# Proposed Rules

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This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

## DEPARTMENT OF ENERGY

## Federal Energy Regulatory Commission, DOE

## 18 CFR Parts 4 and 375

**[Docket No. RM95–16–000]**

## Regulations for the Relicensing of Hydroelectric Projects; Notice of Proposed Rulemaking

November 26, 1996.

**AGENCY:** Federal Energy Regulatory Commission, Doe.

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** The Federal Energy Regulatory Commission (Commission) is proposing to revise its procedural regulations governing applications for licenses for hydroelectric projects. The proposed regulations respond to a petition for rulemaking filed by the National Hydropower Association and are intended to offer an alternative administrative process whereby in appropriate circumstances the pre-filing consultation process and the environmental review process can be integrated. This alternative process is designed to be tailored to the facts and circumstances of the particular proceeding. The proposed regulations would not delete or replace any existing regulations.

**DATES:** Comments on the Notice of Proposed Rulemaking are due February 3, 1997 and March 3, 1997 for reply comments. Comments should be filed with the Office of the Secretary and should refer to Docket No. RM95–16–000.

**ADDRESSES:** Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, DC 20426.

**FOR FURTHER INFORMATION CONTACT:**

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**SUPPLEMENTARY INFORMATION:** In addition to publishing the full text of this document in the Federal Register, the Commission provides all interested persons an opportunity to inspect or copy the contents of this document during normal business hours in Room 2A, 888 First Street, N.E., Washington, DC 20426. The last page of Appendix A consists of a flow chart that is not being published in the Federal Register but is available from the Commission's Public Reference Room.

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Point your Web Browser to: http://www.fedworld.gov
Scroll down the page to select FedWorld Telnet Site
Select the option: [1] FedWorld
Logon to the FedWorld system
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### I. Introduction

The Federal Energy Regulatory Commission (Commission) is proposing to revise its procedural regulations governing applications for licenses for hydroelectric projects. The proposed regulations respond to a petition for rulemaking filed by the National Hydropower Association (NHA) and are intended to offer an alternative administrative process whereby in appropriate circumstances the pre-filing consultation process and the environmental review process can be integrated. This alternative process is designed to be tailored to the facts and circumstances of the particular proceeding. The proposed regulations would not delete or replace any existing regulations.

### II. Reporting Burden

The regulations proposed herein would not impose any new information collection requirements.

### III. Background

#### *A. Order Nos. 513 and 533 Proceedings*

The Commission last made comprehensive revisions of its procedural regulations governing hydropower applications in two major rulemakings. In Order Nos. 513 and 513–A,[1] the Commission revised its regulations governing the relicensing of hydropower projects to implement provisions added to the Federal Power Act (FPA)[2] by the Electric Consumers Protection Act of 1986 (ECPA).[3] The Commission adopted more detailed regulations for applicants for new licenses to conduct pre-filing consultation with resource agencies, to specify the information to be contained in the applications, and to set forth procedures for processing and considering the applications. These regulations are principally contained in 18 C.F.R. Part 16. In Order Nos. 533 and

[1] Order No. 513 (1989), 54 FR 23756 (June 2, 1989), FERC Stats & Regs., Regulations Preambles 1986–1990 ¶ 30,854; Order No. 513–A (1989), 55 FR 4 (January 2, 1990), FERC Stats & Regs., Regulations Preambles 1986–1990 ¶ 30,869.

[2] 16 U.S.C. §§ 791a–825r.

[3] Pub. L. No. 99–495, 100 Stat. 1243 (Oct. 16, 1986).

533–A,[4] the Commission adopted further revisions to its procedural regulations for all applications for hydropower licenses, implemented other provisions of ECPA, especially Section 10(j) of the FPA, and streamlined the hydropower licensing process by making it more efficient, fairer, and more understandable for all participants. In the rule, the Commission codified and improved many of its regulations governing pre-filing consultation and hearing practices, explaining how most hydropower proceedings are conducted by notice and comment rather than by trial-type hearings. This rulemaking established deadlines for participation in hydropower proceedings, clarified a number of Commission practices in the conduct of such proceedings,[5] required the Commission to resolve disputes concerning necessary scientific studies in the pre-filing consultation process for hydropower applicants, and provided greater opportunities for the public and Indian tribes to participate in the proceedings.

In one important respect, however, the Commission took no action in these rulemakings in response to comments made by some resource agencies and citizens' groups. They believed that in the revised regulations the Commission should have integrated the environmental review process pursuant to the National Environmental Policy Act of 1969 (NEPA)[6] with the pre-filing consultation process required of hydropower applicants. The Commission stated that this was not the Commission's historical practice, and that the results of the pre-filing consultation process and the comments, recommendations, conditions, and prescriptions of concerned parties were a necessary predicate to a successful NEPA review by the Commission of a hydropower application.

*B. Implementation of Energy Policy Act of 1992*

In section 2403 of the Energy Policy Act of 1992,[7] Congress authorized the Commission, in preparing a NEPA document in hydropower licensing proceedings, subject to certain conditions, to permit the applicant or its contractor or consultant to prepare an Environmental Assessment (EA) or a contractor or consultant chosen by the Commission and funded by the applicant to prepare an Environmental Impact Statement (EIS).[8] The provision left untouched the Commission's own responsibilities under NEPA.

The Commission has implemented this provision of the Act by permitting hydropower applicants to explore alternative licensing procedures. The Commission has received from potential hydropower applicants requests for guidance as to whether they could submit an EA or an EIS as part of their license applications. Applicants have asked whether they could integrate the NEPA process with the Commission's pre-filing consultation process, obtain greater involvement of Commission staff in this effort, and substitute such actions and the resulting NEPA document for the requirements for pre-filing consultation and filings set forth in the Commission's regulations.

The Commission's staff has responded to such requests on a case-by-case basis.[9] Staff advised potential applicants that it could not participate unless entities that might reasonably have an interest in the contemplated hydropower application are invited to participate in the pre-filing process. Such entities included all resource agencies, Indian tribes, local governments, citizens groups, and members of the general public affected by the proposed project. Staff advised that following this process requires a number of waivers of the Commission's regulations, in order to achieve the purposes of the Act. The principal waivers required are:

(1) the requirement for the applicant to file Exhibit E, containing environmental information[10]—the draft NEPA document prepared by the applicant or contractor or consultant, together with additional information, satisfies this requirement;

(2) the provision allowing parties to request additional scientific studies after the application is tendered for filing[11]—the waiver procedures move this opportunity forward in time;

(3) the requirement for issuing a notice that the application is ready for environmental analysis[12]—integrating preparation of the draft NEPA document with the pre-filing consultation process should ensure that the necessary environmental data concerning the application have already been developed prior to filing; and

(4) the requirement for the applicant to document the pre-filing process in detail[13]—this is replaced by periodic reports during the pre-filing process that are available to the public.

Before staff acts on a potential applicant's request for waiver of these regulatory requirements, the applicant must demonstrate that a cooperative atmosphere exists regarding the participation of concerned entities in the pre-filing process and that the applicant has reached an agreement with such entities on accepted procedures. Staff has advised the participants on procedures that have worked in similar circumstances to produce good NEPA documents or that show promise of working in this respect. Staff's objective has been to encourage the participants to focus analysis on a preferred environmental alternative and, insofar as possible, reach agreement on the issues raised by the application.[14]

The applicant is also required to develop a communications protocol, governing how the participants, including Commission staff, may communicate with each other during the pre-filing process. Oversight and technical committees may be formed. At least three public notices are required during this process, each of which consists of notice placed in the Federal

[4] Order No. 553 (1991), 56 FR 23108 (May 20, 1991), FERC Stats & Regs., Regulations Preambles 1991–1996 ¶ 30,921; Order No. 553–A (1991), 56 FR 61137 (December 2, 1991), FERC Stats. & Regs., Regulations Preambles 1991–1996 ¶ 30,932.

