DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

18 CFR Parts 4, 5, 16, and 385

[Docket No. RM02–16–000]

Hydroelectric Licensing Under the Federal Power Act

February 20, 2003.

AGENCY: Federal Energy Regulatory Commission, DOE.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Federal Energy Regulatory Commission is proposing to revise its regulations pertaining to hydroelectric licensing under the Federal Power Act. The proposed revisions would 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) would be conducted concurrently, rather than sequentially. The proposed 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 to informal resolution of any study disagreements, followed by mandatory, binding study dispute resolution; and schedules and deadlines.

DATES: Comments are due April 21, 2003.

ADDRESSES: File written comments with the Office of the Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426. Comments should reference Docket No. RM02–16–000. Comments may be filed electronically or by paper (an original and 14 copies, with an accompanying computer diskette in the prescribed format requested).

FOR FURTHER INFORMATION CONTACT: John Clements, Office of the General Counsel, Room 101–57, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, 202–502–8070.

SUPPLEMENTARY INFORMATION:

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I. Introduction

1. The Federal Energy Regulatory Commission (Commission) proposes to amend its regulations governing the process for licensing of hydroelectric power projects by establishing a new licensing process. The proposed amendments are the culmination of many actions 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 proposed 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;
- 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 mandatory, binding study dispute resolution;
- Elimination of the need for post-application study requests; and
- Issuance of public schedules and enforcement of deadlines.

3. We believe that the proposed changes will significantly improve the licensing process. During the development of this proposed rule, many commenters have raised issues beyond the scope of this rulemaking and, in fact, beyond the scope of this Commission's jurisdiction, such as concerns about the content of license conditions imposed by various federal land and resource management agencies with authority to require conditions for Commission-issued licenses. We acknowledge that the changes proposed in this rulemaking are largely procedural in nature and would amend only the regulations of this Commission,

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

not the regulations of any of the Federal or state agencies involved in hydropower licensing. Nevertheless, we believe that these proposed procedural changes will promote better-informed decision-making by everyone involved in the licensing process.

4. Moreover, we will continue to support the resource management agencies outside the context of this rulemaking as they explore ways of improving their own licensing-related processes. We appreciate the collegial spirit in which the Departments of Agriculture, Commerce, and the Interior, in particular, have worked with us during the development of this proposed rule. We applaud the announcement of Interior's Assistant Secretary-Policy, Management, and Budget, at our joint hearing on November 7, 2002 in this proceeding, that Interior is developing an administrative appeals process for its mandatory conditions. Agriculture has had such a process for several years, and we support that Department in examining ways of streamlining its existing process. The Commission is ready to assist these other agencies in this regard.

II. Background

5. Sections 4, 10, 14, 15, and 18 of the FPA,[2] as amended by the Electric Consumers Protection Act of 1986 (ECPA),[3] provide the regulatory framework for the licensing of non-Federal hydroelectric projects.

6. Section 10(a)(1)[4] provides that hydropower licenses issued must be best adapted to a comprehensive plan for the affected waterways for all beneficial public uses, and must include provisions for the protection of fish and wildlife and other beneficial public uses, and that the Commission must give environmental values, including fish and wildlife and recreation, equal consideration with hydropower development. Under section 4(e),[5] licenses for projects located within Federal reservations must also include any timely conditions mandated by the department that manages the reservation, which in most cases is the Department of Agriculture or the Interior. Under section 18, licenses must also include fishways if they are timely prescribed by the Departments of Commerce or Interior.

7. In addition, section 401(a)(1) of the Clean Water Act[6] requires a license applicant to obtain from the state in which any project discharge into navigable waters originates, certification that such discharge will comply with applicable water quality standards, or waiver of such certification. Section 401(d) requires state water quality certification conditions to be included in hydroelectric licenses.

8. Other Federal statutes may also apply to a license application. These include, among others, the Endangered Species Act (ESA),[7] Coastal Zone Management Act (CZMA),[8] and National Historic Preservation Act (NHPA).[9]

A. Current Licensing Procedures

9. The Commission staff processes license applications in hearings conducted by notice and comment procedures. Licensing procedures have evolved over time in response to changes in the statutory framework, increased public awareness of the need for increased environmental protection, and as a result of Commission efforts to make the process more efficient and effective.

10. Under the existing ''traditional'' process, prior to filing an application, applicants must consult with Federal and state resource agencies, affected land managing agencies, Indian tribes, state water quality agencies and, to some extent, the public, and must provide the consulted entities with information describing the proposed project. The applicant must also conduct studies necessary for the Commission staff to make an informed decision on the application. Under the Commission's detailed regulations concerning prefiling consultation and processing of filed applications,[10] the formal proceeding before the Commission does not begin until the license application is filed. Accordingly, the Commission staff do not generally participate in pre-filing consultation.

11. After an application is filed, the Federal agencies with responsibilities under the FPA and other statutes, the states, Indian tribes, and other participants have opportunities to request additional studies and provide comments and recommendations. Federal agencies with mandatory conditioning authority also provide their conditions. The Commission staff may ask for additional information that it needs for its environmental analysis. All of this information is incorporated into the Commission staff's environmental review under the NEPA.

12. The Commission's regulations also provide for an alternative licensing process (ALP), which combines the pre-filing consultation process under the FPA with the environmental review process under NEPA.[11] Under this process, the parties work collaboratively prior to the filing of the application to develop the application and, in most cases, a preliminary draft NEPA document, and generally anticipate efforts to conclude a settlement agreement. Also, the Commission staff participate to a greater extent than under the traditional process.

B. Reform Efforts

13. There is widespread agreement that additional improvements are needed to further the goal of achieving a more efficient and timely licensing process without sacrificing environmental protection. The President's National Energy Policy report included recommendations in this regard,[12] and the Commission, the Federal agencies, and many hydropower program stakeholders are engaged in a variety of activities toward the same end.

14. The Commission staff's ongoing efforts include an Outreach Program in which interested persons meet with members of the licensing staff to learn about the licensing process and related laws and Commission regulations; various interagency training activities; encouragement of settlements through the use of Alternative Dispute Resolution (ADR); and issuance of guidance documents.[13] In May 2001, the Commission staff prepared a comprehensive report on hydropower licensing, including recommendations designed to make the licensing process more efficient and timely.[14] The Commission held in December 2001 and November 2002 Hydroelectric Licensing Status Workshops to identify and focus attention on long-pending license applications and find ways to bring

[2] 16 U.S.C. 797, 803, 807, 808, and 811. Sections 4 and 10 apply to all licenses. Sections 14 and 15 are specific to the issuance of a new license following the expiration of an initial license.

[3] Pub. L. 99–495, 100 Stat. 1243.

[4] 16 U.S.C. 803(a)(1).

[5] 16 U.S.C. 797e.

[6] 33 U.S.C. 1341(a)(1).

[7] 16 U.S.C. 1531–1543.

[8] 16 U.S.C. 1451–1465.

[9] 16 U.S.C. 470–470w-6.

[10] *See* 18 CFR Parts 4 and 16.

[11] 18 CFR 4.34(i).

[12] *Report of the National Energy Policy Group,* May 2001.

[13] Staff guidance documents include the Licensing Handbook, Environmental Analysis Preparation, and ALP guidelines. All of these are posted on the Commission's Web site (*http://www.ferc.gov/hydro*).

[14] *Report to Congress on Hydroelectric Licensing Policies, Procedures, and Regulations—Comprehensive Review and Recommendations Pursuant to Section 603 of the Energy Act of 2000,* Federal Energy Regulatory Commission, May 2001 (Section 603 Report). The report can be viewed at *http://www.ferc.gov/hydro/docs/section603.htm.*

these cases to completion.[15] The Commission staff also held regional workshops with states on how better to integrate Commission licensing processes with the states' Clean Water Act responsibilities.[16]

15. Federal agencies have also worked cooperatively on several efforts to improve the licensing process. For example, the staff of the Commission, the Departments of the Interior, Commerce, Agriculture, and Energy, the Council on Environmental Quality, and the Environmental Protection Agency formed an Interagency Task Force to Improve Hydroelectric Licensing Processes (ITF). The ITF's efforts resulted in a series of commitments and administrative actions intended to make the licensing process more efficient and timely.[17]

16. More recently, in July of 2001, senior managers from the Commission staff and other Federal agencies formed the Interagency Hydropower Committee (IHC) to build on the commitments developed by the ITF and to develop additional procedural modifications that would further improve the efficiency and timing of licensing while maintaining environmental protections. The IHC developed a proposal for an integrated licensing process. Another integrated licensing process proposal was developed and circulated for comment by the National Review Group (NRG), a multi-stakeholder forum consisting of representatives from industry and non-governmental organizations (NGOs).

17. One reform concept that shows particular promise is a licensing process that integrates an applicant's prefiling consultation with resource agencies, Indian tribes, and the public with the Commission staff's NEPA scoping (integrated process). Such an approach could differ from the ALP in several respects, such as ensuring the Commission staff involvement at all stages, establishing deadlines for all participants, providing a more effective vehicle for study dispute resolution than currently exists, and better integrating the Commission staff actions with the actions of other Federal agencies with statutory roles under the FPA.

C. The Instant Proceeding

18. On September 12, 2002, the Commission and the Federal agencies with mandatory conditioning authority under FPA sections 4(e) and 18 commenced this proceeding by issuing a notice requesting comments in response to a series of questions concerning the need for a new licensing process, how an integrated process might best be implemented, and establishing a series of regional public and tribal forums to discuss issues and proposals associated with establishing a new licensing process.[18]

19. Following the regional forums and submission of written comments in early December 2002, the Commission conducted public drafting sessions on December 10–12, 2002, in which discussion of the results of the regional forums and comments was followed by a broadly-based collaborative effort to develop consensus recommendations on an integrated licensing process and, where possible, develop preliminary draft regulatory text.

20. Following the December drafting sessions, the Commission staff and staff from the Federal agencies with mandatory conditioning authority held additional discussion and drafting sessions.

21. The Commission appreciates the active participation and deliberate and thoughtful comments provided by the industry representatives, Federal and state resource agencies, Indian tribes, and members of the public in this proceeding. The provisions of the proposed rule, discussed below, attempt to fully take into consideration the interests of all of the stakeholders and to propose an integrated licensing process that will serve the public interest.[19]

22. Following the issuance of this notice, and prior to the due date for comments, the Commission will conduct additional regional stakeholder workshops to seek consensus on final rule language. The schedule for these workshops may be viewed on the hydroelectric page of the Commission's website.

III. Discussion

A. Need for a New Integrated Process

23. The fundamental issue in this proceeding is whether the Commission, by adopting a new licensing process, can make significant progress toward the goal of more efficient and timely licensing procedures, while ensuring environmental protection.[20] Many commenters from across the spectrum of interests think a new process can achieve these goals.[21] Many also support the adoption of an integrated process, subject to various recommendations.[22]

24. Others assert that there is no need for an integrated licensing process distinct from the traditional process if the Commission takes the most beneficial aspects of such a process and incorporates them into the traditional process, or believe that a new untested process is unlikely to result in greater efficiency.[23]

25. Many factors can cause delays in licensing. These include multiple applications for projects in the same watershed; Failure to resolve during pre-filing consultation disagreements over requests for the applicant to gather information or conduct studies; requests for extensions of time, including extensions of time for Federal agencies to provide mandatory conditions pursuant to FPA section 4(e) and

[15] The Commission staff established Docket No. AD02–05 for the workshop proceeding. A number of entities have made filings in that proceeding with recommendations for improvements to the licensing process.

[16] Summaries of these workshops are on the Commission's Web site at *http://www.ferc.gov/hydro/docs/licensing_workshop_sched.htm.*

[17] Reports issued by the ITF have been made public and are posted on the hydroelectric page of the Commission's Web site. *See http://www.ferc.gov/hydro/docs/interagency.htm.*

[18] 67 FR 58,739 (September 19, 2002). Public and Tribal forums were held in Milwaukee, Wisconsin; Atlanta, Georgia; the Commission's headquarters in Washington, DC; Bedford, New Hampshire; Sacramento, California; and Tacoma, Washington. Entities that made oral comments at the public and tribal forums or filed written comments in response to the September 12, 2002 notice are listed on Appendix A.

[19] For the convenience of commenters on the proposed rule, a redline/strikeout version of the affected regulatory text is being posted on the hydroelectric page of the Commission's Web site.

[20] Commenters raised many issues that exceed the Commission's jurisdiction or are beyond the scope of this rulemaking, including dispersed decisional authority in the statutory scheme, minimum terms for licenses, our policy on decommissioning of hydroelectric projects, annual charges for the use of Federal lands, and the Mandatory Conditions Review Policy of the Departments of the Interior and Commerce. These matters should be addressed elsewhere.

[21] *E.g.,* Ameren/UE, RAW, HRC; NHA; NRG, AmRivers, Oregon, Washington, APT, Oregon, Kleinschmidt, Michigan DNR, C–WRC, CDWR, Menominee, WYGF, NHDES, Wisconsin DNR, California, Interior, NCWRC, WPPD, NYSDEC, Long View, Southern, Maryland DNR, NMFS, CRITFC, ADF&G, PG&E.

[22] *E.g.,* NHA, HRC, NRG, Kleinschmidt, Michigan DNR, C–WRC, Menominee, WYGF, NHDES, KT, OWRB, Wisconsin DNR, Interior, EEI, PG&E, HETF, PCWA, NCWRC, WPPD NYSDEC, Southern, Caddo, Xcel, NMFS, CRITFC, California, NMFS, ADF&G, Oregon, CDWR, PG&E. The NHA version of an integrated process actually encompasses two different tracks, one of which features pre-application study development and NEPA scoping, and the other of which features post-application additional information and NEPA scoping. Only the first track would be considered an integrated process as we have defined it.

[23] California, SCE, Idaho Power, EEI. California and SCE both proposed modified traditional process models, which they characterize as integrated processes. The California process does not fully integrate NEPA scoping with study plan development, but does feature pre-filing NEPA scoping. Wisconsin DNR and Oregon endorse California's version of the traditional process model.

fishway prescriptions pursuant to section 18, or required consultation with the U.S. Fish and Wildlife Service or National Marine Fisheries Service (NMFS) and attendant studies under the ESA; and delayed receipt of state water quality certification.[24]

26. Some or all of these factors may be present in any license proceeding. However, the principal causes of delay are the need for additional information or studies after the application is filed, untimely receipt of biological opinions under the ESA, and state water quality certification.[25] The longer the delay in a licensing proceeding, the more likely the cause is to be lack of water quality certification.[26]

27. The potential benefit of an integrated licensing process can be judged by the extent to which it addresses these causes of delay in licensing. The process we are proposing addresses these causes by: merging pre-filing consultation with the Commission's NEPA scoping; enhancing consultation with Indian tribes; improving coordination of processes with Federal and state agencies, especially those with mandatory conditioning authority; increasing public participation during pre-filing consultation; and developing a study plan and schedule, including mandatory, binding study dispute resolution. With these features, the proposed process should make it much more likely that the Commission, Federal agencies with mandatory conditioning authority, and state agencies or Indian tribes with water quality certification authority obtain all the information they need to carry out their respective statutory responsibilities by the time the application is filed. This process should also encourage early settlement discussions by fostering early development of information necessary to inform settlement negotiations.[27]

28. Some commenters made process proposals that they characterize as modifications to the traditional process but which incorporate some, but not all, of the elements of the proposed integrated process. NHA, for instance, would allow the license applicant to unilaterally determine whether to use an integrated process or to defer NEPA scoping until after the license application is filed, and would not provide for binding pre-filing study dispute resolution. California would include expanded pre-filing public participation and dispute resolution, but would defer NEPA scoping until late in the pre-filing process. For these and other reasons, these proposals fall short of the goal. These proposals do however also contain other elements which, as discussed below, have been included in the proposed process.

B. Traditional Process and ALP To Be Retained

29. Our proposal to establish an integrated process raises the issue of whether there is a need to retain the traditional process or ALP. Industry commenters generally favor retaining both processes.[28] They argue that a single process is not suitable for every case, and that they need flexibility to choose a process that best suits the circumstances of each project.[29] NHA suggests that licensee process choice is needed to prevent participants from withholding agreement to an appropriate process as leverage to extract substantive or other procedural advantages. NHA also states that the traditional process remains suitable for projects that have few complications or issues. EEI adds that the traditional process may be most suitable for cases where the stakeholders are extremely polarized and unlikely to work cooperatively, and is less costly for licensees than the ALP. EEI and some licensees also state that the ALP, which tends to be labor-intensive for all concerned, is best suited to large projects with the revenues to support an intensive collaborative effort, but makes little sense for the operator of a small project.[30] Idaho Power adds that it can be difficult to get full participation in pre-filing consultation by agencies, tribes, and NGOs with large agendas and limited resources. Xcel states that both the traditional and ALP processes have been used successfully, and that the study criteria and timelines of the IHC and NRG proposals are rigid and less likely to foster settlements. At least one Native American commenter suggests that the limited resources of many Indian tribes favor a choice of processes, although it does not endorse leaving the choice to applicants.[31] Some commenters also suggest that the traditional process needs to be retained as a fallback in the event that an integrated process or ALP breaks down.[32]

30. EEI and NHA also urge us to allow license applicants to tailor the licensing process to individual projects; that is, regardless of the process used, allow waiver of procedural requirements and the incorporation into ongoing processes of features from an integrated process.[33] EEI, for instance, states that the National Energy Policy Act of 1992[34] and the Council on Environmental Quality regulations [35] permit license applicants to prepare draft environmental assessments and to have a third party (*i.e.*, a contractor funded by the applicant, but working under the Commission's direction) prepare a draft environmental impact statement (EIS). It requests that the Commission modify its regulations to permit this in any process at the applicant's option, rather than only where an ALP is used. These arguments are considered below.[36]

31. Environmental groups, some Federal and state agencies, and tribes argue that the Commission should have one process that is sufficiently flexible to accommodate the circumstances of any specific proceeding. Broadly stated, they suggest that this flexibility would be achieved by allowing for the applicant and stakeholders to agree to modify process steps and schedules, subject to Commission assent, in order to ensure that all parties understand and agree to the process applicable to each proceeding, and by providing guidance on acceptable terms of settlement agreements. These commenters maintain that multiple processes will make it very difficult for participants with limited resources, and that it is already difficult for environmental groups that rely heavily on volunteers to

[24] Other actions that have increased the time required for licensing include a policy established in 1993 of issuing draft environmental analyses for comment in all license proceedings and increasing reluctance by states to grant waiver of water quality certification. *See* 603 Report, p. 32.

[25] *Id.,* pp. 37–39.

[26] *Id.,* p. 43.

[27] Some of these broadly-stated features and more specific features discussed below are consistent with, or were developed in the context of, the drafting groups. These include early Commission contact with Indian tribes, development of a pre-application document, inclusion of tribal and public interest considerations in information development and study plan criteria. One drafting group also discussed concepts related to the filing of a draft license application that are the subject of specific requests for comment.

[28] NHA, Idaho Power, AEP, EEI, DM&GLH, APT, SCL, SCE, WPPD, Xcel, NEU, Troutman, Southern, NYSDEC. On this point, the industry majority appears to enjoy some support from NYSDEC and WDOE. Michigan DNR and WDOE state that they are less concerned with the number of processes than with funding, coordination, mutually agreeable time frames, and other matters. PG&E however suggests that an integrated process would eliminate the need for the traditional and alternative process.

[29] NHA, Idaho Power, AEP, EEI, DM&GLH, APT, SCL, SCE, WPPD Xcel, ORWB; NEU; Troutman; Southern; NEU.

[30] SCE, CHI, EEI, Idaho Power.

[31] GLIFWC.

[32] EEI, Troutman, Menominee.

[33] EEI.

[34] Pub. L. 102–486, 106 Stat. 2776–3133 (Oct. 24, 1992).

[35] 40 CFR part 1500, *et seq.*

[36] *See* Section III.F.3.b.

educate their members on the existing licensing processes.[37]

32. If there is to be more than one proceeding, some of these entities recommend that the ALP be the only alternative to the integrated process, and some suggest that it be modified to better encourage settlement agreements.[38] HRC requests that if the traditional process is retained, it be modified to incorporate important elements of an integrated process. NHDES and OWRB recommend that the ALP and traditional processes be retained until it is demonstrated that the integrated process works, at which point those process options would be eliminated.

33. We conclude that it is appropriate to retain the traditional process and ALP, but that the integrated process should be the default process. Commission approval would be required to use the traditional process, as is now required for the ALP.[39] We are persuaded that the concerns of the industry and others that the integrated process may not be appropriate for some proceedings are well-founded. The integrated process brings together in a compressed time frame consultation, studies, dispute resolution, NEPA scoping and document preparation, and water quality certification activities that are now conducted over a much longer time frame. This could pose undue difficulty for some licensees, particularly those operating small projects, and for the other participants, who may agree that the traditional process will work best. Other considerations in requesting the traditional process might include the degree of stakeholder support for that process, level of controversy concerning project impacts, and the degree to which relevant information already exists.

34. We are also not inclined to abandon the alternative process. It has a demonstrated track record of reducing license application processing times,[40] as well as fostering settlement agreements, which are commonly filed with the application itself.

35. We are mindful of concerns that the availability of three process alternatives could be a source of confusion for some participants. We conclude however that the benefit of having different processes that can be applied to differing circumstances outweighs this concern. In this regard, we also note that the integrated process regulations have been crafted 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, given the complexity of the statutory scheme. We are also proposing to require any applicant seeking permission to use the traditional process or ALP to do so when the notification of intent to seek a license (NOI) is filed,[41] so that all concerned will have a voice in the process selection and will know which process will apply to the proceeding from the very beginning.[42]

36. We have also concluded that certain elements of the integrated process can be included in the existing traditional licensing process. These include full public participation in pre-filing consultation, mandatory, binding study dispute resolution, and elimination of post-application additional information requests for license applications. These are discussed below.[43]

D. Key Issues and Goals for an Integrated Licensing Process

37. The September 12, 2002, notice requested comments on, among other things, what key issues in the licensing process need to be addressed and how a new process might be structured to resolve those key issues. The responses confirm that the notice correctly identified the key issues.

1. Early Identification of Issues and Study Needs

38. Nearly all commenters state that one key to reducing the length of the licensing process is for all concerned entities, including the Commission staff, to participate as early as possible, so that issues can be fully identified, study needs resolved, and necessary studies timely conducted.[44] Many also advise that a well-designed integrated process would improve the timing and development of mandatory terms and conditions by fostering the early involvement of Federal and state agencies with such authorities so that needed information-gathering and studies are timely commenced and completed.[45]

a. Advance Notification of License Expiration

39. The IHC proposed that three years prior to the deadline for an existing licensee to file notification of intent (NOI) to seek a new license the Commission staff would notify the licensee of the deadline and provide it with a list of basic information needs and resource agency and tribal contacts (advance notification of license expiration, or advance notification). Under the IHC proposal, the licensee would be encouraged to contact resource agencies, Indian tribes, and the public to begin identifying issues and collecting data. This early issue identification and data collection would help to ensure that the licensee files with its NOI a complete ''Pre-Application Document,'' [46] more fully described below, which would help to make effective integrated pre-filing consultation and early NEPA scoping.

40. The advance notification concept received much favorable comment.[47] All of the process proposals include some form of voluntary or required pre-NOI consultation.[48] Some proposals contemplate an advance notification followed by a pre-NOI meeting among the licensee, Commission staff and stakeholders.[49] NHA would also have the Commission staff directly contact Indian tribes to discuss licensing process options and initiate government-to-government consultation. Under the NHA and SCE proposals the license applicant would, following the public meeting, choose a licensing process.[50]

41. Long View recommends that the Commission modify its regulations to allow existing licensees to file their NOI

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[37] HRC, AmRivers, NYRU, NE FLOLW, AMC, BRB–LST, Menominee, VANR, KT, RAW, GLIFWC, Oregon, CRITFC, AMC, BRB–LST, Interior.

[38] RAW, Oregon, C–WRC, Menominee, VANR, Wisconsin DNR, DM&GLH, Domtar, FPL, AMC, AW, California.

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

[40] *See* 603 Report, pp. 29–54.

[41] *See* proposed 18 CFR 5.3 (Notification of intent).

[42] *See* proposed 18 CFR 5.1 (Applicability). As discussed below, we also propose to require a potential applicant for an original license to file an NOI.

[43] *See* Section III.F. We are also making certain other modifications applicable to all processes, such as including draft license articles with draft NEPA documents. *See* Section III.D.4.

[44] *E.g.,* EEI, PG&E, NRG, SCE, NHA, Michigan DNR, HRC, NYSDEC, Idaho Power, NF Rancheria, Caddo, ADK, AmRivers, AMC, APT, SCL, C–WRC, CDWR, Interior, PG&E, HETF, PCWA, APT, DM&GLH, Skancke, NYRU, Oregon, Wausau, Salish-Kootenai, HLRTC, PREPA, Kleinschmidt, Xcel, California, WPPD, RAW, GLIFWC, Virginia, CRITFC, NMFS, NHDES, VANR, Wisconsin DNR.

[45] SCE, Oregon, Michigan DNR, HRC, NHDES, Wisconsin DNR, Interior, EEI, PG&E, PCWA, NCWRC, WPPD Xcel, NMFS, PacifiCorp, Kleinschmidt, Idaho Power, NYSDEC, Maryland DNR, ADF&R, CRITFC, California.

[46] *See* proposed 18 CFR 5.4 (Pre-application document).

[47] NHA, APT, Oregon, Idaho Power, VANR, NHDES, HRC, SCE, Kleinschmidt, Menominee, EEI, BRB–LST, Southern.

[48] Voluntary pre-NOI consultation is contemplated in the NRG and PG&E proposals. Required consultation, at least to the extent of an initial informational meeting conducted by the Commission staff and existing licensee, is provided for in the NHA proposal.

[49] NHA, HRC, SCE.

[50] NHA and SCE apparently would not have the applicant's process choice subject to Commission approval.

any time prior to the statutory limit of five years prior to license expiration, rather than only during a five to five and one-half year window. California recommends moving the deadline date for the NOI forward one year (*i.e.,* 6.5 years before license expiration) based on its belief that more time is needed between the NOI and license application to accommodate information-gathering and studies.[51]

42. We conclude that the advance notification concept has merit, and that the notification should be issued regardless of which licensing process may be selected. It would however be inconsistent with our goal of developing a more timely process to compel existing licensees to commence the licensing process in advance of the NOI, and we will not do so. The Commission believes that in the great majority of cases, a license applicant should be able complete consultation, information-gathering and studies, and application development in the three to three and one-half year period provided for in our regulations.

43. We propose to issue an advance notification sufficiently in advance of the deadline date for filing of an NOI with respect to each project to ensure that the existing licensee is alerted to the requirements of the NOI, Pre-Application Document, and any potential request to use the traditional process or ALP.[52] Because the advance notification will be an administrative measure taken by the Commission which requires no action on the part of any other entity, and which would be undertaken regardless of the process selected, we do not propose to include it in the regulations.

44. Also, as recommended by one of the December 2002 drafting groups, the Commission staff will contact Indian tribes whose resources may be affected by a future relicense proceeding to inform them about the licensing process and how they can participate in it, and to become aware of concerns the tribes have with respect to potential relicense proceedings. In this regard, we also intend to create a Tribal Liaison position to ensure that tribes have a clearly identified point of access to the Commission staff.[53]

b. Integrating Pre-Filing Consultation With NEPA Scoping

45. Under the traditional process, pre-filing consultation focuses on development of information and studies by the potential applicant, agencies, and Indian tribes. Public participation is limited.[54] The Commission staff also has not participated in pre-filing consultation, because under the traditional process there is no proceeding until an application is filed, and, particularly with regard to potential original license applications, the Commission has not been willing to commit its limited resources to a process that may not result in a license application.

46. Nearly all commenters agree that the earlier the Commission's NEPA scoping begins, the earlier issues and information needs will be identified, and the earlier information-gathering and studies will be commenced and completed.[55] We agree. Accordingly, the proposed integrated process provides for the Commission staff to begin NEPA scoping immediately after the NOI is filed.[56]

47. NEPA scoping will be greatly assisted by the availability to the participants of as much relevant existing information as possible when scoping begins. The current regulations require an existing licensee, at the time it files its NOI, to make available to the public existing information with respect to the project, its operation, and project impacts on various resources.[57] They also require all potential operating license applicants to provide an initial consultation package to consulted entities during first stage consultation.[58] We propose to supplant these requirements for all processes by requiring a potential applicant for an operating license to file with its NOI the above-mentioned Pre-Application Document.[59]

48. The proposed Pre-Application Document is intended to compile and provide to the Commission, Federal and state agencies, Indian tribes, and members of the public engineering, economic, and environmental information available at the time the notification of intent is filed. It would also provide the basis for identifying issues and information needs, developing study requests and study plans, and the Commission's environmental scoping documents under NEPA. Because of its form and content requirements, the Pre-Application Document would be a precursor to Exhibit E, the environmental exhibit, in the license application. For license applicants using the integrated process, the Pre-Application Document would evolve directly into a new Exhibit E. The integrated process Exhibit E would have the form and content requirements of an applicant-prepared draft NEPA document.[60] Applicants using the traditional process would continue to use the existing Exhibit E, and applicants using the ALP could use the existing Exhibit E or file with their application in lieu thereof an applicant-prepared environmental analysis. The Commission requests comments on the content of the Pre-Application Document.[61]

49. Some industry commenters contend that integrating pre-filing consultation with NEPA scoping should be optional for the applicant.[62] That is, of course, fundamentally inconsistent with the concept of an integrated licensing process. Deferral of NEPA scoping until after the license application is filed should occur where the circumstances are such that use of the traditional process is permitted.[63] We also think that requiring all potential operating license applicants to

[51] We disagree with California that the 3 to 3.5-year time frame from NOI to application contemplated by the FPA is insufficient to develop the necessary information and still provide about two years in which to conduct field studies. As discussed above, the principal barrier to success in the early conduct of studies has been the lack of active Commission staff participation early on and lack of effective pre-filing dispute resolution. The proposed integrated process should go a long way toward curing this problem.

[52] Entities other than the licensee will be able to determine which licenses expire, and when, on the hydroelectric page of the Commission's website. They will likewise have access to the Commission's regulations and Pre-Application Document guidance. These resources should together enable interested members of the public to inform themselves of potential future relicense proceedings.

[53] *See* Section III.D.3.

[54] Unless the potential applicant voluntarily does more, public participation is limited to attendance at a single, publicly noticed meeting. *See* 18 CFR 4.38(g).

[55] *E.g.,* NHA, CDWR, NYSDEC, RAW, Caddo, Menominee, CRITFC, DM&GLH, Domtar, APT, Oregon, SCL, HRC, CRITFC, Oregon, Kleinschmidt, C–WRC, Interior, NMFS, Washington, California, SCE, Salish-Kootenai, HLRTF, PG&E, PCWA, Idaho Power, PacifiCorp, SCDWQ, APT, Michigan DNR, HRC, Wisconsin DNR, EEI, Maryland DNR, NMFS.

