

**Redline/Strikeout Version
of
Proposed Regulatory Text**

RM02-16-000
Proposed Regulatory Text, Redline/Strikeout Version

PART 4

Part 4 – Licenses, Permits, Exemptions, and Determination of Project Costs
Subpart A – Determination of Cost of Projects Constructed Under License

§ 4.1 Initial cost statement.

§ 4.3 Report on project cost.

§ 4.4 Service of report.

§ 4.5 Time for filing protest.

§ 4.6 Burden of proof.

§ 4.7 Findings.

**Subpart B – Determination of Fair Value of Constructed Projects Under Section
23(a) of the Act**

§ 4.10 Valuation data.

§ 4.11 Reports.

§ 4.12 Service of report.

§ 4.13 Time for filing protest.

§ 4.14 Hearing upon request.

**Subpart C – Determination of Cost of Constructed Projects Not Subject to Section
23(a) of the Act**

§ 4.20 Initial report.

§ 4.21 **Reports.**

§ 4.22 **Service of report.**

§ 4.23 **Time for filing protest.**

§ 4.24 **Determination of cost.**

§ 4.25 **Findings**

Subpart D – Application for Preliminary Permit, License or Exemption; General Provisions

§ 4.30 **Applicability and definitions.**

(a) (1) This subpart applies to any-applications for preliminary permit, license, or exemption from licensing.

(2) Any potential applicant for an original license for which pre-filing 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.

§ 4.31 **Initial or competing application; who may file.**

§ 4.32

Acceptance for filing or rejection; information to be made available to the public; requests for additional studies.

4.32(a) Each application must:

(1) For a preliminary permit or license, 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) For a preliminary permit or a license, identify (providing names and mailing addresses):

(i) Every county in which any part of the project, and any Federal facilities that would be used by the project, would be located;

(ii) Every city, town, or similar local political subdivision:

(A) In which any part of the project, and any Federal facilities that would be used by the project, would be located; or

(B) That has a population of 5,000 or more people and is located within 15 miles of the project dam;

(iii) Every irrigation district, drainage district, or similar special purpose political subdivision:

(A) In which any part of the project, and any Federal facilities that would be used by the project, would be located; or

(B) That owns, operates, maintains, or uses any project facilities that would be used by the project;

(iv) Every other political subdivision in the general area of the project that there is reason to believe would likely be interested in, or affected by, the application; and

(v) All Indian tribes that may be affected by the project.

(3)(i) For a license (other than a license under Section 15 of the Federal Power Act) state that the applicant has made, either at the time of or before filing the application, a good faith effort to give notification by certified mail of the filing of the application to:

(A) Every property owner or record of any interest in the property within the bounds of the project, or in the case of the project without a specific project boundary, each such owner of property which would underlie or be adjacent to any project works including any impoundments; and

(B) The entities identified in paragraph (a)(2) of this section, as well as any other Federal, state, municipal or other local government agencies that there is reason to believe would likely be interested in or affected by such application.

(ii) Such notification must contain the name, business address, and telephone number of the applicant and a copy of the Exhibit G contained in the application, and must state that a license application is being filed with the Commission.

(4)(i) As to any facts alleged in the application or other materials filed, be subscribed and verified under oath in the form set forth in paragraph (a)(3)(ii) of this section by the

person filing, an officer thereof, or other person having knowledge of the matters sent 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, etc.) is executed in the **[form of verification goes here]**

(5) Contain the information and documents prescribed in the following sections of this chapter, according to the type of application:

(i) Preliminary permit: § 4.81;

(ii) License for a minor water power project and a major water power project 5 MW or less: § 4.61;

(iii) License for a major unconstructed project and a major modified project: § 4.41;

(iv) License for a major project--existing dam: § 4.51;

(v) License for a transmission line only: § 4.71;

(vi) Nonpower license for a licensed project: § 16.7;

(vii) Exemption of a small conduit hydroelectric facility: § 4.92;

(viii) Case-specific exemption of small hydroelectric power project: § 4.107; or

(ix) License or exemption for a project located at a new dam or diversion where the applicant seeks PURPA benefits: § 292.208.

4.32(b)(1) Each applicant for a preliminary permit, license, and transfer or surrender of license and each petitioner for surrender of an exemption must submit to the Commission's Secretary for filing an original and eight copies of the application or petition. 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. In the case of an application for a preliminary permit, the applicant shall, if the Commission so directs, serve copies of the application on the U.S. Department of the Interior and the U.S. Army Corps of Engineers. The application may include reduced prints of maps and drawings conforming to § 4.39(d). The originals (microfilm) of maps and drawing are not to be filed initially, but will be required pursuant to paragraph (d) of this section. The Commission may also ask for the filing of full-sized prints in appropriate cases.

