

(i) Prior to the Commission issuing a license, the reversal of intent will be treated as an amendment of the application under § 4.35 of this chapter and the applicant must:

(A) Repeat the pre-filing consultation process under this part; and

(B) Satisfy all the requirements in § 292.208 of this chapter; or

(ii) After the Commission issues a license for the project, the applicant is prohibited from obtaining PURPA benefits.

(f) *Limitations on submitting applications.* The provisions of §§ 4.33(b), (c), and (e) of this chapter apply to license applications filed under this Section.

(g) *Applicant notice.* An applicant for a subsequent license that proposes to expand an existing project to encompass additional lands must include in its application a statement that the applicant has notified, by certified mail, property owners on the additional lands to be encompassed by the project and governmental agencies and subdivisions likely to be interested in or affected by the proposed expansion.

### § 5.18 Application content.

(a) *General content requirements.* Each license application filed pursuant to this part must:

(1) Identify every person, citizen, association of citizens, domestic corporation, municipality, or state that has or intends to obtain and will maintain any proprietary right necessary to construct, operate, or maintain the project;

(2) Identify (providing names and mailing addresses):

(i) Every county in which any part of the project, and any Federal facilities that would be used by the project, would be located;

(ii) Every city, town, or similar local political subdivision:

(A) In which any part of the project, and any Federal facilities that would be used by the project, would be located; or

(B) That has a population of 5,000 or more people and is located within 15 miles of the project dam;

(iii) Every irrigation district, drainage district, or similar special purpose political subdivision:

(A) In which any part of the project, and any Federal facilities that would be used by the project, would be located; or

(B) That owns, operates, maintains, or uses any project facilities that would be used by the project;

(iv) Every other political subdivision in the general area of the project that there is reason to believe would likely be interested in, or affected by, the application; and

(v) All Indian tribes that may be affected by the project.

(3)(i) For a license (other than a license under section 15 of the Federal Power Act) state that the applicant has made, either at the time of or before filing the application, a good faith effort to give notification by certified mail of the filing of the application to:

(A) Every property owner or record of any interest in the property within the bounds of the project, or in the case of the project without a specific project boundary, each such owner of property which would underlie or be adjacent to any project works including any impoundments; and

(B) The entities identified in paragraph (a)(2) of this section, as well as any other Federal, state, municipal or other local government agencies that there is reason to believe would likely be interested in or affected by such application.

(ii) Such notification must contain the name, business address, and telephone number of the applicant and a copy of the Exhibit G contained in the application, and must state that a license application is being filed with the Commission.

(4)(i) As to any facts alleged in the application or other materials filed, be subscribed and verified under oath in the form set forth in paragraph (a)(3)(B) of this Section by the person filing, an officer thereof, or other person having knowledge of the matters set forth. If the subscription and verification is by anyone other than the person filing or an officer thereof, it must include a statement of the reasons therefor.

(ii) This application is executed in the:

State of _____
County of _____
By: _____
(Name) _____
(Address) _____

being duly sworn, depose(s) and say(s) that the contents of this application are true to the best of (his or her) knowledge or belief. The undersigned Applicant(s) has (have) signed the application this___ day of____, 2__.

_____
(Applicant(s))
By: _____

Subscribed and sworn to before me, a [Notary Public, or title of other official authorized by the state to notarize documents, as appropriate] this___ day of ____, 2__.

/SEAL [if any]
(Notary Public, or other authorized official)

(5) Contain the information and documents prescribed in the following Sections of this chapter, except as provided in paragraph (b) of this Section, according to the type of application:

(i) License for a minor water power project and a major water power project 5 MW or less: § 4.61 (General instructions, initial statement, and Exhibits A, B, C, D, F, and G);

(ii) License for a major unconstructed project and a major modified project: § 4.41 of this chapter (General instructions, initial statement, Exhibits A, B, C, D, F, and G);

(iii) License for a major project—existing dam: § 4.51 of this chapter (General instructions, initial statement, Exhibits A, F, and G); or

(iv) License for a project located at a new dam or diversion where the applicant seeks PURPA benefits: § 292.208 of this chapter.

(b) *Exhibit E—Environmental Exhibit.* The specifications for Exhibit E in

§§ 4.41, 4.51, or 4.61 of this chapter shall not apply to applications filed under this part. The Exhibit E included in any license application filed under this part must address the resources listed in the Pre-Application Document provided for in § 5.6; follow the Commission's ''Preparing Environmental Assessments: Guidelines for Applicants, Contractors, and Staff,'' as they may be updated from time-to-time; and meet the following format and content requirements:

(1) *General description of the river basin.* Describe the river system, including relevant tributaries; give measurements of the area of the basin and length of stream; identify the project's river mile designation or other reference point; describe the topography and climate; and discuss major land uses and economic activities.

(2) *Cumulative effects.* List cumulatively affected resources based on the Commission's Scoping Document, consultation, and study results. Discuss the geographic and temporal scope of analysis for those resources. Describe how resources are cumulatively affected and explain the choice of the geographic scope of analysis. Include a brief discussion of past, present, and future actions, and their effects on resources based on the new license term (30–50 years). Highlight the effect on the cumulatively affected resources from reasonably foreseeable future actions. Discuss past actions' effects on the resource in the Affected Environment Section.

(3) *Applicable laws.* Include a discussion of the status of compliance with or consultation under the following laws, if applicable:

(i) *Section 401 of the Clean Water Act.* The applicant must file a request for a water quality certification (WQC), as required by Section 401 of the Clean Water Act no later than the deadline specified in § 5.23(b). Potential applicants are encouraged to consult with the certifying agency or tribe concerning information requirements as early as possible.

(ii) *Endangered Species Act (ESA).* Briefly describe the process used to address project effects on Federally listed or proposed species in the project vicinity. Summarize any anticipated environmental effects on these species and provide the status of the consultation process. If the applicant is the Commission's non-Federal designee for informal consultation under the ESA, the applicant's draft biological assessment must be included.

(iii) *Magnuson-Stevens Fishery Conservation and Management Act.* Document from the National Marine Fisheries Service (NMFS) and/or the appropriate Regional Fishery Management Council any essential fish habitat (EFH) that may be affected by the project. Briefly discuss each managed species and life stage for which EFH was designated. Include, as appropriate, the abundance, distribution, available habitat, and habitat use by the managed species. If the project may affect EFH, prepare a draft ''EFH Assessment'' of the impacts of the project. The draft EFH Assessment should contain the information outlined in 50 CFR 600.920(e).

(iv) *Coastal Zone Management Act (CZMA).* Section 307(c)(3) of the CZMA requires that all Federally licensed and permitted activities be consistent with approved state Coastal Zone Management Programs. If the project is located within a coastal zone boundary or if a project affects a resource located in the boundaries of the designated coastal zone, the applicant must certify that the project is consistent with the state Coastal Zone Management Program. If the project is within or affects a resource within the coastal zone, provide the date the applicant sent the consistency certification information to the state agency, the date the state agency received the certification, and the date and action taken by the state agency (for example, the agency will either agree or disagree with the consistency statement, waive it, or ask for additional information). Describe any conditions placed on the state agency's concurrence and assess the conditions in the appropriate section of the license application. If the project is not in or would not affect the coastal zone, state so and cite the coastal zone program office's concurrence.

(v) *National Historic Preservation Act (NHPA).* Section 106 of NHPA requires the Commission to take into account the effect of licensing a hydropower project on any historic properties, and allow the Advisory Council on Historic Preservation (Advisory Council) a reasonable opportunity to comment on the proposed action. ''Historic Properties'' are defined as any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register of Historic Places (NRHP). If there would be an adverse effect on historic properties, the applicant may include a Historic Properties Management Plan (HPMP) to avoid or mitigate the effects. The applicant must include documentation of consultation with the Advisory Council, the State Historic Preservation Officer, Tribal Historic Preservation Officer, National Park Service, members of the public, and affected Indian tribes, where applicable.

(vi) *Pacific Northwest Power Planning and Conservation Act (Act).* If the project is not within the Columbia River Basin, this section shall not be included. The Columbia River Basin Fish and Wildlife Program (Program) developed under the Act directs agencies to consult with Federal and state fish and wildlife agencies, appropriate Indian tribes, and the Northwest Power Planning Council (Council) during the study, design, construction, and operation of any hydroelectric development in the basin. Section 12.1A of the Program outlines conditions that should be provided for in any original or new license. The program also designates certain river reaches as protected from development. The applicant must document consultation with the Council, describe how the act applies to the project, and how the proposal would or would not be consistent with the program.

(vii) *Wild and Scenic Rivers and Wilderness Acts.* Include a description of any areas within or in the vicinity of the proposed project boundary that are included in, or have been designated for study for inclusion in, the National Wild and Scenic Rivers System, or that have been designated as wilderness area, recommended for such designation, or designated as a wilderness study area under the Wilderness Act.