[56] *See* Section III.E.2.a.

[57] 18 CFR 16.7(d).

[58] 18 CFR 4.38(b)(1), 16.8(b)(1).

[59] Exemption and non-power license applicants would continue to use the traditional process and to distribute the initial consultation package now required by 18 CFR 4.38(b)(1) and 16.8(b)(1).

[60] *See* proposed 18 CFR 5.16(b).

[61] The Commission is interested in any comments parties may have on any aspect the proposed rule; however, there are several aspects on which we are particularly requesting comments. Appendix B is a list of all matters on which the Commission is specifically requesting comments, cross-referenced to the appropriate paragraph in the preamble. Commenters are requested to identify the paragraphs to which their comments respond.

[62] Xcel, NHA, HLRTF. Under NHA's proposal, an existing licensee would elect to have a pre- or post-application NEPA process when it files its NOI.

[63] The ALP generally encompasses pre-filing environmental scoping because it contemplates filing by the applicant of a draft environmental document.

file the Pre-Application Document will enhance the combined pre-filing consultation and NEPA scoping that now occurs in the ALP, and pre-filing consultation under the traditional process as well.

c. Study Plan Development

50. Involving all interested parties and Commission staff from the outset of consultation will not alone bring about timely development of information and studies. There is general agreement that a Commission-approved study plan is needed as well,[64] but divergent views on the appropriate development and content of study plans.

51. Industry commenters contend that agencies and NGOs often request studies not based on any demonstrable nexus between project operations and resource impacts, unreasonably oppose the use of existing data from the project in question or other projects, and are insensitive to the cost of the study to the applicant. They recommend that the Commission establish clear criteria for acceptable study and information-gathering requests, and some believe that clearly articulated criteria would significantly reduce the number of study disputes.[65] The ''nexus'' criterion is the one they most often identify as necessary.[66] Some request that we make explicit that site-specific studies are not always needed, since in many cases extrapolation of data from studies at similarly situated projects is appropriate.[67] Some industry commenters, while supporting the concept of study criteria, oppose a prescriptive approach to defining the scope of studies, suggesting that the matter is best resolved in the context of specific cases or in alternative licensing proceedings.[68]

52. Agency, tribal, and NGO commenters generally agree that established study criteria are desirable, but disagree with the industry concerning the development and application of criteria. For instance, HRC and others state that criteria for acceptable studies should include potential cumulative impacts of projects throughout the relevant river basin, because project impacts may extend far beyond project boundaries.[69] HRC adds that studies should be directed not merely at identifying project impacts, but also at determining the causes of those impacts and the sustainability of affected resources in a basin-wide cumulative impacts context. These commenters also tend to view the ''nexus'' issue differently, stating that a ''common sense'' test should apply to the establishment of a nexus between project operations and resource impacts.[70] In addition, several commenters indicate that deference should be shown to state agency study requests.[71]

53. Licensees note that, notwithstanding the Commission's well-established and judicially-approved policy that the baseline for environmental analysis is existing conditions,[72] participants continue to request studies intended to establish a pre-project baseline that would serve as a standard for purposes of establishing environmental mitigation requirements. They recommend that the Commission incorporate its policy into regulations establishing study criteria.[73] Some state agencies respond that state laws or policies require water quality standards to be established with reference to pre-project conditions, and that the record necessary to support certification is not complete until such studies are complete.[74] ADK states that the continuing dispute is unproductive and requests only that we resolve the matter once and for all.

54. We conclude that a Commission-approved study plan is an essential component of any integrated licensing process, and that such a plan will be most effective in reducing study disputes and allowing agreed-upon studies to go forward expeditiously if reasonably objective criteria by which to judge study requests are established.

55. The IHC developed six study dispute resolution criteria. These criteria are:

(a) Whether the request describes available, project-specific information, and provides a nexus between project operations and effects on the resources to be studied.

(b) Whether the request includes an explanation of the relevant resource management goals of the agencies with jurisdiction over the resource to be studied.

(c) Whether the study objectives are adequately explained in terms of new information to be yielded by the study and its significance relative to the performance of agency roles and responsibilities in connection with the licensing proceeding.

(d) If a study methodology is recommended, whether the methodology (including any preferred data collection and analysis techniques) is consistent with generally accepted practice in the scientific community.

(e) Whether the requester has considered cost and practicality, and recommended a study or study design that would avoid unnecessary costs while still fully achieving the stated study objectives.

(f) If the license applicant has provided a lower cost alternative, whether the requester has considered this alternative and, if not adopted, explained why the lower cost alternative would not be sufficient to achieve the stated study objectives.[75]

56. Several commenters endorse the IHC study criteria, and some, as discussed below, also suggest additions or modifications.[76]

57. A few commenters found fault with the IHC criteria. The principal criticism is that the criteria are focused on the needs of agencies with mandatory conditioning authority, notwithstanding that the Commission's public interest analysis must include issues raised by tribes or NGOs which may have resource goals and management plans of their own, or for which no formal goals or management plans may exist.[77] These commenters also take the position that a dispute resolution process should be open to any party, not just to Federal or state agencies or tribes to the extent that

[64] *E.g.,* NHA, SCE, HRC. PG&E's dispute resolution proposal calls for neutral, objective criteria. In most cases, these would be voluntarily applied by the parties to resolve disputes among themselves. Disputes brought to the Commission would not actually be resolved, because the Commission would issue only ''opinions'' based on the neutral, objective criteria.

[65] SCE, Kleinschmidt, NHA, WPPD, Menominee, Oregon, Long View.

[66] NHA, EEI, Wausau, Ameren/UE, Spaulding, Xcel, APT, Duke, SCE.

[67] Xcel, NHA, Southern, NHA.

[68] NHA. EEI states that the scope of required studies is already too broad and that the Commission should require only studies based on demonstrated nexus between project operations and resource impacts.

[69] HRC, NYSDEC, PFMC, Salish-Kootenai.

[70] GLIFWC, VANR.

[71] Michigan DNR, Wisconsin DNR, California, RAW.

[72] *See* American Rivers v. FERC, 201 F.3d 1186 (9th Cir. 1999); Conservation Law Foundation v. FERC, 216 F.3d 41 (DC Cir. 2000).

[73] Wausau, WE Energies, Duke, DM&GLH, Domtar, Skancke, FPL, APT, SCE, NHA. In a related vein, Ameren/UE suggests that applicants who choose the ALP are under continuous pressure to agree to unneeded studies as the price for continued cooperation of special interest groups, and that the Commission should relieve these applicants of this pressure by itself deciding on all study requests. That would however be inconsistent with the collaborative thrust of the ALP.

[74] Wisconsin DNR, NYSDEC.

[75] September 12, 2002 Notice, Attachment A, p. 11.

[76] Menominee, Duke, WPPD, Wisconsin DNR, Michigan DNR, Ameren/UE, NHA, HRC.

[77] PG&E, HRC. For instance, an NGO might support the establishment of certain instream flows in a bypass reach for aesthetic, biological health, or recreation purposes, but have no formal planning process of the kind that resource agencies typically employ.

exercise of their mandatory conditioning authority is implicated. EEI opposes the IHC criteria, because it opposes the IHC dispute resolution proposal in which they would be applied.

58. With regard to IHC criterion (a), the Menominee Tribe states that a study may be needed in some cases to determine if there is a nexus between project operations and resource impacts, and that this criterion should be applied liberally to accommodate that need. For instance, it may be reasonable to assume that unscreened turbines at a project cause entrainment mortality, but no data exist indicating the extent of such mortality or its biological impacts at the project site. GLIFWC similarly states a requester should not have to demonstrate a nexus when common sense dictates that there is one. VANR appears to assert that a requester should only have to articulate a relationship between the study request and a regulatory requirement.

59. We believe the nexus requirement is important to ensure that the licensing process is the vehicle for making informed decisions pursuant to the FPA and other applicable laws, rather than for development of information at the applicant's expense that may be useful to the requester in some other context. The same rule of reason must apply to the application of this criterion as to the application of any other criteria.

60. Some tribes state that the reference to agency jurisdiction over resources in criterion (b) should be removed, because it could be construed to exclude tribal participation in dispute resolution.[78] Similarly, one of the drafting groups recommended that this criterion be modified to take into account tribal and public participation in study plan development. As discussed below, we are proposing a study dispute resolution process for the integrated process which encompasses the participation of tribes in the development of the applicant's Commission-approved study plan, and in formal dispute resolution to the extent their mandatory conditioning authority under the Clean Water Act is implicated.[79]

61. Wausau indicates that agency management goals may not be an appropriate determinant of what studies are necessary, citing the possibility that a resource agency could establish the removal of dams in general as a management goal, which could lead to lengthy and expensive dam removal studies where there is no realistic prospect that a dam will be removed. SCE similarly states that the requester should have to demonstrate that agency management goals are appropriate, then show that the study is designed to directly address the nexus between impacts and management goals.

62. Our intention is that the criteria will be applied as a whole, so that the mere fact that a study request can be related to an agency management goal will not ensure that the study is required to be conducted. This necessarily implies that judgment calls will be made, and it is our intention that those calls 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 tribes with mandatory conditioning can carry out their responsibilities. We do not intend to second guess the appropriateness of agency or Tribal resource management goals, but must consider study requests based on those management goals in light of all applicable criteria, such as the ''nexus'' criteria, as well as the potential for conflict with important Commission policies, practices, or rules.

63. Regarding IHC criteria (e) and (f), some tribes believe that where tribal trust resources are concerned, study cost is irrelevant once the reasonableness of the need for the data has been established.[80] We cannot agree. Our responsibility to balance all aspects of the public interest with respect to any project proposal necessarily encompasses the exercise of independent judgement concerning the relative cost and value of obtaining information.

64. We conclude that the IHC study criteria are sound and reasonably objective, and propose to require participants in the integrated process to support their information-gathering or study requests with reference to those criteria, with minor modifications, such as the inclusion of tribal management plans and public interest considerations mentioned above. Our proposed criteria require an entity making an information-gathering or study request to, as applicable:

(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 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 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;

(7) Describe considerations of cost and practicality, and why any proposed alternatives would not be sufficient to meet the stated information needs.[81]

65. NHA and SCE would add the following three criteria:

1. If a study request has previously been the subject of dispute resolution, or if the Study Plan was undisputed, requests for that study would be rejected except in extraordinary circumstances.[82]

2. Study requests intended to establish a ''pre-project conditions'' baseline would be rejected.

3. The cost of the study must be justified relative to the value of the incremental information provided.[83]

66. NHA's first additional criterion has merit, particularly in light of the fundamental purpose of the proposed rule. It is not, however, really a study criterion, but a statement concerning treatment of additional information requests and will therefore be considered elsewhere.[84] With regard to the baseline issue, we note that all of the criteria will be applied in light of important Commission policies. Thus, we will not include this as a criterion, but will continue to adhere to our environmental analysis baseline policy.[85] NHA's third criterion is similar

[78] Menominee, BRB–LST, GLIFWC, Shoshone.

[79] Consistent with the recommendation of one of the drafting groups, we have also modified the study criteria to require parties requesting information development or studies to address any known resource management goals of Indian tribes or non-governmental organizations.

[80] Menominee, St. Regis Mohawks, GLIFWC.

[81] *See* proposed 18 CFR 5.10.

[82] NHA and EEI frame this also in terms of ''rebuttable presumption'' that no additional studies would be required under these circumstances.

[83] In a similar vein, PG&E suggests that criteria should include whether a real problem has been identified, how the information will be used, and the cost of the information relative to its value.

[84] *See* this section, infra, Section III.E.2, and proposed 18 CFR 5.13 and 5.14.

[85] As stated above, existing environmental conditions, not pre-project conditions in the case of

Continued

to proposed criterion (7). Both our proposed criterion (7) and NHA's recommended criterion (3) involve a significant degree of subjectivity, to which a rule of reason must be applied. The Commission requests comments on whether our proposed criterion (6) or NHA's recommended criterion (3) more appropriately deals with the issue of study costs.

67. SCE also proposes that we add a criterion that ''study results will aid the decision-making process in a substantive way.''[86] We are not entirely certain what SCE means, but the proposed criteria implicitly require that study requests not be frivolous and add some appreciable evidentiary value to the record.

68. Duke and the Michigan and Wisconsin DNRs state that the study criteria might include standard study plan formats, including standardized formats for reporting results. Michigan and Wisconsin DNR state that this would better enable states and tribes to meet their own responsibilities with respect to water quality and coastal zone management plan certification, as well as fishery and energy management goals. AMC recommends that a scientific peer review process be employed to develop a list of approved study methodologies.

69. We do not find that the guidance proposed by Duke and the Michigan and Wisconsin DNRs is appropriate for a rulemaking, because study plan development tends to be project-specific. We note however that Appendix D of the Commission's Hydroelectric Project Licensing Handbook, which may be viewed on the Commission's website, includes guidelines for preparing Exhibit E, the environmental exhibit. This appendix provides, in some detail, the information that should be considered for inclusion in a license application. Study plans can be developed from the information needs there described, and can be adapted to site-specific needs for information and in light of anticipated impacts.

70. Several commenters indicate that an effective study plan must include one or more opportunities for additional study requests to account for circumstances where studies result in data very different from the data expected or otherwise demonstrate that additional information is required to make a fully informed decision.[87] Licensee commenters generally acknowledge that such circumstances may occur, but stress their need for certainty with respect to costs and timeliness. They request that any new rule establish a presumption that an applicant which completes the approved study plan has obtained all of the information necessary for the Commission and agencies with mandatory conditioning authority to carry out their responsibilities, and that any request thereafter for additional information would be granted only upon a showing of extraordinary circumstances.[88]

71. We recognize the tension between licensees' desire for certainty and the need for finality in compiling the decisional record, and, on the other hand, the likelihood that circumstances will occur during the course of studies and data gathering which require additional information or a course correction in order to develop the necessary information. We are proposing therefore that each Commission-approved study plan under the integrated licensing process include specified points at which the status of information development and other relevant factors are reviewed and an opportunity for amendments provided. As the information-gathering and studies proceed however, the standard for new requests will increase.[89] Also, because the integrated process would include stakeholder participation in study plan development, periodic review of results and opportunities for amendments, and study dispute resolution, the integrated process does not contemplate any additional opportunity for participants to request information and studies after the license application is filed.

72. Finally, AMC contends that where studies are conducted by consultants who are paid by and answer to license applicants, the consultants are under explicit or implicit pressure from the applicant to find minimal or no impact on resources from project operations. It recommends that study plans require applicant-funded consultants to report directly to, and work under the direction of, a stakeholder group. We decline to adopt this proposal. Allegations of institutional bias might be directed at technical experts in the employ of any party to a license proceeding. AMC notes that applicants have agreed to such arrangements in at least one instance, and that it worked well for the participants, but we decline to establish a process that compels applicants to fund consultants who answer to other participants.

d. Study Dispute Resolution Process

73. Early resolution of study disputes was identified by many commenters as critical to improving timeliness.[90]

74. The pre-filing study dispute resolution process provided in the Commission's existing regulations[91] is seldom used. Commenters cite various reasons for this. Some say it is because the decision of the Director of the Office of Energy Projects (OEP) is not binding.[92] Others suggest that the absence of specific study criteria in the regulations creates uncertainty that leads parties to continue attempts to negotiate study requirements until after the application is filed.[93] Some Federal and state agencies indicate that they do not use the process because the Commission only considers the need for information to support its own decisions, which may be different from the information these agencies require for a complete record to support the exercise of their own authorities.[94] HRC notes that the current rules do not provide for resolution of disputes between the applicant and NGOs. A few other commenters, mostly from the industry, state that the existing process, or the existing process with minor modifications, works well enough.[95]

75. Commenters generally support the establishment of a more clear and effective dispute resolution process.[96] There are, however, substantial differences concerning the details of what that process should be. It is helpful to use the IHC dispute resolution proposal as a frame of reference to discuss these differences.

existing projects, is the baseline for analysis in our NEPA documents. We have also stated however that, while it does not change the focus our analysis, reliable information on pre-project conditions may help to inform our decisions about what environmental enhancement measures may be appropriate for a new license. *See* City of Tacoma, 67 FERC ¶ 61,152 (1994), *reh'g denied,* 71 FERC ¶ 61,381 at pp. 62,491–92 (1995).

[86] SCE, p. 19.

[87] Wisconsin DNR, Washington, VANR, NMFS.

[88] NHA, Idaho Power, Van Ness, Kleinschmidt, PG&E, Southern, SCE.

[89] *See* Section III.E.2 and proposed 18 CFR 5.14 and 5.15.

[90] *See* Section III.D.1, *supra.* Also, NRG, DM&GLH, Skancke, New York Rivers, Oregon, NMFS.

[91] *See* 18 CFR 4.38(b)(5) and (c)(2); 16.8(b)(5) and (c)(2).

[92] NHA, PG&E, NYSDEC, Van Ness, AMC, WPPD, SCE, Kleinschmidt.

[93] California, Oregon, Long View

[94] Interior, NYSDEC, NCWRC.

[95] SCE, Idaho Power, EEI, NAH, ADK.

[96] NHA, PRT, APT, CRITFC, NYSDEC, CTUIR, Menominee, AMC, Oregon, SCE, Kleinschmidt, WPPD, KCCNY, HRC, AmRivers, HRC, Menominee, Wisconsin DNR, EEI, Idaho Power, DM&GLH, APT, Duke, PG&E, NCWRC, Long View, Xcel, CSPPA. Some industry commenters recommend that any new dispute resolution process be incorporated into any and all licensing process options. Duke, EEI, Van Ness. This is discussed in Section III.H.

76. In brief, the IHC proposal provides for the Commission staff to approve with any necessary modifications a proposed information-gathering and study plan developed by the applicant in consultation with interested parties. Parties other than Federal or state agencies with mandatory conditioning authority under FPA Sections 4(e) and 18, or state or Tribal water quality certification agencies, as well as the applicant, would be bound by the decision. Agencies and tribes with conditioning authority would be able to dispute the decision with respect to studies pertaining to the exercise of their authorities.

77. The dispute would be submitted to a panel consisting of a person nominated by the Commission staff, a person nominated by the agency or tribe referring the dispute, and a third person with the appropriate technical qualifications selected by the other two panel members from a list of such persons maintained by the Commission. The panel would review the request with reference to the study criteria discussed above. There would be an opportunity for other participants to submit information. If the panel concluded that the study request satisfied the criteria, it would recommend to the Director that the applicant be required to conduct the study. The Director would review the recommendation pursuant to the study criteria and, unless he disagreed with the panel's conclusions, would direct the applicant to do the study. This process would be available when the applicant's study plan is first considered and if disputes arise during periodic status reviews. Several commenters indicated that the IHC proposed dispute resolution process appears to be reasonable, subject to various suggested modifications.[97] One frequent comment was that whatever dispute resolution mechanism is adopted, basic fairness requires that it be available to every participant that has a dispute with an applicant.[98]

78. Various commenters oppose the panel approach, or aspects of it, for different reasons. Some state that it would be costly, unwieldy, or take too long, and that the Commission has sufficient in-house expertise to resolve study disputes.[99] PG&E is concerned that the panelists would not be directly involved in the proceeding and thus lack familiarity with the complexities of individual cases. Some object to the absence of the applicant from the panel, because it has expertise and will bear the cost of whatever studies are required.[100] EEI and others suggest that a panel would diminish the Commission's authority by placing too much decisional input into the hands of an entity in which the Commission has a minority role.[101] GLIFWC is concerned that a panel format might result in inconsistent resolution of disputes concerning the same or similar issues, and suggests that consistency could be ensured by having one neutral third party serve on multiple panels concerned with the same or similar issues. CDWR recommends that any panel have the applicant and resource agency or Tribe as the disputants, with the Commission staff acting as the third party.

79. Licensees further assert that if the licensee must be excluded from the panel, then it should in any event be afforded a role in the process. Suggestions in this regard include provisions for informal dispute resolution before a panel is convened,[102] the panel convening a technical conference,[103] and an opportunity for review and comment on the recommendation of any advisory panel before the Director resolves the issue.[104]

80. A few commenters object to the Commission resolving study disputes. Some states and HRC aver that deference to the expertise of state agencies requesting studies is appropriate, and that disputes over studies requested by agencies with mandatory conditioning authority should be resolved by those agencies.[105] States also emphasize that they are not bound by Commission decisions with respect to information needs in support of water quality certification, and if the result of a dispute resolution process at the Commission was not favorable, they would use their own processes to deny the certification or otherwise ensure that they receive the requested data.[106] The Menominee Tribe states that the Commission staff lacks impartiality and, recommends with GLIFWC that the panel's recommendation be binding on the Commission staff as well as other parties. Wisconsin DNR recommends development of a dispute resolution mechanism in which the Commission staff acts as a facilitator.

81. There is also no consensus on whether dispute resolution should be mandatory, and whether the result should be binding. Some licensee commenters would require stakeholders to refer an issue in dispute during prefiling consultation, and if they failed to do so, would not be able to make the study recommendation or raise the dispute after the application is filed.[107] Other commenters appear to support continuation of dispute referral as optional.[108]

82. Some commenters would make the result of the process binding.[109] NHA and NRG would make participation mandatory, which NHA explains would provide a needed incentive for parties to become involved during pre-filing consultation, but would make the result advisory.[110] Under HRC's collaborative process proposal, the participants would negotiate their own case-specific dispute resolution procedures with respect to study requests and various other aspects of the process, such as a plan and schedule for processing the application, as well as the contents of a draft license application, NEPA document, and mitigation and enhancement measures. HRC would have study disputes ultimately resolved by a panel which closely resembles the panel we are proposing.

83. We conclude that in order to be effective, a dispute resolution process should be timely, impartial, transparently based on a thorough consideration of the applicable facts and

[97] NYSDEC, Van Ness, Duke, CRITFC, NYRU, GLIFWC, BRB–LST, WPPD, Michigan DNR, California.

[98] SCE, Kleinschmidt, WPPD, SCE, Skancke, AMC, EEI, PG&E, NYRU, Van Ness, Oregon, VANR, Southern, Idaho Power, ADK. NHA's proposal is that only applicants, agencies, and tribes be able to initiate dispute resolution, but that any party could participate.

[99] SCE, Kleinschmidt, Southern, Idaho Power, EEI, NHA. SCE adds that if the Commission lacks internal expertise with respect to a particular issue, it can obtain it by contract.

[100] Duke, Xcel, Kleinschmidt, Wausau, Georgia Power, WE Energies, Skancke, CDWR, Idaho Power.

[101] Wausau, FPL.

[102] NYSDEC.

[103] Duke, AEP, Van Ness.

[104] Duke.

[105] California, Oregon, Michigan DNR, Washington, HRC.

[106] California, Oregon, Michigan DNR, Washington, NYSDEC.

[107] This concept is frequently expressed in terms of there being a ban on post-application information requests, or a rebuttable presumption against them, or that they be allowable only under extraordinary circumstances. EEI, Idaho Power, NHA, Xcel.

[108] PG&E. NHA's dispute resolution proposal would appear to be voluntary but, if it was invoked, would in effect be binding on requesters because they could not later revisit the issue except in extraordinary circumstances. It would not appear to be binding on the applicant.

[109] SCE, EEI, PG&E, Van Ness, Snohomish.

[110] NHA, NRG. Only a few commenters focused on the NRG dispute resolution process. In general, they approved that the process would be open to all participants, but expressed concern that criteria for dispute resolution were not defined, and that its advisory nature would result in no clear resolution. EEI, PG&E, Van Ness, Snohomish.

decision criteria, and binding. We believe a modified version of the IHC proposal may satisfy these requirements.

84. Timeliness can be ensured by building into the dispute resolution process deadlines for action by all parties. The advisory panel approach offers the best assurance of impartiality and acceptance by including a panel member with appropriate technical expertise agreeable to the other panelists, and who has no conflicts of interest. Transparency can be assured by requiring a disputing party, the advisory panel, and the Director to explain how they applied the facts in light of the study criteria.

85. We propose to establish what is essentially a two-step dispute resolution process. In Step 1, 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 (preliminary determination). Step 2 would be a formal dispute resolution process, including the panel described above, in which resource agencies with mandatory conditioning authority under FPA sections 4(e) and 18, and states or tribes with water quality certification authority under Clean Water Act section 401, would be able to dispute the preliminary determination to the extent their dispute concerns requests that directly implicate their exercise of that conditioning authority.[111] If more than one agency or tribe filed a notice of dispute with respect to the preliminary determination's decision on a study request, the disputing agencies or tribes would select one representative to the panel, to ensure that balance is maintained.

86. This proposed process distinguishes between agencies and tribes with conditioning authority, to extent they are exercising that authority, and participants whose role is to make recommendations pursuant to FPA sections 10(a) and 10(j), NHPA section 106, or other applicable statutes. Agencies or tribes exercising mandatory conditioning authority have a duty to make reasoned decisions based on substantial evidence, and their decisions are subject to judicial review. Agencies, tribes, or members of the public that make recommendations to the Commission bear no such responsibility. The proposed integrated process ensures information and study requests of the latter entities receive appropriate consideration, in the context of early NEPA scoping and a process for developing the study plan provides all parties with opportunities to participate in study plan development meetings and file comments.

87. We recognize 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 any dispute resolution process involving the Commission and agencies or Tribes with mandatory conditioning authority. For that reason, the dispute resolution process we are proposing provides an opportunity for the applicant to submit to the panel information and arguments with respect to a dispute.

88. The advisory panel procedure does not delegate any of the Commission's decisional authority, because the panel is advisory only. Nor do we think it is necessarily too costly or unwieldy if properly managed. All costs of panel members representing the Commission staff and the agency or tribe which served the notice of dispute would be borne by the Commission, agency, or tribe, respectively. The third panel member will serve without compensation, except for certain allowable travel expenses to be borne by the Commission.[112]

89. We agree with GLIFWC that consistency of analysis is desirable in a dispute resolution process, but anticipate that project-specific facts will play a large role in the recommendations of the panels. We are not moreover able to provide any assurance that third party panelists, who volunteer their services, would be willing to appear on multiple panels during any given period of time. Finally, the recommendations of each panel and the Director's decision will be matters of public record, and may inform the thinking of future panels applying the same criteria to issues concerning the same resource.

90. NYSDEC and AMC state that to ensure the neutrality of the third panel member, that person should be from academia and not tied to any licensee's financial interests, or should be some other wholly independent party. We believe that neutrality will be sufficiently ensured by the fact that the third panelist must be agreed upon by the panelists representing the Commission staff and the disputing agency or tribe. The Commission requests comments on the proposed study dispute resolution process, and in particular on the efficacy of the advisory panel.

91. California and others[113] recommend that disputes be resolved by persons local to the project region, on the ground that local officials have a better understanding of the issues and states cannot afford to send staff to Washington, DC This is a matter best decided in the context of each proceeding.

e. Other Recommended Uses for Dispute Resolution

92. Menominee recommends that the study dispute resolution concept be extended to other elements of the licensing process, such as disagreements on draft license articles (which we propose to include with draft NEPA documents),[114] and whether the Commission is in compliance with NEPA. Dispute resolution with the Commission staff is not appropriate for such matters, which are solely within the Commission's authority, and to which rehearing and the opportunity for judicial review apply. Dispute resolution procedures may however be appropriate in the context of settlement negotiations among parties where a settlement agreement could include recommendations to the Commission concerning the content of license articles.

93. Some industry commenters suggest that disputes over material issues of fact related to issuance of mandatory conditions should be the subject of ''mini-hearings'' upon the applicant's request. They contend this would improve the overall record of the proceeding for judicial review, and that the prospect of a fact-finding hearing would make agencies with conditioning authority more likely to settle cases and less likely to impose unreasonable conditions.[115] We do not propose to change our general practice of resolving most hydroelectric licensing matters by means of notice and comment procedures. We agree, however, that there may be merit in using evidentiary hearings before administrative law judges in licensing proceedings, and will give due consideration to any requests for such hearings.[116]

[111] *See* proposed 18 CFR 5.12.

[112] The allowable travel expenses are defined at 31 CFR part 301. In brief, travel allowances are the same as those of a salaried employee traveling on behalf of the Commission. The Commission has procedures and guidance in place for such situations.

[113] Oregon, CRITFC.

[114] *See* Section III.D.4.d.

[115] EEI, NHA, Idaho Power, DM&GLH, APT, Duke.

[116] Proposed 18 CFR 5.27(e) explicitly provides for this.

2. Consultation and Coordination With States

94. The current regulations require prospective license applicants to include state fish and wildlife agencies and water quality certification agencies in pre-filing consultation,[117] and for license applicants to include with their application proof that they have received, applied for, or received waiver of water quality certification.[118] Notwithstanding, the Section 603 Report identified lack of timely state water quality certification as one of the principal causes of delay in licensing.[119]

95. The causes for this appear to vary from state to state. States, including those which participated in the December 2001 regional workshops, indicate that they have very limited resources to devote to such applications; that disputes over the scope of studies required for a complete certification application are not resolved before the license application is filed; or that their water quality certification process is designed to use the Commission's final NEPA document to the extent possible as the basis for acting on the water quality certification application.[120]

96. Not surprisingly, then, there was broad agreement in the regional workshops with states and among the commenters that early collaboration or coordination by all parties with state agencies that issue water quality and CZMA consistency certification is essential to any effort to improve the timeliness of licensing.[121] Many commenters recommend that these state agency processes be fully integrated with the Commission's processes from the beginning of pre-filing consultation through license issuance. This could include joint Federal/state environmental issues scoping and preparation of environmental documents as cooperating agencies.[122] CRITFC states coordination of Federal and state regulatory agency action would also be enhanced by river basin-wide analyses that take into account all relevant state and tribal water quality standards and tribal water rights.

97. The proposed integrated licensing process is designed to maximize coordination with state processes under the CWA and CZMA, and to aid the ability of state agencies to timely provide recommendations pursuant to FPA sections 10(a)(1) and 10(j). State agencies would be consulted with respect to development of the applicant's Commission-approved study plan; invited to participate in an initial public meeting for the purpose, among others, of coordinating all regulatory processes to the extent possible; and could participate in the Commission's NEPA scoping activities. They would also be eligible for dispute resolution with respect to information and study requests pertaining to the exercise of their water quality conditioning authority.