[5] These related to the requirements governing pre-filing consultation for applicants for amendment of licenses, when a water quality certification must be obtained, and how the Commission begins its review of hydropower applications.

[6] 42 U.S.C. §§ 4321–4307a.

[7] Pub. L. No. 102–486, 106 Stat. 2776, 2905–21. Codified at 42 U.S.C. §§ 13201–13556 (Supp. 1993).

[8] Section 2403 provides:

(a) ENVIRONMENTAL IMPACT STATEMENTS.—Where the Federal Energy Regulatory Commission is required to prepare a draft or final environmental impact statement . . . in connection with an application for a [hydropower] license . . ., the Commission may permit, at the election of the applicant, a contractor, consultant, or other person funded by the applicant and chosen by the Commission . . ., to prepare such statement for the Commission. . . . Nothing herein shall affect the Commission's responsibility to comply with the National Environmental Policy Act of 1969.

(b) ENVIRONMENTAL ASSESSMENTS.—Where an environmental assessment is required . . . in connection with an application for a [hydropower] license . . ., the Commission may permit an applicant, or a contractor, consultant or other person selected by the applicant, to prepare such environmental assessment. The Commission shall institute procedures, including pre-application consultations, to advise potential applicants of studies or other information foreseeably required by the Commission. The Commission may allow the filing of such applicant-prepared environmental assessment as part of the application. Nothing herein shall affect the Commission's responsibility to comply with the National Environmental Policy Act of 1969.

[9] The Office of Hydropower Licensing has developed ''Guidelines for the Applicant Prepared Environmental Assessment (APEA) Process.'' *See* Appendix A.

[10] *E.g.*,18 CFR 4.51(f).

[11] 18 CFR 4.32(b)(7).

[12] 18 CFR 4.34(b).

[13] *E.g.*, 18 CFR 4.38.

[14] The alternative process is designed to facilitate the negotiation of settlements in appropriate cases, that could be submitted to the Commission with the application as an offer of settlement.

Register by the Commission, notice placed in local newspapers by the potential applicant, and notice mailed directly to a mailing list of interested entities.[15] These notices are typically given: (1) at the beginning of the pre-filing process, when the applicant releases its initial information package, which may include a schedule for the first NEPA scoping meeting;[16] (2) when the results of the applicant's scientific studies are available, which may be combined with additional NEPA scoping and study requests; and (3) when the preliminary draft environmental document and related application have been prepared.

Prior to the signing of the communications protocol, staff has not communicated with any interested entity other than on procedural matters. Once the protocol is executed, pursuant to its provisions staff may enter into substantive discussions with any entity on the merits of the potential applicant's proposal, so long as the results of those discussions are subsequently made available in the relevant public files. These consist of the Commission's files for the project in question and a file maintained by the potential applicant.

For the majority of the many applications for new license currently undergoing pre-filing consultation, the applicants are using the process set forth in the Commission's rules. In 20 proceedings where a potential applicant is seeking a new or original license, the staff's alternative pre-filing procedures are being explored or are in use. In one proceeding, use of the alternative process has already resulted in an order issuing a license.[17] In most of the pending proceedings the applicant or its agent is preparing an EA; in some of the cases a contractor funded by the applicant is preparing an EIS. Some of the proceedings involve multiple projects on the same river basin.

*C. NHA Petition for Rulemaking*

On July 10, 1995, NHA filed a Petition for Rulemaking Regarding Regulations for the Relicensing of Hydroelectric Projects.[18] In its petition, NHA described its consultation with a large number of entities on how to improve the Commission's regulations in this area. NHA expressed its views on problems it perceives in the existing process for relicensing hydroelectric projects and proposed a comprehensive regulatory scheme for that purpose, which would replace the existing regulations governing the preparation, filing, and hearing process for hydropower applications for new licenses.

As described by NHA, its proposal is intended to integrate the application preparation process under the FPA with the environmental review process under NEPA, to provide an earlier start to the NEPA process, to involve Commission staff prior to the filing of an application, and to afford resource agencies and the public greater opportunity to participate in the pre-filing process. The goal is to shorten and simplify relicensing proceedings, which NHA claimed take too long to complete and impose unnecessary burdens on the participants, by eliminating repetitious steps in the pre-filing and post-filing stages. NHA also sought to promote settlements and to allow greater communication among parties and Commission staff by relaxing restrictions on *ex parte* communications. NHA proposed a ''collaborative option'' by which participants could agree to an alternative process for preparing and evaluating a hydropower application for new license.

NHA proposed 49 pages of regulatory text, which would substitute for sections in Parts 4 and 16 of the Commission's rules governing relicensing proceedings. NHA's proposed regulations specify 52 steps in such proceedings, through the filing of a final license application. The applicant would prepare and file with the Commission a Notice of Intent Package, an Initial Information Package, a study plan, and an application for new license. Under detailed guidelines, the Commission would give public notice of each of these filings, review them to determine their adequacy, and either accept or reject them.[19]

Under NHA's proposed regulations, a proceeding before the Commission would begin no later than the filing of the Initial Information Package, when interested persons could formally intervene in the proceeding as parties under § 385.214 of the Commission's rules.[20] The applicant's Initial Information Package would be ''comprised primarily of baseline data from the exhibits in [existing] 18 CFR § 4.51.''[21] These requirements were spelled out in section 19 of NHA's proposal, describing seven required ''schedules'' containing detailed information on the project, its operation and resource utilization, need for power and alternative sources of power, costs and financing, the environment, design drawings and other information showing the safety and adequacy of project structures, and a project map.

The environmental schedule would contain seven major elements, including a description of the locale and reports on water use and quality; fish, wildlife, and botanical resources; historic and archeological resources; recreational resources; socio-economic impacts; and land management and aesthetics. This information would describe not only the existing project and its impacts but also mitigation and other measures proposed for the new license period. Unlike existing § 4.51 and similar regulations (including § 16.8) now governing the preparation of license applications, no consultation with resource agencies, Indian tribes, or the public would be required in the preparation of these proposals of the applicant.

Under NHA's proposed rules, the Commission would conduct the NEPA process beginning immediately after the receipt of the Initial Information Package. The rules specify deadlines for the Commission and all participants defining ''the latest point at which a decision or action should be taken * * *''[22] The Commission would be required to publish public notice of the Initial Information Package within 30 days of its filing and at the same time issue and serve on each interested person a copy of ''Scoping Document I,'' pursuant to NEPA. This document would include: (1) a description of the scoping process, the project and its history; (2) a discussion of the applicant's proposal, reasonable alternatives, and competing proposals; (3) a discussion of resource and environmental issues (including cumulative impacts, other relevant projects and alternatives); (4) a schedule for preparing the NEPA document; (5) an outline for the final scoping document; and (6) a mailing list of recipients with intervenors identified.[23]

[15] The mailing list is developed by the applicant under the guidance of Commission staff. The list will include federal and state resource agencies, Indian tribes, local governments, environmental groups and others that may be affected by the proposed hydropower project. The mailing list may expand as a result of responses to the applicant's initial pre-filing consultation meeting and public notices, including local newspaper notice.

[16] Scoping is the formal process to solicit comments to help determine the environmental issues and how they should be addressed in an EIS or EA.

[17] *See* Georgia Power Company, 74 FERC ¶ 62,146 (1996) (Sinclair Project No. 1951). No requests for rehearing were filed.

[18] NHA is an association that represents the hydropower industry.

[19] See NHA Petition, Draft Regulations, at sections 6, 7, 18, 23, 24, 27, and 29.

[20] *Id.* at 5, section 8(c).

[21] *Id.* at 13.

[22] *Id.* at 33, section 22(b) (emphasis in original).