(4) *Project facilities and operation.* Provide a description of the project to include:

(i) Maps showing existing and proposed project facilities, lands, and waters within the project boundary;

(ii) The configuration of any dams, spillways, penstocks, canals, powerhouses, tailraces, and other structures;

(iii) The normal maximum water surface area and normal maximum water surface elevation (mean sea level), gross storage capacity of any impoundments;

(iv) The number, type, and minimum and maximum hydraulic capacity and installed (rated) capacity of existing and proposed turbines or generators to be included as part of the project;

(v) An estimate of the dependable capacity, and average annual energy production in kilowatt hours (or mechanical equivalent);

(vi) A description of the current (if applicable) and proposed operation of the project, including any daily or seasonal ramping rates, flushing flows, reservoir operations, and flood control operations.

(5) *Proposed action and action alternatives.* (i) The environmental document must explain the effects of the applicant's proposal on resources. For each resource area addressed include:

(A) A discussion of the affected environment;

(B) A detailed analysis of the effects of the applicant's licensing proposal and, if reasonably possible, any preliminary terms and conditions filed with the Commission; and

(C) Any unavoidable adverse impacts.

(ii) The environmental document must contain, with respect to the resources listed in the Pre-Application Document provided for in § 5.6, and any other resources identified in the Commission's scoping document prepared pursuant to the National Environmental Policy Act and § 5.8, the following information, commensurate with the scope of the project:

(A) *Affected environment.* The applicant must provide a detailed description of the affected environment or area(s) to be affected by the proposed project by each resource area. This description must include the information on the affected environment filed in the Pre-Application Document provided for in § 5.6, developed under the applicant's approved study plan, and otherwise developed or obtained by the applicant. This section must include a general description of socio-economic conditions in the vicinity of the project including general land use patterns (*e.g.*, urban, agricultural, forested), population patterns, and sources of employment in the project vicinity.

(B) *Environmental analysis.* The applicant must present the results of its studies conducted under the approved study plan by resource area and use the data generated by the studies to evaluate the beneficial and adverse environmental effects of its proposed project. This section must also include, if applicable, a description of any anticipated continuing environmental impacts of continued operation of the project, and the incremental impact of proposed new development of project works or changes in project operation. This analysis must be based on the information filed in the Pre-Application Document provided for in § 5.6, developed under the applicant's approved study plan, and other appropriate information, and otherwise developed or obtained by the Applicant.

(C) *Proposed environmental measures.* The applicant must provide, by resource area, any proposed new environmental measures, including, but not limited to, changes in the project design or operations, to address the environmental effects identified above and its basis for proposing the measures. The applicant must describe how each proposed measure would protect or enhance the existing environment, including, where possible, a non-monetary quantification of the anticipated environmental benefits of the measure. This section must also include a statement of existing measures to be continued for the purpose of protecting and improving the environment and any proposed preliminary environmental measures received from the consulted resource agencies, Indian tribes, or the public. If an applicant does not adopt a preliminary environmental measure proposed by a resource agency, Indian tribe, or member of the public, it must include its reasons, based on project-specific information.

(D) *Unavoidable adverse impacts.* Based on the environmental analysis, discuss any adverse impacts that would occur despite the recommended environmental measures. Discuss whether any such impacts are short- or long-term, minor or major, cumulative or site-specific.

(E) *Economic analysis.* The economic analysis must include annualized, current cost-based information. For a new or subsequent license, the applicant must include the cost of operating and maintaining the project under the existing license. For an original license, the applicant must estimate the cost of constructing, operating, and maintaining the proposed project. For either type of license, the applicant should estimate the cost of each proposed resource protection, mitigation, or enhancement measure and any specific measure filed with the Commission by agencies, Indian tribes, or members of the public when the application is filed. For an existing license, the applicant's economic analysis must estimate the value of developmental resources associated with the project under the current license and the applicant's proposal. For an original license, the applicant must estimate the value of the developmental resources for the proposed project. As applicable, these developmental resources may include power generation, water supply, irrigation, navigation, and flood control. Where possible, the value of developmental resources must be based on market prices. If a protection, mitigation, or enhancement measure reduces the amount or value of the project's developmental resources, the applicant must estimate the reduction.

(F) *Consistency with comprehensive plans.* Identify relevant comprehensive plans and explain how and why the proposed project would, would not, or should not comply with such plans and a description of any relevant resource agency or Indian tribe determination regarding the consistency of the project with any such comprehensive plan.

(G) *Consultation Documentation.* Include a list containing the name, and address of every Federal, state, and interstate resource agency, Indian tribe, or member of the public with which the applicant consulted in preparation of the Environmental Document.

(H) *Literature cited.* Cite all materials referenced including final study reports, journal articles, other books, agency plans, and local government plans.

(2) The applicant must also provide in the Environmental Document:

(A) Functional design drawings of any fish passage and collection facilities or any other facilities necessary for implementation of environmental measures, indicating whether the facilities depicted are existing or proposed (these drawings must conform to the specifications of § 4.39 of this chapter regarding dimensions of full-sized prints, scale, and legibility);

(B) A description of operation and maintenance procedures for any existing or proposed measures or facilities;

(C) An implementation or construction schedule for any proposed measures or facilities, showing the intervals following issuance of a license when implementation of the measures or construction of the facilities would be commenced and completed;

(D) An estimate of the costs of construction, operation, and maintenance, of any proposed facilities, and of implementation of any proposed environmental measures.

(E) A map or drawing that conforms to the size, scale, and legibility requirements of § 4.39 of this chapter showing by the use of shading, cross-hatching, or other symbols the identity and location of any measures or facilities, and indicating whether each measure or facility is existing or proposed (the map or drawings in this exhibit may be consolidated).

(c) *Exhibit H.* The information required to be provided by this paragraph (c) must be included in the application as a separate exhibit labeled ''Exhibit H.''

(1) *Information to be provided by an applicant for new license: Filing requirements.*—(i) *Information to be supplied by all applicants.* All Applicants for a new license under this part must file the following information with the Commission:

(A) A discussion of the plans and ability of the applicant to operate and

maintain the project in a manner most likely to provide efficient and reliable electric service, including efforts and plans to:

(*1*) Increase capacity or generation at the project;

(*2*) Coordinate the operation of the project with any upstream or downstream water resource projects; and

(*3*) Coordinate the operation of the project with the applicant's or other electrical systems to minimize the cost of production.

(B) A discussion of the need of the applicant over the short and long term for the electricity generated by the project, including:

(*1*) The reasonable costs and reasonable availability of alternative sources of power that would be needed by the applicant or its customers, including wholesale customers, if the applicant is not granted a license for the project;

(*2*) A discussion of the increase in fuel, capital, and any other costs that would be incurred by the applicant or its customers to purchase or generate power necessary to replace the output of the licensed project, if the applicant is not granted a license for the project;

(*3*) The effect of each alternative source of power on:

(*i*) The applicant's customers, including wholesale customers;

(*ii*) The applicant's operating and load characteristics; and

(*iii*) The communities served or to be served, including any reallocation of costs associated with the transfer of a license from the existing licensee.

(C) The following data showing need and the reasonable cost and availability of alternative sources of power:

(*1*) The average annual cost of the power produced by the project, including the basis for that calculation;

(*2*) The projected resources required by the applicant to meet the applicant's capacity and energy requirements over the short and long term including:

(*i*) Energy and capacity resources, including the contributions from the applicant's generation, purchases, and load modification measures (such as conservation, if considered as a resource), as separate components of the total resources required;

(*ii*) A resource analysis, including a statement of system reserve margins to be maintained for energy and capacity; and

(*iii*) If load management measures are not viewed as resources, the effects of such measures on the projected capacity and energy requirements indicated separately;

(*iv*) For alternative sources of power, including generation of additional power at existing facilities, restarting deactivated units, the purchase of power off-system, the construction or purchase and operation of a new power plant, and load management measures such as conservation: The total annual cost of each alternative source of power to replace project power; the basis for the determination of projected annual cost; and a discussion of the relative merits of each alternative, including the issues of the period of availability and dependability of purchased power, average life of alternatives, relative equivalent availability of generating alternatives, and relative impacts on the applicant's power system reliability and other system operating characteristics; and the effect on the direct providers (and their immediate customers) of alternate sources of power.

(D) If an applicant uses power for its own industrial facility and related operations, the effect of obtaining or losing electricity from the project on the operation and efficiency of such facility or related operations, its workers, and the related community.

(E) If an applicant is an Indian tribe applying for a license for a project located on the tribal reservation, a statement of the need of such Indian tribe for electricity generated by the project to foster the purposes of the reservation.

(F) A comparison of the impact on the operations and planning of the applicant's transmission system of receiving or not receiving the project license, including:

(*1*) An analysis of the effects of any resulting redistribution of power flows on line loading (with respect to applicable thermal, voltage, or stability limits), line losses, and necessary new construction of transmission facilities or upgrading of existing facilities, together with the cost impact of these effects;

(*2*) An analysis of the advantages that the applicant's transmission system would provide in the distribution of the project's power; and

(*3*) Detailed single-line diagrams, including existing system facilities identified by name and circuit number, that show system transmission elements in relation to the project and other principal interconnected system elements. Power flow and loss data that represent system operating conditions may be appended if applicants believe such data would be useful to show that the operating impacts described would be beneficial.