98. There are limits to what the Commission can do to coordinate its activities with state processes. Some states for instance indicate that the problem of incomplete water quality certification applications when the license application is filed would be eliminated if the Commission would treat states as ''full partners'' in the licensing process, which appears to entail, among other things, complete deference to state agency study requests.[123] The Commission may in fact require an applicant to complete all of the information-gathering or studies requested by a state agency, but must exercise its independent judgement with respect to each study request in light of the comprehensive development standard of FPA section 10(a)(1), the Commission's policies, and any other applicable law. Several states moreover commented that they cannot be bound by the result of any Commission decisions on information and study needs insofar as their independent water quality certification authority is concerned, and if they are not satisfied with the information resulting from the Commission-approved study plan or dispute resolution process, they will deny water quality certification or use their other authorities to require the information they believe is needed.[124] Finally, some states oppose participation as cooperating agencies for NEPA document preparation, on the ground that would conflict with their own policies or procedures.[125]

99. EEI, NHA, and Idaho Power recommend that the Commission consider developing state-specific agreements comparable to programmatic agreements with State Historic Preservation Officers (SHPO), which might address such matters as coordination of schedules and key information needs of the states.[126] As previously noted,[127] the Commission has already begun consultations with the states to determine whether such memoranda or other actions to enhance coordination, apart from the proposed rule, may be useful. Our staff is also engaged in more focused discussions with some states where numerous relicense applications are expected to be filed over the next decade.

100. Some states[128] indicate that their ability to timely issue water quality and coastal zone management plan consistency certifications would be greatly enhanced if the Commission directly funded their participation in the licensing process or used its authorities to require license applicants to fund their participation. The Commission does not have authority to directly fund state agencies. Licensee funding of Federal and State agencies is governed by FPA section 10(e)(1), which requires the Commission to collect in annual charges from licensees the Commission's administrative costs and * * * any reasonable and necessary costs incurred by Federal and State fish and wildlife agencies and other natural and cultural resource agencies in connection with studies or other reviews carried out by such agencies for purposes of administering their responsibilities under this part * * *.

101. This clause was added by section 1701(a) of the National Energy Policy Act of 1992 (EPAct).[129] Section 1701(a)(2) of EPAct also added the following proviso:

Provided, That, subject to annual appropriations Acts, the portion of such annual charges imposed by the Commission under this subsection to cover the reasonable and necessary costs of such agencies shall be available to such agencies (in addition to other funds appropriated for such purposes) solely for carrying out such reviews and shall remain available until expended;

102. The Commission has construed this provision to require an annual appropriation for this purpose by

[117] 18 CFR 4.38(a)(1) and (a)(2);and 16.8(a)(1) and (a)(2).

[118] 18 CFR 4.38(f)(7); 16.8(f)(7).

[119] *See* Section 603 Report, pp. 38–43.

[120] WDOE, Oregon, SCDWQ, Michigan DNR, California, Wisconsin DNR. EPA states that the limited resources of some states relative to their Clean Water Act responsibilities could make it difficult for the state agency to stay involved over the term of a multi-year license proceeding.

[121] Washington, California, SCE, Salish-Kootenai, NHA, HLRTF, Oregon, Interior, PG&E, PCWA, Idaho Power, PacifiCorp, SCDWQ, APT, Michigan DNR, HRC, Wisconsin DNR, EEI, NYSDEC, Maryland DNR, NMFS.

[122] NRG, Washington, Idaho Power, PacifiCorp, SCE, Oregon, Michigan DNR, HRC, KCCNY, CDWR, HRC, Idaho Power, PacifiCorp, NHDES, PG&E.

[123] California, NYSDEC, VANR, Wisconsin DNR.

[124] California, Oregon, Michigan DNR, Wisconsin DNR, WDOE.

[125] *See* Section III.D.4.b.

[126] EEI, NHA, Idaho Power. EEI states that any drafts of any such agreements should be submitted to licensees for comment.

[127] *See* Section II.B., supra.

[128] Washington, Oregon, Michigan DNR. California recommends that the Commission reimburse intervenors for attorneys' fees and travel expenses.

[129] Pub. L. 102–486, 106 Stat. 2776–3133 (Oct. 24, 1992).

Congress in the budgets of the applicable agencies or the Commission.[130] Congress has not made such appropriations for the states.[131]

a. Timing of Water Quality Certification Application

103. Some commenters suggest that the timing of the water quality certification application should be governed by events other than the filing of the license application. Although the specific time frames that they recommend for filing are divergent, the common theme appears to be that the water quality certification application should be filed when the record with respect to water quality issues is complete.[132] California recommends that the certification application be filed after the Commission's draft NEPA document is issued. New York Rivers and Oregon suggest that regardless of when the certification application is filed, the Commission should not begin counting the one-year period for state action until the state deems the application to be complete.[133]

104. The current rule requiring a license applicant to apply for water quality certification by the time the license application is filed rests on the assumption that water quality data issues will have been resolved during pre-filing consultation. The integrated licensing process we are proposing provides greater opportunity for that to occur. The applicant and water quality certification agencies will know well before the application is filed what related data the Commission will require to be filed with it. Thus, states should be in a position to inform license applicants if additional information will be required by the state for water quality certification purposes before the application is filed, and applicants should be prepared to begin obtaining any such information and assembling a water quality certification application before the license application is filed.

105. For those applications developed using the traditional process, we propose to modify the rules to require the applicant to show that it has applied for, received, or received waiver of water quality certification no later than the date for responses to the Commission's REA notice. The later date may be appropriate for the traditional process because there is no Commission-approved pre-filing study plan, and therefore less reason to assume that water quality information and study issues will have been resolved when the application is filed. Similar considerations may apply to the ALP, where the parties have much flexibility with respect to the timing of the development of the record. On the other hand, and as discussed below, we are proposing to incorporate full public participation and mandatory, binding dispute resolution into the traditional process, which should result in pre-filing resolution of water quality data issues far more often than is currently the case. The Commission therefore requests comments on whether the deadline date for filing the water quality certification application should remain when the license application is filed for both the traditional process and ALP.

3. Consultation With Indian Tribes

106. The September 12, 2002 Notice asked how a new licensing process can better accommodate the authorities, roles, and concerns of Indian tribes. The principal concerns expressed by tribes are that tribal sovereignty and authorities need to be recognized in the process, that the Commission have government-to-government relations with the tribes, and that the tribes be consulted and their issues identified very early in the process.[134]

107. A few tribes suggest that the existence of a government-to-government relationship means that only the Commission should consult with the tribes, and that the tribes should not have to deal directly with license applicants.[135] Most tribes, however, recognize the crucial role of the license applicant in consultation and development of studies and the license application, and accordingly offer recommendations intended to improve coordination and development of information with the applicant as well as the Commission. A few licensees suggest that if consultations between the tribes and license applicants become unproductive, or at the tribe's request, all consultation with the tribe should be through the Commission.[136]

108. Several tribes state that there is a lack of understanding by the Commission of its roles and responsibilities as a trustee for tribes, and of individual tribal concerns, and a lack of understanding by tribes of the Commission's processes. They also state that our regulations are not clear with respect to the rights, roles, and responsibilities of Indian tribes.[137] Several suggest that the Commission establish either an office of tribal affairs or otherwise dedicate a specific person or persons as a tribal liaison.[138]

109. The relationship between the United States and Indian tribes is defined by treaties, statutes, and judicial decisions. Indian tribes have various sovereign authorities, including the power to make and enforce laws, administer justice, and manage and control their lands and resources. Through several Executive Orders and a Presidential Memorandum,[139] departments and agencies of the Executive Branch have been directed to consult with Federally recognized Indian tribes in a manner that recognizes the government-to-government relationship between these agencies and tribes. In essence, this means that consultation should involve direct contact between agencies and tribes, in a manner that recognizes the status of the tribes as governmental sovereigns.

110. As an independent regulatory agency, the Commission functions as a neutral, quasi-judicial body, rendering decisions on license applications filed with it, and resolving issues among parties appearing before it, including Indian tribes. Therefore, the Commission's rules and the nature of its licensing process place some limitations on the nature and type of consultation

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[130] *See* Testimony of Commission Chair Elizabeth Moler before the Subcommittee on Energy and Water Development of the House Committee on Appropriations (April 21, 1993); Letter from Chair Elizabeth Moler to Hon. John Dingell of August 2, 1994.

Certain Federal agencies have for a number of years submitted ''reasonable and necessary costs'' to the Commission for inclusion in annual charges. Some licensees have challenged the eligibility of these costs for recovery in annual charges and the Commission's policies concerning the evidentiary showing necessary for the costs to be recovered. These matters are currently in litigation. *City of Tacoma, et al.* v. *FERC,* DC Cir. 01–1375 (filed August 28, 2001).

[131] Although the Commission's existing authority in this regard is constrained, we are well aware of the funding challenges faced by many states and are interested in pursuing with them in other contexts how the Commission might be able to assist them in meeting this challenge.

[132] NHA, Idaho Power, NYSDEC, SCE (when the REA notice is issued); CDWR (one year prior to scheduled license issuance); HRC, NCWRC (following issuance of a draft or final NEPA document).

[133] NYRU, Oregon.

[134] Menominee, GLIFWC, CRITFC, Salish-Kootenai, St. Regis Mohawks, PRT, HETF; CTUIR; St. Regis Mohawks, NF Rancheria, Catawba, APT, KT, Nez Perce.

[135] Choctaw, PRT, Shoshone.

[136] PacifiCorp, NHA.

[137] *E.g.,* Nez Perce.

[138] CRITFC, Salish-Kootenai, NF Rancheria, Menominee, KT, GLIFWC, BRB–LST, Quinault, CTUIR, Shoshone.

[139] Executive Order 13175, Consultation and Coordination with Indian Tribal Governments (issued November 6, 2000); Executive Order 13084, Consultation and Coordination with Indian Tribal Governments (issued May 14, 1998); Presidential Memorandum, Government-to-Government Relations with Native American Tribal Governments (issued April 29, 1994), reprinted at 59 Fed. Reg. 22,951; Executive Order 12875, Enhancing the Intergovernmental Partnership (issued October 26, 1993).

that the Commission may engage in with any party in a contested case.

111. The Commission believes that the licensing process will benefit by more direct and substantial consultation between the Commission staff and Indian tribes. Because of the unique status of Indian tribes in relation to the Federal government, it may be beneficial to increase direct communications with tribal representatives in appropriate cases. The type and manner of consultation with Indian tribes should fit the circumstances. Different issues and stages of a proceeding may call for different approaches, and there are some limitations that must be observed. However, there are a number of steps that the Commission staff can take to improve consultation with Indian tribes on matters affecting their interests in hydroelectric licensing.

112. For example, it may be mutually beneficial for the staff and Indian tribes to engage in some high-level meetings to discuss general matters of importance, rather than issues involved in specific licensing proceedings. These could be arranged for particular tribes, regions, or river basins, if appropriate.

113. There are also opportunities for greater involvement with Indian tribes before a licensing proceeding has begun. Indian tribes may be reluctant to consult with the applicant, preferring to meet directly with the Commission staff. In these cases, the staff should consider some means of direct communication with the tribe, at an appropriate level, to explain the consultation process and the importance of tribal participation, and to learn more about the tribe's culture. Because it would occur before the proceeding commences, the Commission's rules regarding off-the-record communications would not apply. Our proposal to establish a tribal liaison, discussed below, responds to this concern.

114. Once the licensing proceeding has begun, the Commission's rules prohibiting off-the-record communications must be observed. These rules apply in any case in which an intervenor disputes a material issue, and they generally prohibit off-the-record communications relevant to the merits of a proceeding between Commission employees involved in the decisional process and interested persons outside the agency. Thus, they would prevent Commissioners or Commission staff from consulting privately in a contested proceeding with representatives of any party to the proceeding, whether on a government-to-government basis or in any other capacity, to discuss matters relevant to the merits of the proceeding.

115. However, under special exemptions provided in the rules, communications concerning the staff's preparation of environmental documents are permitted, as are communications with tribal and other governmental representatives if the tribe or government agency is not a party to the proceeding. In each instance, the staff must promptly disclose the substance of the communication and place it in the record for the proceeding. Using these guidelines, Commission staff can work to ensure that consultation with Indian tribes is both meaningful and appropriate to the circumstances of particular cases. For example, staff might consider holding a high-level ''kick-off'' meeting or invitation to participate, or a separate scoping meeting with tribal representatives.

116. As part of the licensing process, the Commission must also comply with section 106 of the NHPA. Section 106 requires the Commission to take into account the effect of its actions on historic properties, and to afford the Advisory Council on Historic Preservation (ACHP) a reasonable opportunity to comment. The NHPA expressly provides that traditional cultural properties that are of religious or cultural significance to Indian tribes can be considered historic properties. It also requires the Commission to consult with representatives of Federally recognized Indian tribes that attach religious or cultural significance to those properties, if they may be affected by the licensing action. The Council's regulations provide that this consultation ''should be conducted in a sensitive manner respectful of tribal sovereignty,'' and ''must recognize the government-to-government relationship between the Federal government and Indian tribes.''[140] If direct communication between Commission and tribal representatives occurs as part of the Section 106 process, it must be conducted in compliance with the Commission's rules regarding off-the-record communications.

117. A few tribes recommend that consultation be limited to Federally recognized tribes.[141] The Commission is sensitive to the fact that Federal recognition establishes certain rights that are not enjoyed by non-recognized tribes, and that there may be competing interests at stake. For instance, some Federally recognized tribes have authority to issue water quality certification under section 401 of the Clean Water Act with respect to actions that require a Federal license and are located on reservation lands. Consultation under section 106 of the NHPA differs, depending on the tribe's status.[142] The Council's regulations concerning government-to-government consultation apply only to Federally recognized tribes. However, they also provide for consultation with non-Federally recognized tribes as consulting parties that have an interest in the proposed licensing action.[143] If a Federally recognized tribe has an approved Tribal Historic Preservation Officer (THPO), the Commission is required to consult with the THPO instead of the SHPO for undertakings that affect historic properties on tribal lands. We intend for the licensing process to be conducted in a manner consistent with the proper exercise of such rights, and that tribes be consulted at the earliest practicable opportunity. We believe, however, that members of unrecognized tribes can have Native American cultural resources that should also be respected by the Commission. We will therefore direct our staff to consult with non-recognized tribes that choose to participate in license proceedings.

118. The tribes and other commenters made many suggestions intended to enhance early consultation. These include: Commission contact with tribes before the due date for an existing licensee's NOI to better understand tribal issues and to ensure that the tribes are fully aware of the licensing process;[144] Commission and tribe-only meetings to ensure confidential treatment of cultural resources and for NEPA scoping;[145] development with each tribe of a plan for consultation with that tribe;[146] more timely notice of deadlines and flexible deadlines;[147] facilitation services for consultation between tribes and the Commission or tribes and license applicants;[148] and that comprehensive information on future license expirations and the state of any existing consultations be posted

[140] 36 CFR 800.2(c)(2)(ii)(B) and (C).

[141] Choctaw, Catwaba.

[142] As used in the NHPA and the Council's regulations, the term, ''Indian tribe'' refers to Federally recognized tribes; thus, only a Federally recognized tribe has the right to participate in Section 106 consultation. See *http://www.achp.gov/regs_tribes.htm.*

[143] 36 CFR 800.2(C)(5) and 800.3(f).

[144] PacifiCorp, PRT.

[145] NF Rancheria. Several tribes broadly stated their concern that the licensing process protect the confidentiality of cultural resources; *e.g.*, Choctaw, PRT, Shoshone, NF Rancheria.

[146] SCE, Idaho Power, EEI, NHA, NEU, Nez Perce.

[147] CRITFC, St. Regis Mohawks.

[148] Idaho Power, PRT, Nez Perce.

on the Commission's website or made available on CD ROM.[149]

119. Our proposed rule and related administrative actions should substantially address these concerns. First, we are establishing the position of Tribal Liaison. The Tribal Liaison will provide a single, dedicated point of contact and a resource to which Native Americans can go regardless of the proceeding or issue. Also, as discussed above, the Commission will be contacting 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.

120. Under section 304 of the NHPA, the Commission is required to withhold from public disclosure information about the location, character, or ownership of a historic property when disclosure may cause a significant invasion of privacy, risk harm to the property, or impede the use of a traditional religious site by practitioners. The Council's regulations reflect this requirement.[150] The Commission also has regulations and practices in place that address the tribes' confidentiality concerns. For instance, all applicants must delete from any information made available to the public specific site or property locations if their disclosure would create a risk of harm, theft, or destruction of archeological or Native American cultural resources.[151] In addition, the regulations provide specific procedures to follow when requesting privileged treatment of documents that are either filed with the Commission or submitted to the Commission staff.[152]

121. The Commission agrees that Commission-sponsored facilitation services, which some non-tribal commenters also recommend, may be useful in certain proceedings, as discussed in the preceding section. The most appropriate facilitation or dispute resolution techniques are a matter best considered in the context of specific proceedings.

122. Some tribes suggest that, because original construction of dams caused impacts to tribal resources for which there was no compensation under an original license or other pre-license construction authorization, the licensing process should provide a means to identify and mitigate for those past impacts.[153] The Commission has no authority under the FPA to require restitution or to assess damages. Moreover, the FPA does not mandate that all past environmental damage caused by a project be ''mitigated'' in a relicensing proceeding. Our responsibility at relicensing is to determine whether, and under what conditions, to issue a new license for a hydroelectric project. As previously stated, we use existing environmental conditions as a baseline for our analysis, and do not attempt to re-create a hypothetical pre-project environment. However, past environmental effects are relevant in assessing cumulative effects and in determining what measures are appropriate to protect, mitigate, and enhance natural resources for the new license term. This approach is reasonable, and complies with both NEPA and the FPA.[154]

123. Some tribes state that the geographic scope of the Commission's public interest analysis with respect to tribal cultural and other resources should not be limited to resources located within the project boundary, but should extend to project impacts wherever they may occur.[155] The Commission agrees that there may be instances where project impacts occur outside of an existing or proposed project boundary, and that appropriate mitigation for these impacts, as well as possible changes to the project boundary, should be considered in the licensing process. For historic properties, this is taken into account in defining the project's ''area of potential effect'' during the consultation process under section 106 of the NHPA. Such matters are best dealt with in the context of specific proceedings.

124. Some commenters indicate that project-related social and economic issues raised by tribes should be addressed in the licensing process and should be given the same weight as developmental values.[156] We agree that social and economic impacts of proposed projects on tribal resources, positive and negative, need to be addressed through consultation pursuant to our trust responsibility, the NHPA section 106 process, and in the Commission's NEPA and decisional documents. The enhanced consultation measures provided by the proposed integrated process generally, and for Indian tribes in particular, should ensure that such issues are fully considered.

125. A few tribes suggest that tribal water rights should be specifically addressed in the licensing process.[157] Issues concerning tribal water rights have rarely been raised in licensing proceedings, mainly because the Commission does not adjudicate water rights. The Commission's practice, when such water rights are in dispute, is that if it issues the license, it makes the license subject to a reservation of authority to reopen the license to make any changes that may be required once the water rights issues are resolved.[158] This safeguard has worked in the past and should continue to adequately protect tribal water rights.[159]

126. Some commenters state that the Commission's guidelines for the development of Historic Properties Management Plans (HPMPs) are confusing with regard to how Section 106 is fulfilled and the degree of applicant responsibility. They request clarification of the distinction between government-to-government relations and consultation.[160] The Commission and the Council issued these guidelines jointly in May 2002.[161] They are intended to assist license applicants in preparing their HPMPs, which the Commission includes as a license condition, and provide for the licensee's management of historic properties during the license term. These plans, while related to historic preservation, are not necessarily part of the Section 106 process. Rather, a programmatic agreement or memorandum of agreement entered into as part of the Section 106 process will usually include provisions requiring the applicant to prepare and implement an HPMP. The HPMP is often prepared in consultation with the SHPO, THPO, or Indian tribe, and may include provisions for consultation with the tribes during the term of the license. The Commission's role is to review and approve the HPMP. Thus, any consultation with tribes that may occur during the preparation or implementation of the HPMP ordinarily

[149] NF Rancheria, PRT.

[150] *See* 36 CFR 800.6(a)(5) and 800.11(c).

[151] 18 CFR 4.32(b)(3)(ii) and 16.7(d)(5)(ii).

[152] 18 CFR 388.112.

[153] Shoshone, NW Indians.

[154] *See* Section III.D.1.c

[155] CTUIR, Menominee, Shoshone.

[156] Shoshone, CTUIR.

[157] CTUIR, CRITFC.

[158] *See, e.g.*, Idaho Water Resources Board, 84 FERC ¶ 61,146 (1998) (reserving authority to modify the license to reflect the outcome of pending state water right proceeding in which an Indian Tribe claimed an implied Federal reserved water right). Similarly OWRB states that license conditions should be developed consistent with interstate water compacts enacted as Federal law. It is not the Commission's intention to interfere in any way with such compacts, and we are not aware of any instance where there has been an inconsistency.

[159] *See Covelo Indian Community* v. *FERC*, 895 F.2d 581, 586 (9th Cir. 1990).

[160] SCE, NHA. SCE states that Section 106 consultation should begin when the applicant files a draft HPMP.

[161] Guidelines for the Development of Historic Resources Management Plans for FERC Hydroelectric Projects (May 2002), *http://www.ferc.gov/hydro/docs/hpmp/pdf.*

would be with the applicant or licensee, rather than with the Commission. In some cases, consultation pursuant to Section 106 may be combined with consultation concerning the preparation of an HPMP. As discussed above, the Commission will attempt to be responsive to tribes' requests for direct communication, if this can be accomplished in a manner consistent with the Commission's rules governing off-the-record communications.

127. Some tribes state that they should be consulted on the identity of, or have the right to approve, all persons performing tribal cultural resources analyses pursuant to section 106 of the NHPA. Tribes may also have professional expertise in this area, and some indicate that qualified tribal members should be hired for such studies whenever possible.[162] We agree that it is appropriate for license applicants to consult with tribes concerning the identity and qualifications of persons conducting studies with respect to a tribe's cultural resources. However, license applicants need to have flexibility in the hiring of consultants. We do not believe that applicants should be required to obtain a tribe's approval before engaging a consultant, or to engage a consultant based on tribal membership. It would however appear to be in a license applicant's best interests to consult affected tribes concerning these matters. We note that, in many proceedings, licensees have reached agreements with affected tribes in which the tribes have a voice in the selection of consultants.[163]

4. Environmental Document Preparation

a. Cooperating Agencies Policy

128. The Commission's policy has for a number of years been that an agency that has served as a cooperating agency in a proceeding may not thereafter intervene in that proceeding. The reason for this policy is that staff of a cooperating agency is treated in some respects as though it were Commission staff, including having conversations and exchanging information that may not be put in the record, just as Commission staff shares predecisional analyses and information internally. To allow a cooperating agency to intervene in a proceeding would make it a party privy to decisional information not available to other parties, in violation of our rule prohibiting *ex parte* communications.[164]

129. Other Federal agencies, environmental groups, and some states urge us to revisit this policy.[165] They contend that the policy is inefficient because it discourages other agencies from becoming cooperating agencies, which forces the preparation of multiple NEPA documents. Interior suggests that if the Commission were to issue non-decisional NEPA documents, that is, documents which are purely analytical and make no substantive recommendations, there should be no concern about off-the-record communications regarding the merits of the proceeding.[166]

130. EEI and Idaho Power assert however that reversing the policy would violate the Administrative Procedure Act (APA).[167] They state that APA section 557(d)(1) prohibits in an adjudicatory proceeding any ''interested person'' from outside the agency from making any ''*ex parte* communication relevant to the merits of the proceeding'' to a decisional employee.[168] This is correct, but the APA defines a ''person'' as ''a public or private organization *other than an agency*.'' [169] (emphasis added), and defines an agency, with certain exceptions not relevant here, as ''each authority of the Government of the United States.'' [170] Thus, the APA does not prohibit *ex parte* communications between Federal agencies.

131. Our policies concerning *ex parte* communications exceed the requirements of the APA in this regard, because the Commission is concerned that its procedures be fundamentally fair in both appearance and reality. On this score, EEI and Idaho Power cite Order No. 607, where the policy against cooperating agency intervenors articulated above was codified, and *Arizona Public Service*, where it was affirmed. They assert that nothing has changed in this regard, and add that reversing the policy would afford a dissatisfied cooperating agency a ''second bite at the apple'' by permitting it to seek rehearing and judicial review of Commission orders.[171] EEI intimates that permitting cooperating agency relationships would enable other Federal agencies to prevent or hinder the issuance of economically vital gas pipeline certificates and unduly influence the Commission's public interest balancing under FPA section 10(a)(1).[172] Finally, they argue that NRG's proposal would be impractical because it would require all communications to and from a cooperating agency to be placed on the record, which would be administratively unworkable and inimical to the free exchange of ideas essential to the cooperating agency relationship.

132. We conclude that reversal of our policy (and the concomitant revision of our *ex parte* rules) as it applies to Federal agencies would increase the likelihood that Federal agencies with mandatory conditioning authority would be willing to act as cooperating agencies, which would better enable these agencies and the Commission to coordinate the exercise of their separate responsibilities. This should also better enable cooperating Federal agencies with conditioning authority to develop a complete record, reduce duplication of effort among cooperating agencies, and may help to focus discussion of scientific and policy issues. To be weighed against these benefits is 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.

133. On balance, we are persuaded that the potential benefits are significant and the likelihood of prejudice to other parties is minimal if an appropriate disclosure requirement is established. The Commission and other Federal agencies with mandatory conditioning

[162] Shoshone, Kalispel.

[163] Examples include relicense proceedings for the Condit Project No. 2342, Box Canyon Project No. 2040, Lake Chelan Project No. 637, Rocky Reach Project No. 2145, Klamath River Project No. 2082, and Baker River Project No. 2150.

[164] *See* Rainsong Company, 79 FERC ¶ 61,338, at p. 62,457, n.18 (1997); Order No. 596, Regulations for the Licensing of Hydroelectric Projects, FERC Statutes and Regulations ¶ 31,057 at p. 30,644 (1997). When the Commission modified its *ex parte* communication rules in 1999, it noted, but made no change to, this policy. *See* Order No. 607–A, FERC Statutes and Regulations ¶ 31,112 n. 50 and p. 31,931 n. 41. *See also* Arizona Public Service Co., 94 FERC ¶ 61,076 (2001) (denying request for late intervention by the Forest Service and rejecting arguments that the new *ex parte* rule does permit a cooperating agency to also be an intervenor).

[165] HRC, SCE, NYSDEC, WDOE, DOI. NRG also supports this proposal, but would put limits on the bases upon which a cooperating agency that subsequently became an intervenor could seek rehearing or judicial review, and would include disclosure requirements with respect to discussions concerning license articles or terms and conditions, and ''any communication necessary for the completeness of the record.'' *See* Attachment B to September 12, 2002 Notice, p. 10.

[166] This suggestion is inconsistent with our *ex parte* regulations, which define ''relevant to the merits'' as ''capable of affecting the outcome of a proceeding, or of influencing a decision, or providing an opportunity to influence a decision, on any issue in the proceeding,'' subject to certain narrowly drawn exceptions not applicable here. *See* 18 CFR 385.2201(b)(c)(5).

[167] 5 U.S.C. 551–559.

[168] 5 U.S.C. 557(d)(1).

[169] 5 U.S.C. 551(2).

[170] 5 U.S.C. 551(1).

[171] EEI, Idaho Power.

[172] *See* EEI, pp. 45–46.

authority must support their conditions with reasoned decisions based on facts in the public record. A cooperating agency that supplies the Commission with study results or other information presumably does so because it believes the material adds value to the decisional record and deliberations. No cooperating agency should therefore object to a requirement that all study results and other information provided to the Commission also be served on parties to the proceeding. Deliberative communications however involve the interpretation and application of study results and other information. It is appropriate for such communications among cooperating agencies to remain off-the-record in order to foster the free and timely exchange of ideas. As long as the analyses upon which the Commission and a cooperating agency ultimately rely are set forth in their respective NEPA or decisional documents, they will be subject to challenge in comments on draft NEPA documents, on rehearing of decisional orders, and on judicial review. Under these circumstances, no other party should be prejudiced.

134. We therefore propose to modify our policy by permitting Federal cooperating agencies to intervene, subject to a requirement that all studies and other information provided by a cooperating agency to the Commission be promptly submitted to the Secretary and placed in the decisional record. Decisional communications such as working drafts of NEPA documents and associated communications would continue to be exempt from disclosure. Accordingly, we also propose to modify the text of the ex parte regulations to this effect.[173] The exception to the APA's prohibition on ex parte communications for Federal agency communications does not extend to states or Indian tribes. Our policy will therefore remain in place with respect to these entities.

b. NRG Cooperating Agency Proposal

135. NRG proposes that the Commission and Federal or state resource agencies that regularly participate in the Commission's licensing processes develop a general Memorandum of Understanding (MOU) that would establish a procedural framework in which the resource agencies would be cooperating agencies in the preparation of a non-decisional NEPA document; that is, one which would analyze resource impacts of the applicant's proposal and reasonable alternatives, but would not include any recommendations on license articles or terms and conditions. The MOU would cover procedures for cooperation, dispute resolution, and decision-making. Each MOU would be supplemented by a project-specific Memorandum of Agreement.[174]

136. The Commission supports in general the use of cooperating agency NEPA documents as a means of increasing efficiency. We are not however prepared to structure the integrated licensing process proposal based on the assumption that there will be a cooperating agency relationship in all or most cases. Many considerations go into an agency's decision to seek or not to seek such status. These include staff availability, the nature and extent of the agency's responsibilities with respect to licensing, and the policies and practices of the potential cooperating agencies.[175] Moreover, where the Commission and resource agencies have found it to their mutual benefit to be cooperating agencies, project-specific agreements have generally been timely concluded so that the processing milestones were not prejudiced. Nevertheless, the Commission acknowledges that there may be benefits to having general MOUs with resource agencies to address coordination issues that cut across projects, and we will continue to explore that approach outside the context of this rulemaking.

c. Non-Decisional NEPA Documents

137. Under NRG's proposal for non-decisional NEPA documents, the Commission and cooperating agencies would separately publish records of decision explaining the basis for their respective decisions, based on the record in the joint NEPA document and other relevant materials in their public record. NRG believes there would be little controversy with regard to the scientific analyses, which would eliminate the need for the Commission and cooperating agencies to conduct separate NEPA reviews. It suggests that this might reduce the average time of license proceedings.

138. NRG's proposal enjoys some support from across the spectrum of interests.[176] HRC states that having a non-decisional NEPA document will help to ensure transparent decision-making, and that non-decisional documents are needed to ensure that license articles and terms and conditions are not negotiated between agencies without public input. It is not however universally embraced. EPA, citing the regulations of the Council on Environmental Quality,[177] and NMFS support a decisional NEPA document with a Commission-preferred alternative. ADK suggests that using two documents for what is now encompassed in one document might lead to inefficient sequential processing.