[23] *Id.* at 35, section 24.

Sixty days would be allowed for filing comments on Scoping Document I, and within 45 days the Commission would be required to hold a site visit and public scoping meeting.[24] Within 45 days of the completion of the public comment period on Scoping Document I, the Commission would be required to issue Scoping Document II, reviewing all the issues identified and the comments provided.[25] This document would identify all the data needs that must be satisfied by studies to be conducted by the applicant. Persons would have 45 days to file comments on Scoping Document II, including requests for additional or alternative studies. Not less than 14 days after issuance of Scoping Document II, the Commission would be required to issue public notice of a final public scoping meeting.

Within 30 days after the final scoping meeting, the Commission would be required to issue a final scoping document, which would ''identify all reasonable alternatives that need to be considered, identify cumulative effects and significant issues that need to be addressed in the environmental review process, document issues that were found not to be significant, and list all study and additional information requirements * * *'' [26] At this point, applicants would have the right to elect to prepare an EA or to have a contractor prepare an EIS.[27]

Pursuant to a set of detailed deadlines, NHA would allow a period of 150 days for the applicant to prepare a study plan, comments on it to be filed, and the Commission to resolve any disputes and review the plan.[28] Agencies and citizens groups would have the burden of asking the Commission to resolve any dispute over the adequacy of the applicant's study plan.[29] If the agencies or groups failed to request such a resolution, they would waive any right to raise this issue subsequently in the relicensing proceeding. The Commission would have 60 days after the filing of the Final Study Plan for the first year's study to resolve any disputes presented to the Commission over the plan and to accept, reject, or modify the plan accordingly.[30] The applicant would be required to submit a report summarizing the results of each study completed at the conclusion of the first year's study, and the Commission would hold a meeting to discuss the report.[31] Similar steps would be required in reference to a study plan for the second year, with further restrictions on the ability of others to request additional studies, and deadlines for the Commission to resolve any disputes presented to it.

The final stage of NHA's rulemaking proposal would require the applicant to prepare a ''final license application'' for filing with the Commission.[32] This application would incorporate the Notice of Intent Package, the Initial Information Package, the scoping documents and the study reports made in the pre-filing process. This information would be updated as necessary, and recommendations of agencies or citizens groups that were rejected would be explained.[33] This filing would ''constitute the complete application upon which the Commission will base its decision to accept, reject, or accept with modifications the final application submitted by the Applicant.'' [34]

NHA's proposed rules would also require the Commission to make more information about the relicensing process available on the Commission Issuance Posting Systems (CIPS); [35] provide that the Commission's *ex parte* rule, § 385.2201, does not apply to the proposed hydropower proceeding until after the filing of a final license application; [36] and give an applicant the right to elect a collaborative option, by which the applicant and interested parties may jointly design rules—different from the detailed rules proposed by NHA—to govern a hydropower proceeding.[37]

NHA acknowledged that there are a number of relevant subject areas, where it has not proposed regulations, that require further analysis. These areas include: [38]

(1) the impact of the relicensing process on small hydropower projects;

(2) the interaction of the Commission's process with administrative processes of other agencies, such as those conducted pursuant to the Endangered Species Act,[39] and FPA sections 4(e) and 18;

(3) how to integrate cumulative impact analysis into an accelerated NEPA process;

(4) how to evaluate the appropriateness of the time deadlines proposed for comment and Commission action; and

(5) how to develop transition provisions regarding ongoing licensing proceedings.

### *D. Comments Received on NHA's Petition*

On October 31, 1995, the Commission issued a notice of NHA's petition and invited comment on it.[40] The Commission received 43 comments and four reply comments. The commenters are listed in Appendix B.

A number of licensees of hydropower projects [41] and other industry associations [42] filed comments supportive of NHA's petition. A number of state agencies filed comments supporting NHA.[43] A number of federal agencies supported NHA's petition,[44] but other federal agencies, while approving of a Commission rulemaking that would integrate the NEPA and pre-filing consultation processes, objected to the short time frames and other aspects of NHA's proposed rules.[45]

Many hydropower licensees filed comments critical of various aspects of NHA's petition, supporting the goal of greater integration of the NEPA and pre-filing processes but asking for more flexibility in the proposed rules in order to accommodate different circumstances.[46] Questions about the appropriateness of the time frames established in NHA's proposal were raised,[47] and the Commission was asked

[24] *Id.* at 37, section 26.

[25] *Id.* at 37, section 27.

[26] *Id.* at 39, section 31.

[27] *Id.* at 39, section 32.

[28] *Id.* at 40–47, sections 34–37.

[29] NHA's proposed rules do not recognize any right of Indian tribes to dispute the adequacy of the applicant's study plan.

[30] NHA Petition, Draft Regulations, at 43, section 34(e).

[31] *Id.* at 45, section 35(g).

[32] *Id.* at 47–48, section 38.

[33] As in the pre-filing process, NHA's proposed regulations do not recognize any role for Indian tribes.

[34] NHA Petition, Draft Regulations, at 47, section 38(b).

[35] *Id.* at 6, section 9(a).

[36] *Id.* at 6, section 10.

[37] *Id.* at 6–7, section 12.

[38] NHA Petition at 12.

[39] 16 U.S.C. § 1531, *et seq.*

[40] The notice was published in the Federal Register on November 8, 1995 (60 FR 56278). On January 4, 1996, the Commission issued a notice extending the deadline for comments and reply comments to February 5 and March 4, 1996, respectively.

[41] *E.g.*, Comments of Adirondack Hydro Development Corp., Alabama Power Co., Idaho Power Co., Minnesota Power & Light Co., Montana Power Co., Pacific Gas and Electric Co., and Southern California Edison Co.

[42] *E.g.*, Comments of American Public Power Association and Edison Electric Institute.

[43] *E.g.*, Comments of Idaho Public Utilities Commission and State of Washington, Department of Ecology.

[44] Comments of the U.S. Environmental Protection Agency and the U.S. Department of Energy.

[45] Comments of U.S. Department of Agriculture and U.S. Department of Commerce.

[46] Comments of Duke Power Co., Georgia Power Co., Nebraska Public Power District, and Niagara Mohawk Power Co.

[47] Comments of Public Utility District No. 2 of Grant County.

to codify the alternative procedures staff had used on a case-by-case basis.[48] Some licensees believed that NHA's Initial Information Package was too detailed, amounting to a draft license application.[49]

New England Power Company opposed adoption of NHA's proposed rule, except in situations where the parties agreed on such an approach as an alternative. The company doubted that NHA's proposal would help when there was no such consensus, especially in light of the importance of other related legal processes, such as those involving fishway prescriptions under section 18 of the FPA and certifications under section 401 of the Clean Water Act.[50] New England Power did not believe that the Commission would have the resources to be as involved in the pre-filing process as NHA's proposed rule would require. The company thought that NHA did not recognize the importance of the flexible, case-by-case procedures the Commission's staff had been using in recent years when there was a consensus supporting this approach.

Some commenters characterized NHA's petition as discouraging competing relicense applications, because the petition would seriously delay a potential competitor's access to project information that section 15(b)(2) of the FPA requires the incumbent licensee to make available, and that the potential competitor needs in order to decide whether to file an application.[51]

A number of state agencies opposed adoption of NHA's proposed rule as unnecessary.[52] They objected to its rigidity and to many of its features that in their view favored the applicant at the expense of other participants. They considered NHA's time deadlines on participants in the process unreasonable and opposed the elimination of draft applications and the shifting of responsibility from the applicant to others. A number of federal agencies, while supporting the goal of greater integration of the pre-filing and NEPA processes, made similar criticisms of NHA's petition and reminded the Commission of its trust responsibilities for Indian tribes, which they asserted NHA ignored.[53]

Citizens' groups were very much opposed to adoption of the regulations NHA proposed.[54] These commenters asked the Commission to continue its current practice of flexibly implementing the existing hydropower procedural regulations.