(G) If the applicant has plans to modify existing project facilities or operations, a statement of the need for, or usefulness of, the modifications, including at least a reconnaissance-level study of the effect and projected costs of the proposed plans and any alternate plans, which in conjunction with other developments in the area would conform with a comprehensive plan for improving or developing the waterway and for other beneficial public uses as defined in Section 10(a)(1) of the Federal Power Act.

(H) If the applicant has no plans to modify existing project facilities or operations, at least a reconnaissance-level study to show that the project facilities or operations in conjunction with other developments in the area would conform with a comprehensive plan for improving or developing the waterway and for other beneficial public uses as defined in Section 10(a)(1) of the Federal Power Act.

(I) A statement describing the applicant's financial and personnel resources to meet its obligations under a new license, including specific information to demonstrate that the applicant's personnel are adequate in number and training to operate and maintain the project in accordance with the provisions of the license.

(J) If an applicant proposes to expand the project to encompass additional lands, a statement that the applicant has notified, by certified mail, property owners on the additional lands to be encompassed by the project and governmental agencies and subdivisions likely to be interested in or affected by the proposed expansion.

(K) The applicant's electricity consumption efficiency improvement program, as defined under Section 10(a)(2)(C) of the Federal Power Act, including:

(*1*) A statement of the applicant's record of encouraging or assisting its customers to conserve electricity and a description of its plans and capabilities for promoting electricity conservation by its customers; and

(*2*) A statement describing the compliance of the applicant's energy conservation programs with any applicable regulatory requirements.

(L) The names and mailing addresses of every Indian tribe with land on which any part of the proposed project would be located or which the applicant reasonably believes would otherwise be affected by the proposed project.

(ii) *Information to be provided by an applicant licensee.* An existing licensee that applies for a new license must provide:

(A) The information specified in paragraph (c)(1) of this section.

(B) A statement of measures taken or planned by the licensee to ensure safe management, operation, and maintenance of the project, including:

(*1*) A description of existing and planned operation of the project during flood conditions;

(*2*) A discussion of any warning devices used to ensure downstream public safety;

(*3*) A discussion of any proposed changes to the operation of the project or downstream development that might affect the existing Emergency Action Plan, as described in subpart C of part 12 of this chapter, on file with the Commission;

(*4*) A description of existing and planned monitoring devices to detect structural movement or stress, seepage, uplift, equipment failure, or water conduit failure, including a description of the maintenance and monitoring programs used or planned in conjunction with the devices; and

(*5*) A discussion of the project's employee safety and public safety record, including the number of lost-time accidents involving employees and the record of injury or death to the public within the project boundary.

(C) A description of the current operation of the project, including any constraints that might affect the manner in which the project is operated.

(D) A discussion of the history of the project and record of programs to upgrade the operation and maintenance of the project.

(E) A summary of any generation lost at the project over the last five years because of unscheduled outages, including the cause, duration, and corrective action taken.

(F) A discussion of the licensee's record of compliance with the terms and conditions of the existing license, including a list of all incidents of noncompliance, their disposition, and any documentation relating to each incident.

(G) A discussion of any actions taken by the existing licensee related to the project which affect the public.

(H) A summary of the ownership and operating expenses that would be reduced if the project license were transferred from the existing licensee.

(I) A statement of annual fees paid under part I of the Federal Power Act for the use of any Federal or Indian lands included within the project boundary.

(iii) *Information to be provided by an applicant who is not an existing licensee.* An applicant that is not an existing licensee must provide:

(A) The information specified in paragraph (c)(1) of this section.

(B) A statement of the applicant's plans to manage, operate, and maintain the project safely, including:

(*1*) A description of the differences between the operation and maintenance procedures planned by the applicant and the operation and maintenance procedures of the existing licensee;

(*2*) A discussion of any measures proposed by the applicant to implement the existing licensee's Emergency Action Plan, as described in subpart C of part 12 of this chapter, and any proposed changes;

(*3*) A description of the applicant's plans to continue safety monitoring of existing project instrumentation and any proposed changes; and

(*4*) A statement indicating whether or not the applicant is requesting the licensee to provide transmission services under section 15(d) of the Federal Power Act.

(d) *Consistency with comprehensive plans.* An application for license under this part must include an explanation of why the project would, would not, or should not, comply with any relevant comprehensive plan as defined in § 2.19 of this chapter and a description of any relevant resource agency or Indian tribe determination regarding the consistency of the project with any such comprehensive plan.

(e) *Response to information requests.* An application for license under this Section must respond to any requests for additional information-gathering or studies filed with comments on its preliminary licensing proposal or draft license application. If the license applicant agrees to do the information-gathering or study, it must provide the information or include a plan and schedule for doing so, along with a schedule for completing any remaining work under the previously approved study plan, as it may have been amended. If the applicant does not agree to any additional information-gathering or study requests made in comments on the draft license application, it must explain the basis for declining to do so.

(f) *Maps and drawings.* All required maps and drawings must conform to the specifications of § 4.39 of this chapter.

### § 5.19 Tendering notice and schedule.

(a) *Notice.* Within 14 days of the filing date of any application for a license developed pursuant to this part, the Commission will issue public notice of the tendering for filing of the application. The tendering notice will include a preliminary schedule for expeditious processing of the application, including dates for:

(1) Issuance of the acceptance for filing and ready for environmental analysis notice provided for in § 5.22.

(2) Filing of recommendations, preliminary terms and conditions, and fishway prescriptions;

(3) Issuance of a draft environmental assessment or environmental impact statement, or an environmental assessment not preceded by a draft.

(4) Filing of comments on the draft environmental assessment or environmental impact statement, as applicable;

(5) Filing of modified recommendations, mandatory terms and conditions, and fishway prescriptions in response to a draft NEPA document or Environmental Analysis, if no draft NEPA document is issued;

(6) Issuance of a final NEPA document, if any;

(7) In the case of a new or subsequent license application, a deadline for submission of final amendments, if any, to the application; and

(8) Readiness of the application for Commission decision.

(b) *Modifications to process plan and schedule.* The tendering notice shall also include any known modifications to the schedules developed pursuant to § 5.8 for completion of consultation under section 7 of the Endangered Species Act and water quality certification under section 401 of the Clean Water Act.

(c) *Method of notice.* The public notice provided for in paragraphs (a) and (b) of this Section will be given by:

(1) Publishing notice in the **Federal Register**; and

(2) Notifying appropriate Federal, state, and interstate resource agencies, state water quality and coastal zone management plan consistency certification agencies, Indian tribes, and non-governmental organizations by mail.

(d) *Applicant notice.* The applicant must publishing notice once every week for two weeks in a daily or weekly newspaper published in the county or counties in which the project or any part thereof or the lands affected thereby are situated, and, as appropriate, tribal newspapers.

(e) *Resolution of pending information requests.* Within 30 days of the filing date of any application for a license developed pursuant to this part, the Director of the Office of Energy Projects will issue an order resolving any requests for additional information-gathering or studies made in comments on the preliminary licensing proposal or draft license application.

### § 5.20 Deficient applications.

(a) *Deficient applications.* (1) If an applicant believes that its application conforms adequately to the pre-filing consultation and filing requirements of this part without containing certain required materials or information, it

must explain in detail why the material or information is not being submitted and what steps were taken by the applicant to provide the material or information.

(2) Within 30 days of the filing date of any application for a license under this part, the Director of the Office of Energy Projects will notify the applicant if, in the Director's judgment, the application does not conform to the prefiling consultation and filing requirements of this part, and is therefore considered deficient. An applicant having a deficient application will be afforded additional time to correct the deficiencies, not to exceed 90 days from the date of notification. Notification will be by letter or, in the case of minor deficiencies, by telephone. Any notification will specify the deficiencies to be corrected. Deficiencies must be corrected by submitting an a filing pursuant to the requirements of subpart T of part 385 of this chapter within the time specified in the notification of deficiency.

(3) If the revised application is found not to conform to the prefiling consultation and filing requirements of this part, or if the revisions are not timely submitted, the revised application will be rejected. Procedures for rejected applications are specified in paragraph (b)(3) of this section.

(b) *Patently deficient applications.* (1) If, within 30 days of its filing date, the Director of the Office of Energy Projects determines that an application patently fails to substantially comply with the prefiling consultation and filing requirements of this part, or is for a project that is precluded by law, the application will be rejected as patently deficient with the specification of the deficiencies that render the application patently deficient.