139. The Commission does not propose to adopt a practice of issuing non-decisional NEPA documents as proposed by NRG. Although we propose to change our existing policy with respect to intervenor status for cooperating agencies, there is no assurance that cooperating agency agreements will become the norm, as discussed above. We are moreover less optimistic than NRG concerning the likelihood of conflicts over scientific analyses. The ubiquity of study disputes and conflicts over interpretation of study results, quite apart from decisions over how they might translate into PM&E measures, leads us to believe that the resource impact analysis sections of NEPA documents will continue to be controversial.

140. The Commission does however propose to modify the structure of its NEPA documents to better separate resource impact analysis from decisional analysis. In the future, all of our NEPA documents will confine decisional analyses pursuant to FPA sections 10(a) and 10(j) to clearly delineated sections at the close of the document. In this way, any other Federal or state agency or Tribe with mandatory conditioning authority will, whether or not it is a cooperating agency, be able to use those parts of the resource impact analysis not in dispute in whatever documents it prepares pursuant to its legislative mandates.

d. Draft License Articles

141. Federal agencies and some commenters recommend that the Commission issue draft license articles for comment in connection with draft NEPA documents. They believe this will result in better license orders and license articles, and that issuance of draft articles would help to foster settlement agreements.[178]

[173] Proposed new 18 CFR 385.2201(g)(2).

[174] *See* NRG proposal summary, September 12, 2002 Notice, Attachment B, p. 9. NHA supports the NRG proposal in this regard. CRITFC and Nez Perce support joint-agency NEPA documents in concept, but are concerned that the NRG's proposal might exclude the tribes, or somehow impose inappropriate limitations on appeal rights.

[175] Michigan DNR and WDOE object to the inclusion of state agencies as cooperating agencies, on the ground that would subject the state agency to schedules established by the Commission, which they aver would conflict with other Federal or state laws and regulations.

[176] HRC, AmRivers, SCE, CRITFC.

[177] *See* 40 CFR 1500, *et seq.*

[178] HRC, Menominee, BRB–LST.

142. The Commission has previously issued draft license articles only in the extraordinary circumstance of a lengthy proceeding in which the Commission's jurisdiction was at issue and where it was concluded that issuance of draft license articles might provide assurance to the operator of existing, previously unlicensed facilities that a Commission license would not undermine its ability to operate the project in a manner consistent with certain state laws affecting project operations.[179]

143. We propose to attach to the draft NEPA document for comment the preliminary terms and conditions of any Federal or state agency with mandatory conditioning authority, plus additional draft articles proposed by the Commission to be required pursuant to FPA section 10(a)(1).[180] This will provide the parties with more specific information concerning the staff's licensing recommendations. Where no draft NEPA document is issued, we would include draft license articles and preliminary terms and conditions with the environmental assessment. Parties would have an opportunity to file comments before the Commission issued an order acting on the license application. We also propose to begin this practice for applications developed under the traditional process and ALP.[181]

e. Endangered Species Act Consultation

144. Currently, neither Interior and Commerce rules nor Commission rules specifically address how the ESA section 7 consultation process is to be integrated into the Commission's licensing process.[182] NHA and others state that ESA consultation is often deferred until the end of the licensing process, causing delay and disruption. The ITF prepared a report on this subject[183] containing recommendations for integrating consultation in the context of the traditional process, but which also includes an outline of a process beginning at the time the NOI is filed.[184] These commenters state that the ITF recommendations have met with little success, and suggest that it is because the ITF recommendations are unenforceable. WPPD recommends that the Commission, Interior, and Commerce cooperate in developing joint rules to integrate ESA Section 7 consultation with the licensing process. Interior and NMFS recommend that the integrated process regulations identify the key steps and requirements for completing ESA consultation.

145. The proposed integrated licensing process encourages early ESA consultation, and is consistent with the ITF Report on section 7 consultation. First, it encourages an applicant to request designation as the Commission's non-Federal representative at the time it files its NOI and distributes its Pre-Application Document.[185] The proposed process also provides a vehicle for all parties to make their issues and information needs known from the beginning. This, in conjunction early development of a process plan for coordinating regulatory processes, a Commission-approved study plan, binding dispute resolution process, periodic status reports, a high standard for requesting additional data and studies following an initial status report on studies and information gathering, a recommendation to include a draft Biological Assessment (BA) in the draft license application, and requirement for applicants that are designated non-Federal representatives to include a draft BA in their license application, should help to ensure that ESA consultation proceeds on the same track as the rest of the process. We acknowledge however that timely completion of ESA consultation has been an ongoing issue, particularly concerning projects in the Pacific Northwest, and we are open to working with the Departments of Interior and Commerce to develop additional means of effecting improvements in this area.

f. Fish and Wildlife Agency Recommendations

146. The proposed integrated process rules incorporate the Commission's existing practices with respect to consideration of fish and wildlife agency recommendations made pursuant to the Fish and Wildlife Coordination Act and FPA section 10(j), with minor modifications to the timing of any meetings that may occur in order to ensure that the 10(j) process is fully compatible with the proposed application processing milestones.[186]

g. National Historic Preservation Act Consultation

147. Consultation pursuant to section 106 of the National Historic Preservation Act has not been a significant source of delay in licensing. The few parties who addressed section 106 recommend that such consultation begin early.[187] We agree. The proposed integrated process includes SHPOs among the entities to be consulted and encourages applicants to request to initiate section 106 consultation when the NOI is filed.[188]

5. Public Participation

148. The traditional process regulations concerning prefiling consultation focus on the applicant's interactions with agencies and Indian tribes. Potential license applicants are required to conduct only one public meeting prior to filing the license application,[189] and the draft license application is required to be served only on agencies and tribes.[190] Thus, unless an applicant voluntarily consults with the public, the traditional process often causes identification of issues and study requests from the public to be delayed until after the license application is filed. Commenters from across the spectrum of interests agree that identifying NGO issues and study requests as early as possible is important to alleviating this source of delay.[191]

149. We agree that improving public participation in pre-filing consultation is essential to the success of an integrated licensing process, and believe that the traditional process regulations should also be revised in this regard. The specific provisions for enhancing

[179] *See* Hudson River-Black River Regulating District, Project No. 2318, letter dated February 8, 2002.

[180] This would encompass conditions based on 10(j) recommendations. We do not propose to attach the standard L-Form license articles (*See* 54 FPC 1799–1928 (1975)) to draft or final NEPA documents, as we have consistently rejected requests to modify these articles, which are intentionally broad, in the context of specific license proceedings.

[181] NYSDEC states that project operational effects cannot be fully understood before a new project is built, so license articles should be included to determine what a new project's actual impacts are, and to reserve authority to modify the project as needed to meet resource goals. Licenses very often include monitoring requirements and every license includes a standard form article reserving our authority to modify the license to respond to fish and wildlife concerns. Specific post-licensing articles are, of course, a matter best determined in the context of project-specific proceedings.

[182] The joint Interior and Commerce regulations implementing the ESA are found at 50 CFR part 402.

[183] *Interagency Task Force Report on Improving Coordination of ESA Secton 7 with the FERC Licensing Process. http://www.ferc.gov/hydro/docs/interagency.htm.*

[184] ITF ESA Report, Figure 1.

[185] Proposed 18 CFR 5.1.

[186] The Commission also proposes to make non-substantive modifications to the existing 10(j) process rule at 18 CFR 4.34(e), so that the language of that section will better track the statutory provisions.

[187] ACHP, Menominee.

[188] Proposed 18 CFR 5.1.

[189] 18 CFR 4.38(b)(3); 16.8(b)(3).

[190] 18 CFR 4.38(c)(4); 16.8(c)(4).

[191] EEI, PG&E, NRG, SCE, NHA, Michigan DNR, HRC, NYSDEC, Idaho Power, NF Rancheria, Caddo, ADK, AmRivers, AMC, SCL, C–WRC, CDWR, Interior, PG&E, HETF, PCWA, APT, DM&GLH, Skancke, NYRU, Oregon, Wausau, Salish-Kootenai, HLRTC, PREPA, Kleinschmidt, Xcel, California, Michigan DNR, WPPD, RAW, GLIFWC, Virginia, NE FLOW, Wehnes, RAW, AmRivers, CRWC, WDOE.

public participation are discussed below.[192]

6. Processing Schedules and Deadlines

150. Many commenters express the view that timeliness would be improved if the Commission established schedules and deadlines, including for itself, and ensured that the deadlines are firm to the extent possible.[193] Beyond that general principle, there is little agreement.

151. Licensees fault resource agencies for most delays and favor strict application of deadlines to the actions required of agencies, tribes, and the public, particularly the filing of recommendations and Federal agency mandatory conditions, on the basis that strict deadlines provide an incentive to timely participation.[194] Resource agency, Tribal, and NGO commenters identify tardy or incomplete filings (particularly studies) by licensees as the principal reason firm schedules and deadlines are needed.[195]

152. Commenters from all camps favor the establishment of schedules and deadlines, with strict compliance required by others, but also agree that ''default'' or ''generic'' time frames need to be flexible to accommodate case-specific complicating factors and settlement agreements. There is also general agreement that the time frames in the IHC and NRG proposals, including the time period from NOI to filing of the license application, are too short, except for very simple cases.[196]

153. There is broad agreement that improving outcomes is equal in importance to reducing licensing process time and expense, particularly where 30–50 year license terms are involved, and that strict adherence to schedules may compromise the development of study plans and the conduct of studies, hamper public or Tribal participation, and be inconsistent with state water quality certification processes.[197] Various commenters similarly state that it is inappropriate to make assumptions concerning the number of field seasons required to compile data on current conditions or to complete other studies, because the time needed to obtain representative data may be affected by drought, ESA consultation, insufficient years of existing data where anadromous fish with multi-year return cycles are involved, and many other factors.[198] Others suggest that the time frames should be adjusted as necessary to accommodate instances where multi-project or basin-wide environmental analyses are necessary.[199]

154. Commenters' perceptions of the nature of, and procedures for, study plan development and the conduct of studies also influence their perceptions of timeliness. HRC and RAW, for instance, appear to view these matters as a collaborative endeavor in which consensus is required. A number of agency, tribal, and public commenters similarly advocate that schedules in individual cases should be negotiated by the Commission staff with the stakeholders,[200] or via agreements between the applicant and the parties.[201]

155. In this connection, HRC states that NGOs with minimal staff are often trying to keep up with many projects in a region, so predictability of schedules and deadlines is an important tool for them to effectively allocate resources. It adds that the traditional process provides no advance warning of notices calling for comments, recommendations, responses to draft NEPA documents, and the like, which makes their task difficult. Some Indian tribes similarly state that they have very limited resources, and that tribal decisional hierarchies and communications channels may require longer to obtain a decision than in other organizations.[202]

156. The Commission agrees with the commenters that firm schedules and deadlines are important to keep the licensing process moving, and also that there will be instances where a schedule or deadline will need to be revised. As of July 2002, the Commission's practice has been to publish a licensing schedule with each application tendering notice, and these schedules are updated periodically as required. The integrated process we are proposing also includes time frames for all critical process steps, from filing of the NOI to issuance of a license application, that will form the basis for development of case-specific detailed schedules.[203]

157. The elements of the proposed integrated process should make it easier to establish and maintain a timely schedule. Early issue identification and voluntary commencement of information-gathering are fostered by the advance notification of license expiration; Commission contact with potentially affected tribes; existing information, and process options; and the more complete informational requirements of the Pre-Application Document. Pre-filing consultation following the Applicant's NOI will be improved by full Commission staff and public participation; a Commission-approved study plan binding on the applicant which provides for interim review of study results; and a study dispute resolution process for agencies with mandatory conditioning authority. There would moreover be no opportunity after the application is filed for parties to request additional information or studies. Under these conditions, every interested entity has powerful incentives to timely participate.

158. We encourage all parties to consult in a collegial manner on the development of information and study plans (indeed, on all aspects of licensing). We are not however disposed to adopt a process, such as HRC appears to advocate, that relies almost entirely on consensus as the basis for approving a study plan and schedule. That approach would be incompatible with the three to three and one-half year time frame from the NOI to filing of the application, and would be certain to

[192] *See* Section III.F.1.

[193] Ameren/UE, NHA, HLRTC, Ameren/UE, APT, SCE, AmRivers, HRC, NMFS, RAW, NRG, California, Wisconsin DNR, Interior, PG&E, NCWRC, Southern, Duke, C–WRC, WPPD, Wyoming.

[194] NHA, HLRTC, Ameren/UE, APT, SCE, Southern, Xcel. SCE states that the Commission should decline to accept late-filed study requests and establish an ''extraordinary conditions'' test for any study requests following the first field season of studies as incentives to timely agency action.

[195] California, Oregon, Michigan DNR, HRC, NMFS, NYSDEC, CRITFC.

[196] EEI, PG&E, HETF, HRC, NHA, EEI, SCE, Snohomish, Xcel, WPPD, California, Oregon, Michigan DNR, NYSDEC, CRITFC, WGFD, Catawba, Choctaw, GLIFWC, BRB–LST, Menominee, KT, Interior. PG&E states that when parties work together to identify issues and study plans, three years is sometimes not enough to go from early issue identification to a filed license application, and that a five year process is realistic only for a simple proceeding.

[197] *E.g.,* Oregon, HRC, California, NW Indians, Menominee, NHA, Idaho Power.

[198] HRC, Wisconsin DNR, AmRivers, AMC, NMFS, NHDES, Menominee, GLIFWC, NMFS, Washington, Xcel.

[199] GLIFWC, Interior, NCWRC.

[200] Ameren/UE, AmRivers, HRC, NMFS, RAW, DM&GLH, SCL, Washington, ADK, Michigan DNR. Some commenters recommend that the rules provide for a ''default'' time frame that would apply to simple, non-controversial applications that can be adjusted to accommodate water quality certifying agency data requirements or the complications posed by individual cases. HRC, Michigan DNR, Wisconsin DNR, PG&E, Washington.

[201] HRC.

[202] Catawba, Choctaw, Menominee.

[203] Some commenters recommend that time be built into schedules to accommodate intra-agency appeals of Federal or state mandatory terms and conditions. APT, NHA, EEI. Our long-standing practice is to include final conditions in licenses and to reserve authority to modify the license depending if the licensee successfully appeals the conditions. *See e.g.,* Southern California Edison Co., 77 FERC ¶ 61,313 (1996). That policy, which permits the licensee to seek extensions of time to comply with such conditions if the burden of interim compliance would be unduly onerous, recognizes the authority of the conditioning agency while protecting the interests of the licensee during the pendency of the appeal.

ensure the filing of many applications requiring significant additional information. An applicant-proposed study plan and schedule, subject to review and comment, and appropriate dispute resolution provisions, is much more likely to ensure timeliness without sacrificing the quality of the record.

7. Settlement Agreements

159. Commenters offered very broad support for the inclusion in our regulations of specific provisions to accommodate settlement agreements, regardless of which licensing process is employed.[204]

a. Flexibility in Processing Schedules

160. One view shared by nearly all commenters is that the Commission should allow more flexibility in schedules to accommodate settlement discussions. They state that settlement agreements generally best represent the public interest because they are consensus-based, may avoid Federal/state conflicts, can reduce delays and litigation, and result in limited resources being devoted to providing environmental benefits rather than transaction costs. They indicate that the Commission's recent practice of denying requests for temporary suspension of the licensing process pending settlement negotiations is hindering settlement agreements.[205] NHA and Oregon recommend that the licensing process provide for a 12–18 month ''time-out'' for settlement negotiations, based on the joint request of the parties. California urges that flexibility in this regard is necessary in order to recognize the responsibilities of Federal and state agencies with mandatory conditioning authority.

161. The Commission strongly favors settlement agreements, which provide the opportunity to eliminate the need for more lengthy proceedings if the parties reach an agreement on the issues that is compatible with the public interest and within our authority to adopt. The integrated licensing process should provide substantial encouragement to settlement agreements by helping to ensure early identification of issues and production of information useful to parties considering whether to engage in settlement negotiations. We do not however see a need for specific provisions in our regulations to provide a ''time out'' or other flexibility in scheduling to accommodate settlement negotiations. General assertions to the contrary notwithstanding, we see no evidence that suspending Commission actions in the licensing process is more likely to result in a settlement agreement. Rather, our experience indicates that the prospect of near-term Commission action in the form of a draft or final NEPA document, or a license order, is more likely to spur the parties to resolve their differences. We are also concerned that suspending the licensing process to accommodate settlement negotiations may cause parties to view settlement negotiations as a means to obtain an open-ended suspension of the licensing process. We will, however, continue to consider requests for brief suspension of the Commission's processes on a case-by-case basis.

b. Timing and Conduct of Settlement Negotiations

162. HRC recommends that the Commission require the parties to a proceeding to meet at certain critical times in the process to explore interest in and opportunities for settlement. Others oppose this recommendation on the grounds that settlement negotiations require substantial commitments of time and can be costly, and that any such requirement is unnecessary because the parties will know whether and when the effort makes sense in the context of each proceeding.[206] RAW states that settlement discussions should begin before the licensing proceeding begins. NHA suggests that appropriate junctures for such discussions are during formation of the study plan and preparation of a draft license application. NMFS recommends that settlement discussions be barred until all information requests have been satisfied.

163. We are not inclined to require parties to meet for this purpose, or to predetermine any particular point in the process where settlement should be considered. Settlement agreements have been conducted, and agreements filed, at every step in the licensing process, from the pre-filing consultation stage to after issuance of a license order. The parties themselves are in the best position to determine whether and when it makes sense to consider settlement negotiations. It may however be beneficial to encourage the applicant at the time the draft license application is filed to include with that filing a non-binding statement of whether or not it intends to make an offer to engage in settlement negotiations.[207] Such a provision might encourage all parties to consider whether the proceeding is in a favorable posture with regard to potential settlement negotiations. The Commission requests comments on this matter.

164. NMFS recommends that we require parties to establish ground rules and a communications protocol before settlement discussions begin. C–WRC similarly suggests that the rules should provide for stakeholder charters to accompany settlement discussions. The Commission agrees in general that settlement discussions should proceed based on mutual understandings concerning the scope of, and procedures for, negotiation. These commenters however offer no reason, and we see none, to limit the flexibility of parties to an individual proceeding with regard to the drafting of agreements, written or oral, in this connection.

165. NHA suggests that the ADR procedures established in Order No. 578[208] may be unduly formal and that the Commission's Dispute Resolution Service (DRS) staff could serve as facilitators rather than mediators.[209] Some commenters state that the Commission could assist settlement negotiations by providing training to stakeholders in interest-based negotiation processes[210] or by providing neutral facilitators or mediators to parties involved in negotiations.[211] The Commission's dispute resolution program encompasses all of these recommendations where circumstances are appropriate. The DRS is designed to encourage the use of ADR, train the Commission staff and other parties in its use, and, where appropriate, provide staff to serve as neutral facilitators of settlement negotiations. Under this program the Commission's administrative law judges have received

[204] EEI, SCE, Oregon, Kleinschmidt, NHA, Idaho Power, HRC, Wisconsin DNR, Interior, PG&E, AmRivers, NCWRC, Xcel, NYSDEC, NMFS, CRITFC, ADF&G.

[205] EEI, CRITFC, SCE, Oregon, Kleinschmidt, NHA, Idaho Power, HRC, Wisconsin DNR, Interior, PG&E, AmRivers, NCWRC, Xcel, NMFS, NYRU, NYSDEC, SCL, Idaho Power, CDWR, VANR, Troutman, Menominee, CTUIR, Xcel, Michigan DNR, NCWRC, WPPD, DM&GLH, Domtar, FPL, AMC, AW, California.

[206] NHA, PG&E, CDWR, NMFS.

[207] Alternatively, an applicant might make such a statement when all major information-gathering and studies are completed.

[208] Order No. 578 (1995), 60 FR 19494 (April 19, 1995), FERC Stats. & Regs., Regulations Preambles January 1991–June 1996 ¶ 31,018 (April 12, 1995).

[209] In general, a facilitator is a person who works with the group members by providing procedural directions concerning how the group can move efficiently through the problem solving steps of the meeting and arrive at a jointly agreed-upon goal. More concisely stated, a facilitator's efforts are focused on process. A mediator also brings process skills to the group, but focuses in addition on helping the group member reach a mutually acceptable substantive resolution of the issues. This may involve working with the whole group or subsets of the group to explore interests and develop options that address the interests with the aim of reaching settlement.

[210] PacifiCorp.

[211] SCE, NHA, PG&E, NCWRC, Kleinschmidt, Michigan DNR.

training in service as third-party neutrals, and judges have served in that capacity in a number of hydroelectric proceedings. In addition, the Commission has provided various training programs in facilitation, mediation, and dispute resolution to its staff. In just the past few years, over 100 members of the Commission staff have completed training courses in various forms of ADR, and many staff members have put their skills to work in assisting collaborative licensing processes and settlement negotiations as mediators or facilitators.

166. Finally, NMFS states that the Commission should establish schedules for acting on settlement agreements. As noted above, we are already providing schedules for license application proceedings.

c. Guidance on the Content of Settlement Agreements

167. Several commenters stated that the Commission's rules should provide guidance concerning the Commission's policies on what kinds of settlement provisions are or are not acceptable,[212] or that the Commission should have a policy of deferring to settlement agreements in the absence of illegality.[213] Specific subjects on which commenters seek guidance include support for adaptive management programs for licenses,[214] mitigation measures in lieu of additional studies,[215] mitigation measures that occur outside of existing project boundaries or are beyond the Commission's authority to require,[216] and confidentiality agreements.[217]

168. The Commission strongly supports the efforts of parties appearing before it to settle their differences and propose to the Commission agreements to resolve pending proceedings in the public interest.[218] We make every effort to fully accept uncontested settlement agreements that are consistent with the public interest. Where settlements are contested, the Commission has an additional duty to protect the interests of non-settling parties and must ensure that agreements are fair and reasonable. Our conclusions concerning the compatibility of a settlement agreement with the public interest are informed by the comprehensive development standard of FPA section 10(a)(1) and the policies and practices we have adopted pursuant to that standard. This is not the same as the absence of illegality, and our responsibility to review the merits of each settlement agreement in this context is statutory and cannot be delegated to the settling parties.

169. Our practice is to incorporate into the license those provisions of an approved settlement agreement that are within the Commission's authority to enforce or, albeit not enforceable by the Commission, are required to be included because they are contained in a water quality certification issued pursuant to Clean Water Act Section 401 or mandatory terms and conditions issued pursuant to FPA Sections 4(e) or 18.[219]

170. We do not propose to include in the regulations statements endorsing in general terms any potential components of a settlement agreement, such as adaptive management plans, mitigation measures in lieu of studies, or mitigation measures that may occur outside of an existing project boundary. The Commission has approved all of these things in the context of specific settlement agreements, but only after considering the entire record of the proceeding and conducting the analyses required by applicable portions of the FPA, NEPA, ESA, NHPA, and any other applicable statutes.

E. Description of Integrated Licensing Process

1. Applicability

a. New and Original Licenses

171. The September 12, 2002 Notice solicited comments on whether there are issues unique to the processing of original license applications or new license applications that need to be addressed in an integrated licensing process. Most commenters suggested that studies associated with original licensing may require more time than studies for new licenses, owing to a lack of existing data and uncertainty with regard to the specific project proposal during pre-filing consultation. They recommend that an integrated licensing process, if it applies to original licenses, should be flexible in order to accommodate these considerations.[220]

172. The proposed integrated process would apply to original licenses as well as new licenses.[221] As detailed below, a potential applicant for an original license would be required to file an NOI. Although there is no statutory limit on the time between filing of the NOI and filing of an original license application, the time periods in the proposed rule between NOI and license application are roughly coincident with the three year period for which preliminary permits are issued. This should bring some additional pressure to bear on permit holders to timely develop their project proposals, which responds to the concerns of states such as Oregon that believe too much of their time is spent responding to ill-formed and highly speculative proposals under preliminary permits.[222] A few commenters suggest that it might be desirable to merge the integrated process and preliminary permit regulations,[223] but we see no reason the proposed rules cannot co-exist with the existing preliminary permit regulations. We would however modify our practice by including in each order issuing a preliminary permit language directing the permit holder to the requirements of new part 5. The Commission requests comments on whether the proposed

[212] APT, HRC, Interior, AMC, PG&E, Wisconsin DNR.

[213] Washington, Interior, NYSDEC, NMFS. DM&GLH states that when a settlement agreement is accompanied by an applicant-prepared EA (APEA), the Commission should adopt the APEA, rather than prepare a separate NEPA document. While an APEA prepared in connection with a settlement agreement is certain to be helpful to the Commission's analysis, the Commission cannot delegate its NEPA responsibilities to applicants or settling parties.

[214] RAW, NYSDEC, Oregon, Michigan DNR.

[215] Xcel, Southern, NHA.

[216] Oregon, Michigan DNR.

[217] SCE, NHA.

[218] 18 CFR 385.602 (g)(3). *See also* City of Seattle, WA, 71 FERC ¶ 61,159 (1995), *order on reh'g,* 75 FERC ¶ 61,319 (1996); Consumers Power Company, 68 FERC ¶ 61,1077 (1994); P.U.D. No. 2 of Grant County, WA, 45 FERC ¶ 61,401 (1988); Long Lake Energy Corp., 34 FERC ¶ 61,225 (1986).

[219] In Erie Boulevard Hydropower LP, 88 FERC ¶ 61,176 (1999), we identified the types of settlement provisions that are beyond our authority to enforce because they apply to non-jurisdictional entities. These typically include provisions which govern relations among parties to the settlement agreement, such as dispute resolution, and the procedural practices of such groups. *See also* Avista Corporation, 90 FERC ¶ 61,167 (2000) and 93 FERC ¶ 61,116 at p. 61,329. Until recently, the Commission declined, as a matter of policy, to enforce such provisions against licensees. That policy was reversed in Erie Boulevard Hydropower, LP and Hudson River-Black River Regulating District, 100 FERC ¶ 61,321, at p. 62,502 (2002).

[220] HRC, Michigan DNR, NMFS. HRC also notes that a license application for a new project might also involve regulatory requirements not applicable to a new license application, such as a dredge and fill permit from the U.S. Army Corps of Engineers pursuant to Section 404 of the Clean Water Act, 33 U.S.C. 344. Only ADK specifically recommends that the integrated licensing process apply to original licenses.

[221] The proposed rule would not apply to applications for non-power licenses, because they are an interim measure until a separate state, municipal, interstate, or Federal agency assumes regulatory supervision over the lands and facilities involved when a licensee proposes to cease power generation. They are, in essence, a form of license surrender.

[222] Where a potential applicant is genuinely interested in submitting a license application, but circumstances are such that additional time is needed to develop the specific licensing proposal, it may be appropriate to grant a waiver or extension of the pertinent 18 CFR part 5 regulations.

[223] NHA, Interior.

integrated process should apply to original license applications.

b. Competition for New Licenses

173. One matter that has received very little attention is whether a non-licensee competitor for a new license for an existing project should be subject to the same regulatory requirements under the integrated process as existing licensees. The proposed integrated process regulations would also apply to such competitors, except that they would not be required to file a notification of intent. We have twice previously considered and rejected recommendations to require potential competitors to file notices of intent,[224] and we see no reason to revisit the matter again.

2. Process Steps

174. HRC states that the existing licensing process regulations are confusing because they require the reader to cross-reference sections in parts 4 and 16, and proposes that any integrated licensing process regulations be sequential in form; that is, consist of a series of steps from beginning to end. The proposed regulation text does just that and should make the process easily understood,[225] but necessarily includes some cross-referencing to sections of parts 4 and 16.[226]

a. NOI, Process Schedule, and Study Plan Development

175. The NOI would continue to be due between five and five and one-half years prior to expiration of the license. It would be accompanied by the Pre-Application Document,[227] which the potential applicant would serve on resource agencies, tribes, and the public. The Applicant could at that time also request to be designated as the Commission's non-Federal representative for purposes of consultation under the ESA and Magnuson-Stevens Act,[228] or to initiate consultation under NHPA Section 106.

176. The integrated licensing process is proposed to be the default process. A potential applicant for an original or new license requesting to use the traditional process or ALP would have to file a request to do so when it files its NOI and Pre-Application Document. It would, at the same time, have to issue public notice of any request to use the traditional process or ALP in order to ensure that the general public has an opportunity to respond.[229]

177. Filing of the NOI and Pre-Application Document would mark the commencement of the integrated process proceeding. Commission staff would be assigned to the proceeding at that time.[230] The Commission would issue public notice of the filing and of a public meeting and site visit. The purposes of the public meeting would be to review existing environmental conditions and resource management goals, review existing information, initiate NEPA scoping, consider the advisability of cooperating agency relationships, and develop a schedule that, to the extent possible, coordinates all applicable regulatory processes and results in an approved study plan (including any dispute resolution) no later than a year after the NOI is filed. The participants' comments and information requests would be due following the public meeting and site visit. That same notice would also include a decision on any request to use the traditional process or the ALP.

178. For applications developed using the integrated process,[231] the potential applicant would file, following comments in response to the notice, a revised Pre-Application Document and a proposed information-gathering and study plan following comments in response to the notice.[232] That would be followed by the Commission's NEPA Scoping Document 1 (SD1), comments on SD1 and the applicant's proposed study plan, and a meeting to discuss the proposed study plan and seek informal resolution of study disagreements.[233]

179. Following the study plan meeting, the applicant would file for Commission approval a revised study plan, including a description of informal efforts made to resolve study disputes and explaining why the applicant rejected any of the stakeholder information and study requests. The Commission would issue a preliminary determination on the revised study plan, describing any modifications to the plan as proposed.[234]

180. The study plan would be deemed approved as provided for in the preliminary determination and the Director would issue an order directing the Applicant to implement the plan, except with respect to any parts of the proposed study plan that become the subject of the formal dispute resolution procedure.[235]

181. The dispute resolution procedure is designed to be concluded within 90 days. Federal or state agencies or Indian tribes with mandatory conditioning authority would be required to file any notice of dispute within 20 days. The Commission would within another 20 days convene one or more three-member dispute resolution panels to consider all disputes with respect to specified resource areas (*e.g.*, fisheries, recreation). Two of the panelists would represent the Commission and the agency that raised the dispute, respectively, and neither would have had any prior involvement with the proceeding. The third panelist would be selected by the other two panelists from among a list of technical experts, and would be required to certify that he or she has no conflicts of interest. The Commission requests comments on whether it may be appropriate in some circumstances for one panel to make recommendations with respect to disputes involving different, but related resources, such as fisheries and aquatic resources. The applicant would have 25 days from the notice of study dispute to file and serve on the panelists any information or argument with respect to the dispute.

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[224] *See* Order No. 513, 54 FR 23,756 (June 2, 1989), 55 FR 10,768 (March 23, 1990), p. 31,415, FERC Stats. & Regs. Regulations Preambles 1986–1990, ¶ 30,854 (May 17, 1989).

[225] Appendix C is a flow chart depicting the proposed integrated process. The flow chart appears in color on the Commission's website.