Hydro Reform Coalition (HRC) stated that the Commission's current procedural regulations for hydropower applications were adopted for good reasons, to cure real problems in the licensing process, have been working reasonably well and are not the chief cause of any delays encountered in the process.[55] Rather, HRC asserted that applicants have brought such delays on themselves by not conducting adequate studies of a project's resource impacts and not filing required information with their applications. Other delays are necessary to allow sufficient time to address such critical issues as cumulative impacts. HRC stated: ''NHA's package of changes drastically alters the equities of the relicensing process in favor of a front-end loaded, fast track, where licensees gain at the expense of all other participants—resource agencies, conservation groups, competing applicants * * *.'' [56]

HRC noted that a hydropower licensing proceeding is a learning process for most parties, who do not have the information and knowledge of the applicant. It takes some time for them to learn about and evaluate the proposed project's resource impacts so that they can usefully participate in the process and assist the Commission in considering reasonable alternatives and in compiling an adequate record for a decision in the public interest. While the current procedural regulations allow this process to unfold, in HRC's view NHA's proposal would replace them with new regulations designed to curtail this process and serve the interests of the license applicants.[57]

## IV. Discussion

### *A. NHA's Petition*

The Commission recognizes that the present procedures for licensing hydroelectric projects are complicated and can result in lengthy proceedings. We agree with NHA that every effort should be made to lessen the burden of such proceedings on the participants. To a considerable extent, however, we believe the burdens are an unavoidable product resulting from statutory mandates and the often conflicting objectives of the large number of parties, including state and federal agencies with overlapping roles, Indian tribes, and citizens' groups, interested in the licensing process. Nevertheless, we believe there continues to be room for taking reasonable measures to improve the efficiency of the process, while remaining faithful to the statutory mandates and public interest the Commission serves. Our hope is that the licensing process can be both expedited in time and improved in results, while treating all parties fairly.

We commend NHA and the other representatives of the hydropower industry who devoted substantial time and effort in evaluating the Commission's hydropower licensing procedures. We appreciate NHA's consultation with other participants in the licensing process and the submission of a petition for rulemaking, and we welcome the comments of all those who responded. We believe that the comments show that everyone who has studied and addressed this subject shares common goals, making licensing proceedings more efficient while maintaining procedures that will protect the participatory rights of interested parties and compile an adequate record for decision.

A critical difference between the avenues explored by the Commission staff in light of the Energy Policy Act and by NHA is in their basic design. The staff process was designed to supplement and not replace the existing procedures in licensing proceedings and can be flexibly applied on a case-by-case basis, with the alternative procedures tailored to the expressed needs and desires of the participants. This process places a lot of responsibility on the participants to come together and reach

[48] Comments of Power Authority of the State of New York.

[49] Comments of Georgia Power Co. and Safe Harbor Water Power Corp.

[50] 33 U.S.C. § 1341(a)(1).

[51] Comments of the Confederated Tribes of the Warm Springs Reservation and the City of Santa Clara, California, Holyoke Gas & Electric Dept., and the Northern California Power Agency.

Section 15(b)(2) of the FPA provides that, at the time an existing licensee notifies the Commission whether it intends to file an application for a new license (which shall be at least 5 years before the expiration of the existing license), the existing licensee must make publicly available such information about construction and operation of the project as the Commission shall require. The Commission's regulations implementing this provision (18 CFR 16.7) require extensive and detailed information about the project.

[52] *E.g.*, State of Washington Department of Fish and Wildlife and State of Wisconsin Department of Natural Resources.

[52] Comments of the U.S. Department of the Interior, Fish and Wildlife Service, and Bureau of Indian Affairs.

[54] Comments of the Adirondack Mountain Club, the Defenders of Wildlife, and the Hydropower Reform Coalition, which includes American Rivers, American Whitewater Affiliation, Appalachian Mountain Club, Conservation Law Foundation, Michigan Hydro Relicensing Coalition, Natural Heritage Institute, New England F.L.O.W., New York Rivers United, River Alliance of Wisconsin, Trout Unlimited, and Sierra Club Legal Defense Fund.

[55] HRC at 3–8. HRC pointed to many recent relicense proceedings, primarily involving some kind of cooperative approach, that were expeditiously conducted under the current regulations.

[56] HRC at 4.

[57] HRC at 8.

a consensus on how the environmental impacts of the applicant's proposal should be evaluated. If such a consensus cannot be achieved, the standard procedures set forth in the Commission's regulations must be followed by the applicant.

NHA has proposed enactment of comprehensive generic procedures that would apply to all relicensing proceedings, regardless of whether such a consensus exists and the prospect for success. NHA's proposal would require the Commission's staff to be involved in developing every application for a new license and to render decisions on the details of the steps required in that development. The Commission does not have the resources to carry out such an open-ended mandate. Furthermore, if, as NHA proposed, Commission staff assumed the role of decisionmaker in pre-filing consultation for all proceedings, concerned parties (including the applicant) could be discouraged from trying to form a consensus on how to study and resolve critical issues in a mutually satisfactory manner.

We share with the critics of NHA's petition a concern that NHA's proposed regulations would not improve hydropower licensing proceedings. In effect, NHA's proposal would eliminate the pre-filing consultation process. NHA would have an applicant for a new license develop a detailed package, called the ''Initial Information Package,'' that is for all intents and purposes a draft license application. We think such proposals are best developed based on prior consultation with affected resource agencies, Indian tribes, and the public. Before doing such consultation and conducting the studies that are required as part of the pre-filing process, an applicant cannot know in detail what mitigation and enhancement measures it should propose.

To require the Commission staff to step in to direct every hydropower relicensing proceeding prior to any pre-filing consultation would consume too much of the Commission's limited resources without providing any assurance that the process would be improved. The Commission did not have the resources to undertake this role in the past; we certainly do not have the resources to do so now, a time when federal agencies are being called upon to tighten their budgets.

NHA has described as critical its proposal to waive the *ex parte* rule prior to the filing of what it calls the ''final license application'' with the Commission. But its proposal would have the Commission conducting a proceeding prior to that time, with the intervention of parties, and NHA itself also recognized that the proceeding may be highly contentious. Under those circumstances, it would be unwise and may be unlawful for the Commission to consider itself and its advisory staff as not subject to any *ex parte* restraint.

We also share the concern of those who question how NHA's proposal would afford potential competitors the timely access to project information that section 15(b)(12) of the FPA calls for.

Nor has NHA justified the short time frames it sets for responses and decisions during its proposed hydropower process. The periods allowed are much shorter than similar time frames in the existing regulations, whose deadlines have been considered strict by various participants in the licensing process. Any successful process will necessarily require more flexibility than may be contemplated in NHA's proposal.

NHA's proposed rules might also not result in a more efficient proceeding if other state or federal agencies with related statutory responsibilities, such as Clean Water Act certification, do not wish to participate in the accelerated NEPA process that NHA would require in all cases. Lacking a consensus for an alternative approach to front-load the NEPA process would risk wasting a large amount of resources by all participants and might require the NEPA process to be repeated, once the other agencies decided how they wished to proceed in reference to the applicant's proposal. The Commission cannot by rule mandate a positive spirit of mutual understanding and cooperation among the applicant, resource agencies, Indian tribes, and the public, or fully integrate related processes that occur under separate statutes.[58]

We do, however, believe there is considerable merit in the part of NHA's proposal called a ''collaborative option.'' This appears to be similar to the alternative procedures that the Commission's staff has been using on a case-by-case basis at the request of license applicants, where there is a consensus among the interested entities that such an approach would be fruitful. If an applicant is willing to devote itself to working on a cooperative basis with all the entities interested in its proposed hydropower project, including affected resource agencies, Indian tribes, and the public, and those entities have a similar attitude and commitment, the Commission is willing to commit its staff to active involvement in the proceeding prior to the filing of an application, to the extent our limited resources permit. In such cases, the staff's participation has been more as a resource and guide to the parties rather than as a decisionmaker.