(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 ~~need not~~ conform to the requirements of § 4.39. ~~but must be of sufficient size, scale and quality to permit each reading.~~ The originals (microfilm) of maps and drawing are not to be filed initially, but will be requested pursuant to paragraph (d) of this section.

(3)(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 or exemption until the licensing or exemption proceeding for the project is terminated by the Commission. This information includes a copy of the complete application for license or exemption, 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 violated 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.

(4)(i) An applicant must make available the information specified in paragraph (b)(3) 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 (b)(3) 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 (b)(3) 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.

(5) Anyone may file a petition with the Commission requesting access to the information specified in paragraph (b)(3) 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.

(6) 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, the laces where the information specified in paragraph (b)(3) of this section is available for inspection and reproduction, and the date by which any requests for additional scientific studies are due under paragraph (b)(7) of this

section, and must state that the Commission will publish subsequent notices soliciting public participation if the application is found acceptable for filing. The applicant must promptly provide the Commission with proof of the publication of this notice.

(7) Except as to a license or exemption application, if any resource agency, Indian tribe, or person believes that an additional scientific study should be conducted in order to form an adequate factual basis for a complete analysis of the application on its merits, the resource agency, Indian tribe, or person must file a request for the study with the Commission within 60 days after the application is filed and serve a copy of the request on the applicant. The Commission will issue public notice of the tendering for filing of each application for hydropower license or exemption; each such applicant must submit a draft of this notice to this Commission with its application. For any such additional study request, the requester must describe the recommended study and the basis for the request in detail, including who should conduct and participate in the study, its methodology and objectives, whether the recommended study methods are generally accepted in the scientific community, how the study and information sought will be useful in furthering the resource goals that are affected by the proposed facilities, and approximately how long the study take to complete, and must explain why the study objectives cannot be achieved using the data already available. In addition, in the case of a study request by a resource agency or Indian tribe that failed to request the study during the pre-filing consultation process under § 4.38 of this part or § 16.8 of this chapter, the agency or Indian tribe must explain why this request was not made during the pre-filing consultation process and show good cause why its request for the study should be considered by the Commission.

(8) An applicant may file a response to any such study request within 30 days of its filing, serving a copy of the response to the requester.

(9) The requirements of paragraphs (b)(3) to (b)(8) of this section only apply to an application for license or exemption filed on or after May 20, 1991. Paragraphs (b)(3) and (b)(4) of this section do not apply to applications subject to the requirements of § 16.7 of this chapter.

(10) *Transition provisions.* (1) This paragraph (b) 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 part, 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 Section 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.

4.32(c)(1) Every application for a license or exemption for a project with a capacity of 80 megawatts or less must include in its application copies of the statements made under § 4.38(b)(1)(vi).

(2) If an applicant reverses a statement of intent not to seek PURPA benefits:

(i) Prior to the Commission issuing a license or exemption, 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 § 4.38; and

(B) Satisfy all the requirements in § 292.208 of this chapter; or

(ii) After the Commission issues a license or exemption for the project, the applicant is prohibited from obtaining PURPA benefits.

4.32(d) When any application is found to conform to the requirements of paragraphs (a), (b), and (c) of this section, the Commission or its delegate will:

(1) Notify the applicant that the application has been accepted for filing, specifying the project number assigned and the date upon which the application was accepted for filing, and, for a license or exemption application, direct the filing of the originals (microfilm) of the required maps and drawings;

(2)(i) For an application for a preliminary permit or license, issue public notice of the application as required in the Federal Power Act;

(ii) For an application for exemption from licensing, publish notice once in a daily or weekly newspaper of general circulation in each county in which the project is or will be located; and

(3) If the project affects lands of the United States, notify the appropriate Federal office of the application and the specific lands affected, pursuant to Section 24 of the Federal Power Act.

(4) For an application for a license seeking benefits under section 210 of the Public Utility Regulatory Policies Act of 1978, as amended, for a project that would be located at a new dam or diversion, serve the public notice issued for the application under paragraph (d)(2)(I) of this section to interested agencies at the time the application is notified that the application is accepted for filing.