[226] Some commenters also suggested a wholesale restructuring of the regulations in which parts 4 and 16 would be combined. Part 16 is distinct from part 4 because the statutory provisions applicable to new licenses established in 1986 by ECPA are in numerous respects different from the requirements applicable to original licenses: The part 4 framework governs the many overlapping aspects (*e.g.*, application procedures, application contents, amendments) of the numerous types of authorizations (original, new, subsequent, minor, major, non-power, and transmission line licenses; small conduit and under 5 megawatt exemptions; amendments to same) that the Commission's hydropower program entails.

[227] *See* Section III.D.1.b, *supra.*

[228] Section 305(b) of the Magnuson-Stevens Fishery Conservation and Management Act, 16 U.S.C. 1855(b) requires Federal agencies to consult with NMFS on any action that may result in adverse effects to essential fish habitat.

[229] *See* proposed 18 CFR 5.1 (Applicability, definitions, requirement to consult, process selection). NGOs likely to be interested in the proceeding should not be caught unaware in any event, because existing license expiration dates will be posted on the Commission's website.

[230] Commission staff would be responsible for filing comments and recommendations on information-gathering and study proposals, and in other respects have the same functions as most other stakeholders throughout the licensing proceeding.

[231] The remainder of the discussion in this section, unless specifically stated to be otherwise, pertains only to the proposed integrated process.

[232] Proposed 18 CFR 5.6 (Comments and information requests), 18 CFR 5.7 (Revised pre-application document), and 18 CFR 5.8 (Applicant's proposed study plan).

[233] Proposed 18 CFR 5.9 (Scoping document and study plan meeting); 18 CFR 5.10 (Comments and information or study requests); and 18 CFR 5.11 (Study plan meeting).

[234] Proposed 18 CFR 5.12 (Revised study plan and preliminary determination).

[235] *Id.*

182. No later than 50 days following the notice of dispute, the panel would make a written recommendation to the Director of Energy Projects. The panel would recommend that the Director require the applicant to conduct the requested information-gathering or study if the panel finds that the request satisfies the criteria set forth in the regulations. The Director would issue a decision within 70 days of the notice of dispute, either accepting the panel's recommendation or reaching a different conclusion that explains why the information and arguments before the panel do not support the panel's recommendation or explains why the recommendation is inappropriate as a result of pertinent laws, regulations, or Commission policies. The Director's decision would constitute an amendment to the approved study plan, and would be accompanied by an order directing the applicant to carry out the study plan as amended.[236]

b. Conduct of Studies

183. The proposed rule requires the applicant during the period of information-gathering and study to file status reports including study results and analyses to date. The first such report would be filed after the first season of studies or other appropriate time following the date of the preliminary determination. The status report would also include any proposals to modify the study plan and schedule in light of the results to date. The initial status report would be followed by a meeting with parties and Commission staff. Following the meeting, the Applicant would file a meeting summary and, if necessary, a request to modify the study plan. The Applicant's meeting summary and request to modify the plan, if any, would be deemed approved unless any party filed a notice of disagreement. The procedure for resolving these disagreements would not include a panel, but would rest on written submissions to the Director. Following responses to any notice of dispute, the Director would issue an order resolving the dispute.[237]

184. An updated status report would follow the first status report after the second season of studies, if any, or other appropriate time in light of the circumstances of the cases. It would be subject to the same review, comment, and dispute resolution procedures, except that any party requesting additional information or studies at this late point in the information gathering process would be required to show exceptional circumstances warranting acceptance of the request.[238] The Commission requests comments on whether participants should be permitted to make new information-gathering or study requests (as opposed to making requests for modification of ongoing studies, or to raise disputes concerning the implementation of, existing studies), following the updated status report.

185. The Commission also requests comments on whether there should be a requirement for parties to file written comments on the potential applicant's status reports prior to the required meeting, or whether the familiarity of the parties with the facts of the proceeding may make written comments at this juncture superfluous.

c. Draft Application to License Order

186. Following the updated status report, the Applicant would file the draft license application for comment by the parties and Commission staff. The draft application would be required to contain, insofar as possible, the same contents as a final license application.[239] Also, the form of 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.[240]

187. The Commission requests comments on whether the draft license application contents should be required to track the contents of the final application, or whether it would be preferable to require only the proposed revised Exhibit E, or any other materials, to be included. One drafting group also considered whether a draft license application should be filed at all, but reached no conclusions. The Commission also requests 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.

188. The participants and Commission staff would file comments on the draft license application, including recommendations concerning whether an environmental assessment is acceptable or an environmental impact statement is needed. Any commenter requesting additional information or studies in its comments would be required to show exceptional circumstances, and to address in its request certain criteria, as applicable to the facts of that case.[241]

189. We expect that in most cases the updated status report will 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. In such circumstances, it may be appropriate for the parties to file preliminary 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. Were this to happen, it follows that the parties could appropriately be asked to file modified (*i.e.*, final) recommendations or terms and conditions in response to the Commission's notice of ready for environmental analysis, rather than following issuance of a draft environmental assessment or environmental impact statement, or an environmental assessment not preceded by a draft, as provided for in the proposed rule. If so, a step could be eliminated at the end of the process, and Commission action on the application could be rendered more timely.

190. The Commission requests comments on whether the Commission should in each case make a determination following the updated studies status report of whether the record is sufficiently complete to require filing of preliminary recommendations and terms and conditions with comments on the draft license application, filing of final terms and conditions in response to the REA notice, and elimination of an opportunity to file further revised recommendations or terms and conditions following the draft NEPA document, or environmental assessment, as applicable.

191. The Commission further solicits comment on how to ensure that resource agencies have an adequate opportunity to consider public comment on their proposed terms and conditions if such an approach were adopted, and how such an approach could be

[236] Proposed 18 CFR 5.13 (Study dispute resolution process).

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

[238] *Id.*

[239] Proposed 18 CFR 5.15 (Draft license application). In contrast, the existing regulations require the draft license application to include only responses to agency and tribal comments and study requests, the results of information-gathering and studies, and proposed environmental protection measures. *See* 18 CFR 4.38(c)(4).

[240] Proposed 18 CFR 5.17 (Application content). By contrast, *see e.g.*, the existing Exhibit E requirements of part 4, subpart F (Major Project—Existing Dam), 18 CFR 4.51(f).

[241] Proposed 18 CFR 5.15.

accommodated where the resource agencies are working cooperatively with the Commission on preparation of the NEPA document.

192. The application would be required to include the applicant's response to comments on the draft application and, with respect to any requests for additional information gathering or studies in the comments to which it agrees, either provide the requested information or include a plan and schedule for doing so. 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.[242] The application would also be required to include a copy of the water quality certification, a copy of the request for certification, or evidence of waiver of water quality certification.[243]

193. Within 14 days of the application filing, the Commission would issue public notice of the tendering of the application, including a preliminary schedule of major processing milestones.[244] Within 30 days, the Commission would make a determination with respect to any requests for additional information or studies made in comments on the draft license application.[245]

194. When all filing requirements are met and the approved study plan is completed, the Commission would issue a notice of acceptance and ready for environmental analysis, requesting comments, protests, interventions; recommendations, preliminary mandatory terms and conditions, and fishway prescriptions, and an updated schedule for the remainder of the proceeding.[246] Responses would be due within 60 days.[247]

195. Each draft EA or EIS, and EA not preceded by a draft, will include for comment draft license articles based on recommendations made pursuant to FPA Sections 10(a) (including 10(j) recommendations),[248] and preliminary mandatory terms and conditions and fishway prescriptions. If the application does not require a draft EA, the EA would be issued within 120 days of date for responses to the application acceptance and REA notice, with comments thereon due in 30–45 days, and modified terms and conditions due 60 days thereafter. The Commission would act on the application within 60 days following the date for filing modified terms and conditions.[249]

196. For applications requiring a draft NEPA document, the draft NEPA document would be issued within 180 days from the date responses are due to the acceptance and REA notice, with comments due in from 30 to 60 days. Modified recommendations, terms and conditions, and fishway prescriptions would be due within 60 days of the date for filing of comments on the draft NEPA document. The Commission would issue a final NEPA document within 90 days following the date for filing modified terms and conditions or fishway prescriptions. The Commission would act on the application within 90 days following issuance of the final NEPA document.[250]

197. An amendment to an application filed under part 5 would be governed by the same provisions that govern amendments to applications under the existing regulations.[251]

198. The Commission requests comments on which process steps in the proposed integrated process may require adjustment. The Commission also requests comments on which time frames, if any, should be specified in the regulations for purposes of guiding the development of a process plan and schedule (including studies), and which may not be appropriate for specification in the regulations, but rather should be developed entirely in the context of case-specific facts.

F. Improvements to Traditional Process and ALP

199. Various commenters propose that the traditional licensing process be modified to include various elements of an integrated licensing process or other features.[252] These include: Early public and agency input on issues and study design;[253] establishment of specific criteria for study requests;[254] the outcome of the existing pre-filing study dispute resolution to be binding on all stakeholders;[255] waiver of pre-filing consultation requirements; greater use of applicant-prepared NEPA documents; including process steps in the ALP; and moving NEPA scoping into the pre-filing consultation period.[256] In addition to draft license articles discussed above, we are adopting two of these recommendations; increased public participation and mandatory, binding dispute resolution.

1. Increased Public Participation

200. NGOs identify limited opportunity for public participation as a major problem in the traditional process,[257] and many licensees and other commenters agree.[258] American Rivers and Alabama Rivers also state that consultation meetings are often held at times and places that are inconvenient for unpaid volunteers. They recommend that applicants hold more consultation meetings on evenings and weekends when NGO volunteers are more likely to be available.

201. We agree that the traditional process needs to provide greater opportunity for public participation. Since the current regulations were established in 1989, the role of the public, in particular NGOs, has increased dramatically and their participation is often crucial to the negotiation of settlement agreements. Environmental groups, organizations representing recreation users, as well as local residents, consumer advocacy groups, and organizations representing ratepayers all have important interests to represent. We *see* no reason potential applicants should not make reasonable efforts to bring these entities into pre-filing consultation as early as possible, and for these entities to be involved in the development of study plans. We are therefore proposing to modify the existing pre-filing consultation regulations to that end.[259]

202. There is no need to modify the ALP with regard to public participation, since it already requires the applicant to include the public in pre-filing

[242] Proposed 18 CFR 5.16(e).

[243] Proposed 18 CFR 5.17(f).

[244] Proposed 18 CFR 5.18 (Tendering notice and schedule).

[245] Proposed 18 CFR 5.18(b).

[246] Proposed 18 CFR 5.21 (Notice of acceptance and ready for environmental analysis).

[247] Proposed 18 CFR 5.22 (Response to notice).

[248] These would not include standard form license articles. *See* Section III.D.4.d., *supra.*

[249] Proposed 18 CFR 5.23 (Applications not requiring a draft NEPA document).

[250] Proposed 18 CFR 5.24 (Applications requiring a draft NEPA document).

[251] Proposed 18 CFR 5.26 (Amendment of application).

[252] AMC, SCE, NHA, SCL, EEI, PREPA, California, Wisconsin DNR, CTUIR.

[253] HRC, AMC, California, SCE, NHA, Wisconsin DNR, SCDWQ, SCL.

[254] Study criteria are identified by SCE and NHA.

[255] SCE.

[256] SCL, Southern. Southern would also require the applicant to file a study plan for Commission approval following the issuance of a staff scoping document.

[257] HRC, ADK, AmRivers, C–WRC, KCCNY, CRWC, RAW, NE FLOW.

[258] NHA, SCE, PG&E, Southern. All of the industry-sponsored process proposals contemplate greater pre-filing participation by the public, although the degree of participation is not always clear. A few industry commenters suggest that the general public already plays too great a role in licensing and makes unreasonable study requests. They recommend that public participation be limited to local residents who own lands adjacent to project reservoirs or other persons similarly situated. Wausau, DM&GLH, Domtar.

[259] Briefly stated, in most places that 18 CFR 4.38 and 16.8 refer to consultation with resource agencies and Indian tribes, the reference has been changed to resource agencies, Indian tribes and members of the public.

consultation and to do so according to mutually agreeable rules.[260]

2. Mandatory, Binding Study Dispute Resolution

203. As discussed above, lack of effective study dispute resolution has been identified as one of the principal reasons for license applications that are incomplete or require significant additional information. The most commonly identified reasons for failing to use the existing study dispute resolution process are that it is not required to be used and that the result is advisory only.

204. We therefore propose 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. We also propose to make the outcome of dispute resolution binding on all participants. In other words, the Director's order resolving the dispute will, 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.

205. Dispute resolution requests would occur during first stage consultation following the applicant's response to study requests by agencies, Indian tribes, or the public. Any additional study requests during the second stage of consultation would be subject to the same dispute resolution requirements.[261]

206. Consistent with our proposals to provide for full public participation in pre-filing consultation, require all potential license applicants to prepare the Pre-Application Document, and make study dispute resolution mandatory and binding, we also propose to eliminate from the traditional process for license applications the provision for participants to file requests for additional scientific studies not later than 60 days after the application is filed, and for the license applicant to respond. Resource agencies, tribes, and the public will have had two opportunities to request studies during pre-filing consultation and study disputes should be resolved, so there should be no need for an additional post-application opportunity to do so.[262]

207. The ALP process includes a provision for dispute resolution which is similar to the existing procedures for the traditional process and which, like those procedures, is advisory.[263] We propose to leave the existing ALP dispute resolution procedures in place, because mandatory, binding dispute resolution appears to be incompatible with the collaborative nature of the ALP. We request however comments on whether there may be circumstances under which binding study dispute resolution could be conducted in a manner that safeguards the collaborative process.

3. Recommendations Not Adopted

a. Waiver of Pre-Filing Consultation

208. Some industry commenters favor special provisions for non-controversial projects, which may include many small projects.[264] They state that small projects probably have few impacts that warrant serious study,[265] and that the cost of licensing is already disproportionately high for small projects.[266] PREPA recommends that projects be categorized by size and that small projects be the subject of a separate fast track process with short time frames and one year of studies, if any are needed.

209. In this connection, NHA and EEI recommend that applicants be permitted to request waiver of all or part of the pre-filing consultation requirements. Under this proposal, an applicant would, prior to the NOI deadline, distribute an information package to resource agencies, tribes, and other interested entities. This would be followed by a public meeting at which the Commission staff would explain the process options, and the Commission staff and applicant would seek input on an appropriate process. Following the meeting, and presumably before the NOI deadline, the applicant would choose a post-application NEPA process for the project. This would be accompanied by a request for waiver of all or part of the pre-filing consultation requirements.[267] The waiver request would be subject to public notice and comment. The applicant would still be required to meet the applicable filing requirements. Further public participation would be deferred until after the application is filed, as part of the Commission's NEPA process.[268]

210. NYSDEC and New York Rivers oppose any special provisions for small projects or those an applicant may regard as non-controversial. They state that project size is no determinant of environmental impacts or the scope of issues.[269] NYSDEC suggests that a single, flexible licensing process can accommodate small projects with few issues, but that the determination of issues and information needs can only be developed through NEPA scoping.

211. We are not inclined to adopt this aspect of NHA's proposal. For those applicants who use the traditional process, existing § 4.38(e)(1) already excuses applicants from complying with the pre-filing consultation requirements to the extent that a resource agency or Indian tribe is willing to waive consultation in writing. If a proposed project indeed engenders little controversy, then such waivers, in whole or part, may be obtainable in any event, or the burden of pre-filing information-gathering and studies should be modest. We also think it would be asking too much of stakeholders to comment on a waiver request following as little discussion as a single public meeting based on an information package that will necessarily be very slim with respect to project operations under a future new license. Finally, NHA's proposed criteria are not appropriate. Any information used in a NEPA analysis more than several years old is likely to be outdated with respect to current environmental conditions, and the document is likely to lack much information that is now routinely required. Nonetheless, the Commission recognizes the important place in the nation's energy infrastructure of small hydropower projects and is concerned about the potential imposition of unnecessary relicensing costs on these projects. We therefore request comments on other approaches to streamlining the licensing process for small projects without compromising the interests of other stakeholders.

[260] *See* 18 CFR 4.38(i).

[261] *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).

[262] *See* proposed changes to 18 CFR 4.32(b)(7).

[263] 18 CFR 4.34(i)(6)(vii). Any party may request dispute resolution, but only after making reasonable efforts to resolve the matter informally.

[264] NHA, EEI, Spaulding.

[265] PREPA.

[266] Spaulding.

[267] NHA suggests that appropriate criteria for granting such waivers would include where: (1) The project has previously undergone NEPA review, as far back as 1969, which predates the Clean Water Act; (2) no new ground-disturbing facilities would be constructed; or (3) the project operation would be the same as under the existing license.

[268] NHA, EEI.

[269] NYSDEC, New York Rivers.

b. Applicant-Prepared NEPA Documents

212. Some licensees state that the licensing process would be less redundant and more timely if the Commission would permit applicants to include a draft EA or EIS with their application even if they use the traditional process.[270] That would clearly be inappropriate under the existing traditional process, because of the limited opportunity for public participation and the all-too-common continuation at the license application stage of study disputes. Such documents would in many cases be less useful to the Commission in fulfilling its NEPA responsibilities than the existing Exhibit E. Increasing public participation and adding binding dispute resolution to the traditional process should alleviate this problem, but we are not certain to what extent. The Commission requests comments on whether the Commission should modify its regulations in this regard.

c. Process Steps in the ALP

213. Some commenters state that the ALP is difficult to work with because the regulations do not clearly define process steps and the roles of the participants. They suggest that this gives applicants too much control over ALP processes, and that the ALP rules should be clarified in this regard.[271] We do not propose to impose any additional process steps to the ALP. The existing regulations provide the participants great flexibility to devise processes amenable to all participants, within certain general parameters, including a communications protocol, distribution of an initial information package, meetings open to the public, cooperative NEPA scoping and study plan development, and preliminary NEPA documents. The participants also set their own schedule, subject to the few limits established by the FPA and our implementing regulations (*i.e.*, final date for NOI and filing of new license application). The Commission staff, including its DRS, is also available upon request to assist the participants' efforts to resolve issues. We think this consensus-based, flexible approach is in part responsible for making the ALP a success story. Commenters more comfortable with a pre-determined process should find the integrated process more appealing.

214. PFMC states that participation in ALPs is difficult for some entities because it tends to be labor-intensive and they lack the resources to make the necessary commitment of time. It recommends that the Commission deny applicant requests to use the ALP if stakeholders indicate that they lack the needed resources. The Commission carefully considers each request to use the ALP and will, in appropriate cases, deny requests to use it where there is an absence of sufficient support from stakeholders.[272]

G. Ancillary Matters

1. Intervention by Federal and State Agencies

215. Federal agencies have requested that the Commission permit them to file a notice of intervention rather than a motion to intervene in all hydroelectric proceedings, grant them automatic intervenor status in all hydroelectric proceedings, or treat a grant of intervention in a licensing proceeding for any project as a grant of intervention in all subsequent proceedings involving that project. They contend that their mandatory conditioning and fishway prescription authority under FPA sections 4(e) and 18, respectively, responsibilities with respect to providing fish and wildlife recommendations pursuant to FPA section 10(j), and roles and responsibilities under other statutes that directly implicate the licensing process, such as the ESA and NHPA, ensure that they have a basis for intervening in any licensing proceeding.

216. The Commission agrees that the roles and responsibilities of these Federal agencies under the FPA and other applicable law ensure that their timely motions to intervene will be granted. The same consideration applies to the intervention of these Federal agencies in pipeline certificate proceedings under the Natural Gas Act. We therefore propose to permit these agencies to intervene by timely filing a notice of intervention in any proceeding, as is currently permitted for intervention by the Secretary of Energy and State Commissions pursuant to 18 CFR 385.214 (a) and (b). The Federal agencies that would be permitted to intervene by notice are the U.S. Departments of the Interior, Commerce, and Agriculture, and the Advisory Council on Historic Preservation.[273] We also propose to permit notice by intervention by State fish and wildlife and State water quality certification agencies, in light of their responsibilities under FPA section 10(j) and section 401 of the Clean Water Act, respectively.

217. It is not appropriate to grant automatic intervenor status in all proceedings, or to treat an intervention in any proceeding as an intervention in any other proceeding. The filing of a notice of intervention is at worst a very minor inconvenience. More important, the Commission solicits interventions at the beginning of proceedings in order to ensure that the concerns of all interested entities are timely considered, and known to all other interested entities, in the context of the procedures specific to that proceeding. No interested entity should have the option of remaining silent until the proceeding is well advanced unless it can show, in a late motion to intervene, good cause why it has not previously intervened.

2. Information Technology

218. GLIFWC states that pre-filing consultation and application development can involve many large documents that are not necessarily easily or cheaply obtained or readily searched, and that some tribes and other parties have limited areas of interest. They recommend that applicants be required to put as much information as possible on a website, so that participants can download documents of interest and use document searching capabilities to more easily find information relevant to their area of interest. Long View recommends that the Commission explicitly authorize license applicants to make the data now required to be made available to the public in public libraries or other places available on line instead.

219. The use of websites to disseminate information in licensing proceedings has grown dramatically in the past several years, particularly where applicants are using the ALP. The manner in which the internet is used to disseminate information and documents varies substantially from case to case. Uses range from posting little more than schedules of events, to posting of all documents generated during the licensing process or that existing licensees are required to make public by § 16.7 of our rules, to interactive stakeholder participation. The advantages of using the internet include adding transparency to the process,

[270] DM&GLH, Domtar, APT. Applicants who use the ALP are authorized to include a draft NEPA document with their application.

[271] CRITFC, NYRU, AMC, KCCNY, HRC.

[272] For example, the Commission declined to approve one licensee's request to use the ALP where it did not appear that there was sufficient support for the process from critical participants. In that case, the Commission is providing limited support by assigning separate technical and legal staff to assist stakeholders, but who are not active participants in prefiling consultation.

[273] An eligible Federal agency that does not timely intervene would be required to comply with the rules for motions to intervene applicable to any person under 18 CFR 385.214(a)(3), including the content requirements of 18 CFR 385.214(b).

document retrieval, and helping participants stay up to speed. If, for instance, a stakeholder in an ALP misses a meeting, it may be able to download or read meeting minutes.

220. We are not convinced that it is necessary or appropriate to require that all information required by our regulations to be made public before or during a licensing proceeding be made available on the internet or by CD ROM.[274] This may make sense for licensing proceedings in connection with large projects, or smaller projects operated by licensees with substantial resources.[275] There are however many small projects operated by small enterprises for which the cost of establishing and maintaining a Web site may be prohibitive.[276] There may also be concerns about site security and accidental dissemination of information prejudicial to national security.

221. Finally, we note that the Commission has granted waiver for an existing licensee to use a Web site in lieu of the requirement of § 16.7(d) to maintain a public ''licensing library,'' in circumstances where the licensee agreed to mail documents to persons lacking access to the internet.[277]

3. Project Boundaries and Maps

222. The Commission believes the existing regulations regarding the filing of maps to accompany applications for preliminary permits, exemptions, and licenses, which were most recently updated in 1988, have become outdated as the result of technological innovations since that time. Specifically, the Commission has been converting project boundary maps into georeferenced electronic maps to better enable it to evaluate and describe hydropower applications. To facilitate this effort, the Commission proposes to require applicants for licenses, exemptions, and amendments thereto, to file project boundary maps in a georeferenced electronic format compatible with the Commission's geographic information system.

223. Also, the Commission's current regulations do not require minor projects (projects with an installed capacity of 1.5 MW or less) occupying non-Federal lands to have a project boundary, because the project boundary for such projects was historically considered to be the reservoir shoreline.[278] Consistent with the effort described above, the Commission proposes to require all license and exemption applicants, regardless of the license or exemption type, to provide a project boundary with each application. For minor projects, a project boundary line would assist in establishing the project lands. To have consistency among all types of licenses and exemptions, we propose to modify the convention for naming exhibit drawings by requiring for all licenses and exemptions that Exhibit F contain design drawings of the principal project works, including fishways and fish screening facilities, and Exhibit G identify the project boundaries.[279] The Commission requests comments on this proposal.

4. Miscellaneous Filing Requirements

224. The Commission also proposes minor additions to the application filing requirements of §§ 4.41, 4.51, and 4.61. These are: monthly flow duration curves;[280] minimum and maximum hydraulic capacities for the powerplant;[281] estimated capital and operating and maintenance (O&M) expenses for each proposed environmental mitigation or enhancement measure;[282] estimates of the costs to develop the license application;[283] on-peak and off-peak values of project power, and the basis for the value determinations;[284] estimated annual increase or decrease in generation at existing projects;[285] remaining undepreciated net investment or book value of project;[286] annual O&M expenses for environmental measures;[287] a detailed, single-line electrical diagram;[288] and a statement of measures taken or planned to ensure safe management, operation, and maintenance of the project.[289]

225. 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. 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.

H. Transition Provisions

226. Several licensee commenters request that any new rule contain appropriate transition provisions so that ongoing proceedings are not disrupted.[290] The Commission proposes that the integrated licensing process rules and modifications to the traditional process and ALP apply to license applications for which the deadline for filing a notification of intent is three months or later after issuance of the final rule. If the deadline for existing licensees to file a notification of intent to seek a new license falls before that date, the rules as they exist prior to that date will apply to those licensees. The new rule will also not apply to potential original license applicants who have commenced first stage consultation prior to three months following the issuance date of the final rule. This will ensure that no ongoing proceedings are interrupted and would afford a window during which existing licensees facing a deadline for filing of their NOI can complete their Pre-Application Document and determine whether to file a request to use the traditional process or ALP.[291]

227. NHA recommends that applicants currently engaged in prefiling consultation under the traditional process or ALP be permitted

[274] *See, e.g.*, with respect to pre-filing consultation, 18 CFR 4.32(b)(3)–(5); 4.38(b)–(d) and (g); 16.7; and 16.8(b)(c), (d), and (i).

[275] A paper company might be one example, or a licensee that operates several small projects.

[276] While there are free web hosting sites on the internet, they may not be available to commercial entities and, if so, are not likely to offer terms of service that would accommodate the amount of space required to host the volume of data required by the Commission's licensing regulations. An informal canvassing of free hosting services indicates that most limit space to 5 megabytes (MB) or less. A typical license application exceeds 20 MB. Free web hosting sites may also have technical specifications for content that are incompatible with the kind of complex data accompanying license applications.

[277] A waiver was granted to Alabama Power Company with respect to the relicensing of the Coosa-Warrior Project Nos. 82, 618, 2146, and 2165.

[278] *See* Application for License for Minor Water Power Projects and Major Water Power Projects 5 Megawatts or Less, 46 FR 55,944 (Nov. 13, 1981), FERC Stats. & Regs. Preambles 1977–1981 ¶ 30,309 at p. 31,372 (Nov. 6, 1981) (Order No. 185).

[279] *See* proposed modifications to 18 CFR 4.32(b)(2), 4.39 (a) and (b); 4.41(h), first paragraph, (h)(2), (h)(3), and (h)(4)(ii); 4.51 (g) and (h); 4.61 (e) and (f); 4.81(b); 4.92(a)(2), (c), (d), and (f); and 4.107 (d) and (f).

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

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

[282] Proposed new 18 CFR 4.41(e)(4)(v); 4.51(e)(7), and 4.61(c)(1)(x).

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

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

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

[286] Proposed new 18 CFR 4.61(c)(6).

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

[288] Proposed new 18 CFR 4.61(c)(8).

[289] Proposed new 18 CFR 4.61(c)(9).

[290] EEI, PG&E, SCE, Idaho Power, NHA.

[291] We are also taking this opportunity to remove numerous obsolete transition provisions included in the part 16 relicensing rules promulgated pursuant to the Electric Consumers Protection Act. Specifically, we propose to remove 18 CFR 16.10(d) and (f); 16.11(a)(2); 16.19 (b)(3) and (b)(4); 16.19(c)(2); and 16.20 (c)(2), and (c)(3).

to decide whether to incorporate into the ongoing process any improvements resulting from this proceeding. Other licensee commenters similarly suggest that any new dispute resolution process be made available for use in any ongoing license proceeding.[292] CTUIR opposes modification of any ongoing licensing processes unless all participants agree to the specific modification.

228. We do not propose to make the modifications to the traditional process available for ongoing processes, because it would prejudice the interests of stakeholders with respect to pre-filing consultations ongoing when the rule is issued. As discussed above, for instance, the public is wholly excluded from first-stage consultation, and has very limited rights during second-stage consultation. NGOs that have had little or no opportunity to participate in a pre-filing consultation that is relatively advanced at the time the rules go into effect should not be bound by the dispute resolution provisions, which assume that they were full participants in consultation from the beginning. Likewise, an applicant that has conducted pre-filing consultation in good faith under the existing rules should not be faced during the later stages with the addition of NGOs making new study requests and filing 11th-hour dispute resolution requests because they were not consulted during first stage consultation, or because the opportunity to file a second stage dispute resolution request has passed. The more pre-filing consultation time has elapsed under the existing processes, the more prejudicial requests to import dispute resolution or other integrated process elements into the existing process become. If, however, all interested entities (including interested members of the public) are agreed that it would be advantageous to make an exception to this general rule, the Commission will entertain requests for exceptions.[293]

229. Finally, the project maps and boundaries and miscellaneous filing requirements would take effect three months after the issuance date of the final rule, in order to give license and exemption applicants time to comply.

IV. Environmental Analysis

230. 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.[294] The Commission has categorically excluded certain action 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.[295] This proposed rule, if finalized, is procedural in nature and therefore falls under this exception; consequently, no environmental consideration would be necessary.

V. Regulatory Flexibility Act

231. The Regulatory Flexibility Act of 1980 (RFA)[296] generally requires a description and analysis of final rules that will have a significant economic impact on a substantial number of small entities.[297] 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) would benefit small entities by minimizing the redundancy and waste caused by the often duplicative information needs of the Commission and the various federal and state agencies associated with the hydroelectric licensing process.

VI. Information Collection Statement

232. The following collections of information contained in this proposed rule has been submitted to the Office of Management and Budget for review under sectio 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.'' Comments are solicited on the Commission's need for this information, whether the information will have practical utility, the accuracy of provided burden estimates, ways to enhance the quality, utility, and clarity of the information to be collected, and any suggested methods for minimizing respondent's burden, including the use of automated information techniques.

Estimated Annual Burden:

TABLE 1.—TRADITIONAL LICENSING PROCESS

Data collection	Number of respondents [1]	Number of responses	Hours per response	Total annual hrs
FERC–500	26	1	46,000	1,196,000
FERC–505	15	1	10,000	150,000

[1] Estimated number of licenses subject to renewal through 2009.

Total Annual Hours for Collection: (Reporting + Recordkeeping, (if appropriate)) = 1,356,000 hours.