Such an approach, tailored to the needs and requirements of the particular circumstances and facts presented, has worked in many cases and in our view offers the best hope of achieving the goal of expediting the licensing process in a way that is fair to all parties and in the public interest. Such proceedings can front-load not only NEPA, but also the completion of other processes related to hydropower licensing that are not in the Commission's control, such as state water quality certification for the project.

In the following section, we describe the Commission's proposed rule on this alternative process. The proposed rule is intended to refine, clarify, and codify the alternative procedures that the Commission's staff has evolved over the past few years on a case-by-case basis. By articulating these procedures in the form of a notice of proposed rulemaking, we are providing a forum in which all interested persons will have an opportunity to comment on them, in light of experience with the alternative procedures as well as with the existing procedures. This rulemaking should provide an opportunity to consider how the alternative procedures have worked to date, and how they might be refined to improve the efficiency of the licensing process while preserving the rights of all of the participants in it.

*B. Proposed Rule*

We propose to codify an alternative process that affords case-by-case flexibility and opportunity for continued innovation for all concerned. We recognize that some of the procedures that participants may agree to use and that the Commission may approve in individual cases might well be similar to those that NHA has proposed in generic form. The proposal would leave intact the existing pre-filing and hearing procedures for use in all proceedings where there is neither a consensus on suitable alternative procedures nor any reasonable prospect for their success in expediting the proceeding.

We see no reason to restrict the proposal to applicants for new licenses, but, consistent with Commission practice and the Energy Policy Act,

[58] NHA has also not explained its apparent omission of Indian tribes from its proposed rules. The Commission included the tribes in the pre-filing consultation process in recognition of their special interests and status. NHA claimed that it consulted with Indian tribes in developing its proposal, but NHA did not identify them or their positions.

would extend the ability to apply for this option to all applicants for licenses, whether original, new or subsequent, and to amendments to existing licenses where pre-filing consultation is required (pursuant to § 4.38(a)(4) of the regulations).[59]

The Commission proposes to revise § 4.34 of the regulations, governing the hydropower hearing process, to add a new subsection (i). Under this subsection, a potential applicant could request that it be permitted to conduct the pre-filing consultation and hearing processes pursuant to an alternative procedure. Under this procedure, the pre-filing consultation process and the NEPA process would be integrated and the applicant or its contractor or consultant would prepare a preliminary draft environmental assessment or a contractor or consultant chosen by the Commission and funded by the applicant would prepare a preliminary draft environmental impact statement, to be filed with the application.

In appropriate circumstances, the Commission could approve the request and participate in the alternative process, if the applicant demonstrated that it had reached out to interested entities and a consensus exists supporting the use of alternative procedures. The requester would also have to submit a communications protocol, supported by interested entities, that would describe how the applicant and other participants in the pre-filing consultation process, including Commission staff, would communicate concerning the merits of the applicant's proposal.

The alternative process would integrate the NEPA process and the pre-filing consultation process. The applicant, contractor or consultant would be required to conduct an initial information meeting, to scope environmental issues, to complete scientific studies and release them, to conduct further scoping if appropriate, and to prepare the preliminary draft environmental document for filing with the Commission. The process would allow for public participation, and public notice would be given of critical stages (including the filing of the request for alternative procedures) by the Commission in the Federal Register and by the applicant in a local newspaper.

Every quarter, the applicant would be required to report to the Commission on the progress of the pre-filing consultation process. Public files of relevant documents would be maintained by the Commission and the applicant. The Commission's file would contain summary information while the applicant's file would contain all relevant information compiled during the process.

Under the alternative process, the applicant could substitute a draft NEPA document for Exhibit E to its application, and the applicant would not need to document all the details of the pre-filing consultation process. Requests for scientific studies would be due during the pre-filing process, and requests for additional studies could be made after filing of the application only upon a showing that it was not possible to request them during the pre-filing process. Preliminary fish and wildlife recommendations, prescriptions, mandatory conditions, and comments would be due during the pre-filing period, to be finalized after the filing of the application. No notice that the application is ready for environmental analysis would be given by the Commission after filing of the application.

The proposed rule would also reserve the Commission's authority, upon request and on a case-by-case basis, to participate in the pre-filing consultation process and assist in the integration of this process with the NEPA process where, *e.g.*, the applicant, contractor or consultant funded by the applicant would not prepare an environmental assessment or environmental impact statement. In such cases, the Commission could approve suitable modifications to the procedures otherwise applicable during the pre-filing and post-filing periods, similar to those made for alternative procedures set forth in the proposed rule.

The Commission invites comment on all aspects of its proposal, as described above. The Commission particularly invites comment on what should happen if the consensus for use of alternative procedures disappears prior to the filing of an application. Should the Commission still allow alternative procedures to be followed in such a situation? If not, what procedures should apply?

Would any transition provisions be necessary for the proposed rule, so as not to upset applications currently being prepared pursuant to staff-granted waivers?

The Commission also proposes to add a new § 375.314(u) to its regulations, to clarify and codify the authority of the Director of the Office of Hydropower Licensing to approve the use of the alternative procedures and to assist in the pre-filing consultation process. In appropriate cases, for example, the Director could decide to actively assist a potential applicant in the pre-filing consultation process, including the preparation of a NEPA document.

## V. Environmental Analysis

Commission regulations describe the circumstances where preparation of an environmental assessment or an environmental impact statement will be required.[60] The Commission has categorically excluded certain actions from this requirement as not having a significant effect on the human environment.[61] No environmental consideration is necessary for the promulgation of a rule that is clarifying, corrective, or procedural, or that does not substantially change the effect of legislation or regulations being amended.[62]

This proposed rule is procedural in nature. It proposes alternative procedures that participants to a hydroelectric licensing proceeding may wish to use. Thus, no environmental assessment or environmental impact statement is necessary for the requirements proposed in the rule.

## VI. Regulatory Flexibility Certification

The Regulatory Flexibility Act of 1980 (RFA) [63] generally requires a description and analysis of final rules that will have significant economic impact on a substantial number of small entities. Pursuant to section 605(b) of the RFA, the Commission hereby certifies that the proposed regulations, if promulgated, will not have a significant economic impact on a substantial number of small entities.

The procedures proposed herein are purely voluntary in nature, and are designed to reduce burdens on small entities (as well as large entities) rather than to increase them. More fundamentally, the alternative process we are proposing herein would be purely voluntary. The procedures proposed herein would be a potential alternative to the procedures currently prescribed in our regulations, and would not be adopted unless all of the persons and entities interested in the proceeding affirmatively agreed to use them. Under this approach, each small entity would be able to evaluate for itself whether the alternative procedures would be beneficial or burdensome, and could decline to agree to their adoption

[59] By revising § 4.34 of the regulations, which governs the hearing process for all hydropower applications, the proposal would apply to all licensing proceedings, including those subject to Part 16.

[60] Regulations Implementing National Environmental Policy Act, 52 FR 47897 (Dec. 17, 1987), codified at 18 CFR Part 380.

[61] 18 CFR 380.4(a)(2)(ii).

[62] 18 CFR 380.4.

[63] 5 U.S.C. §§ 601–612.

if they appeared to be burdensome. Under these circumstances, the economic impact of the proposed rule would be either neutral or beneficial to the small entities affected by it.

VII. Information Collection Requirements

The Office of Management and Budget's (OMB)[64] regulations require that OMB approve certain information collection requirements imposed by agency rules. The regulations proposed in this Notice do not require the collection or filing of any information, nor would they amend any existing information collection requirement.