(2) If, after 30 days following its filing date, the Director of the Office of Energy Projects determines that an application patently fails to comply with the prefiling consultation and filing requirements of this part, or is for a project that is precluded by law:

(i) The application will be rejected by order of the Commission, if the Commission determines that it is patently deficient; or

(ii) The application will be considered deficient under paragraph (a)(2) of this Section, if the Commission determines that it is not patently deficient.

(iii) Any application for an original license that is rejected may be submitted if the deficiencies are corrected and if, in the case of a competing application, the resubmittal is timely. The date the rejected application is resubmitted will be considered the new filing date for purposes of determining its timeliness under § 4.36 of this chapter and the disposition of competing applications under § 4.37 of this chapter.

### § 5.21 Additional information.

An applicant may be required to submit any additional information or documents that the Commission considers relevant for an informed decision on the application. The information or documents must take the form, and must be submitted within the time, that the Commission prescribes. An applicant may also be required to provide within a specified time additional copies of the complete application, or any of the additional information or documents that are filed, to the Commission or to any person, agency, Indian tribe or other entity that the Commission specifies. If an applicant fails to provide timely additional information, documents, or copies of submitted materials as required, the Commission may dismiss the application, hold it in abeyance, or take other appropriate action under this chapter or the Federal Power Act.

### § 5.22 Notice of acceptance and ready for environmental analysis.

(a) When the Commission has determined that the application meets the Commission's filing requirements as specified in §§ 5.18 and 5.19, the approved studies have been completed, any deficiencies in the application have been cured, and no other additional information is needed, it will issue public notice as required in the Federal Power Act:

(1) Accepting the application for filing and specifying the date upon which the application was accepted for filing (which will be the application filing date if the Secretary receives all of the information and documents necessary to conform to the requirements of §§ 5.1 through 5.21, as applicable, within the time frame prescribed in § 5.20 or § 5.21;

(2) Finding that the application is ready for environmental analysis;

(3) Requesting comments, protests, and interventions;

(4) Requesting recommendations, preliminary terms and conditions, and preliminary fishway prescriptions, including all supporting documentation; and

(5) Establishing the date for final amendments to applications for new or subsequent licenses; and

(6) Updating the schedule issued with the tendering notice for processing the application.

(b) If the project affects lands of the United States, the Commission will notify the appropriate Federal office of the application and the specific lands affected, pursuant to Section 24 of the Federal Power Act.

(c) For an application for a license seeking benefits under Section 210 of the Public Utility Regulatory Polices Act of 1978, as amended, for a project that would be located at a new dam or diversion, the Applicant must serve the public notice issued under paragraph (a)(1) of this Section to interested agencies at the time the applicant is notified that the application is accepted for filing.

### § 5.23 Response to notice.

(a) *Comments and reply comments.* Comments, protests, interventions, recommendations, and preliminary terms and conditions or preliminary fishway prescriptions must be filed no later than 60 days after the notice of acceptance and ready for environmental analysis. All reply comments must be filed within 105 days of that notice.

(b) *Water quality certification.* (1) With regard to certification requirements for a license applicant under Section 401(a)(1) of the Federal Water Pollution Control Act (Clean Water Act), the license applicant must file no later than 60 days following the date of issuance of the notice of acceptance and ready for environmental analysis provide for in § 5.22:

(i) A copy of the water quality certification;

(ii) A copy of the request for certification, including proof of the date on which the certifying agency received the request; or

(iii) Evidence of waiver of water quality certification as described in paragraph (b)(5)(2) of this Section.

(2) A certifying agency is deemed to have waived the certification requirements of section 401(a)(1) of the Clean Water Act if the certifying agency has not denied or granted certification by one year after the date the certifying agency received a written request for certification. If a certifying agency denies certification, the applicant must file a copy of the denial within 30 days after the applicant received it.

(3) Notwithstanding any other provision in 18 CFR part 4, subpart B, any application to amend an existing license, and any application to amend a pending application for a license, requires a new request for water quality certification pursuant to § 4.34(b)(5) of this chapter if the amendment would have a material adverse impact on the water quality in the discharge from the project or proposed project.

**§ 5. 24 Applications not requiring a draft NEPA document.**

(a) If the Commission determines that a license application will be processed with an environmental assessment rather than an environmental impact statement and that a draft environmental assessment will not be required, the Commission will issue the environmental assessment for comment no later than 120 days from the date responses are due to the notice of acceptance and ready for environmental analysis.

(b) Each environmental assessment issued pursuant to this paragraph must include draft license articles, a preliminary determination of consistency of each fish and wildlife agency recommendation made pursuant to Federal Power Act section 10(j) with the purposes and requirements of the Federal Power Act and other applicable law, as provided for in § 5.26, and any preliminary mandatory terms and conditions and fishway prescriptions.

(c) Comments on an environmental assessment issued pursuant to paragraph (a) of this section, including comments in response to the Commission's preliminary determination with respect to fish and wildlife agency recommendations and on preliminary mandatory terms and conditions or fishway prescriptions, must be filed no later than 30 or 45 days after issuance of the environmental assessment, as specified in the notice accompanying issuance of the environmental assessment, and should any revisions to supporting documentation.

(d) Modified mandatory prescriptions or terms and conditions must be filed no later than 60 days following the date for filing of comments provided for in paragraph (c) of this section, as specified in the notice accompanying issuance of the environmental analysis.

**§ 5.25 Applications requiring a draft NEPA document.**

(a) If the Commission determines that a license application will be processed with an environmental impact statement, or a draft and final environmental assessment, the Commission will issue the draft environmental impact statement or environmental assessment for comment no later than 180 days from the date responses are due to the notice of acceptance and ready for environmental analysis provided for in § 5.22.

(b) Each draft environmental document will include for comment draft license articles, a preliminary determination of the consistency of each fish and wildlife agency recommendation made pursuant to section 10(j) of the Federal Power Act with the purposes and requirements of the Federal Power Act and other applicable law, as provided for in § 5.26, and any preliminary mandatory terms and conditions and fishways prescriptions.

(c) Comments on a draft environmental document issued pursuant to paragraph (b) of this section, including comments in response to the Commission's preliminary determination with respect to fish and wildlife agency recommendations and on preliminary mandatory terms and conditions or prescriptions must be filed no later than 30 or 60 days after issuance of the draft environmental document, as specified in the notice accompanying issuance of the draft environmental document.

(d) Modified mandatory prescriptions or terms and conditions must be filed no later than 60 days following the date for filing of comments provided for in paragraph (c) of this section.

(e) The Commission will issue a final environmental document within 90 days following the date for filing of modified mandatory prescriptions or terms and conditions.

**§ 5.26 Section 10(j) process.**

(a) In connection with its environmental review of an application for license, the Commission will analyze all terms and conditions timely recommended by fish and wildlife agencies pursuant to the Fish and Wildlife Coordination Act for the protection, mitigation of damages to, and enhancement of fish and wildlife (including related spawning grounds and habitat) affected by the development, operation, and management of the proposed project. Submission of such recommendations marks the beginning of the process under section 10(j) of the Federal Power Act.

(b) The agency must specifically identify and explain the recommendations and the relevant resource goals and objectives and their evidentiary or legal basis. The Commission may seek clarification of any recommendation from the appropriate fish and wildlife agency. If the Commission's request for clarification is communicated in writing, copies of the request will be sent by the Commission to all parties, affected resource agencies, and Indian tribes, which may file a response to the request for clarification within the time period specified by the Commission. If the Commission believes any fish and wildlife recommendation may be inconsistent with the Federal Power Act or other applicable law, the Commission will make a preliminary determination of inconsistency in the draft environmental document or, if none, the environmental assessment. The preliminary determination, for any recommendations believed to be inconsistent, shall include an explanation why the Commission believes the recommendation is inconsistent with the Federal Power Act or other applicable law, including any supporting analysis and conclusions and an explanation of how the measures recommended in the environmental document would adequately and equitably protect, mitigate damages to, and enhance, fish and wildlife (including related spawning grounds and habitat) affected by the development, operation, and management of the project.

(c) Any party, affected resource agency, or Indian tribe may file comments in response to the preliminary determination of inconsistency, including any modified recommendations, within the time frame allotted for comments on the draft environmental document or, if none, the time frame for comments on the environmental assessment. In this filing, the fish and wildlife agency concerned may also request a meeting, telephone or video conference, or other additional procedure to attempt to resolve any preliminary determination of inconsistency.

(d) The Commission shall attempt, with the agencies, to reach a mutually acceptable resolution of any such inconsistency, giving due weight to the recommendations, expertise, and statutory responsibilities of the fish and wildlife agency. If the Commission decides, or an affected resource agency requests, the Commission will conduct a meeting, telephone or video conference, or other procedures to address issues raised by its preliminary determination of inconsistency and comments thereon. The Commission will give at least 15 days' advance notice to each party, affected resource agency, or Indian tribe, which may participate in the meeting or conference. Any meeting, conference, or additional procedure to address these issues will be scheduled to take place within 90 days of the date the Commission issues a preliminary determination of inconsistency. The Commission will prepare a written summary of any meeting held under this paragraph to discuss section 10(j) issues, including any proposed resolutions and supporting analysis, and a copy of the summary will be sent to all parties,

affected resource agencies, and Indian tribes.