TABLE 2.—PROPOSED INTEGRATED LICENSING PROCESS

Data collection	Number of respondents [1]	Number of responses	Hours per response [2]	Total annual hrs
FERC–500	26	1	32,200	837,200

[292] Van Ness, Duke.

[293] *See* proposed new 18 CFR 4.38(e)(4) and 16.8(e)(4).

[294] Order No. 486, Regulations Implementing the National Environmental Policy Act, 52 FR 47897 (Dec. 17, 1987), FERC Stats. & Regs. Preambles 1986–1990 ¶ 30,783 (December 10, 1987).

[295] 18 CFR 380.4(a)(2)(ii).

[296] 5 U.S.C. 601–612 (1994).

[297] 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).

TABLE 2.—PROPOSED INTEGRATED LICENSING PROCESS—Continued

Data collection	Number of respondents [1]	Number of responses	Hours per response [2]	Total annual hrs
FERC–505	15	1	7,000	105,000

[1] Estimated number of licenses subject to renewal through FY 2009.
[2] Based on a 30% reduction through concomitant processes.

Total Annual Hours for Collections: (Reporting + Recordkeeping, (if appropriate)) = 942,200 hours

Information Collection Costs: The Commission seeks comments on the costs to comply with these requirements. It has projected the average annualized cost per respondent to be the following:

ANNUALIZED COSTS

Annualized Costs (Capital & Startup 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 [298] 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 proposed rule would revise the Commission's regulations regarding applications for licenses to construct, operate, and maintain hydroelectric projects. Specifically, proposed revisions would 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 proposed to be collected is needed to evaluate the license application pursuant to the comprehensive development standard of FPA section 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 proposed revisions are necessary because the hydroelectric licensing process is unnecessarily long and costly.

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 specific, objective support for the burden estimates associated with the information requirements.

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 Chief Information Officer, Phone: (202) 502–8415, fax: (202) 273–0873, e-mail: *mike.miller@ferc.gov*]

For submitting comments concerning the collection of information(s) and the associated burden estimate(s), please send your comments to the contact listed above and to the Office of Management and Budget, Office of Information and Regulatory Affairs, 725 17th Street, NW., Washington, DC 20503 [Attention: Desk Officer for the Federal Energy Regulatory Commission, phone (202) 395–7318, fax: (202) 395–7285.

[298] 5 CFR 1320.11.

VII. Public Comment Procedures

233. The Commission invites interested persons to submit comments, data, views and other information concerning the matters set out in this proposed rule. To facilitate the Commission's views of the comments, the Commission requests commenters to provide an executive summary of their recommendations. To the greatest degree possible, commenters should use the topic headings that the proposed rule uses and arrange their comments in the order of topics presented in this proposed rule, and cite the specific referenced paragraph numbers. Commenters should identify separately any additional issues they may wish to address. Comments must refer to Docket No. RM02–16–000, and may be filed on paper or electronically via the Internet. The Commission must receive all such comments no later than 60 days after the issuance of this notice of proposed rulemaking. Those filing electronically do not need to make a paper filing. Reply comments will not be entertained.

234. Those making paper filings should submit the original and 14 copies of their comments to the Office of the Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

235. The Commission strongly encourages electronic filings.

Commenters filing their comments via the Internet must prepare their comments in WordPerfect, MS Word, Portable Document Format, Real Text Format, or ASCII format as listed on the Commission's Web site at *http://www.ferc.gov* , under the e-Filing link. To file the document, access the Commission's Web site at *http://www.ferc.gov* and click on ''e-Filing'' and then follow the instructions for each screen. First time users will have to establish a user name and password. The Commission will send an automatic acknowledgment to the sender's E-Mail address upon receipt of comments. User assistance for electronic filing is available at 202–502–8258 or by E-Mail to *efiling@ferc.gov.* Do not submit comments to the E-Mail address.

236. The Commission will place all comments in the public files and they will be available for inspection in the Commission's Public Reference Room at 888 First Street, NE., Washington, DC 20426, during regular business hours. Additionally, all comments may be viewed, printed, or downloaded remotely via the Internet through the Commission's Homepage using the FERRIS link.

VIII. Document Availability

237. 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.

238. 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.

239. 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.

List of Subjects

18 CFR Part 4

Administrative practice and procedure, Electric power, Reporting and record keeping requirements.

18 CFR Part 5

Administrative practice and procedure, Electric power, Reporting and record keeping requirements.

18 CFR Part 16

Administrative practice and procedure, Electric power, Reporting and record keeping requirements.

18 CFR Part 385

Administrative practice and procedure, Electric power, Penalties, Pipelines, Report and record keeping requirements.

By direction of the Commission.

Magalie R. Salas,

Secretary.

In consideration of the foregoing, the Commission proposes to amend parts 4, 16, and 385, and add part 5 to Chapter I, Title 18, Code of Federal Regulations as follows:

Regulatory Text

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.

2. Amend § 4.30 by revising paragraph (a) to read 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 [insert date three months following issuance date of final rule] 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.

* * * * *

3. Amend § 4.32 as follows.

a. Throughout the section, remove the phrase ''Office of Hydropower Licensing'' and add in its place the phrase ''Office of Energy Projects''.

b. The second sentence of paragraph (b)(1) is revised.

c. Paragraph (b)(2) is revised.

d. In paragraph (b)(7), add the phrase ''Except as to a license or exemption application,'' at the beginning of the first sentence.

e. Paragraph (b)(10) is added.

f. Paragraph (k) is added.

The revised and added 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, or 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 [insert date three months following issuance date of final rule], 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.

* * * * *

(10) *Transition provisions.* (i) This section 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 required by § 5.3 of this chapter, is [insert date three months following issuance date of final rule] or later.

(ii) Applications for which the deadline date for filing a notification of intent to seek a new or subsequent license is prior to [insert date three months following issuance date of final rule], and potential applications for original license for which the potential applicant commenced first stage pre-filing consultation pursuant to § 4.38(b) prior to [insert date three months following issuance date of final rule], are subject to the Commission's regulations in § 4.32 as promulgated prior to [insert date three months following issuance date of final rule].

(iii) This section shall apply to exemption applications filed on or after [insert date three months following issuance date of final rule]. For exemption applications filed prior to [insert date three months following issuance date of final rule], this section

shall apply in the form in which it was promulgated prior to that date.

* * * * *

(k) *Transition provisions.* (1) This section 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 required by § 5.3 of this chpater, is [insert date three months following issuance date of final rule] or later.

(2) Applications for which the deadline date for filing a notification of intent to seek a new or subsequent license is prior to [insert date three months following issuance date of final rule], and potential applications for original license for which the potential applicant commenced first stage pre-filing consultation pursuant to § 4.38(b) prior to [insert date three months following issuance date of final rule], are subject to the Commission's regulations in § 4.32 as promulgated prior to [insert date three months following issuance date of final rule].

(3) This section shall apply to exemption applications filed on or after [insert date three months following issuance date of final rule]. For exemption applications filed prior to [insert date three months following issuance date of final rule], this section shall apply in the form in which it was promulgated prior to that date.

4. Amend § 4.34 as follows:

a. In paragraph (b)(1), add at the beginning of the third sentence which begins ''If ongoing agency proceedings * * *'' the phrase ''In the case of an application prepared other than pursuant to part 5 of this chapter,''.

b. Paragraph (b)(5) is added.

c. Paragraph (e) is revised.

d. Paragraph (i)(5) is removed.

e. Paragraph (i)(9) is removed.

f. Paragraph (j) is added.

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 (f)(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, subchpater 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 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.

(3) 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 analysis. The preliminary determination, for those recommendations believed to be inconsistent, shall include:

(i) 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

(ii) An explanation of how the measures recommended in the environmental document would 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.

(4) Any party, affected resource agency, or Indian tribe may file comments in response to the preliminary determination of inconsistency 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.

(5) 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 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.

(6) The section 10(j) process ends when the Commission issues an order

granting or denying the license application in question.

* * * * *

(j) *Transition provisions.* (1) This section 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 required by § 5.3 of this chpater, is [insert date three months following issuance date of final rule] or later.

(2) Applications for which the deadline date for filing a notification of intent to seek a new or subsequent license is prior to [insert date three months following issuance date of final rule], and potential applications for original license for which the potential applicant commenced first stage pre-filing consultation pursuant to § 4.38(b) prior to [insert date three months following issuance date of final rule], are subject to the Commission's regulations as promulgated prior to [insert date three months following issuance date of final rule].

(3) This section shall apply to exemption applications filed on or after [insert date three months following issuance date of final rule]. For exemption applications filed prior to [insert date three months following issuance date of final rule], this section shall apply in the form in which it was promulgated prior to that date.

5. Amend § 4.38 as follows:

a. Throughout the section, remove the phrase ''Office of Hydropower Licensing'' and add in its place the phrase ''Office of Energy Projects.''

b. In paragraph (a)(1), after the phrase 33 U.S.C. 1341(c)(1),'' remove the phrase ''and any Indian tribe that may be affected by the proposed project.'' and add in its place the following text: ''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 § 5.3 and a Pre-Application Document pursuant to the provisions of § 5.4.''

c. Paragraph (a)(2) is revised.

d. Paragraph (b) is revised.

e. Paragraph (c) is revised.

f. In paragraph (d)(1), remove the phrase ''Indian tribes and other government offices'' and add in its place the phrase ''Indian tribes, other government offices, and consulted members of the public''.

g. In paragraph (d)(2), after the phrase ''Indian tribe'', add a comma and the following phrase ''members of the public''.

h. Paragraph (e) is revised.

i. Paragraph (f) is revised.

j. In paragraph (g)(1), remove the phrase ''(b)(2)'' and add in its place the phrase ''(b)(3)''.

k. Paragraph (g)(2) is revised.

k. Paragraph (h) is revised.

The revised text reads as follows:

§ 4.38 Consultation requirements.

(a) * * *

(2) 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 must, at the time it files its notification of intent to seek a license pursuant to § 5.2 of this chapter, provide a copy of the Pre-Application Document to the entities specified in § 5.3 of this chapter.

(2) A potential applicant 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).

(3) No earlier than 30 days, but no later than 60 days, from the date of the potential applicant's letter transmitting the Pre-Application Document, or information required by paragraph (b)(2) of this section, as applicable, to the agencies, Indian tribes and members of the public under paragraph (b)(1) of this section, the potential applicant must:

(i) 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;

(ii) Consult with the resource agencies, Indian tribes and members of the public on the scheduling and agenda of the joint meeting; and

(iii) 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.

(4) 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)(2) 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, Indian tribe, and members of the public 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) *Study dispute resolution.* (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, 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) 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, Indian tribe, or member of the public, 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 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), 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) 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, 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.

(c) *Second stage of consultation.* (1) Unless determined to be unnecessary by the Director pursuant to paragraph (b)(6) of this section, a potential applicant must diligently conduct all reasonable studies and obtain all reasonable information requested by resource agencies, Indian tribes, and members of the public under paragraph (b) of this section to which the potential applicant has agreed. The applicant shall also obtain any data and conduct any studies required by the Commission pursuant to the dispute resolution procedures of paragraph (b)(6) of this section. These studies must be completed and the information obtained:

(i) Prior to filing the application, if the results:

(A) Would influence the financial (*e.g.,* instream flow study) or technical feasibility of a project (*e.g.,* study of potential mass soil movement); or

(B) Are needed to determine the design or location of project features, reasonable alternatives to the project, the impact of the project on important natural or cultural resources (*e.g.,* resource surveys), or suitable mitigation or enhancement measures, or to minimize impact on significant resources (*e.g.,* wild and scenic river, anadromous fish, endangered species, caribou migration routes);

(ii) After filing the application but before issuance of a license or exemption, if the applicant otherwise complied with the provisions of paragraph (b)(1) or (b)(2) of this section, as applicable, and the study or information gathering would take longer to conduct and evaluate than the time between the conclusion of the first stage of consultation and the expiration of the applicant's preliminary permit or the application filing deadline set by the Commission;

(iii) After a new license or exemption is issued, if the studies can be conducted or the information obtained only after construction or operation of the proposed facilities, would determine the success of protection, mitigation, or enhancement measures (*e.g.,* post-construction monitoring studies), or would be used to refine project operation or modify project facilities.

(2) If, after the end of the first stage of consultation as defined in paragraph (b)(7) of this section, a resource agency, Indian tribe, or member of the public requests that the potential applicant conduct a study or gather information not previously identified and specifies the basis and reasoning for its request, under paragraphs (b)(5)(i)–(vi) of this section, the potential applicant must promptly initiate the study or gather the information, or explain to the requesting entity why it believes the request is not reasonable or necessary. If the potential applicant declines to obtain the information or conduct the study, any resource agency, Indian tribe, or consulted member of the public may refer any such request to the Director of the Office of Energy Projects for dispute resolution under the procedures and subject to the other requirements set forth in paragraph (b)(6) of this section

(3)(i) The results of studies and information-gathering referenced in paragraphs (c)(1)(ii) and (c)(2) of this section will be treated as additional information; and

(ii) 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) merely because the study or information gathering is not complete before the application is filed.

(4) A potential applicant must provide each resource agency, Indian tribe, and consulted member of the public with:

(i) A copy of its draft application that:

(A) Indicates the type of application the potential applicant expects to file with the Commission; and

(B) Responds to any comments and recommendations made by any resource agency, Indian tribe, or consulted member of the public either during the first stage of consultation or under paragraph (c)(2) of this section;

(ii) The results of all studies and information-gathering either requested by that resource agency, and Indian tribe, or consulted member of the public in the first stage of consultation (or under paragraph (c)(2) of this section if available) or which pertain to resources of interest to the resource agency, Indian tribe, or consulted member of the public and which were identified by the potential applicant pursuant to paragraph (b)(2)(vii) of this section, including a discussion of the results and any proposed protection, mitigation, or enhancement measures; and

(iii) A written request for review and comment.

(5) A resource agency, and Indian tribe, or consulted member of the public will have 90 days from the date of the potential applicant's letter transmitting the paragraph (c)(4) of this section information to it to provide written comments on the information submitted by a potential applicant under paragraph (c)(4) of this section.

(6) If the written comments provided under paragraph (c)(5) of this section indicate that a resource agency, Indian tribe, or consulted member of the public has a substantive disagreement a potential applicant's conclusions regarding resource impacts or its proposed protection, mitigation, or enhancement measures, the potential applicant will:

(i) Hold a joint meeting with the resource agency, Indian tribe, other agencies, and consulted members of the public with similar or related areas of interest, expertise, or responsibility not later than 60 days from the date of the written comments of the disagreeing agency, Indian tribe, or consulted member of the public to discuss and to attempt to reach agreement on its plan for environmental protection, mitigation, or enhancement measures;

(ii) Consult with the disagreeing agency, Indian tribe, other agencies with similar or related areas of interest, expertise, and responsibility, and consulted member of the public on the scheduling of the joint meeting; and

(iii) At least 15 days in advance of the 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.

(7) The potential applicant and any disagreeing resource agency, Indian tribe, or consulted member of the public may conclude a joint meeting with a document embodying any agreement among them regarding environmental protection, mitigation, or enhancement measures and any issues that are unresolved.

(8) The potential applicant must describe all disagreements with a resource agency, Indian tribe, or consulted member of the public on technical or environmental protection, mitigation, or enhancement measures in its application, including an explanation of the basis for the applicant's disagreement with the resource agency, Indian tribe, and consulted non-governmental organization, and must include in its application any document developed pursuant to paragraph (c)(7) of this section.

(9) A potential applicant may file an application with the Commission if:

(i) It has complied with paragraph (c)(4) of this section and no resource agency, Indian tribe, or consulted member of the public has responded with substantive disagreements by the deadline specified in paragraph (c)(5) of this section; or

(ii) It has complied with paragraph (c)(6) of this section and a resource agency, Indian tribe, or consulted member of the public has responded with substantive disagreements.

(10) The second stage of consultation ends:

(i) Ninety days after the submittal of information pursuant to paragraph (c)(4) of this section in cases where no resource agency, Indian tribe, or consulted member of the public has responded with substantive disagreements; or

(ii) At the conclusion of the last joint meeting held pursuant to paragraph (c)(6) of this section in case where a resource agency, Indian tribe, or consulted member of the public has responded with substantive disagreements.

* * * * *

(e) *Waiver of compliance with consultation requirements.* (1) If a resource agency, Indian tribe, or consulted member of the public waives in writing compliance with any requirement of this section, a potential applicant does not have to comply with that requirement as to that agency or tribe.

(2) If a resource agency, Indian tribe, or consulted member of the public fails to timely comply with a provision regarding a requirement of this section, a potential applicant may proceed to the next sequential requirement of this section without waiting for the resource agency, Indian tribe, or consulted member of the public to comply.

(3) The failure of a resource agency, Indian tribe, or consulted member of the public to timely comply with a provision regarding a requirement of this section does not preclude its participation in subsequent stages of the consultation process.

(4) Following [insert issuance date of final rule], 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 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.

(f) *Application requirements documenting consultation and any disagreements with resource agencies.* An applicant must show in Exhibit E of its application that it has met the requirements of paragraphs (b) through (d) and paragraphs (g) and (h) of this section, and must include a summary of the consultation process and:

(1) Any resource agency's, Indian tribe's, or consulted member of the public letters containing comments, recommendations, and proposed terms and conditions;

(2) Any letters from the public containing comments and recommendations;

(3) Notice of any remaining disagreements with a resource agency, Indian tribe, or consulted member of the public on:

(i) The need for a study or the manner in which a study should be conducted and the applicant's reasons for disagreement;

(ii) Information on any environmental protection, mitigation, or enhancement measure, including the basis for the applicant's disagreement with the resource agency, Indian tribe, or

consulted non-governmental organization.

(4) Evidence of any waivers under paragraph (e) of this section;

(5) Evidence of all attempts to consult with a resource agency, Indian tribe, or consulted non-governmental organization, copies of related documents showing the attempts, and documents showing the conclusion of the second stage of consultation.

(6) An explanation of how and 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;

(7) A description of how the applicant's proposal addresses the significant resource issues raised at the joint meeting held pursuant to paragraph (b)(3) of this section; and

(8) A list containing the name and address of every Federal, state, and interstate resource agency, Indian tribe, or consulted member of the public with which the applicant consulted pursuant to paragraph (a)(1) of this section.

(g) * * *

(2)(i) A potential applicant must make available to the public for inspection and reproduction the information specified in paragraph (b)(1) or (b)(2) of this section, as applicable, from the date on which the notice required by paragraph (g)(1) of this section is first published until a final order is issued any the 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)(1) or (b)(2) of this section, as applicable.

(h) *Transition provisions.* (1) This section 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 required by § 5.3 of this chapter, is [insert date three months following issuance date of final rule] or later.

(2) Applications for which the deadline date for filing a notification of intent to seek a new or subsequent license is prior to [insert date three months following issuance date of final rule], and potential applications for original license for which the potential applicant commenced first stage pre-filing consultation pursuant to § 4.38(b) prior to [insert date three months following issuance date of final rule], are subject to the Commission's regulations in § 4.38 as promulgated prior to [insert date three months following issuance date of final rule].

* * * * *

6. Amend § 4.39 as follows:

a. Paragraph (a) is revised.

b. Paragraph (b), introductory language, is revised.

c. Paragraph (e) is added.

d. Paragraph (f) 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<gr-thn-eq> by 7⅜ <gr-thn-eq> 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 these 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.

(f) *Transition provisions.* (1) This section shall apply to license or exemption applications filed following [insert date three months following issuance date of final rule].

(2) For license or exemption applications filed prior to [insert date three months following issuance date of final rule], this section shall apply in the form in which it was promulgated prior to that date.

* * * * *

7. Amend § 4.41 as follows:

a. In paragraph (c)(4)(i), remove the phrase ''a flow duration curve'' and add in its place the phrase ''monthly flow duration curves''.

b. In paragraph (c)(4)(iii), add the phrase ''minimum and maximum'' between the words ''estimated'' and ''hydraulic''.

c. In paragraph (e)(4)(iii), remove the word ''and''.

d. In paragraph (e)(4)(iv), add the word ''and'' after the word ''contingencies''.

e. In paragraph (e)(7), remove the word ''and'' after the word ''constructed;''.

f. Paragraph (e)(4)(v) is added.

g. In paragraph (e)(8), remove the period after ''section'' and add in its place a semi-colon.

h. Paragraphs (e)(9) and (e)(10) are added.

i. Paragraph (h), introductory text, is revised.

j. In paragraph (h)(2), second sentence, the word ''license'' is removed from the phrase ''the license application''.

k. Paragraph (h)(3)(iv) is added.

l. Paragraph (h)(4)(ii) is revised.

m. Paragraph (i) is added.

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;

(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 know 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.

(i) *Transition provisions.* (1) This section shall apply to license applications filed following [insert date three months following issuance date of final rule].

(2) For license applications filed prior to [insert date three months following issuance date of final rule], this section shall apply in the form in which it was promulgated prior to that date.

8. Amend § 4.51 as follows:

a. In paragraph (c)(2)(i), after the phrase ''available flow;'' remove the word ''a'' and add in its place the word ''monthly''.

b. In paragraph (c)(2)(iii), before the word ''maximum'', add the phrase ''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.

g. Paragraph (i) is added.

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-peal 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).

(h) Exhibit G. See § 4.41(h).

(i) *Transition provisions.* (1) This section shall apply to license applications filed following [insert date three months following issuance date of final rule].

(2) For license applications filed prior to [insert date three months following issuance date of final rule], this section shall apply in the form in which it was promulgated prior to that date.

* * * * *

9. Amend § 4.61 as follows:

a. In paragraph (c)(1)(vii), after the first appearance of the word ''estimated'' add the phrase ''minimum and maximum''. After the phrase ''1.5 megawatts,'' remove the word ''a'' and add in its place the word ''monthly''. Pluralize the word ''curve''.

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.

f. Paragraph (g) is added.

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).

(f) Exhibit G. See § 4.41(h).

(g) *Transition provisions.* (1) This section shall apply to license applications filed following [insert date three months following issuance date of final rule].

(2) For license applications filed prior to [insert date three months following issuance date of final rule], this section shall apply in the form in which it was promulgated prior to that date.

* * * * *

10. Amend § 4.81 as follows:

a. Paragraph (b)(5) is revised.

b. Paragraph (f) is added.

The revised and added 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;

* * * * *

(f) *Transition provisions.* (1) This section shall apply to preliminary permit applications filed following [insert date three months following issuance date of final rule].

(2) For preliminary permit applications filed prior to [insert date three months following issuance date of final rule], this section shall apply in the form in which it was promulgated prior to that date.

* * * * *

11. Amend § 4.92 as follows:

a. Paragraph (a)(2) is revised.

b. In paragraph (c), introductory text, remove the phrase ''Exhibit B'' and add it its place the phrase ''Exhibit F''.

c. Paragraph (d) is revised.

d. Paragraph (f) is revised.

e. Paragraph (g) is added.

The revised and added 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).

* * * * *

(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).

(g) *Transition provisions.* (1) This section shall apply to exemption applications filed following [insert date three months following issuance date of final rule].

(2) For exemption applications filed prior to [insert date three months following issuance date of final rule], this section shall apply in the form in which it was promulgated prior to that date.

* * * * *

12. Amend § 4.107 as follows:

a. Paragraph (d) is revised.

b. Paragraph (f) is revised.

c. Paragraph (g) is added.

The revised and added 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).

* * * * *

(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).

(g) *Transition provisions.* (1) This section shall apply to exemption applications filed following [insert date three months following issuance date of final rule].

(2) For exemption applications filed prior to [insert date three months following issuance date of final rule], this section shall apply in the form in which it was promulgated prior to that date.

1. 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, requirement to consult, process selection.

(a) *Applicability.* 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) and 16.2 of this chapter 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 the National Marine Fisheries Service, the United States Fish and Wildlife Service, 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 under Section 401(a)(1) of the Federal Water Pollution Control Act (Clean Water Act), 33 U.S.C. 1341(c)(1)), 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) *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 of this chapter (*i.e.*, traditional process), pursuant to paragraph (c) of this section; or

(2) Section 4.34(i) Alternative procedures of this chapter

(f) *Request to use traditional licensing process or alternative procedures.* (1) A

potential license applicant may file with the Commission a request to use the traditional licensing process or alternative procedures pursuant to this paragraph.

(2) A potential applicant for an original, new, or subsequent license must file its request for approval to use the traditional licensing process or alternative procedures with its notification of intent pursuant to § 5.3.

(3) (i) An application for authorization to use the traditional process must include any existing written comments on the applicant's proposal and a response thereto.

(ii) A potential applicant requesting the use of § 4.34(i) *alternative procedures* of this part must:

(A) 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;

(B) 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 and proposals and recommendations of interested entities; and

(C) Serve a copy of the request on all affected resource agencies and Indian tribes and on all entities contacted by the applicant that have expressed an interest in the alternative pre-filing consultation process.

(4)(i) The applicant shall serve a copy of the request on all affected resource agencies, Indian tribes, and members of the public likely to be interested in the proceeding. The request shall state that comments on the request to use the traditional process or alternative procedures must be filed with the Commission within 15 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.

(ii) The Applicant must also publish notice of the filing of its notification of intent, Pre-Application Document, and 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:

(A) Disclose the filing date of the notification of intent, Pre-Application Document, and request to use the traditional process or alternative procedures;

(B) Briefly summarize these documents and the basis for the request to use the traditional process or alternative procedures;

(C) 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;

(D) 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 15 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; and

(E) State that respondents must submit 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.

(5) Requests to use the traditional process or alternative procedures shall be granted for good cause shown.

§ 5.2 Acceleration of a license expiration date.

(a) *Request for acceleration.* (1) 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 shall make available the Pre-Application Document provided for in § 5.4 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 by mail.

(2) The notice issued pursuant to paragraphs (b)(1) (i) and (ii) of this section and the written notice given pursuant to paragraph (b)(1)(iii) of this section 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.

§ 5.3 Notification of intent.

(a) A potential applicant for an original license and, in the case of an existing licensee for the project, a potential applicant for 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) In order to notify the Commission whether it intends to file an application for an original license or, in the case of an existing licensee, whether or not it intends to file an application for a new or subsequent license, a potential applicant for an original license or an existing licensee must file with the Commission an original and eight copies of 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, Indian tribe, 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; and

(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.

(c) 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 and, as appropriate, part 16 (*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) An existing licensee 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 its existing license expires.

(e) Any entity that files a notification of intent to seek an original, new, or subsequent license application shall be referred to hereafter in this part as a license applicant.

(f) A 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, or request to initiate consultation under section 106 of the National Historic Preservation Act and the implementing regulations at 36 CFR 800.2(c)(4).

(g) The provisions of subpart F of part 16 of this chapter apply to projects to which this part applies.

(h) The provisions of this part and parts 4 and 16 of this chapter 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.

§ 5.4 Pre-Application document.

(a) Along with its notification of intent (if applicable), before it files any application for an original, new, or subsequent license, a license applicant filing an application pursuant to this part or requesting to file an application pursuant to part 4 of this chapter and, as appropriate, part 16 of this chapter, (*e.g.*, the traditional process) including an application pursuant to § 4.34(i), *alternative procedures* of this chapter must, at the time it files its notification of intent to seek a license, file with the Commission and distribute to the appropriate Federal, state, and interstate resource agencies, Indian tribes, and members of the public likely to be interested in the proceeding, the Pre-Application Document provided for in paragraph (b) of this section.

(b) The agencies referred to in paragraph (a) of this section include, by resource area:

(1) *Geology and soils, water resources, fish and aquatic resources, wildlife and botanical resources, wetlands and riparian habitat, and rare, threatened, and endangered species:* Any state agency with responsibility for fish, wildlife, and botanical resources, the U.S. Fish and Wildlife Service, the National Marine Fisheries Service (if the project may affect anadromous fish resources subject to that agency's jurisdiction), and any other state or Federal agency with managerial authority over any part of project lands.

(2) *Cultural resources:* The State Historic Preservation Officer, Tribal Historic Preservation Officer, National Park Service, and any other state or Federal agency with managerial authority over any part of project lands.

(3) *Recreation and land use, aesthetic resources:* Local, state, and regional recreation agencies and planning commission, local and state zoning agencies, the National Park Service, and any other state or Federal agency with managerial authority over any part of project lands.

(c) Pre-Application Document: (1) *Purpose.* This document is intended to compile and provide to the Commission, Federal and state agencies, Indian tribes, and members of the public engineering, economic, and environmental information available at the time the applicant files the notification of intent required by § 5.2. The Pre-Application Document also provides the basis for identifying issues and information needs, developing study requests, study plans, and the Commission's environmental scoping documents under the National Environmental Policy Act (NEPA). It is a precursor to Exhibit E of the draft and final license applications and the Commission's NEPA document.

(2)(i) *Form and Content.* The potential applicant must include in the Pre-Application Document:

(A) The exact name and business address, and telephone number of each person authorized to act as agent of the applicant.

(B) A record of contacts, if any, with Federal, state, and interstate resource agencies, Tribes, non-governmental organizations (NGOs) or other members of the public made in connection with preparing the Pre-Application Document.

(C) Detailed maps showing project boundaries, 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 Federal and tribal lands, and all proposed project facilities, including roads, transmission lines, and any other appurtenant facilities.

(D) A general description of the river basin in which the project is located, including:

(*1*) Land use and cover;

(*2*) Hazardous waste disposal sites;

(*3*) Federal or tribal lands;

(*4*) Dams and diversions, whether or not used for hydropower generation, within the basin;

(*5*) A list of relevant comprehensive or resource management plans applicable to both the basin and the project (Federal and state comprehensive plans are listed on the Commission's Web site at *http://www.ferc.gov*/hydro/docs/complan.pdf).

(E) If applicable, a description of all project facilities and associated components. The description must include:

(*1*) The physical composition, dimensions, and general configuration and engineering design of any dams, spillways, penstocks, canals, powerhouses, tailraces or other structures proposed to be included as part of the project;

(*2*) The normal maximum water surface area and normal maximum water surface elevation (mean sea level), gross storage capacity of any

impoundments to be included as part of the project;

(*3*) The number, type, and the hydraulic and installed (rated) capacity of any proposed turbines or generators to be included as part of the project;

(*4*) The number, length, voltage and interconnections of any primary transmission lines proposed to be included as part of the project;

(*5*) The description of any additional mechanical, electrical, and transmission equipment appurtenant to the project; and

(*6*) An estimate of the dependable capacity, average annual, and average monthly energy production in kilowatt-hours (or mechanical equivalent).

(F) If applicable, a description of:

(*1*) The current and proposed operation of the project;

(*2*) Any new facilities or components to be constructed at the project;

(*3*) The construction history of the project; and

(*4*) Any plans for future development or rehabilitation of the project.