VIII. Comment Procedure

The Commission invites interested persons to submit written comments on the matters proposed in this notice. An original and 14 copies of the written comments must be filed with the Commission no later than February 3, 1997, for comments and March 3, 1997, for reply comments. Comments should be submitted to the Office of the Secretary, Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C. 20426, and should refer to Docket No. RM95–16–000.

Written comments will be placed in the public files of the Commission and will be available for inspection at the Commission's Public Reference Room, at 888 First Street, N.E., Washington, D.C. 20426, during regular business hours.

List of Subjects

*18 CFR Part 4*

Electric power, Reporting and recordkeeping requirements.

*18 CFR Part 375*

Authority delegations (Government agencies), Seals and insignia, Sunshine Act.

By direction of the Commission.

Lois D. Cashell,

*Secretary.*

In consideration of the foregoing, the Commission proposes to amend parts 4 and 375 of chapter I, title 18, *Code of Federal Regulations*, as set forth below.

## PART 4—LICENSES, PERMITS, EXEMPTIONS, AND DETERMINATION OF PROJECT COSTS

1. 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.

[64] 5 CFR 1320.13.

2. In § 4.34, the heading is revised and a new paragraph (i) is added to read as follows:

**§ 4.34 Hearings on applications; consultation on terms and conditions; motions to intervene; alternative procedures.**

* * * * *

(i) *Alternative procedures.* (1) An applicant may submit to the Commission a request to approve the use of alternative procedures for pre-filing consultation and the filing and processing of an application for an original, new or subsequent hydropower license, or for the amendment of a license that is otherwise subject to the provisions of § 4.38.

(2) The goal of such alternative procedures shall be to:

(i) Integrate the pre-filing consultation process with the environmental review process;

(ii) Facilitate the greater participation of the public and Commission staff in the pre-filing consultation process;

(iii) Allow for the preparation of an environmental assessment by an applicant or its contractor or consultant or of an environmental impact statement by a contractor or consultant chosen by the Commission and funded by the applicant; and

(iv) Encourage the applicant and interested persons to narrow any areas of disagreement and promote settlement of the issues raised by the hydropower proposal.

(3) A potential hydropower applicant requesting the use of alternative procedures must:

(i) Demonstrate that a reasonable effort has been made to contact all resource agencies, Indian tribes, citizens' groups and others affected by the applicant's proposal, and that a consensus exists that the use of alternative procedures is appropriate under the circumstances; and

(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 applicant's proposal.

(4) As appropriate, the alternative procedures shall include provision for an initial information meeting, the scoping of environmental issues, the analysis of completed scientific studies and further scoping, and the preparation of a preliminary draft environmental assessment or environmental impact statement and related application.

(5) The Commission will give public notice inviting comment on the applicant's request to use alternative procedures.

(6) If the Commission accepts the use of alternative procedures, the following provisions will apply.

(i) To the extent feasible under the circumstances of the proceeding both the Commission and the applicant will give public notice at each of the stages described in paragraph (i)(4) of this section. The applicant will also send notice of these stages to a mailing list approved by the Commission.

(ii) Every quarter, the applicant shall furnish the Commission with a report summarizing the progress made in the pre-filing consultation process and referencing the applicant's public file, where additional information on that process can be obtained.

(iii) At a suitable location, the applicant will maintain a public file of all relevant documents, including scientific studies, correspondence, and minutes of meetings, compiled during the pre-filing consultation process. The Commission will maintain a public file of the applicant's initial proposal and information package, scoping documents, periodic reports on the pre-filing consultation process, and the preliminary draft environmental document.

(iv) An applicant authorized to use alternative procedures may substitute a preliminary draft environmental document and specified additional material instead of Exhibit E to its application and need not document the pre-filing consultation process.

(v) The procedures approved may require all resource agencies, Indian tribes, citizens groups, and interested persons to submit to the applicant requests for scientific studies during the pre-filing consultation process, so long as additional requests may be made to the Commission for good cause after the filing of the application, explaining why it was not possible to request the study during the pre-filing period.

(vi) During the pre-filing process the Commission may require the filing of preliminary fish and wildlife recommendations, prescriptions, mandatory conditions, and comments, to be finalized after the filing of the application; no notice that the application is ready for environmental analysis need be given by the Commission after the filing of an application pursuant to these procedures.

(7) The Commission may participate in the pre-filing consultation process and assist in the integration of this process and the environmental review process in appropriate cases where the applicant, contractor or consultant

funded by the applicant is not preparing a preliminary draft environmental assessment or environmental impact statement, but where staff assistance is available and will expedite the proceeding.

## PART 375—THE COMMISSION

3. 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.

4. In § 375.314, paragraph (u) is added to read as follows:

### § 375.314 Delegations to the Director of the Office of Hydropower Licensing.

* * * * *

(u) Approve, on a case-specific basis, the use of alternative procedures for the development of an application for an original, new or subsequent license or of an application for a license amendment subject to the pre-filing consultation process, and assist in the pre-filing consultation process.

Note: The appendices will not appear in the *Code of Federal Regulations.*

## Appendix A—Guidelines for the Applicant Prepared Environmental Assessment (APEA) Process

(November 26, 1996—Office of Hydropower Licensing Division of Project Review)

Section 2403(b) of the Energy Policy Act of 1992 (Act) allows an applicant to file a draft environmental assessment (DEA), pursuant to the National Environmental Policy Act of 1969 (NEPA),[65] with its license application. The Act also requires the Federal Energy Regulatory Commission (Commission) to institute procedures to advise applicants who choose this route. This document provides general advice consistent with the statutory provisions.

We've divided the process into three stages, consistent with the Commission's three stage consultation regulations. In each stage, we: 1) highlight the objective; and 2) discuss the major milestones and work products. The process, as outlined by the bullet items and arrows, provides a framework for applicants, consultants, Commission staff and other interested entities to complete the process successfully. The guidance herein is intended to be flexibly administered, to suit the circumstances of specific cases.

*Applicant Prepared EA (APEA) Process*

Commission Staff Goal: 1) front-load NEPA review and other licensing requirements (i.e., 401 water quality certification, section 106—historic preservation consultation, section 7—endangered species consultation, etc.) by providing oversight for an applicant who prepares a DEA during the prefiling consultation period; 2) facilitate a process whereby the draft EA fully evaluates and balances the interests of all stakeholders involved; and 3) expedite the licensing process.

Stage 1 Consultation

Stage 1 Consultation sets the tone for the process and has two important features: participation in the activities ancillary to the licensing process and the beginning of NEPA scoping, including a site visit. Part of the licensing process includes the applicant inviting the federal, state, and local agencies, nongovernmental organizations (NGOs), and other interested members of the public to participate in the process. Once the applicant has gathered a group to participate, the applicant and participants should prepare a communications protocol and a request for waiver of specific three-stage consultation regulations. If a federal land managing agency is involved and desires cooperating agency status in the Commission's NEPA document, a Letter of Understanding (LOU) should be prepared by staff.

NEPA scoping and a site visit may begin in Stage 1. Basically, there are two options: 1) the applicant can begin the NEPA scoping by combining the 1st Stage joint agency and public meeting [required in 18 C.F.R. § 4.38(b)(3) and 16.8] with a NEPA scoping meeting; or 2) the applicant can hold the 1st Stage meeting and postpone NEPA scoping until Stage 2. The Commission and the Council on Environmental Quality (CEQ) prefer to scope the issues as early as possible.