(e) The section 10(j) process ends when the Commission issues an order granting or denying the license application in question. If, after attempting to resolve inconsistencies between the fish and wildlife recommendations of a fish and wildlife agency and the purposes and requirements of the Federal Power Act or other applicable law, the Commission does not adopt in whole or in part a fish and wildlife recommendation of a fish and wildlife agency, the Commission will publish the findings and statements required by section 10(j)(2) of the Federal Power Act.

**§ 5.27 Amendment of application.**

(a) *Procedures.* If an Applicant files an amendment to its application that would materially change the project's proposed plans of development, as provided in § 4.35 of this chapter, an agency, Indian tribe, or member of the public may modify the recommendations or terms and conditions or prescriptions it previously submitted to the Commission pursuant to §§ 5.20–5.26. Such modified recommendations, terms and conditions, or prescriptions must be filed no later than the due date specified by the Commission for comments on the amendment.

(b) *Date of acceptance.* The date of acceptance of an amendment of application for an original license filed under this part is governed by the provisions of § 4.35 of this chapter.

(c) *New and subsequent licenses.* The requirements of § 4.35 of this chapter do not apply to an application for a new or subsequent license, except that the Commission will reissue a public notice of the application in accordance with the provisions of § 4.32(d)(2) of this chapter if a material amendment, as that term is used in § 4.35(f) of this chapter, is filed.

(d) *Deadline.* All amendments to an application for a new or subsequent license, including the final amendment, must be filed with the Commission and served on all competing applicants no later than the date specified in the notice issued under § 5.23.

**§ 5.28 Competing applications.**

(a) *Site access for a competing applicant.* The provisions of § 16.5 of this chapter shall govern site access for a potential license application to be filed in competition with an application for a new or subsequent license by an existing licensee pursuant to this part, except that references in § 16.5 to the pre-filing consultation provisions in parts 4 and 16 of this chapter shall be construed in a manner compatible with the effective administration of this part.

(b) *Competing applications.* The provisions of § 4.36 of this chapter shall apply to competing applications for original, new, or subsequent licenses filed under this part.

(c) *New or subsequent license applications—final amendments; better adapted statement.* Where two or more mutually exclusive competing applications for new or subsequent license have been filed for the same project, the final amendment date and deadlines for complying with provisions of § 4.36(d)(2) (ii) and (iii) of this chapter established pursuant to the notice issued under § 5.23 will be the same for all such applications.

(d) *Rules of preference among competing applicants.* The Commission will select among competing applications according to the provisions of § 4.37 of this chapter.

**§ 5.29 Other provisions.**

(a) *Filing requirement.* Unless otherwise provided by statute, regulation or order, all filings in hydropower hearings, except those conducted by trial-type procedures, must conform to the requirements of 18 CFR part 385, subpart T of this chapter.

(b) *Waiver of compliance with consultation requirements.* (1) If an agency, Indian tribe, or member of the public waives in writing compliance with any consultation requirement of this part, an applicant does not have to comply with the requirement as to that agency, Indian tribe, or member of the public.

(2) If an agency, Indian tribe, member of the public fails to timely comply with a provision regarding a requirement of this section, an applicant may proceed to the next sequential requirement of this section without waiting for the agency, Indian tribe, or member of the public.

(c) *Requests for privileged treatment of pre-filing submission.* If a potential Applicant requests privileged treatment of any information submitted to the Commission during pre-filing consultation (except for the information specified in § 5.4), the Commission will treat the request in accordance with the provisions in § 388.112 of this chapter until the date the application is filed with the Commission.

(d) *Conditional applications.* Any application, the effectiveness of which is conditioned upon the future occurrence of any event or circumstance, will be rejected.

(e) *Trial-type hearing.* The Commission may order a trial-type hearing on an application for a license under this part either upon its own motion or the motion of any interested party of record. Any trial-type hearing will be limited to the issues prescribed by order of the Commission. In all other cases, the hearings will be conducted by notice and comment procedures.

(f) *Notice and comment hearings.* (1) All comments and reply comments and all other filings described in this part must be served on all persons on the service list prepared by the Commission, in accordance with the requirements of § 385.2010 of this chapter. If a party submits any written material to the Commission relating to the merits of an issue that may affect the responsibility of particular resource agency, the party must also serve a copy of the submission on that resource agency.

(2) The Director of Energy Projects may waive or modify any of the provisions of this part for good cause. A commenter or reply commenter may obtain an extension of time from the Commission only upon a showing of good cause or extraordinary circumstances in accordance with § 385.2008 of this chapter.

(3) Late-filed recommendations by fish and wildlife agencies pursuant to the Fish and Wildlife Coordination Act and section 10(j) of the Federal Power Act for the protection, mitigation of damages to, and enhancement of fish and wildlife affected by the development, operation, and management of the proposed project and late-filed terms and conditions or prescriptions filed pursuant to sections 4(e) and 18 of the Federal Power Act, respectively, will be considered by Commission under section 10(a) of the Federal Power Act if such consideration would not delay or disrupt the proceeding.

(g) *Settlement negotiations.* (1) The Commission will consider, on a case-by-case basis, requests for a short suspension of the procedural schedule for the purpose of participants conducting settlement negotiations, where it determines that the suspension will not adversely affect timely action on a license application. In acting on such requests, the Commission will consider, among other things:

(i) Whether requests for suspension of the procedural schedule have previously been made or granted;

(ii) Whether the request is supported by a consensus of participants in the proceeding and an explanation of objections to the request expressed by any participant;

(iii) The likelihood that a settlement agreement will be filed within the requested suspension period; and

(iv) Whether the requested suspension is likely to cause any new or subsequent license to be issued after the expiration of the existing license.

(2) The Commission reserves the right to terminate any suspension of the procedural schedule if it concludes that insufficient progress is being made toward the filing of a settlement agreement.

(h) *License conditions and required findings.* (1) All licenses shall be issued on the conditions specified in Section 10 of the Federal Power Act and such other conditions as the Commission determines are lawful and in the public interest.

(2) Subject to paragraph (f)(3) of this section, fish and wildlife conditions shall be based on recommendations timely received from the fish and wildlife agencies pursuant to the Fish and Wildlife Coordination Act.

(3) The Commission will consider the timely recommendations of resource agencies, other governmental units, and members of the public, and the timely recommendations (including fish and wildlife recommendations) of Indian tribes affected by the project.

(4) Licenses for a project located within any Federal reservation shall be issued only after the findings required by, and subject to any conditions that may be timely filed pursuant to section 4(e) of the Federal Power Act.

(5) The Commission will require the construction, maintenance, and operation of such fishways as may be timely prescribed by the Secretary of Commerce or the Secretary of the Interior, as appropriate, pursuant to section 18 of the Federal Power Act.

(i) *Standards and factors for issuing a new license.* (1) In determining whether a final proposal for a new license under section 15 of the Federal Power Act is best adapted to serve the public interest, the Commission will consider the factors enumerated in sections 15(a)(2) and (a)(3) of the Federal Power Act.

(2) If there are only insignificant differences between the final applications of an existing licensee and a competing Applicant after consideration of the factors enumerated in section 15(a)(2) of the Federal Power Act, the Commission will determine which Applicant will receive the license after considering:

(i) The existing licensee's record of compliance with the terms and conditions of the existing license; and

(ii) The actions taken by the existing licensee related to the project which affect the public.

(iii) An existing licensee that files an application for a new license in conjunction with an entity or entities that are not currently licensees of all or part of the project will not be considered an existing licensee for the purpose of the insignificant differences provision of section 15(a)(2) of the Federal Power Act.

(j) *Fees under section 30(e) of the Federal Power Act.* The requirements of 18 CFR part 4, subpart M, of this chapter, fees under section 30(e) of the Federal Power Act, apply to license applications developed under this part.

**§ 5.30 Critical energy infrastructure information.**

If any action required by this part requires a potential Applicant or Applicant to reveal Critical Energy Infrastructure Information, as defined by § 388.113(c) of this chapter, to the public, the Applicant must follow the procedures set out in § 4.32(k) of this chapter.

**§ 5.31 Transition provision.**

This part shall apply to license applications for which the deadline for filing a notification of intent to seek a new or subsequent license, or for filing a notification of intent to file an original license application, as required by § 5.5 of this part, is July 23, 2005 or later.

## PART 9—TRANSFER OF LICENSE OR LEASE OF PROJECT PROPERTY

■ 27. The authority citation for part 9 continues to read as follows:

**Authority:** Sec. 8, 41 Stat. 1068, sec. 309, 49 Stat. 858; 16 U.S.C. 801, 825h; Pub. L. 96–511, 94 Stat. 2812 (44 U.S.C. 3501 *et seq.*)

**§ 9.1 [Amended]**

■ 28. In § 9.1, remove ''4.31'' and add ''4.32'' in its place.