(G)(*1*) The potential applicant should discuss, with respect to each of the resources as follows:

(*i*) The existing environment to the level of detail indicated in this paragraph;

(*ii*) Any existing data or studies regarding the resource;

(*iii*) Any known or potential adverse impacts and issues associated with the construction, operation or maintenance of the proposed project;

(*iv*) Any project features the potential applicant has already constructed and/or maintains, voluntarily, or pursuant to the requirements of Federal or state agency or tribe to avoid or minimize adverse effects on the resource;

(*v*) Any measures the potential applicant believes might reasonably be taken to avoid or minimize adverse effects on the resource. The potential license applicant should consider providing photographs or other visual aids, as appropriate, to supplement its written presentation of information.

(ii) *Geology and Soils.* A description of the existing geology, topography, and soils of the proposed project and surrounding area, to the extent known and available, including:

(A) A description of geological features, including bedrock lithology, stratigraphy, structural features, glacial features, unconsolidated deposits, and mineral resources;

(B) A description of the soils, including the types, occurrence, physical and chemical characteristics, erodability and potential for mass soil movement;

(C) A description showing the location of existing and potential geological and soil hazards and problems, including earthquakes, faults, seepage, subsidence, solution cavities, active and abandoned mines, erosion, and mass soil movement, and an identification of any large landslides or potentially unstable soil masses which could be aggravated by reservoir fluctuation;

(D) The existence of any disposal sites especially those listed under Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), Resource Conservation and Recovery Act (RCRA) and the National Priorities List (NPL); and

(E) A description of the anticipated erosion, mass soil movement and other impacts on the geological and soil resources due to construction and operation of the proposed project.

(iii) *Water Resources.* A description of the water resources of the proposed project and surrounding area. The applicant should address the quantity and quality (chemical/physical parameters) of all waters affected by the project including but not limited to the project's reservoir(s), tributaries to the reservoir, the bypassed reach, and tailrace. To the extent known, available, and applicable, this section should include:

(A) Drainage area, 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, with a specification of any adjustment made for evaporation, leakage minimum flow releases (including duration of releases) or other reductions in available flow; a 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;

(B) A description of existing instream flow uses of streams in the project area that would be affected by construction and operation; estimated quantities of water discharged from the proposed project for power production; and any 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;

(C) A description of the seasonal variation of existing water quality data for any stream, lake, or reservoir that would be affected by the proposed project, including measurements of: significant ions, heavy metals, hazardous organic compounds, chlorophyll a, nutrients, specific conductance, pH, total dissolved solids, total alkalinity, total hardness, dissolved oxygen, bacteria, temperature, suspended sediments, turbidity and vertical illumination;

(D) A description of any existing lake or reservoir and any of the proposed project reservoirs including surface area, volume, maximum depth, mean depth, flushing rate, shoreline length, substrate classification, and gradient for streams directly affected by the proposed project;

(E) A description of the anticipated impacts of any proposed construction and operation of project facilities on downstream flows, including stream geomorphology, and water quality, such as temperature, turbidity and nutrients;

(F) A description of groundwater in the vicinity of the proposed project, including water table and artesian conditions, the hydraulic gradient, the degree to which groundwater and surface water are hydraulically connected, aquifers and their use as water supply, and the location of springs, wells, artesian flows and disappearing streams.

(iv) *Fish and Aquatic Resources.* A description of the fish and other aquatic resources, including invasive species, of the proposed project and surrounding area. The section should address the existing fish and macroinvertebrate communities, including the presence or absence of anadromous or catadromous fish and any known impacts on the aquatic community. To the extent known and available, this section should include:

(A) A description of existing fish and aquatic communities of the proposed project area and its vicinity, including any upstream and downstream areas that may be affected by the proposed project;

(B) The temporal and spacial distribution of fish and aquatic communities and any associated trends on;

(*1*) Species and life stage composition;

(*2*) Standing crop;

(*3*) Age and growth data;

(*4*) Run timing;

(*5*) The extent and location of spawning, rearing, feeding, and wintering habitat; and

(*6*) Essential fish habitat as defined under the Magnuson-Stevens Fishery Conservation and Management Act.

(v) *Wildlife and Botanical Resources.* A description of the wildlife and botanical resources, including invasive species, of the proposed project and surrounding area, to the extent known and available, including:

(A) A description of the upland habitat(s) within and around the project area, including the area within the transmission line corridor or right-of-way, and a listing of plant and animal species that use the habitat(s); and

(B) The temporal or spacial distribution of species considered important because of their commercial or recreational value.

(vi) *Wetlands and Riparian Habitat.* A description of the floodplain, wetlands and riparian habitats, including invasive species, of the proposed project and surrounding area, to the extent known and available, including a listing of plant and animal species, including invasive species, that use the habitat.

(vii) *Rare, Threatened and Endangered Species.* A description of any Rare, Threatened and Endangered Species that may be present in the vicinity or surrounding area of the proposed project, to the extent known and available, include:

(A) A listing of both Federal- and state-listed, or proposed to be listed, threatened and endangered species present in the project area;

(B) Identification of habitat requirements;

(C) A reference to any known biological opinion, status reports, or recovery plans pertaining to listed species; and

(D) The extent and location of any critical habitat, or other habitat for listed species in the project area;

(vii) *Recreation and Land Use.* A description of the recreation uses (including public use), facilities or measures as well as land uses, ownership and management of the proposed project and surrounding area. This section should address recreation opportunities associated with the reservoir(s), river, and project lands; conservation of shore lands and riparian areas; and public access, flow, facilities, aesthetics, reservoir levels, and safety measures. In preparing this section the applicant should consider the needs of persons with disabilities. The section should distinguish between different kinds of recreational opportunities (*e.g.,* various types of boating—challenge white water or scenic canoeing or power boating; and fishing activities—drift boat fishing or wading or bank fishing). To the extent known and available, this section should include:

(A) A consideration of whether the river on which the project is located is:

(*1*) Within the same basin, as a designated part of, or under study for inclusion in the National Wild & Scenic River System;

(*2*) Listed on the Nationwide Rivers Inventory (NRI); and/or

(*3*) Part of a state river protection program;

(B) A consideration of whether any project lands are designated as part of, or under study for inclusion in, the National Trails System or designated as, or under study for inclusion as, a Wilderness Area;

(C) A detailed description of the existing recreational facilities (*i.e.* type, location, capacity, usage, condition, ownership and management) within the project vicinity;

(D) A detailed description of other recreational uses of project lands, waters, and riparian areas (*i.e.* types number, locations capacity information);

(E) Any provision for a shoreline buffer zone around the reservoir and/or river shoreline that must be within the project boundary, above the normal maximum surface elevation of the project reservoir, and of sufficient width to allow public access to project lands and waters and to protect the scenic, public recreational, cultural, and other environmental values of the reservoir and river shoreline;

(F) Any existing measures required by any local, State, Tribal, or Federal permit or license, any measure voluntarily constructed, operated or maintained, by the applicant, to protect recreation opportunities or land uses of the proposed project and surrounding area;

(G) Any future recreation needs identified in the current State Comprehensive Outdoor Recreation Plans, other plans on file with the Commission, or other relevant local, State, and regional conservation and recreation plans and activities; and

(H) A description of the applicant's policy, if any, with regard to permitting development of piers, docks, boat landings, bulkheads, and other shoreline facilities on project lands and waters.

(ix) *Aesthetic Resources.* A description of the visual characteristics of the lands and waters affected by the project. To the extent known and available, this section should include a description of the dam, natural water features, and other scenic attractions of the project and surrounding vicinity.

(x) *Cultural Resources.* A description of the known cultural or historical resources of the proposed project and surrounding area, to the extent known and available, including:

(A) An identification of any historic or archaeological site in the proposed project area, 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 that could be affected by the construction or operation of the proposed project; and

(B) A description of any 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 at the project or on project lands; and

(C) Identification of Indian tribes that may attach religious and cultural significance to historic properties within the project boundary or in the surrounding area; as well as available information on Indian traditional cultural and religious properties. (Note: National Historic Preservation Act regulations include a reminder that tribal concerns relating to cultural and historic properties are not limited to reservation lands. Frequently, historic properties of religious and cultural significance are located on ancestral, aboriginal or ceded lands of Indian Tribes.) An 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 description of the socio-economic resources of the proposed project and surrounding area, to the extent known and available, including:

(A) A description of the employment, population, housing, personal income, local governmental services, local tax revenues and other factors within the towns and counties in the vicinity of the proposed project;

(B) A description of employment, population and personal income trends in the project vicinity ; and

(C) Identification of any environmental justice issues.

(xii) *Tribal Resources.* This section should include information on Indian tribes, tribal lands, resources, and interests that may be affected by the project, to the extent known. Tribal resources to be addressed here will generally include some or all of the resources discussed or listed in the other resource related sections. For example, erosion affecting tribal cultural sites may be discussed in multiple

resource sections. To the extent known, the applicant should also identify certain tribal-specific issues that do not neatly fit into the other discrete resource sections. Such issues may include identification of tribal fishing practices at the project, land use, or agreements between the applicant and an Indian Tribe.

(H) Copies of any approved Exhibit F showing all major project structures in sufficient detail to provide a full understanding of the project, including:

(*1*) Plan view;

(*2*) Elevation view; and

(*3*) Section view.

(I) Copies of any approved Exhibit G showing:

(*1*) The location of the project and principle project features;

(*2*) Project boundary, if required under the current license;

(*3*) Recreation facilities or areas; and

(*4*) Federal, tribal, state lands.

(J) A list of issues, by resource area, in the form of a scoping document. The applicant should identify:

(*1*) Resource issues by resource area, including any issues raised during any initial contact with the entities identified in paragraph (b)(1) of this section;

(*2*) Resource management plans and objectives related to the project area and prepared by the potential applicant or any resource agency;

(*3*) Existing studies that have already been completed; and

(*4*) Preliminary information or studies needed.

(K) The following construction and operation information, if applicable:

(*1*) The original license application and the order issuing the license and any subsequent license application and subsequent order issuing a license for an existing project, including approved Exhibit drawings not listed in paragraphs (c)(2)(xii)(H) and (I) of this section, including as-built exhibits; any order issuing amendments or approving exhibits, and any order issuing annual licenses for the existing project; and

(*2*) A copy of any state issued water quality certificate under section 401 of the Clean Water Act;

(*3*) 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;

(*4*) 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;

(*5*) Any report on the total actual annual generation, the total value of annual generation, and annual operation and maintenance costs for the period beginning five years before the filing of a notice of intent;

(*6*) Any reports on original project costs, current net investment, and available funds in the amortization reserve account; and

(*7*) 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.

(L) If applicable, the applicant must also provide the following safety and structural adequacy information in the PAD:

(*1*) The most recent emergency action plan for the project or a letter exempting the project from the emergency action plan requirement;

(*2*) Any independent consultant's reports required by part 12 of this chapter and filed on or after January 1, 1981;

(*3*) 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;

(*4*) Any construction report for an existing project; and

(*5*) Any public correspondence relating to the safety and structural adequacy of the existing project.

(M) If applicable, the applicant must also provide 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 any:

(*1*) Plan of the licensee;

(*2*) Public correspondence; and

(*3*) Other pertinent information relating to a conservation plan.

(O) 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.

(P) A plan and schedule for all pre-application activity that includes any time frames for pre-application actions set forth in this part, that to the extent reasonably possible maximizes coordination of Federal, state, and tribal permitting and certification processes (process plan), and which contemplates finalization of the applicant's information-gathering and study plan provided for in §§ 5.9–5.14, including any dispute resolution, within one year of the applicant's notification of intent, and approximately two years for studies and application development.

§ 5.5 Commission notice.

(a) *Notices.* Within 30 days of the notification required under § 5.3, filing of the Pre-Application Document pursuant to § 5.4, and filing of any request to use the traditional licensing process or alternative procedures, the Commission will provide notice by:

(1) Publishing notice in the **Federal Register**;

(2) 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

(3) Notifying the appropriate Federal and state resource agencies, state water quality agencies, Indian tribes, and non-governmental organizations by mail; of:

(i) The decision of the Director of the Office of Energy Projects on any request to use the traditional licensing process or alternative procedures.

(ii) If the potential license application is to be developed and filed pursuant to this part:

(A) The applicant's intent to file a license application;

(B) The filing of the Pre-Application Document;

(C) Assignment of a project number and commencement of a proceeding;

(D) A request for comments on the Pre-Application Document (including the proposed process plan and schedule);

(E) A statement that all communications to or from the Commission staff related to the merits of the proceeding shall be placed into the record;

(F) Any request for other Federal or state agencies or Indian tribes to be cooperating agencies for purposes of developing an environmental document;

(G) The Commission's intent with respect to preparation of an environmental impact statement; and

(H) A public meeting and site visit to be held within 30 days of the notice.

(b) *Scoping meeting and site visit.* The purpose of the public meeting and site visit is to:

(1) Initiate environmental 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 needs;

(4) Develop a process plan and schedule for pre-filing activity that to the extent reasonably possible maximizes coordination of Federal, state, and tribal permitting and certification processes;

(5) Discuss the appropriateness of the license applicant for designation as the Commission's non-Federal representative for purposes of consultation under the Endangered Species Act or Magnuson-Stevens Fishery Conservation and Management Act; and

(6) 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.

(c) *Method of Notice.* The public notice provided for in this section, and the public notice of application tendering and notice that the application is accepted and ready for environmental analysis provided for in § 5.18 and § 5.21, respectively, will given by:

(1) Publishing notice in the **Federal Register**;

(2) Publishing notice once every week for four 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;

(3) Notifying appropriate Federal, state, and interstate resource agencies, Indian tribes, and non-governmental organizations by mail.

§ 5.6 Comments and information requests.

(a) *Filing requirements.* Comments on the Pre-Application Document, and requests for information by all participants, including Commission staff, must be filed with the Commission within 60 days following the Commission's notice pursuant to § 5.5 of the notification of intent and Pre-Application Document. Comments may include initial information requests and study requests.

(b) *Applicant seeking PURPA benefits; estimate of fees.* If an 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 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 an 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 applicant with a new estimate and submit a copy to the Commission.

§ 5.7 Revised pre-application document.

(a) Within 45 days following the receipt of comments on the Pre-Application Document, including information and study requests, the Applicant shall file with the Commission a revised Pre-Application Document and proposed study plan.

(b) The revised Pre-Application Document shall include copies of comments on the initial Pre-Application Document, a description of consultation between the Applicant and the participants with respect to information and study proposals and, if the Applicant does not agree to an information or study request, shall explain why the information is unnecessary.

§ 5.8 Applicant's proposed study plan.

(a) The Applicant's proposed study plan to accompany the revised Pre-Application Document shall include with respect to each proposed study:

(1) A detailed description of the study and the methodology to be used;

(2) A schedule; and

(3) Provisions for status reports and opportunities for a meeting or periodic meetings to evaluate the data being collected.

(b) The applicant's proposed study plan must:

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

(2) Address any known resource management goals of the agencies 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 cost and practicality, and why any proposed alternatives would not be sufficient to meet the stated information needs.

§ 5.9 Scoping document and study plan meeting.

(a) Within 30 days following submittal of the revised Pre-Application Document and proposed study plan, the Commission will issue Scoping Document 1 and public notice of a study plan meeting to be held within 60 days for the purpose of discussing the Applicant's proposed study plan.

(b) Scoping Document 1 will include:

(1) An introductory section describing the purpose of the scoping document, the date and time of the study plan meeting, procedures for submitting written comments, and a request for information 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 process plan and schedule and draft outline of the environmental document;

(6) A list of recipients; and

(7) The applicant's proposed study plan in an appendix.

§ 5.10 Comments and information-gathering or study requests.

(a) *Comments on SD1 and study plan.* Comments on Scoping Document 1 and the Applicant's proposed study plan, including any information or study requests, must be filed within 30 days from the issuance of Scoping Document 1.

(b) *Content of study request.* Any information or study request must:

(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 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 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;

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

§ 5.11 Study plan meeting.

A study plan meeting shall be held within 30 days of the deadline date for filing of information-gathering and study requests for the purpose of clarifying such requests as necessary and resolving any outstanding issues with respect to the proposed study plan.

§ 5.12 Revised study plan and preliminary determination.

(a) Within 30 days following the study plan meeting provided for in § 5.11, the Applicant shall 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 applicant does not adopt a requested study, it shall explain why the request was not adopted, with reference to the criteria set forth in § 5.10.

(b) Within 30 days from the date the Applicant files its revised study plan, the Commission will issue a Preliminary Determination with regard to the Applicant's study plan, including any modifications determined to be necessary in light of the record.

(c) If no notice of study dispute is filed pursuant to § 5.13 within 20 days of the Preliminary Determination, the study plan as approved in the Preliminary Determination shall be deemed to be approved and final, and the Commission will issue an order directing the Applicant to proceed with the approved studies.

§ 5.13 Study dispute resolution process.

(a) Within 20 days of the Preliminary 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 state 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 regard to the preliminary determination.

(b) The notice of study dispute shall explain how the criteria set forth in section 5.10 of this part have been satisfied.

(c) Studies and portions of study plans approved in the Preliminary Determination that are not the subject of a notice of dispute shall be deemed to be approved and final, and the 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 or a contractor in the Commission's employ who is not otherwise involved in the proceeding;

(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. If no third panel member has been selected by the other two panelists within 15 days, those two panel members will carry out the duties of the panel, as described herein.

(e) If more than one agency or 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 tribes shall 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 website. Persons willing to serve in this capacity should serve on the Director of the Office of Energy Projects a statement of their qualifications with respect to the resource with which they have applicable expertise. 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 and 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 Tribe which served the notice of dispute will be borne by the Commission or the agency or 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 Applicant may file with the Commission and serve upon the panel members comments and information regarding the dispute.

(j) The panel will make a finding, with respect to each information or study request in dispute, as to whether the criteria set forth in § 5.10 are met or not met, and why, and provide to the Director of the Office of Energy Projects a recommendation based on its findings. No later than 50 days following the notice of study dispute, the panel shall file that recommendation with the Commission, a written recommendation to the Director of Energy Projects with respect to each information or study request in dispute, including all of the materials received by the panel. Any recommendation for the Applicant to provide information or a study shall include the technical specifications, including data acquisition techniques and methodologies.

(k) No later than 70 days from the date of filing of the notice of study dispute, the Director of Energy Projects will review and consider the recommendations of the panel, and will issue a written decision. The Director's decision will be made with reference to the study criteria set forth in § 5.10 and any applicable law or Commission policies and practices. The Director's decision shall constitute an amendment to the approved study plan.

(l) The Commission will, if necessary, issue a Scoping Document 2 within 30 days following the Director's decision or, if no dispute resolution is required, the Preliminary Decision.

§ 5.14 Conduct of studies.

(a) *Initial Status Report.* (1) At an appropriate time following the first season of studies or other appropriate time, the applicant shall prepare and file with the Commission an initial status report containing study results and analyses to date.

(2) Promptly following the filing of the initial status report, the applicant shall hold a meeting with the parties and Commission staff to discuss the study results and the applicant's and or other party's proposals, if any, to modify the study plan in light of study results and analyses to date.

(3) Promptly following the meeting provided for in paragraph (a)(2) of this section, the applicant shall file a meeting summary and request to amend the approved study plan, as necessary.

(4) Any party or the Commission staff may file a disagreement concerning the applicant's meeting summary and request to amend the approved study plan within 15 days, setting forth the basis for the dispute, and explaining what modifications, if any, should be made to the approved study plan.

(5) Responses to any filings made pursuant to paragraph (a)(4) of this section shall be filed within 15 days.

(6) No later than 15 days following the due date for responses provided for in paragraph (a)(5) of this section, the Director will issue an order resolving the disagreement, amending the approved study plan as appropriate, and directing the applicant to complete the study plan as amended.

(7) If no party or the Commission staff files a disagreement concerning the applicant's meeting summary and request to amend the approved study plan within 15 days, the proposed amendment shall be deemed to be approved.

(b) *Additional information.* Any request for additional information or study in response to the initial status report must be accompanied by a showing of good cause why the request should be approved, and which must provide, as appropriate to the facts of the case, a:

(1) Demonstration that approved studies were not conducted as provided for in the approved study plan;

(2) Demonstration that the study was conducted under anomalous environmental conditions or that environmental conditions have changed in a material way;

(3) Statement of material changes in the law or regulations applicable to information request;

(4) Statement explaining why the objectives of any approved study to which the information request relates cannot be achieved using existing data;

(5) Statement explaining why the request was not made earlier;

(6) Statement explaining significant changes in the project proposal or that significant new information material to the study objectives has become available; and

(7) In the case of a new study, an explanation why the study request satisfies the study criteria in § 5.12.

(c) *Updated Status Report.* After the second field season of studies or other appropriate time following the initial status report, the applicant shall prepare and file an updated status report. The review, comment, and disagreement resolution provisions of paragraphs (a)(4)–(7) of this section shall apply to the updated status report, and any request for additional information or study in response to the updated report must be accompanied by a demonstration of extraordinary circumstances warranting approval of the request, and must address the criteria set forth in paragraphs (b)(1)–(7) of this section, as appropriate to the facts of the case. The applicant shall promptly proceed to complete any remaining undisputed information-gathering or studies under its proposed amendments to the study plan, if any, and shall proceed to complete any information-gathering or studies that are the subject of a disagreement upon the Director's order resolving the disagreement.

§ 5.15 Draft license application.

(a) Following the filing of the updated status report, but no later than 150 days prior to the deadline for filing a new or subsequent license application, if applicable, the Applicant shall file for comment a draft license application.

(b) The draft license application shall contain, to the extent practicable, the contents required for license applications by part 4, subpart E, F, or G and §§ 16.9 and 16.10 of this chapter, except that the Exhibit E required to be included with an application filed under this part must meet the form and contents of Exhibit E set forth in § 5.17(b).

(c) An applicant that has been designated as the Commission's non-Federal representative may include a draft Biological Assessment, Essential Fish Habitat Assessment, and draft Historic Properties Management Plan with its draft license application.

(d) Within 90 days of the date the Applicant files the draft license application, parties and the Commission staff may file comments on the 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 party 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 § 5.14(b).

§ 5.16 Filing of application.

(a) *Timing of application.* An application for a new or subsequent license shall 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) *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.

(d) *Filing and service.* (1) Each applicant for a license under this part must submit to the Commission's Secretary for filing an original and eight copies of the application. The applicant 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, or member of the public consulted pursuant to this part.

(2)(i) An applicant must make information regarding its project reasonably available to the public for inspection and reproduction, from the date on which the applicant files its application for a license until the licensing proceeding for the project is terminated by the Commission. This information includes 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.

(ii) An applicant must delete from any information made available to the public under 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 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.

(3)(i) An applicant must make available the information specified in paragraph (c)(2) of this section 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.

(ii) An applicant must make the information specified in paragraph (c)(2) of this section available to the public for inspection:

(A) At its principal place of business or at any other location that is more accessible to the public, provided that all of the information is available in at least one location:

(B) During regular business hours; and

(C) In a form that is readily accessible, reviewable, and reproducible.

(iii) 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.

(iv) An applicant must make requested copies of the information specified in paragraph (c)(2) of this section available either:

(A) At its principal place of business or at any other location that is more accessible to the public, after obtaining reimbursement for reasonable costs of reproduction; or

(B) Through the mail, after obtaining reimbursement for postage fees and reasonable costs of reproduction.

(4) Anyone may file a petition with the Commission requesting access to the information specified in paragraph (c)(2) of this section if it believes that the 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) 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 paragraph (c)(2) of this section 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) of this chapter.

(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 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) *Rejection or dismissal.* If the Commission rejects or dismisses an application for a new or subsequent license filed under this part pursuant to the provisions of § 5.19, the application may not be refiled after the new or subsequent license application filing deadline specified in paragraph (a) of this section.

§ 5.17 Application content.

(a) 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 locate 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 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)(ii) 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 shall 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_____, 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 of this chapter;

(ii) License for a major unconstructed project and a major modified project: § 4.41 of this chapter;

(iii) License for a major project—existing dam: § 4.51 of this chapter; or

(iv) License for a project located at a new dam or diversion where the applicant seeks PURPA benefits: § 292.208.

(b) 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 shall meet the following format and content requirements: Exhibit E is an Environmental Document. Information provided in the document must be organized according to paragraphs (b)(1) and (2) of this section, as appropriate. The Environmental Document must address resources listed in the Pre-Application Document provided for in § 5.3. In preparing the Environmental Document, the applicant shall follow the Commission's ''Preparing Environmental Assessments: Guidelines for Applicants, Contractors, and Staff.'' The Environmental Assessment Guidelines may be viewed on the Commission's Web site or through its Public Reference Room.

(1) *Environmental Document Contents:*

(i) *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

(ii) *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.

(iii) *Applicable Laws.* Include a discussion of the status of compliance with or consultation under the following laws, if applicable:

(A) *Section 401 of the Clean Water Act.* The applicant must file a request for a water quality certification (WQC), required by section 401 of the Clean Water Act, as provided for in this section. Describe the conditions of the water quality certificate, if known.

(B) *Endangered Species Act (ESA).* Briefly describe the consultation 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 shall be included.

(C) *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 an ''EFH Assessment'' of the impacts of the project. The EFH Assessment should contain the information outlined in 50 CFR 600.920(e).

(D) *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.

(E) *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 shall include a Historic Properties Management Plan (HPMP) to avoid or mitigate the effects. The applicant shall include documentation of consultation with the Council, the State Historic Preservation Officer, and affected tribes on the HPMP.

(F) *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 shall 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.

(G) *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.

(iv) *Proposed Action and Action Alternatives.* (A) Explain the effects of the applicant's proposal on environmental resources. For each resource area addressed include:

(*1*) A discussion of the affected environment;

(*2*) An analysis of the proposed action and any other recommended alternatives or measures; and

(*3*) Any unavoidable adverse impacts.

(B) The Environmental Document must contain, with respect to the resources listed in the Pre-Application Document provided for in § 5.3, and any other resources identified in the Commission's environmental scoping document prepared pursuant to the National Environmental Policy Act and § 5.3, the following information, *commensurate with the scope of the project:*

(*1*) *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 information should be consistent with the information provided in the revised Pre-Application Document, plus any additional information on affected environment that the applicant has identified through implementation of its approved study plan.

(*2*) *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 shall 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.

(*3*) *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. This section shall 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 or tribes. If an applicant does not adopt a preliminary environmental measure proposed by a resource agency, Indian tribe, or member of the public, it shall include its reasons, based on project-specific information.

(*4*) *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.

(*5*) *Developmental Analysis.* (*i*) Discuss the economic benefits of the proposed action, the estimated costs of various alternatives, and environmental recommendations and their effect on project economics. Evaluate the cost of each measure considered and give the total and annual levelized costs and net benefits of:

(A) The existing conditions—the way the project operates now;

(B) As proposed by the applicant (the proposed action); and

(C) Any other action alternatives.

(*ii*) Estimate the value of the developmental resources—power generation, water supply, irrigation, navigation, and flood control—under each alternative considered. Discuss economic benefits of the project or project capacity expansion. For those measures that reduce the amount of project power or the value of the project power, estimate the cost to replace these power benefits. Provide separate economic information for each recommended measure so that the approximate cost of any reasonable combination of measures can be calculated.

(v) *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.

(vi) *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.

(vii) *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:

(i) 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);

(ii) A description of operation and maintenance procedures for any existing or proposed measures or facilities;

(iii) 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;

(iv) An estimate of the costs of construction, operation, and maintenance, of any proposed facilities, and of implementation of any proposed environmental measures, including a statement of the sources and extent of financing; and

(v) 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) *Information to be provided by an applicant for new license: Filing requirements.*

(1) *Information to be supplied by all applicants.* All applicants for a new license under this part must file the following information with the Commission:

(i) 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:

(A) Increase capacity or generation at the project;

(B) Coordinate the operation of the project with any upstream or downstream water resource projects; and

(C) Coordinate the operation of the project with the applicant's or other electrical systems to minimize the cost of production.

(ii) A discussion of the need of the applicant over the short and long term for the electricity generated by the project, including:

(A) 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;

(B) 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;

(C) The effect of each alternative source of power on:

(*1*) The applicant's customers, including wholesale customers;

(*2*) The applicant's operating and load characteristics; and

(*3*) The communities served or to be served, including any reallocation of costs associated with the transfer of a license from the existing licensee.

(iii) The following data showing need and the reasonable cost and availability of alternative sources of power:

(A) The average annual cost of the power produced by the project, including the basis for that calculation;

(B) The projected resources required by the applicant to meet the applicant's capacity and energy requirements over the short and long term including:

(*1*) 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;

(*2*) A resource analysis, including a statement of system reserve margins to be maintained for energy and capacity; and

(*3*) If load management measures are not viewed as resources, the effects of such measures on the projected capacity and energy requirements indicated separately;

(C) 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:

(*1*) The total annual cost of each alternative source of power to replace project power;

(*2*) The basis for the determination of projected annual cost; and

(*3*) 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

(D) The effect on the direct providers (and their immediate customers) of alternate sources of power.

(iv) 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.

(v) 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 tribe for electricity generated by the project to foster the purposes of the reservation.

(vi) 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:

(A) 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;

(B) An analysis of the advantages that the applicant's transmission system would provide in the distribution of the project's power; and

(C) 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.

(vii) 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.

(viii) 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.

(ix) 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.

(x) 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.

(xi) The applicant's electricity consumption efficiency improvement program, as defined under section 10(a)(2)(C) of the Federal Power Act, including:

(A) 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

(B) A statement describing the compliance of the applicant's energy conservation programs with any applicable regulatory requirements.

(xii) 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.

(2) *Information to be provided by an applicant licensee.* An existing licensee that applies for a new license must provide:

(i) The information specified in paragraph (c)(1) of this chapter.

(ii) A statement of measures taken or planned by the licensee to ensure safe management, operation, and maintenance of the project, including:

(A) A description of existing and planned operation of the project during flood conditions;

(B) A discussion of any warning devices used to ensure downstream public safety;

(C) 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;

(D) 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

(E) 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.

(iii) A description of the current operation of the project, including any constraints that might affect the manner in which the project is operated.

(iv) A discussion of the history of the project and record of programs to upgrade the operation and maintenance of the project.

(v) 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.

(vi) 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.

(vii) A discussion of any actions taken by the existing licensee related to the project which affect the public.

(viii) A summary of the ownership and operating expenses that would be reduced if the project license were transferred from the existing licensee.

(ix) 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.

(3) *Information to be provided by an applicant who is not an existing licensee.* An applicant that is not an existing licensee must provide:

(i) The information specified in paragraph (c)(1) of this section.

(ii) A statement of the applicant's plans to manage, operate, and maintain the project safely, including:

(A) 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;

(B) 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;

(C) A description of the applicant's plans to continue safety monitoring of existing project instrumentation and any proposed changes; and

(D) 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.

(4) *Location of information.* The information required to be provided by this paragraph (c) must be included in the application as a separate exhibit labeled ''Exhibit H.''