There are advantages and disadvantages of beginning NEPA scoping at the 1st Stage consultation meeting. The advantage is that the applicant and participants can focus on identifying the issues up-front to develop study plans for the project. This may help eliminate the ''cart before the horse'' syndrome where the applicant is requested to study everything to find out if it's an issue. Another advantage is that the applicant can ask for input regarding project alternatives and ask the meeting participants to provide information, such as existing studies, that other agencies or NGOs might have. Most APEA efforts have completed NEPA scoping in Stage 1.

It may not be possible to combine NEPA scoping with the 1st Stage consultation meeting, because the participants may not be able to identify the issues owing to a lack of data.

Consider combining the NEPA scoping and 1st Stage joint meeting when:

1) applicants ask to begin the APEA process at the beginning of Stage 1, and

2) project issues and potential impacts are fairly well-known. This option is most appropriate for relicenses or unlicensed projects (UL's).

Here Are the Milestones and Work Products for Stage 1 Consultation

- Applicant decides to do APEA—preferably at the preliminary permit stage (original license) or at the notice of intent to file stage (relicense) or earlier.[66]
- Applicant generates a project mailing list (federal, state, local agencies, NGOs, and any other interested entities, such as property owners along the river).
- Applicant writes to the Commission (cc: the mailing list) requesting that the Commission agree to advise it in the APEA process.
- Commission responds to the applicant's letter and specifies staff's role in the process. Staff sends samples of communications protocol, if one hasn't been proposed, as well as samples of other EAs, scoping documents, etc.

==> Commission staff are selected to advise applicant

- Applicant requests a waiver of certain regulations (such as a waiver allowing the filing of the DEA in lieu of an exhibit E), as appropriate.
- The applicant, Commission staff, and other participants develop a Communications protocol (merits and procedures discussions) and a timeline (milestones). Participants are encouraged to sign the communications protocol. The applicant mails a copy of these documents to the mailing list.
- If applicable, the Commission or applicant will executes a Letter of Understanding (LOU) with cooperating federal managing agencies.
- Applicant mails Initial Stage Consultation Document (ISCD). The ISCD must be comprehensive and contain adequate information to provide a basis for participants to comment and make recommendations concerning study plans, etc.

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BASED ON THE AMOUNT OF AVAILABLE PROJECT INFORMATION, THE COMMISSION STAFF WILL ADVISE THE APPLICANT TO: (A) HOLD THE 1ST STAGE MEETING ONLY; OR (B) COMBINE THE 1ST STAGE AND NEPA SCOPING MEETINGS.

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(A) Applicant holds joint agency and public meeting within 60 days of mailing the ISCD; conducts a site visit; Applicant requests that the agencies, NGOs provide initial study needs.

==> Comments from agencies/NGOs on the ISCD are due 60 days after joint meeting. Agencies, NGOs, and the public should request initial studies.

- Applicant, agencies, or NGOs can, if needed, request dispute resolution on study requests.

(B) Applicant prepares Scoping Document 1 (SD1)[67] and mails 30 days before joint agency/public meeting. Applicant can attach Scoping Document I to the ISCD and mail together.

==> Commission issues a notice of scoping.

==> Applicant holds NEPA scoping meetings (public and agency); conducts site visit.

==> Comments from agencies/NGOs on the ISCD and SDI are due 60 days after joint meeting. This includes requests for initial studies.

- Applicant, agencies, or NGOs can, if needed, request dispute resolution on study requests.
- Applicant issues Scoping Document II (SDII).

[65] National Environmental Policy Act of 1969, as amended.

[66] Applicant and interested stakeholders can request to meet with staff to discuss the process.

[67] SDI can be very brief since the ISCD will provide a great deal of information.

• Applicant should apply for the 401 WQC so that the WQC agency can determine whether it requires any additional information to act on water quality certification.

Stage 2 Consultation

Several activities occur during Stage 2: 1) data collection and analysis [1–2 field seasons]; 2) scoping [if not completed in Stage 1]; 3) final request for additional studies pursuant to 18 C.F.R. Section 4.32 (b)(7); 4) development of the preliminary DEA and draft license application; 5) request for agency/NGO/public preliminary recommendations, terms and conditions; and 6) issuance of the draft license application and preliminary DEA for comment [as required in 18 C.F.R. § 4.38(c)(4); § 16.8].

Here Are the Milestones and Work Products for Stage 2

• Applicant will copy Commission and all participants on study plans (Commission staff reviews, advises, comments).
• Applicant completes first field season of studies.

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IF NEPA SCOPING WASN'T DONE IN STAGE 1, PROCEED WITH (A); IF NEPA SCOPING WAS DONE IN STAGE 1, FOLLOW (B).

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(A) Applicant provides study results to all interested participants along with SD1.

==> In SD1, applicant issues a request for any further study recommendations.

• Applicant holds a Scoping meeting and site visit 30 days after mailing SDI.
• Comments on scoping and additional study requests are due to the Applicant, with a copy to the Commission staff, 60 days after SD1 is mailed; 30 days after the NEPA scoping meeting.
• If a dispute regarding an additional study request can not be resolved, an applicant, agency, or NGO may request dispute resolution.

(B) Since scoping meetings were held in Stage 1, the Applicant mails study results to all participants for 60-day review.

==> Applicant issues a request for any further study recommendations 30 days after study results have been mailed and allows 60 days after issuance of that letter for agencies, NGOs, public, to request additional studies, if needed.

• If a dispute regarding an additional study request can not be resolved, an applicant, agency, or NGO may request dispute resolution.

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ALL APPLICANTS FOLLOW THE STEPS OUTLINED BELOW

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• Second field season of studies, if needed.
• Applicant begins preparing draft license application and preliminary DEA (PDEA).
• Applicant requests preliminary terms and conditions from the stakeholders to analyze in the PDEA.
• Applicant presents and analyzes its proposal for licensing/relicensing the project in the PDEA along with any preliminary terms and conditions, prescriptions and recommendations from the participants and sends to all participants for review and comment.[68] The PDEA should contain the results of any additional studies that were completed in stage 2.

==>NOTE: The PDEA must include the applicant's proposal and reasonable alternatives.

==> Commission issues a notice of availability of the PDEA with a request for preliminary terms and conditions, prescriptions and recommendations.

• The applicant will incorporate comments, preliminary terms and conditions and recommendations from the participants into the DEA and final license application.

==> Comments from agencies, NGOs, and the public are due to the applicant 90 days from mailing the draft license application and PDEA.

• Hold a meeting, if needed, (not later than 60 days from the disagreeing parties' letter) to discuss the applicant's proposal, analyses, etc., that were presented in the PDEA and discuss any changes (such as settlement agreements, the preliminary conditions and recommendations) to be incorporated and analyzed in the DEA and final license application.
• Prepare final application and DEA.

Stage 3 Consultation

At this stage, the Commission staff conducts an independent analysis and makes a recommended decision.

Here Are the Milestones for Stage 3

• Applicant files license application and DEA with Commission, and distributes it to the mailing list.

==> Staff reviews the application and DEA for adequacy.

• The Commission issues a notice of acceptance, provides opportunity for interested entities to request intervenor status, and requests final terms, conditions [including final 401 WQC conditions] recommendations, and 4(e) conditions if applicable, from participants.

==> 60-day period to file a motion to intervene with the Commission.

==> 105-day comment period (60 days for agency final recommendations; 45 days for the applicant's response to agency final recommendations.

==> This 60-day recommendation period is also an opportunity for agencies, NGOs, and other interested entities to comment on the applicant's license application and DEA.

• Commission staff receives final agency terms and conditions, prescriptions and participants' final recommendations.

[68] To allow sufficient time for the applicant to evaluate and balance the participants' recommendations and preliminary terms and conditions, the applicant should mail the PDEA about 8 months prior to the deadline date for filing the final license application and DEA with the Commission.

• Commission staff modifies the DEA in light of responses to final agency and participants' recommendations.