4.32(e) In order for an application to conform adequately to the requirements of paragraphs (a), (b), and (c) of this section and of § 4.38, an application must be completed fully. No blanks should be left in the application. No material or information required in the application should be omitted. If the applicant believes that its application conforms adequately without containing certain required material 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. If the Commission finds that an

application does not adequately conform to the requirements of paragraphs (a), (b), and (c) of this section and of § 4.38, the Commission or its designee will consider the application either deficient or patently deficient.

(1) *Deficient applications.* (i) An application that in the judgment of the Office of Energy Projects ~~Hydropower Licensing~~ does not conform to the requirements of paragraphs (a), (b), and (c) of this section and of § 4.38, may be considered deficient. An applicant having a deficient application will be afforded additional time to correct the deficiencies, not to exceed 45 days from the date of notification in the case of an application for preliminary permit or exemption from licensing or 90 days from the date of notification in the case of an application for license. 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 the number of copies specified in paragraph (b) of this section of the specified materials or information to the Secretary within the time specified in the notification of deficiency.

(ii) Upon submission of a conforming application, action will be taken in accordance with paragraph (d) of this section.

(iii) If the revised application is found not to conform to the requirements of paragraphs (a), (b), and (c) of this section and of § 4.38, or if the revisions are not timely submitted, the revised application will be rejected. Procedures for rejected applications are specified in paragraph (e)(2)(iii).

(2) *Patently deficient applications.* (i) If, within 90 days of its filing date, the Director of the Office of Energy Projects ~~Hydropower Licensing~~ determines that an application patently fails to substantially comply with the requirements of paragraphs (a), (b), and (c) of this part and of § 4.38 of this part of § 16.8 of this chapter, 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.

(ii) If, after 90 days of its filing date, the Director of the Office of Energy Projects ~~Hydropower Licensing~~ determines that an application patently fails to comply with the requirements of paragraphs (a), (b), and (c) of this part and of § 4.38 of this part of § 16.8 of this chapter, or is for a project that is precluded by law:

(A) The application will be rejected by order of the Commission, if the Commission determines that it is patently deficient; or

(B) The application will be considered deficient under paragraph (e)(1) of this section, if the Commission determines that it is not patently deficient.

(iii) 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 and the disposition of competing applications under § 4.37.

4.32(f) Any application will be considered *accepted for filing* as of the application filing date if the Secretary receives all of the information and documents necessary to conform to the requirements of paragraphs (a), (b), and (c) of this section and of § 4.38 within the time prescribed by the Commission or its delegate under paragraph (e) of this section.

4.32(g) 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.

4.32(h) A prospective applicant, prior to submitting its application for filing, may seek advice from the Commission staff regarding the sufficiency of the application. For this purpose, five copies of the draft application should be submitted to the Director of the Division of Engineering and Environmental Review ~~Project Management~~. An applicant or prospective applicant may confer with the Commission staff at any time regarding deficiencies or other matters related to its application. All conferences are subject to the requirements of § 385.2201 of this chapter governing ex parte communications. The opinions or advice of the staff will not bind the Commission or any person delegated authority to act on its behalf.

4.32(i) Intervention in any preliminary permit proceeding will not constitute intervention in any subsequent licensing or exemption proceeding.

4.32(j) Any application, the effectiveness of which is conditioned upon the future occurrence of any event or circumstance, will be rejected.

(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 part, 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 Section 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.

§ 4.33 Limitations on submitting applications.

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

4.34(a) *Trial-type hearing.* The Commission may order a trial-type hearing on an application for a preliminary permit, a license, or an exemption from licensing upon either 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.

4.34(b) *Notice and comment hearings.* All comments (including mandatory and recommended terms and conditions and prescriptions) on an application for exemption or license must be filed with the Commission no later than 60 days after issuance by the Commission of public notice declaring that the application is ready for environmental analysis. All reply comments must be filed within 105 days of that notice. All comments and reply comments and all other filings described in this section must be served on all persons listed in 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 a particular resource agency, the party or interceder must also serve a copy of the submission on this resource agency. The Commission may allow for longer comment or reply comment periods if appropriate. A commenter or reply commenter may obtain an extension of time from the Commission only upon a showing of good cause or extraordinary circumstances in accordance with § 385.2008 of this chapter. Late-filed fish and wildlife recommendations will not be subject to the requirements of paragraph (e), (f)(1)(ii), and (f)(3) of this section, and late-filed terms and conditions will not be subject to the requirements of paragraphs (f)(1)(iv), (f)(1)(v), and (f)(2) of this section. Late-filed fish and wildlife recommendations, terms and conditions, and prescriptions will be considered by the Commission under section 10(a) of the Federal Power Act if such consideration would not delay or disrupt the proceeding.