**§ 9.2 [Amended]**

■ 29. In § 9.10, remove ''4.31'' and add ''4.32(b)(1)'' in its place.

## PART 16—PROCEDURES RELATING TO TAKEOVER AND RELICENSING OR LICENSED PROJECTS

■ 30. The authority citation for part 16 continues to read as follows:

**Authority:** 16 U.S.C. 791a–825r, 2601–2645; 42 U.S.C. 7101–7352.

■ 31. Remove the phrase ''Office of Hydropower Licensing'' throughout the part and add in its place ''Office of Energy Projects''.

■ 32. Amend § 16.1 by adding paragraph (c) to read as follows:

**§ 16.1 Applicability.**

* * * * *

(c) Any potential applicant for a new or subsequent license for which the deadline for the notice of intent required by § 16.6 falls on or after July 23, 2005 and which wishes to develop and file its application pursuant to this part, must seek Commission authorization to do so pursuant to the provisions of part 5 of this chapter.

■ 33. Amend § 16.6 as follows:

■ a. In paragraph (b)(9), remove ''16.16'' and add ''16.7'' in its place.

■ b. In paragraph (b)(10)(ii), remove ''Indian tribe''.

■ c. In paragraph (b)(10)(iii)(B), remove ''and''.

■ d. In paragraph (b)(10)(iv), remove the period after ''notification'' and add a semi-colon in its place.

■ e. In paragraph (b)(10), add a new paragraph (b)(10)(v).

■ f. Paragraph (d) is revised.

■ The revised text reads as follows:

**§ 16.6 Notification procedures under Section 15 of the Federal Power Act.**

* * * * *

(b) * * *

(10) * * *

(v) Affected Indian tribes.

* * * * *

(d) *Commission notice.* Upon receipt of the notification required under paragraph (c) of this Section, the Commission will provide notice of the licensee's intent to file or not to file an application for a new license by:

(1) If the notification is filed prior to July 23, 2005;

(i) Publishing notice in the **Federal Register**;

(ii) Publishing notice once in a daily or weekly newspaper published in the county or counties in which the project or any part thereof or the lands affected thereby are situated; and

(iii) Notifying the appropriate Federal and state resource agencies, state water quality and coastal zone management consistency certifying agencies, and Indian tribes by mail.

(2) If the notification is filed on or after July 23, 2005, pursuant to the provisions of § 5.8 of this chapter.

■ 34. Amend § 16.7 as follows:

■ a. Paragraph (d) is revised.

■ b. In paragraph (e)(1), following ''section'' add '', or the pre-application document, as applicable,''.

■ c. In paragraph (e)(3), after ''National Marine Fisheries Service,'' add ''Indian tribes,''.

■ d. In paragraph (g), remove ''16.16(d)(1)(iv)'' and add ''16.7(d)(1)(iv)'' in its place.

■ The revised text reads as follows:

**§ 16.7 Information to be made available to the public at the time of notification of intent under Section 15(b) of the Federal Power Act.**

* * * * *

(d) *Information to be made available.* (1) A licensee for which the deadline for filing a notification of intent to seek a new or subsequent license is on or after July 23, 2005 must, at the time it files a notification of intent to seek a license pursuant to § 5.5 of this chapter, provide a copy of the pre-application document required by § 5.6 of this chapter to the entities specified in that paragraph.

(2) A licensee for which the deadline for filing a notification of intent to seek a new or subsequent license is prior to July 23, 2005, and which elects to seek a license pursuant to this part must make the following information regarding its existing project reasonably available to the public as provided in paragraph (b) of this section:

(i) The following construction and operation information:

(A) The original license application and the order issuing the license and any subsequent license application and subsequent order issuing a license for the existing project, including

(*1*) Approved Exhibit drawings, including as-built exhibits,

(*2*) Any order issuing amendments or approving exhibits,

(*3*) Any order issuing annual licenses for the existing project;

(B) All data relevant to whether the project is and has been operated in accordance with the requirements of each license article, including minimum flow requirements, ramping rates, reservoir elevation limitations, and environmental monitoring data;

(C) A compilation of project generation and respective outflow with time increments not to exceed one hour, unless use of another time increment can be justified, for the period beginning five years before the filing of a notice of intent;

(D) Any public correspondence related to the existing project;

(E) Any report on the total actual annual generation and annnual operation and maintenance costs for the period beginning five years before the filing of a notice of intent;

(F) Any reports on original project costs, current net investment, and available funds in the amortization reserve account;

(G) A current and complete electrical single-line diagram of the project showing the transfer of electricity from the project to the area utility system or point of use; and

(H) Any bill issued to the existing licensee for annual charges under Section 10(e) of the Federal Power Act.

(ii) The following safety and structural adequacy information:

(A) The most recent emergency action plan for the project or a letter exempting the project from the emergency action plan requirement;

(B) Any independent consultant's reports required by part 12 of this chapter and filed on or after January 1, 1981;

(C) Any report on operation or maintenance problems, other than routine maintenance, occurring within the five years preceding the filing of a notice of intent or within the most recent five-year period for which data exists, and associated costs of such problems under the Commission's Uniform System of Accounts;

(D) Any construction report for the existing project; and

(E) Any public correspondence relating to the safety and structural adequacy of the existing project.

(iii) The following fish and wildlife resources information:

(A) Any report on the impact of the project's construction and operation on fish and wildlife resources;

(B) Any existing report on any threatened or endangered species or critical habitat located in the project area, or affected by the existing project outside the project area;

(C) Any fish and wildlife management plan related to the project area prepared by the existing licensee or any resource agency; and

(D) Any public correspondence relating to the fish and wildlife resources within the project area.

(iv) The following recreation and land use resources information:

(A) Any report on past and current recreational uses of the project area;

(B) Any map showing recreational facilities and areas reserved for future development in the project area, designated or proposed wilderness areas in the project area; Land and Water Conservation Fund lands in the project area, and designated or proposed Federal or state wild and scenic river corridors in the project area.

(C) Any documentation listing the entity responsible for operating and maintaining any existing recreational facilities in the project area; and

(D) Any public correspondence relating to recreation and land use resources within the project area.

(v) The following cultural resources information:

(A) Except as provided in paragraph (d)(2)(v)(B) of this section, a licensee must make available:

(*1*) Any report concerning documented archeological resources identified in the project area;

(*2*) Any report on past or present use of the project area and surrounding areas by Native Americans; and

(*3*) Any public correspondence relating to cultural resources within the project area.

(B) A licensee must delete from any information made available under paragraph (d)(2)(v)(A) of this section, specific site or property locations the disclosure of which would create a risk of harm, theft, or destruction of archeological or Native American cultural resources or to the site at which the resources are located, or would violate any Federal law, including the Archeological Resources Protection Act of 1979, 16 U.S.C. 470w–3, and the National Historic Preservation Act of 1966, 16 U.S.C. 470hh.

(vi) The following energy conservation information under section 10(a)(2)(C) of the Federal Power Act related to the licensee's efforts to conserve electricity or to encourage conservation by its customers including:

(A) Any plan of the licensee;

(B) Any public correspondence; and

(C) Any other pertinent information relating to a conservation plan.

* * * * *

■ 35. Amend § 16.8 as follows:

■ a. Redesignate existing paragraphs (a)(2) and (a)(3) as paragraphs (a)(4) and (a)(5) and revise newly redesignated paragraph (a)(4).

■ b. Add new paragraphs (a)(2) and (a)(3).

■ c. Paragraph (b) is revised.

■ d. In paragraph (c)(1), remove ''(b)(5)'' and add ''(b)(6)'' in its place.

■ e. In paragraph (c)(1)(ii), following ''(b)(1)'' remove ''of this section'' and add ''or (b)(2) of this section, as applicable,'' in its place.

■ f. In paragraph (c)(2), remove ''(b)(6)'' and add ''(b)(7)'' in its place.

■ g. In paragraph (c)(2), remove ''resource agency or Indian tribe'' and add ''resource agency, Indian tribe, or member of the public'' in its place.

■ h. In paragraph (c)(4)(ii), remove ''(b)(1)((vi)'' and add ''(b)(2)(vi)'' in its place.

■ i. In paragraph (d)(1), remove ''mailed'' and add ''distributed'' in its place.

■ j. In paragraph (e), add a new paragraph (e)(4).

■ k. Remove paragraph (f)(7) and redesignate existing paragraph (f)(8) as (f)(7).

■ l. In paragraph (h), remove ''(b)(2)(i)'' and add ''(b)(3)(i)'' in its place.

■ m. In paragraph (i)(1), remove ''(b)(2)'' wherever it appears and add ''(b)(3)'' in its place.

■ n. In paragraph (i)(2)(i), remove ''the date of the joint meeting required by

paragraph (b)(2) of this section.'' and add ''a final order is issued on the license application.'' in its place.