==> Staff completes comprehensive development analysis; writes Finding of Significant Impact or of No Significant Impact.

• Commission issues staff DEA.

==> 30-day comment period on the DEA or 45 days comment if section 10(j) issues apply.

• Commission staff revises DEA in light of comments received and the results of section 10(j) negotiations, if applicable.
• Commission issues Final EA.
• Commission requests Final 4(e) conditions, if applicable.[69]
• License order issued.[70] Note: The Applicant-Prepared EA Process flow chart that follows is not being published in the Federal Register but is available from the Commission's Public Reference Room.

Note: The Applicant-Prepared EA Process flow chart that follows is not being published in the Federal Register but is available from the Commission's Public Reference Room.

## Appendix B—Commenters

U.S. Department of Agriculture, U.S. Forest Service
U.S. Department of Commerce, National Marine Fisheries Service
U.S. Department of Energy
U.S. Department of the Interior, Bureau of Indian Affairs
U.S. Department of the Interior, U.S. Fish and Wildlife Service
U.S. Environmental Protection Agency
Environmental Council of States
Idaho Public Utility Commission
Minnesota Department of Natural Resources
Washington Department of Ecology
Washington Department of Fish and Wildlife
Wisconsin Department of Natural Resources
Confederated Tribes of the Warm Springs Reservation of Oregon
National Hydropower Association
Edison Electric Institute
American Public Power Association
Western Urban Water Coalition
Northwest Hydroelectric Association
Association of California Water Agencies
Hydro Reform Coalition
Adirondack Mountain Club
Defenders of Wildlife
Denver Water Department
Nebraska Public Power District
New York State Power Authority
Sacramento Municipal Power District
Santa Clara County, Holyoke Gas & Electric Company, and California Water Agency
Alabama Power Company
Duke Power Company
Georgia Power Company
Idaho Power Company
Minnesota Power & Light Company

[69] Some 4(e) agencies have a practice of providing only preliminary terms and conditions before a final NEPA document is issued. However, Staff will work with cooperating agencies with the goal of expediting final 4(e) conditions so that they may be incorporated into the Final EA, rather than have those conditions provided afterward.

[70] Assumes 401 WQC has been received/waived and no intervenors in opposition.

Montana Power Company
Niagara Mohawk Power Company
New England Power Services
Pacific Gas & Electric Company
Portland General Electric Company
Safe Harbor Power Company
Southern California Edison Company
Washington Water Power Company
TAPOCO
Adirondack Hydro Development Corporation

Reply comments were filed by NHA, Hydro Reform Coalition, Georgia Power, and Niagara Mohawk.

[FR Doc. 96–30715 Filed 12–2–96; 8:45 am]

BILLING CODE 6717–01–P

## DEPARTMENT OF THE TREASURY

## Customs Service

## 19 CFR Part 122

## Addition of Midland International Airport to List of Designated Landing Locations for Private Aircraft

**AGENCY:** Customs Service, Treasury.

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** This document proposes to amend the Customs Regulations by adding the user-fee airport at Midland, Texas (Midland International Airport) to the list of designated airports at which private aircraft arriving in the Continental U.S. via the U.S./Mexican border, the Pacific Coast, the Gulf of Mexico, or the Atlantic Coast from certain locations in the southern portion of the Western Hemisphere must land for Customs processing. This proposed amendment is made to improve the effectiveness of Customs enforcement efforts to combat the smuggling of drugs by air into the United States. This proposed amendment, if adopted, would also improve service to the community, by relieving congestion at Presidio-Lely International, Del Rio International, and Eagle Pass Municipal Airports, which are also located in Texas.

**DATES:** Comments must be received on or before February 3, 1997.

**ADDRESSES:** Written comments (preferably in triplicate) may be addressed to U.S. Customs Service, Office of Regulations and Rulings, Regulations Branch, Franklin Court, 1301 Constitution Avenue, NW., Washington, D.C. 20229. Comments submitted may be inspected at the Regulations Branch, Office of Regulations and Rulings, located at Franklin Court, 1099 14th St., NW, Suite 4000, Washington, DC.

**FOR FURTHER INFORMATION CONTACT:** Gay Laxton, Passenger Operations Division, Office of Field Operations, (202) 927–5709.

**SUPPLEMENTARY INFORMATION:**

### Background

As part of Customs efforts to combat drug-smuggling efforts, Customs air commerce regulations were amended in 1975 to impose special reporting requirements and control procedures on private aircraft arriving in the Continental United States from certain areas south of the United States. T.D. 75–201. Thus, since 1975, commanders of such aircraft have been required to furnish Customs with timely notice of their intended arrival, and certain private aircraft have been required to land at certain airports designated by Customs for processing. In the last twenty years the list of designated airports for private aircraft has changed and the reporting requirements and control procedures—now contained in Subpart C of Part 122 of the Customs Regulations (19 CFR Subpart C, Part 122)—have been amended, as necessary.

Specifically, § 122.23 (19 CFR 122.23) provides that subject aircraft arriving in the Continental U.S. must furnish a notice of intended arrival to the designated airport located nearest the point of crossing. Section 122.24(b) provides that, unless exempt, such aircraft must land at the designated airport for Customs processing and delineates the airports designated for private aircraft reporting and processing purposes. There are currently 30 designated airports listed at § 122.24(b).

Community officials from Midland, Texas, have written Customs requesting that the user-fee airport there (Midland International Airport) be added to Customs list of airports designated for private aircraft reporting and processing. The request is based both on considerations of the strategic location of the airport—between the communities of El Paso and Laredo, Texas—and because the airport has become a modern, well-equipped airport that can accommodate corporate aircraft.

Customs has determined that the addition of Midland International Airport to the list of designated landing sites for private aircraft will improve the effectiveness of Customs drug-enforcement programs relative to private aircraft arrivals, as Midland is adjacent to the Southwest Border of the U.S. and is on a regularly traveled flight path. Further, the designation would enhance the efficiency of the Customs Service, as the airport is close to the normal work location for inspectional personnel assigned to the Del Rio-Eagle Pass-El Paso-Laredo-Presidio Ports-area. In this regard, it is pointed out that the private aircraft processing services Customs provides at the Presidio, Del Rio, and Eagle Pass Airports will continue; designating Midland International Airport is meant to provide an alternative airport to these other airports in order to relieve air traffic congestion at those locations.

Although notice of this proposed designation is not required to be published in the Federal Register, comments are solicited from interested parties concerning whether or not the Midland International Airport should be designated as an airport for the landing of private aircraft.

### Comments

Before adopting this proposal as a final rule, consideration will be given to any written comments timely submitted to Customs. Comments submitted will be available for public inspection in accordance with the Freedom of Information Act (5 U.S.C. 552), § 1.4 of the Treasury Department Regulations (31 CFR 1.4), and § 103.11(b) of the Customs Regulations (19 CFR 103.11(b), on regular business days between the hours of 9 a.m. and 4:30 p.m. at the Regulations Branch, Office of Regulations and Rulings, U.S. Customs Service, 1099 14th St., NW, 4th floor, Washington, DC.

### Inapplicability of the Regulatory Flexibility Act and Executive Order 12291

This proposed amendment seeks to expand the list of designated airports at which private aircraft may land for Customs processing. Although this document is being issued with notice for public comment, because it relates to agency management and organization, it is not subject to the notice and public procedure requirements of 5 U.S.C. 553. Accordingly, this document is not subject to the provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). Agency organization matters such as this document are exempt from consideration under E.O. 12866.

### Drafting Information

The principal author of this document was Gregory R. Vilders, Regulations Branch.

### List of Subjects in 19 CFR Part 122

Air carriers, Air transportation, Aircraft, Airports, Customs duties and inspection, Drug traffic control, Organization and functions (Government agencies), Reporting and recordkeeping requirements, Security measures.