(1) *Agencies responsible for mandatory terms and conditions and prescriptions.* Any agency responsible for mandatory terms and conditions or prescriptions for licenses or exemptions, pursuant to sections 4(e), 18, and 30(c) of the Federal Power Act and section 405(d) of the Public Utility Regulatory Policies Act of 1978, as amended, must provide these terms and conditions or prescriptions in its initial comments filed with the Commission pursuant to paragraph (b) of this section. In those comments, the agency must specifically identify and explain the mandatory terms and conditions or prescriptions and their evidentiary and legal basis. In the case of an application prepared other than pursuant to part 5, iff ongoing agency proceedings to determine the terms and conditions or prescriptions are not completed by the date specified, the agency must submit to the Commission by the due date:

(i) Preliminary terms and conditions or prescriptions and a schedule showing the status of the agency proceedings and when the terms and conditions or prescriptions are expected to become final; or

(ii) A statement waiving the agency's right to file the terms and conditions or prescriptions or indicating the agency does not intend to file terms and conditions or prescriptions.

(2) *Fish and wildlife agencies and Indian tribes.* All fish and wildlife agencies must set forth any recommended terms and conditions for the protection, mitigation of damages to, or enhancement of fish and wildlife, pursuant to the Fish and Wildlife Coordination Act and section 10(j) of the Federal Power Act, in their initial comments filed with the Commission by the date specified in paragraph (b) of this section. All Indian tribes must submit recommendations (including fish and wildlife recommendations) by the same date. In those comments, a fish and wildlife agency or Indian tribe must discuss its understanding of the resource issues presented by the proposed facilities and the evidentiary basis for the recommended terms and conditions.

(3) *Other government agencies and members of the public.* Resource agencies, other governmental units, and members of the public must file their recommendations in their initial comments by the date specified in paragraph (b) of this section. The comments must clearly identify all recommendations and present their evidentiary basis.

(4) *Submittal of modified recommendations, terms and conditions or prescriptions.*

(i) If the information and analysis (including reasonable alternatives) presented in a draft environmental impact statement, issued for comment by the Commission, indicate a need to modify the recommendations or terms and conditions or prescriptions previously submitted to the Commission pursuant to paragraphs (b)(1), (b)(2), or (b)(3) of this section, the agency, Indian tribe, or member of the public must file with the Commission any modified recommendations or terms and conditions or prescriptions on the proposed project (and reasonable alternatives) no later than the due date for comments on the draft environmental impact statement. Modified recommendations or terms and conditions or prescriptions must be clearly distinguished from comments on the draft statement.

(ii) 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, 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 paragraphs (b)(1), (b)(2), or (b)(3) of this section, the agency, Indian tribe, or member of the public must file with the Commission any modified recommendations or terms and conditions or prescriptions on the proposed project (and reasonable alternatives) no later than the due date specified by the Commission for comments on the amendment.

(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)(7)(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, subpart B, any application to amend an existing license, and any application to amend a pending application for a license, requires a new request for water quality certification pursuant to 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.

4.34(c) *Additional procedures.* If necessary or appropriate the Commission may require additional procedures (*e.g.*, a pre-hearing conference, further notice and comment on specific issues or oral argument). A party may request additional procedures in a motion that clearly and specifically sets forth the procedures requested and the basis for the request. Replies to such requests may be filed within 15 days of the request.

4.34(d) *Consultation procedures.* Pursuant to the Federal Power Act and Public Utility Regulatory Policies Act of 1978, as amended, the Commission will coordinate as appropriate with other government agencies responsible for mandatory terms and conditions for exemptions and licenses for hydroelectric projects. Pursuant to the Federal Power Act and the Fish and Wildlife Coordination Act, the Commission will consult with fish and wildlife agencies concerning the impact of a hydropower proposal on fish and wildlife and appropriate terms and conditions for license to adequately and equitably

protect, mitigate damages to, and enhance fish and wildlife (including related spawning grounds and habitat). Pursuant to the Federal Power Act and the Endangered Species Act, the Commission will consult with the U.S. Fish and Wildlife Service or the National Marine Fisheries Service, as appropriate, concerning the impact of hydropower proposal on endangered or threatened species and their critical habitat.