(d) *Comprehensive plans.* An application for license under this part shall 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 shall respond to any requests for additional information-gathering or studies filed with comments on the draft license application. If the license applicant agrees to do the information-gathering or study, it shall 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 shall explain the basis for declining to do so.

(f) *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 application must include:

(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 (f)(1)(ii) 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 Title 18, Chapter I, subchapter 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.

(g) All required maps and drawings must conform to the specifications of § 4.39 of this chapter.

§ 5.18 Tendering notice and schedule.

(a) Within 14 days of the 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 § 5.21.

(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) Within 30 days of the 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 a additional information-gathering or studies made in comments on the draft license application and to which the license applicant has not agreed in its application.

§ 5.19 Deficient applications.

(a) *Deficient applications.* (1) If an applicant believes that its application conforms adequately to the prefiling 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 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 judgement, 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 original and eight copies of the specified materials or information to the Secretary 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.

(3) Any application 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.

§ 5.20 Additional information.

An applicant may be required to submit any additional information or documents that the Commission or its designee 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 or its designee 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, or other entity that the Commission or its designee specifies. If an applicant fails to provide timely additional information, documents, or copies of submitted materials as required, the Commission or its designee may dismiss the application, hold it in abeyance, or take other appropriate action under this chapter or the Federal Power Act.

§ 5.21 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 §§ 5.16 and 5.17, the approved study plan has 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 5.17, as applicable, within the time frame prescribed in § 5.19;

(2) Finding that the application is ready for environmental analysis;

(3) Requesting comments, protests, and interventions;

(4) Requesting recommendations, preliminary terms and conditions, and fishway prescriptions; and

(5) Establishing the date for final amendments to applications for new or subsequent licenses; and

(6) Updating the processing schedule.

(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 shall 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. 22 Response to notice.

Comments, protests, interventions, recommendations, and preliminary terms and conditions or fishway prescriptions will be due 60 days after the notice of acceptance and ready for environmental analysis.

§ 5. 23 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. Each environmental assessment issued pursuant to this paragraph shall 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 § 5.25, and preliminary mandatory terms and conditions and fishway prescriptions.

(b) 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 30–45 days after issuance of the environmental assessment, as specified in the notice accompanying issuance of the environmental assessment.

(c) 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 (b) of this section, as specified in the notice accompanying issuance of the environmental analysis.

(d) The Commission will act on the license application within 60 days from the date for filing of modified mandatory prescriptions or terms and conditions.

§ 5.24 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 acceptance notice issued pursuant to § 5.21.

(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 Federal Power Act section 10(j) with the purposes and requirements of the Federal Power Act and other applicable law, as provided for in § 5.21, and preliminary mandatory terms and conditions and fishways prescriptions.

(c) Comments on an 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 to 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.

(f) The Commission will act on the license application from 30 to 90 days from the date the final environmental document is issued.

§ 5.25 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 mandatory terms and conditions or prescriptions 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 analysis. The preliminary determination, for those recommendations believed to be inconsistent, shall include:

(1) 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

(2) An explanation of how the measures recommended in the environmental document would 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 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.

(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 subsection to discuss 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.

§ 5.26 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 §§ 5.20–5.24. 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) *Original license.* 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 or subsequent license.* 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 § 4.35 of this chapter if a material amendment, as that term is used in § 4.35(f) of this chapter, is filed.

(d) *Timing and service.* 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 § 5.21.

§ 5.27 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 of this chapter 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 § 5.21 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.

§ 5.28 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, shall consist of an original and eight copies.

(b) *Waiver of compliance with consultation requirements.* (1) If a resource agency, Indian tribe, or member of the public waives in writing compliance with any requirement of this part, an applicant does not have to comply with the requirement as to that agency, tribe, or member of the public.

(2) If a resource 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 resource agency, 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 or interceder (as defined in § 385.2201 of this chapter) 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 or interceder must also serve a copy of the submission on that resource agency.

(2) Time periods—waiver or modification. The Director of the Office of Energy Projects may waive or modify any of the time periods provided for in this part. 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 Section 385.2008 of this chapter.

(3) Late-filed recommendations by fish and wildlife agencies pursuant to the Fish and Wildlife Coordination Act and Federal Power Act section 10(j) 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 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) *License conditions and required findings*—(1) *License conditions.* (i) 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.

(ii) 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.

(iii) 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.

(iv) 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 received pursuant to, section 4(e) of the Federal Power Act.

(v) 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.

(2) *Required findings.* 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.

(h) *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.

(i) *Fees under Section 30(e) of the Act.* The requirements of subpart M, part 4 of this chapter, Fees Under Section 30(e) of the Act, apply to license applications developed under this part.

§ 5.29 Transition provisions.

(a) 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 required by § 5.3, is

[insert date three months following issuance date of final rule] or later.

(b) Except as provided in paragraph (c) of this section, applications for which the deadline for filing a notification of intent to seek a new or subsequent license is prior to [insert date three months following issuance date of final rule], and potential applications for original license for which the potential applicant commenced first stage pre-filing consultation pursuant to § 4.38(b) of this chapter prior to [insert date three months following issuance date of final rule], are not subject to this part, but are subject to the Commission's regulations as promulgated prior to [insert date three months following issuance date of final rule].

(c) Potential applicants for an original, new, or subsequent license subject to paragraph (b) of this section may seek to apply prefiling consultation and application processing procedures provided for under this part to the development and processing of their application, subject to the provisions of §§ 4.38(e)(4) and 16.8(e)(4) of this chapter.

PART 16—PROCEDURES RELATING TO TAKEOVER AND RELICENSING OR LICENSED PROJECTS

1. 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.

2. Remove the phrase ''Office of Hydropower Licensing'' throughout the part and add in its place ''Office of Energy Projects''.

§ 16.1 [Amended]

3. Amend § 16.1 by adding paragraph (c) to read as follows:

* * * * *

(c) Any potential applicant for a new or subsequent license for which the deadline for the notice of intent required by § 16.6 falls after [insert date three months following issuance date of final rule] 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.

* * * * *

4. Amend § 16.6 as follows:

a. In paragraph (b)(9), remove the phrase ''16.16'' and add in its place the phrase ''16.7''.

b. In paragraph (d)(3), remove the phrase ''and Indian tribes by mail.'' and add in its place the phrase, ''state water quality agencies, Indian tribes, and non-governmental organizations likely to be interested in the proceedings by mail.''

c. Paragraph (e) is added.

The added text reads as follows:

§ 16.6 Notification procedures under section 15 of the Federal Power Act.

* * * * *

(e) *Transition provisions.* (1) This section shall apply to license applications for which the deadline for filing a notification of intent to seek a new or subsequent license is [insert date three months following issuance date of final rule] or later.

(2) Applications for which the deadline date for filing a notification of intent to seek a new or subsequent license is prior to [insert date three months following issuance date of final rule] are subject to part 16 of this chapter as promulgated prior to [insert date three months following issuance date of final rule].

* * * * *

5. Amend § 16.7 as follows:

a. Paragraph (d)(1) is revised.

b. In paragraph (e)(1), remove the word ''information'' and add in its place the phrase ''Pre-Application Document''.

c. In paragraph (g), remove the phrase ''16.16(d)(1)(iv)'' and add in its place the phrase ''16.7(d)(1)(iv)''.

d. Paragraph (h) is added.

The revised and added 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 potential applicant must, at the time it files its notification of intent to seek a license pursuant to § 5.3 of this chapter, provide a copy of the Pre-Application Document required by § 5.4 of this chapter to the entities specified in § 5.4 of this chapter.

* * * * *

(h) *Transition provisions.* (1) This section shall apply to license applications for which the deadline for filing a notification of intent to seek a new or subsequent license is [insert date three months following issuance date of final rule] or later.

(2) Applications for which the deadline date for filing a notification of intent to seek a new or subsequent license is prior to [insert date three months following issuance date of final rule] are subject to this section as promulgated prior to [insert date three months following issuance date of final rule].

6. Amend § 16.8 as follows:

a. In paragraph (a)(1), remove everything after the phrase ''33 U.S.C. 1341(c)(1)),'' and add in its place the phrase any Indian tribe that may be affected by the project, and members of the public.''

b. Paragraph (a)(2) is revised.

c. Paragraphs (b)–(c) are revised.

d. In paragraphs (d) (1), remove the phrase ''Indian tribes and other government offices'' and add in its place the phrase ''Indian tribes, other government offices, and consulted members of the public''.

e. In paragraph (d)(2), remove the phrase ''agency and Indian tribe'' and add in its place the phrase ''agency, Indian tribe, and member of the public consulted''.

f. Paragraph (e) is revised.

g. Paragraph (f) is revised.

h. In paragraph (h), remove the phrase ''agency or Indian tribe'' and add in its place the phrase ''agency, Indian tribe, or member of the public''.

i. In paragraph (i)2(i), remove everything after the word ''until'' and add in its place ''a final order is issued on the license application.''.

j. Paragraph (j) is revised.

The revised and added text reads as follows:

§ 16.8 Consultation requirements.

(a) * * *

(2) 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 § 5.3 of this chapter, provide a copy of the Pre-Application Document required by § 5.4 of this chapter to the entities specified in that paragraph.

(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) Not earlier than 30 days, but not later than 60 days, from the date of the potential applicant's letter transmitting the Pre-Application Document to the agencies, Indian tribes and members of the public under paragraph (b)(1) of this section, the potential applicant must:

(i) 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

(ii) 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.

(4) 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, Indian tribe, or member of the public.

(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.

(c) *Second stage of consultation.* (1) Unless determined otherwise by the Director of the Office of Energy Projects pursuant to paragraph (b)(6) of this section, a potential applicant must complete all reasonable and necessary studies and obtain all reasonable and necessary information requested by resource agencies, Indian tribes, and members of the public under paragraph (b) of this section to which the potential applicant has agreed. The applicant shall also obtain any data and conduct any studies required by the Commission pursuant to the dispute resolution procedures of paragraph (b)(6) of this section. These studies must be completed and the information obtained:

(i) Prior to filing the application, if the results:

(A) Would influence the financial (*e.g.,* instream flow study) or technical feasibility of a project (*e.g.,* study of potential mass soil movement); or

(B) Are needed to determine the design or location of project features, reasonable alternatives to the project, the impact of the project on important natural or cultural resources (*e.g.,* resource surveys), suitable mitigation or enhancement measures, or to minimize impact on significant resources (*e.g.,* wild and scenic river, anadromous fish, endangered species, caribou migration routes);

(ii) After filing the application but before license issuance, if the applicant otherwise complied with the provisions of paragraph (b)(1) or (b)(2) of this section, as applicable, no later than four years prior to the expiration date of the existing license and the results:

(A) Would be those described in paragraphs (c)(1)(i) (A) or (B) of this section; and

(B) Would take longer to conduct and evaluate than the time between the conclusion of the first stage of consultation and the new license application filing deadline.

(iii) After a new license is issued, if the studies can be conducted or the information obtained only after construction or operation of proposed facilities, would determine the success of protection, mitigation, or enhancement measures (*e.g.,* post-construction monitoring studies), or would be used to refine project operation or modify project facilities.

(2) If, after the end of the first stage of consultation as defined in paragraph (b)(7) of this section, a resource agency, Indian tribe, or member of the public requests that the potential applicant conduct a study or gather information not previously identified and specifies the basis for its request, under paragraphs (b)(5)(i)–(vi) of this section, the potential applicant will promptly initiate the study or explain to the requesting entity why it believes the request is not reasonable or necessary. If the potential applicant declines to obtain the information or conduct the study, the potential applicant, any resource agency, Indian tribe, or consulted member of the public may refer any such request to the Director of the Office of Energy Projects for dispute resolution under the procedures and subject to the other requirements set forth in paragraph (b)(6) of this section.

(3)(i) The results of studies and information-gathering referenced in paragraphs (c)(1)(ii) and (c)(2) of this section will be treated as additional information; and

(ii) 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 section merely because the study or information gathering is not complete before the application is filed.

(4) A potential applicant must provide each resource agency, Indian tribe, and consulted member of the public with:

(i) A copy of its draft application that:

(A) Indicates the type of application the potential applicant expects to file with the Commission; and

(B) Responds to any comments and recommendations made by any resource agency, Indian tribe, or consulted member of the public either during the first stage of consultation or under paragraph (c)(2) of this section;

(ii) The results of all studies and information-gathering either requested by that resource agency, Indian tribe, or consulted member of the public in the first stage of consultation (or under paragraph (c)(2) of this section if available) or which pertain to resources of interest to that resource agency, Indian tribe, or consulted member of the public and which were identified by the potential applicant pursuant to paragraph (b)(2)(vi) of this section, including a discussion of the results and any proposed protection, mitigation, or enhancement measure; and

(iii) A written request for review and comment.

(5) A resource agency, Indian tribe, or consulted member of the public will have 90 days from the date of the potential applicant's letter transmitting the paragraph (c)(4) of this section information to it to provide written comments on the information submitted by a potential applicant under paragraph (c)(4) of this section.

(6) If the written comments provided under paragraph (c)(5) of this section indicate that a resource agency, Indian tribe, or consulted member of the public has a substantive disagreement with a potential applicant's conclusions regarding resource impacts or its proposed protection, mitigation, or enhancement measures, the potential applicant will:

(i) Hold at least one joint meeting with the resource agency, Indian tribe, other agencies, consulted member of the public and other agencies with similar or related areas of interest, expertise, or responsibility not later than 60 days from the date of the written comments of the disagreeing agency's, Indian tribe's, or consulted member of the public's written comments to discuss and to attempt to reach agreement on its plan for environmental protection, mitigation, or enhancement measures; and

(ii) Consult with the disagreeing agency, Indian tribe, other agencies with similar or related areas of interest, expertise, and responsibility, and consulted member of the public on the scheduling of the joint meeting; and provide the disagreeing resource agency, Indian tribe, consulted member of the public, or other agencies with similar or related areas of interest, expertise, or responsibility, and the Commission with written notice of the time and place of each meeting and a written agenda of the issues to be discussed at the meeting at least 15 days in advance.

(7) The potential applicant and any disagreeing resource agency, Indian tribe, or consulted member of the public may conclude a joint meeting with a document embodying any agreement among them regarding environmental protection, mitigation, or enhancement measures and any issues that are unresolved.

(8) The potential applicant must describe all disagreements with a resource agency, Indian tribe, or consulted member of the public on technical or environmental protection, mitigation, or enhancement measures in its application, including an explanation of the basis for the applicant's disagreement with the resource agency, Indian tribe, and consulted member of the public, and must include in its application any document developed pursuant to paragraph (c)(7) of this section.

(9) A potential applicant may file an application with the Commission if:

(i) It has complied with paragraph (c)(4) of this section and no resource agency, Indian tribe, or consulted member of the public has responded with substantive disagreements by the deadline specified in paragraph (c)(5) of this section; or

(ii) It has complied with paragraph (c)(6) of this section and a resource agency, Indian tribe, or consulted member of the public has responded with substantive disagreements.

(10) The second stage of consultation ends:

(i) Ninety days after the submittal of information pursuant to paragraph (c)(4) of this section in cases where no resource agency, Indian tribe, or consulted member of the public has responded with substantive disagreements; or

(ii) At the conclusion of the last joint meeting held pursuant to paragraph (c)(6) of this section in case where a resource agency, Indian tribe, or consulted member of the public has responded with substantive disagreements.

* * * * *

(e) *Resource agency, Indian tribe, or member of the public waiver of compliance with consultation requirements.* (1) If a resource agency, Indian tribe, or consulted member of the public waives in writing compliance with any requirement of this section, a potential applicant does not have to comply with that requirement as to that agency, Indian tribe, or consulted member of the public.

(2) If a resource agency, Indian tribe, or consulted member of the public fails to timely comply with a provision regarding a requirement of this section, a potential applicant may proceed to the next sequential requirement of this section without waiting for the resource agency, Indian tribe, or consulted member of the public to comply.

(3) The failure of a resource agency, Indian tribe, or consulted member of the public to timely comply with a provision regarding a requirement of this section does not preclude its participation in subsequent stages of the consultation process.

(4) Following [insert issuance date of final rule] 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 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.

(f) *Application requirements documenting consultation and any disagreements with resource agencies, Indian tribes, or members of the public.* An applicant must show in Exhibit E of its application that it has met the requirements of paragraphs (b) through (d) and § 16.8(i), and must include:

(1) Any resource agency's, Indian tribe's, or member of the public's letters containing comments, recommendations, and proposed terms and conditions;

(2) Any letters from the public containing comments and recommendations;

(3) Notice of any remaining disagreements with a resource agency, Indian tribe, or consulted member of the public on:

(i) The need for a study or the manner in which a study should be conducted and the applicant's reasons for disagreement;

(ii) Information on any environmental protection, mitigation, or enhancement measure, including the basis for the applicant's disagreement with the resource agency, Indian tribe, or consulted member of the public.

(4) Evidence of any waivers under paragraph (e) of this section;

(5) Evidence of all attempts to consult with a resource agency, Indian tribe, or consulted member of the public, copies of related documents showing the attempts, and documents showing the conclusion of the second stage of consultation.

(6) An explanation of how and 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;

(7) A description of how the applicant's proposal addresses the significant resource issues raised by members of the public during the joint meeting held pursuant to paragraph (b)(2) of this section.

* * * * *

(j) *Transition provisions.* (1) This section shall apply to license applications for which the deadline for filing a notification of intent to seek a new or subsequent license is [insert date three months following issuance date of final rule] or later.

(2) Applications for which the deadline date for filing a notification of intent to seek a new or subsequent license is prior to [insert date three months following issuance date of final rule] are subject to the provisions of § 16.8 as promulgated prior to [insert date three months following issuance date of final rule].

* * * * *

§ 16.9 [Amended]

7. Amend § 16.9 as follows:

In paragraph (d)(1)(iii), remove the phrase ''agencies and Indian tribes'' and add in its place the phrase ''agencies, Indian tribes, and non-governmental organizations''.

8. Amend § 16.10 as follows:

a. Paragraph (d) is removed.

b. Paragraph (e) is redesignated as paragraph (d) and 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]

9. Amend § 16.11 by removing paragraph (a)(2).

§ 16.19 [Amended]

10. Amend § 16.19 by removing paragraphs (b)(3) and (b)(4).

§ 16.20 [Amended]

11. Amend § 16.20 by revising paragraph (c) to read as follows:

* * * * *

(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 385—RULES OF PRACTICE AND PROCEDURE

1. 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).

2. Amend § 385.214 by revising paragraphs (a)(2) and (a)(3) to read as follows:

§ 385.214 Intervention (Rule 214).

(a) * * *

(2) Any State Commission, the Advisory Council on Historic Preservation, and the U.S. Departments of Agriculture, Commerce, and the Interior, and any state fish and wildlife or water quality certification agency 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, a State Commission, the Advisory Council on Historic Preservation, and the U.S. Departments of Agriculture, Commerce, and the Interior, state fish and wildlife or water quality certification agency 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, other than the Secretary of Energy or a State Commission, the Advisory Council on Historic Preservation, and the U.S. Departments of Agriculture, Commerce, and the Interior, and any state fish and wildlife or water quality certification agency seeking to intervene to become a party must file a motion to intervene.

* * * * *

3. Amend § 385.2201 by adding paragraph (g)(2) to read as follows:

§ 385.2201 Rules governing off the record communications (Rule 2201).

* * * * *

(g) * * *

(2) The disclosure requirement of paragraph (g)(1) of this section shall apply, with respect to communications with a cooperating agency, only to study

results, data, or other information obtained in writing or orally from the cooperating agency. Communications of a deliberative nature, including drafts of NEPA documents and related communications, are exempt from the disclosure requirement.

* * * * *

Note: The following Appendices will not be published in the Code of Federal Regulations.

Appendix A

List of Commenters

Licensees

Alaska Power & Telephone Co. (APT)
Ameren/UE
American Electric Power Company (AEP)
CHI Energy, Inc. (CHI)
Connecticut Small Power Producers Association (CSPPA)
Domtar, Inc., Madison Paper, and Great Lakes Hydro America (DM&GLH)
Domtar, Inc. (Domtar)
Duke Power Company (Duke)
Edison Electric Institute (EEI)
FAMP
FPL Energy (FPL)
Georgia Power Company (Georgia Power)
Hydroelectric Relicensing Reform Task Force (HLRTC) [299]
Idaho Power Company (IPC)
National Hydropower Association (NHA)
National Hydropower Association, American Public Power Association, and Edison Electric Institute (NHA)
New York Power Authority (NYPA)
North American Hydro (NAH)
Northeast Utilities (NEU)
PacifiCorp
Pacific Gas & Electric Co. (PG&E)
Puerto Rico Electric Power Authority (PREPA)
Seattle City Light (SCL)
Southern California Edison Company (SCE)
Southern Company (Southern)
Wausau-Mosinee Paper Corp. (Wausau)
WE Energies
Western Public Power Districts (WPPD)
Xcel Energy (Xcel)

Non-Governmental Organizations

Adirondack Mountain Club (ADK)
Alabama River Alliance (Alabama Rivers)
American Rivers (AmRivers)
American Whitewater (AW)
Appalachian Mountain Club (AMC)
Catawba-Wateree Relicensing Coalition (C–WRC)
Connecticut River Watershed Council (CRWC)
Hydropower Reform Coalition (HRC)
Kayak and Canoe Club of New York (KCCNY)
New England FLOW (NE FLOW)
New York Rivers United (NYRU)
Pacific Fishery Management Council (PFMC)
River Alliance of Wisconsin (RAW)

Federal Agencies

Advisory Council on Historic Preservation (ACHP)
Environmental Protection Agency
National Marine Fisheries Service (NMFS)
U.S. Department of the Interior (Interior)

States/State Agencies

Alaska Department of Fish and Game (ADF&G)
Alabama Division of Wildlife and Freshwater Fisheries (Alabama)
California Resources Agency, California EPA, State Water Resources Control Board (California)
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)
Maryland Department of Natural Resources (Maryland DNR)
Michigan Department of Natural Resources (Michigan DNR)
New Hampshire Department of Environmental Services (NHDES)
New York State Department of Environmental Conservation (NYSDEC)
North Carolina Wildlife Resources Commission (NCWRC)
Northeast Utilities (NEU)
Oklahoma Water Resources Board (OWRB)
Placer County Water Agency (PCWA)
Snohomish County PUD and City of Everett (Snohomish)
South Carolina Division of Water Quality (SCDWQ)
State of Oregon
State of Washington
State of Virginia
State of Vermont, Agency of Natural Resources (VANR)
Washington Department of Ecology (WDOE)
Wisconsin Department of Natural Resources (Wisconsin DNR)
Wyoming Game and Fish Department (WGFD)
Wyoming Attorney General, Water and Natural Resources Division (Wyoming)

Indian Tribes

Affiliated Tribes of Northwest Indians—Economic Development Corporation (NW Indians)
Bad River Band-Lake Superior Tribe (BRB-LST)
Caddo Nation of Oklahoma (Caddo)
Coeur d'Alene Tribe
Confederated Salish-Kootenai Tribes (Salish-Kootenai)
Confederated Tribes of the Umatilla Indian Reservation (CTUIR)
Columbia River Inter-Tribal Fish Commission (CRITFC)
Duck Valley Shoshone Paiute Tribes of Nevada and Idaho (Shoshone)
Great Lakes Indian Fish and Wildlife Commission (GLIFWC)
Haudenosaunee Environmental Task Force (HETF)
Klamath River Inter-Tribal Fish and Water Commission (KRITFWC)
Klamath Tribes (KT)
Menominee Tribe of Wisconsin (Menominee)
Mississippi Band of Choctaw Indians (Choctaw)
North Fork Rancheria (NF Rancheria)
Pit River Tribal Council, Hammawi Tribe (PRT)
Quinault Indian Nation (Quinault)
St. Regis Mohawk Tribe

Individuals

Jerry Atkins
Fred Ayer
A. Williams Cass
Thomas Sullivan, Sullivan & Gomez Engineers (Sullivan)
Nancy Skancke
Doug Spalding
David Wehnes

Other

Kleinschmidt Associates (Kleinschmidt)
Long View Associates (Long View)
Troutman Sanders (Troutman)
Van Ness Feldman (Van Ness)

Appendix B

Specific Requests for Comments

¶ 48 What contents are appropriate for the Pre-Application Document?

¶ 66 Does proposed study criterion (7) or NHA's recommended study criterion (3) more appropriately deal with the issue of study costs?

¶ 90 (a) What modifications, if any, should be made to the proposed study dispute resolution process?

(b) What modifications, if any, should be made to the proposed advisory panel?

¶ 105 (a) In light of the proposal to include full public participation and mandatory, binding study dispute resolution in the traditional process, should the deadline date for filing the water quality certification application for this process remain when the license application is filed, or is there good reason to make the deadline date later?

(b) Should the deadline date for filing a water quality certification application in the ALP remain the application filing date, or be moved to a later date?

¶ 163 Should the integrated process regulations encourage license applicants to include with their draft license applications a non-binding statement of whether or not they intend to engage in settlement negotiations?

¶ 172 Should the proposed integrated process apply to original license applications?

¶ 181 Are there circumstances in which one study dispute resolution advisory panel can make recommendations with respect to disputes involving different, but related resources, such as fisheries and aquatic resources?

¶ 184 Should participants 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 status report?

¶ 185 Should the rules require parties to file written comments on the potential applicant's initial and updated status reports prior to the required meeting?

¶ 187 (a) After the updated status report, should a draft license application be

[299] HLRTC members are drawn from the memberships of the American Public Power Association, Edison Electric Institute, and National Hydropower Association.

circulated for comment, or would it be preferable for the participants to continue informally working on resolution of outstanding issues?

(b) If a draft license application is required, should it be required to track the contents of the final license application, or would it be preferable to require it to include only a revised Exhibit E, and/or any other materials?

¶ 190 Should Federal and state agencies be required to provide preliminary recommendations, terms and conditions, or prescriptions following the updated status report if the Commission determines that all necessary information required by the study plan is already in the record?

¶ 191 If Federal and state agencies are required to provide preliminary recommendations, terms and conditions, or prescriptions following the updated status report, how can the Commission ensure that they have an adequate opportunity to consider public comment on their proposed terms and conditions if such an approach were adopted, and how can such an approach best be accommodated where the resource agencies are cooperating agencies for development of the NEPA document?

¶ 198 (a) Which process steps in the proposed integrated process may require adjustment?

(b) Which time frames, if any, should be specified in the regulations for purposes of guiding the development of a process plan and schedule (including studies), and which may not be appropriate for specification in the regulations, but rather should be developed entirely in the context of case-specific facts?

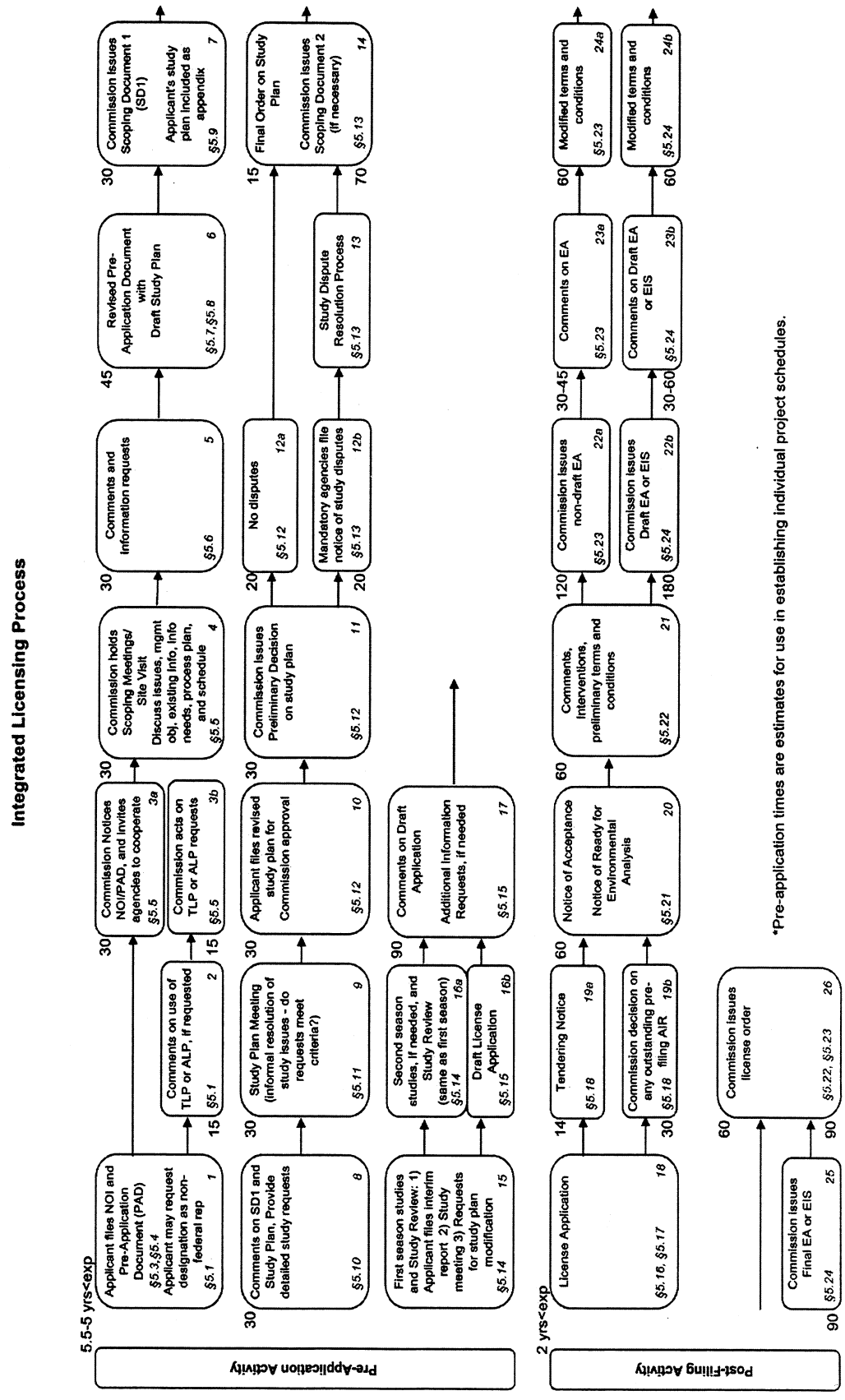
¶ 207 Are there circumstances under which binding study dispute resolution could be conducted in the ALP in a manner that safeguards the collaborative process?

¶ 211 What approaches to streamlining the licensing process for small projects other than non-consensual waiver of filing requirements may be viable that also protect the interests of stakeholders other than the license applicant?

¶ 212 Should the Commission amend its regulations to permit license applicants to file draft applicant-prepared environmental analyses with license applications prepared using the traditional process, in light of the proposed modifications to that project?

¶ 223 Should project boundaries be required for all licenses and exemptions?

Appendix C



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