■ o. In paragraph (i)(2)(iii), remove ''(b)(2)'' and add ''(b)(3)'' in its place and remove ''(b)(1)'' and add ''(b)(2)'' in its place.

■ p. Paragraph (j) is removed.

■ The revised and added text reads as follows:

**§ 16.8 Consultation requirements.**

(a) * * *

(2) Each requirement in this section to contact or consult with resource agencies or Indian tribes shall require as well that the potential Applicant contact or consult with members of the public.

(3) If the potential applicant for a new or subsequent license commences first stages pre-filing consultation under this part on or after July 23, 2005, it must file a notification of intent to file a license application pursuant to § 5.5 of this chapter and a pre-application document pursuant to the provisions of § 5.6 of this chapter.

(4) The Director of the Office of Energy Projects will, upon request, provide a list of known appropriate Federal, state, and interstate resource agencies, and Indian tribes, and local, regional, or national non-governmental organizations likely to be interested in any license application proceeding.

* * * * *

(b) *First stage of consultation.* (1) A potential Applicant for a new or subsequent license must, at the time it files its notification of intent to seek a license pursuant to § 5.5 of this chapter, provide a copy of the pre-application document required by § 5.6 of this chapter to the entities specified in § 5.6(a) of this chapter.

(2) A potential applicant for a nonpower license or exemption must promptly contact each of the appropriate resource agencies, Indian tribes, and members of the public listed in paragraph (a)(1) of this section, and the Commission with the following information:

(i) Detailed maps showing existing project boundaries, if any, proper land descriptions of the entire project area by township, range, and section, as well as by state, county, river, river mile, and closest town, and also showing the specific location of all existing and proposed project facilities, including roads, transmission lines, and any other appurtenant facilities;

(ii) A general engineering design of the existing project and any proposed changes, with a description of any existing or proposed diversion of a stream through a canal or penstock;

(iii) A summary of the existing operational mode of the project and any proposed changes;

(iv) Identification of the environment affected or to be affected, the significant resources present and the applicant's existing and proposed environmental protection, mitigation, and enhancement plans, to the extent known at that time;

(v) Streamflow and water regime information, including drainage area, natural flow periodicity, monthly flow rates and durations, mean flow figures illustrating the mean daily streamflow curve for each month of the year at the point of diversion or impoundment, with location of the stream gauging station, the method used to generate the streamflow data provided, and copies of all records used to derive the flow data used in the applicant's engineering calculations;

(vi) Detailed descriptions of any proposed studies and the proposed methodologies to be employed; and

(vii) Any statement required by § 4.301(a) of this chapter.

(3)(i) A potential applicant for an exemption, a new or subsequent license for which the deadline for filing a notification of intent to seek a license is prior to July 23, 2005 and which elects to commence pre-filing consultation under this part, or a new or subsequent license for which the deadline for filing a notification of intent to seek a license is on or after July 23, 2005 and which receives Commission approval to use the license application procedures of this part must:

(A) Hold a joint meeting, including an opportunity for a site visit, with all pertinent agencies, Indian tribes and members of the public to review the information and to discuss the data and studies to be provided by the potential applicant as part of the consultation process; and

(B) Consult with the resource agencies, Indian tribes and members of the public on the scheduling of the joint meeting; and provide each resource agency, Indian tribe, member of the public, and the Commission with written notice of the time and place of the joint meeting and a written agenda of the issues to be discussed at the meeting at least 15 days in advance.

(ii) The joint meeting must be held no earlier than 30 days, and no later than 60 days from, as applicable:

(A) The date of the potential applicant's letter transmitting the information required by paragraph (b)(2) of this section, in the case of a potential exemption applicant or a potential license applicant that commences pre-filing consultation under this part prior to July 23, 2005; or

(B) The date of the Commission's approval of the potential license applicant's request to use the license application procedures of this part pursuant to the provisions of part 5, in the case of a potential license applicant for which the deadline for filing a notification of intent to seek a license is on or after July 23, 2005.

(4) Members of the public are invited to attend the joint meeting held pursuant to paragraph (b)(3) of this section. Members of the public attending the meeting are entitled to participate fully in the meeting and to express their views regarding resource issues that should be addressed in any application for a new license that may be filed by the potential applicant. Attendance of the public at any site visit held pursuant to paragraph (b)(3) of this section shall be at the discretion of the potential applicant. The potential applicant must make either audio recordings or written transcripts of the joint meeting, and must upon request promptly provide copies of these recordings or transcripts to the Commission and any resource agency and Indian tribe.

(5) Unless otherwise extended by the Director of Office of Energy Projects pursuant to paragraph (b)(6) of this section, not later than 60 days after the joint meeting held under paragraph (b)(3) of this section each interested resource agency, and Indian tribe, and member of the public must provide a potential applicant with written comments: (i) Identifying its determination of necessary studies to be performed or information to be provided by the potential applicant;

(ii) Identifying the basis for its determination;

(iii) Discussing its understanding of the resource issues and its goals objectives for these resources;

(iv) Explaining why each study methodology recommended by it is more appropriate than any other available methodology alternatives, including those identified by the potential applicant pursuant to paragraph (b)(2)(vi) of this section;

(v) Documenting that the use of each study methodology recommended by it is a generally accepted practice; and

(vi) Explaining how the studies and information requested will be useful to the agency, Indian tribe, or member of the public in furthering its resource goals and objectives.

(6)(i) If a potential applicant and a resource agency, Indian tribe, or member of the public disagree as to any matter arising during the first stage of

consultation or as to the need to conduct a study or gather information referenced in paragraph (c)(2) of this section, the potential applicant or resource agency, or Indian tribe, or member of the public may refer the dispute in writing to the Director of the Office of Energy Projects (Director) for resolution.

(ii) The entity referring the dispute must serve a copy of its written request for resolution on the disagreeing party at the time the request is submitted to the Director. The disagreeing party may submit to the Director a written response to the referral within 15 days of the referral's submittal to the Director.

(iii) Written referrals to the Director and written responses thereto pursuant to paragraphs (b)(6)(i) or (b)(6)(ii) of this section must be filed with the Secretary of the Commission in accordance with the Commission's Rules of Practice and Procedure, and must indicate that they are for the attention of the Director of the Office of Energy Projects pursuant to § 16.8(b)(6).

(iv) The Director will resolve disputes by an order directing the potential applicant to gather such information or conduct such study or studies as, in the Director's view, is reasonable and necessary.

(v) If a resource agency, Indian tribe, or member of the public fails to refer a dispute regarding a request for a potential applicant to obtain information or conduct studies (other than a dispute regarding the information specified in paragraph (b)(1) or (b)(2) of this section, as applicable), the Commission will not entertain the dispute following the filing of the license application.

(vi) If a potential applicant fails to obtain information or conduct a study as required by the Director pursuant to paragraph (b)(6)(iv) of this section, its application will be considered deficient.

(7) Unless otherwise extended by the Director pursuant to paragraph (b)(6) of this section, the first stage of consultation ends when all participating agencies, Indian tribes, and members of the public provide the written comments required under paragraph (b)(5) of this section or 60 days after the joint meeting held under paragraph (b)(3) of this section, whichever occurs first.

* * * * *

(e) * * *

(4) Following July 23, 2003 a potential license applicant engaged in pre-filing consultation under this part may during first stage consultation request to incorporate into pre-filing consultation any element of the integrated license application process provided for in part 5 of this chapter. Any such request must be accompanied by a:

(i) Specific description of how the element of the part 5 license application would fit into the pre-filing consultation process under this part; and

(ii) Demonstration that the potential license applicant has made every reasonable effort to contact all resource agencies, Indian tribes, non-governmental organizations, and others affected by the potential applicant's proposal, and that a consensus exists in favor of incorporating the specific element of the part 5 process into the pre-filing consultation under this part.

* * * * *

**§ 16.9 [Amended]**

■ 36. Amend § 16.9 by removing ''agencies and Indian tribes by mail'' from paragraph (d)(1)(iii) and adding ''agencies, Indian tribes, and non-governmental organizations'' in its place.

**§ 16.10 [Amended]**

■ 37. Amend § 16.10 as follows:
■ a. Paragraph (d) is removed.
■ b. Paragraph (e) is redesignated as paragraph (d) and newly redesignated paragraph (d) is revised.
■ c. Paragraph (f) is removed.
■ The revised text reads as follows:

**§ 16.10 Information to be provided by an Applicant for new license: Filing requirements.**

* * * * *

(d) *Inclusion in application.* The information required to be provided by this section must be included in the application as a separate exhibit labeled ''Exhibit H.''

**§ 16.11 [Amended]**

■ 38. Amend § 16.11 by removing paragraph (a)(2).

**§ 16.19 [Amended]**

■ 39. Amend § 16.19 by removing paragraphs (b)(3) and (b)(4) and by redesignating paragraph (b)(5) as paragraph (b)(3).

**§ 16.20 [Amended]**

■ 40. In § 16.20, paragraph (c) is revised.
The revised text reads as follows:

**§ 16.20 Applications for subsequent license for a project with an expiring license subject to Section 14 and 15 of the Federal Power Act.**

* * * * *

(c) *Requirement to file.* An applicant must file an application for subsequent license at least 24 months before the expiration of the existing license.

* * * * *

## PART 375—THE COMMISSION

■ 41. The authority citation for part 375 continues to read as follows:

**Authority:** 5 U.S.C. 551–557; 15 U.S.C. 717–717w, 3301–3432; 16 U.S.C. 791–825r, 2601–2645; 42 U.S.C. 7101–7352.

■ 42. Amend § 375.308 as follows:
■ a. In paragraph (c)(11), remove ''4.303(d)'' and add ''4.303(e)'' in its place.
■ b. In paragraph (k)(1), remove ''4.32(d)(2)(i)'' and add ''4.32(e)(2)(i)'' in its place.
■ c. In paragraph (k)(2)(ii), remove ''4.32(d)(1)'' and add ''4.32(e)(1)(iii)'' in its place.
■ d. In paragraph (k)(3), remove ''4.32(f)'' and add ''4.32(g)'' in its place.
■ e. Add a new section (aa):
■ The added text reads as follows.

**§ 375.308 Delegations to the Director of the Office of Energy Projects.**

* * * * *

(aa) Take the following actions to implement part 5 of this chapter on or after October 23, 2003:

(1) Act on requests for approval to use the application procedures of parts 4 or 16, pursuant to § 5.3 of this chapter;

(2) Approve a potential license applicant's proposed study plan with appropriate modifications pursuant to § 5.13 of this chapter;

(3) Resolve formal study disputes pursuant to § 5.14 of this chapter; and

(4) Resolve disagreements brought pursuant to § 5.15 of this chapter.

## PART 385—RULES OF PRACTICE AND PROCEDURE

■ 43. The authority citation for part 385 continues to read as follows:

**Authority:** 5 U.S.C. 551–557; 15 U.S.C. 717–717z, 3301–3432; 16 U.S.C. 791a-825r, 2601–2645; 31 U.S.C. 9701; 42 U.S.C. 7101–7352; 49 U.S.C. 60502; 49 App. U.S.C. 1–85 (1988).

■ 44. In § 385.214, revise paragraphs (a)(2) and (a)(3).

■ The revised text reads as follows.

**§ 385.214 Intervention (Rule 214).**

(a) * * *

(2) Any State Commission, the Advisory Council on Historic Preservation, the U.S. Departments of Agriculture, Commerce, and the Interior, any state fish and wildlife, water quality certification, or water rights agency; or Indian tribe with authority to issue a water quality certification is a party to any proceeding upon filing a notice of intervention in that proceeding, if the notice is filed within the period established under

Rule 210(b). If the period for filing notice has expired, each entity identified in this paragraph must comply with the rules for motions to intervene applicable to any person under paragraph (a)(3) of this section including the content requirements of paragraph (b) of this section.

(3) Any person seeking to intervene to become a party, other than the entities specified in paragraphs (a)(1) and (a)(2) of this section, must file a motion to intervene.

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**§ 385.2001 [Amended]**

■ 45. In § 385.2001, remove ''*http://www.ferc.fed.us*'' from paragraph (a)(iii) and add ''*http://www.ferc.gov*'' in its place.

**§ 385.2003 [Amended]**

■ 46. In § 385.2003, remove ''*http://www.ferc.fed.us*'' from paragraph (c)(ii) and add ''*http://www.ferc.gov*'' in its place.

**Note:** The following Appendix will appear in the Code of Federal Regulations:

## Appendix A

**List of Commenters**

*Licensees*

Alabama Power Co. (Alabama Power)
American Electric Power Company (AEP)
CHI Energy (CHI)
Consumers Energy Company (Consumers)
Duke Power Company (Duke)
Edison Electric Institute and Alliance of Energy Suppliers (EEI)
Georgia Power Company (Georgia Power)
Idaho Power Company (Idaho Power)
National Hydropower Association (NHA)
Northeast Utilities Systems (NEU)
Oroville-Wyandotte Irrigation District (Oroville)
PG&E Corporation (PG&E)
Progress Energy (Progress)
Puget Sound Energy (PSE)
Reliant Energy (Reliant)
Southern California Edison Company (SCE)
Tri-Dam Project (Tri-Dam)
WPS Resources (WPSR)
Wisconsin Public Service Corporation (WPSC)
Xcel Energy (Xcel)

*Non-Governmental Organizations*

Adirondack Mountain Club (ADK)
American Rivers (AmRivers)
American Whitewater Affiliation (AW)
Appalachian Mountain Club (AMC)
California Hydropower Reform Coalition (CHRC)
Catawba-Wateree Relicensing Coalition (C-WRC)
Hydropower Reform Coalition (HRC)
Idaho Rivers United (IRU)
Maine Rivers
New England FLOW (NE FLOW)
Pacific Fishery Management Council (PFMC)
River Alliance of Wisconsin (RAW)
South Carolina Coastal Conservation League (SC League)
Trout Unlimited (TU)

*Federal Agencies*

Advisory Council on Historic Preservation (Advisory Council)
Environmental Protection Agency (EPA)
National Marine Fisheries Service (NOAA)
Dept. of the Interior (Interior)
Dept. of the Interior, Bureau of Indian Affairs (BIA)
Dept. of the Interior, Bureau of Land Management (BLM)
Dept. of the Interior, Fish and Wildlife Service (FWS)
Dept. of the Interior, National Park Service (NPS)

*States/State Agencies*

Alaska Department of Natural Resources (Alaska DNR)
California Department of Fish and Game (CDFG)
California Attorney-General (Cal A-G)
California Department of Water Resources (CDWR)
California Resources Agency, California EPA, State Water Resources Control Board,
Department of Fish and Game, State of California Office of the Attorney General (California)
California Regional Council of Rural Counties (CA RCRC)
Commonwealth of Virginia (Virginia DEQ)
Georgia Department of Natural Resources (Georgia DNR)
Idaho Department of Fish and Game (IDFG)
Idaho Department of Environmental Quality (IDEQ)
Idaho Department of Parks and Recreation (IDPR)
Indiana Department of Natural Resources
Maine Department of Environmental Protection (MDEP)
Maryland Department of Natural Resources (Maryland DNR)
Massachusetts Division of Energy Resources (Massachusetts DER)
Minnesota Department of Natural Resources (Minnesota DNR)
Minneapolis Parks and Recreation Board (MPRB)
New Jersey Department of Environmental Protection (NJDEP)
New York State Department of Environmental Conservation (NYSDEC)
North Carolina Wildlife Resources Commission (NCWRC)
Pennsylvania Fish and Boat Commission (PFBC)
Placer County Water Agency (PCWA)
State of Oregon (Oregon)
Oregon Water Resources Commission (OWRC)
Oregon Department of Fish and Wildlife (ODFW)
Oregon Dept. of Enviromental Quality (ODEQ)
Snohomish County PUD and City of Everett (Snohomish)
State of Washington
State of Vermont, Agency of Natural Resources (VANR)
Washington Department of Ecology (WDOE)
Washington Department of Natural Resources (Washington DNR)
Western Governors' Association (WGA)
Wisconsin Department of Natural Resources (Wisconsin DNR)
Wyoming Game and Fish Department

*Indian Tribes*

Affiliated Tribes of Northwest Indians—Economic Development Corporation (NW Indians)
Catawba Indian Nation (Catawba)
Confederated Tribes of the Umatilla Indian Reservation (Umatilla)
Columbia River Inter-Tribal Fish Commission (CRITFC)
Fort Peck Assiniboine Sioux Tribes, Northeast Montana (Fort Peck)
Shoshone-Paiute Tribes of Nevada and Idaho, Duck Valley Reservation (S–P)
Shoshone-Bannock (S–B)
Great Lakes Indian Fish and Wildlife Commission (GLIFWC)
Maidu-Enterprise Tribe (Maidu)
Menominee Tribe of Wisconsin (Menominee)
Mississippi Band of Choctaw Indians (Choctaw)
Nez Perce
North Fork Rancheria of Mono Indians of California (NF Rancheria)
Skagit System Cooperative
Skokomish Indian Tribe (Skokomish)

*Individuals*

Frank Groznik
Acres International
Cyrus Noe
Thomas Sullivan, Sullivan & Gomez Engineers (Sullivan)
Grammer, Kissel, Robbins, Skancke, & Edwards (GKRSE)
Fred Springer
John Suloway

*Other*

Association of California Water Agencies (ACWA)
Balch & Bingham (B&B)
California State Water Contractors (CSWC)
Commonwealth of Puerto Rico (PR)
Geosyntec
Long View Associates (Long View)
Mead & Hunt (M&H)
MWH
Normandeau Associates (Normandeau)
Pacific Legacy
Spiegel and McDiarmid (Spiegel)
Troutman Sanders (Troutman)
Western Urban Water Coalition (WUWC)

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