4.34(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) ~~Within 45 days of the filing of any fish and wildlife recommendation, the~~ The Commission may seek clarification of any recommendation from the appropriate fish and wildlife agency. ~~it, unless this deadline is extended by the Commission upon notice to the fish and wildlife agency concerned.~~ 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) ~~The Commission will make a preliminary determination of inconsistency of the fish and wildlife recommendation with the purposes and requirements of the Federal Power Act or other applicable law. The preliminary determination will be in writing and shall include an explanation of its basis, including appropriate references to the environmental analysis conducted on the license application. A copy of the environmental analysis will be provided with the determination, and will be sent to all parties, affected resource agencies, and Indian tribes.~~ 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.

(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. ~~45 days of its issuance.~~ 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(i) 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. ~~If the Commission decides to conduct any meeting, telephone, or video conference, or other procedure 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 75 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, and a copy of the summary will be sent to all parties, affected resource agencies, and Indian tribes. If the Commission believes that any fish and wildlife recommendation submitted by a fish and wildlife agency may be inconsistent with the purposes and requirements of the Federal Power Act or other applicable law, the Commission will attempt to resolve any such inconsistency by appropriate means, giving due weight to the recommendations, expertise, and statutory responsibilities of the fish and wildlife agencies.~~

(6) The section 10(j) process ends when the Commission issues an order granting or denying the license application in question.

4.34(f) *Licenses and exemption 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) *Exemption conditions.* Any exemption from licensing issued for conduit facilities, as provided in section 30 of the Federal Power Act, or for small hydroelectric power projects having a proposed installed capacity of 5,000 kilowatts or less, as provided in section 405(d) of the Public Utility Regulatory Policies Act of 1978, as amended, shall include such terms and conditions as the fish and wildlife agencies may timely determine are appropriate to carry out the responsibilities specified in section 30(c) of the Federal Power Act.

(3) *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.

4.34(g) *Application.* The provisions of paragraphs (b) through (d) and (f) of this section apply only to applications for license or exemption; paragraph (e) applies only to applications for license.

4.34(h) 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.

4.34(i) *Alternative procedures.* (1) An applicant may submit to the Commission a request to approve the use of alternative procedures for pre-filing consultation and the filing and processing of an application for an original, new, or subsequent hydropower license or exemption that is subject to § 4.38 or § 16.8 of this chapter, or for the amendment of a license that is subject to the provisions of § 4.38.

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

(i) Combine into a single process the pre-filing consultation process, the environmental review process under the National Environmental Policy Act and administrative processes associated with the Clean Water Act and other statutes;

(ii) Facilitate greater participation by and improve communication among the potential applicant, resource agencies, Indian tribes, the public and Commission staff in a flexible pre-filing consultation process tailored to the circumstances of each case;

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

(iv) Promote cooperative efforts by the potential applicant and interested entities and encourage them to share information about resource impacts and mitigation or enhancement proposals and to narrow any areas of disagreement and reach agreement or settlement of the issues raised by the hydropower proposal; and

(v) Facilitate an orderly and expeditious review of an agreement or offer of settlement of an application for hydropower license, exemption, or amendment to a license.

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

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

(ii) Submit a communications protocol, supported by interested entities, governing how the applicant and other participants in the pre-filing consultation process, including the Commission staff, may communicate with each other regarding the merits of the applicant's proposal and proposals and recommendations of interested entities; and

(iii) 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) As appropriate under the circumstances of the case, the alternative procedures should include provisions for:

(i) Distribution of an initial information package and conduct of an initial information meeting open to the public;

(ii) The cooperative scoping of environmental issues (including necessary scientific studies), the analysis of completed studies and any further scoping; and

(iii) The preparation of a preliminary draft environmental assessment or preliminary draft environmental impact statement and related application.

~~—(5) The Commission will give public notice in the FEDERAL REGISTER inviting comment on the applicant's request to use alternative procedures. The Commission will consider any such comments in determining whether to grant or deny the applicant's request to use alternative procedures. Such a decision will not be subject to interlocutory rehearing or appeal.~~

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

(i) To the extent feasible under the circumstances of the proceeding the Commission will give notice in the FEDERAL REGISTER and the applicant will give notice, in a local newspaper of general circulation in the county or counties in which the project is located, of the initial information meeting and the scoping of environmental issues. The applicant will also send notice of these stages to a mailing list approved by the Commission.

(ii) Every six months, the applicant shall file with the Commission a report summarizing the progress made in the pre-filing consultation process and referencing the applicant's public file, where additional information on that process can be obtained. Summaries or minutes of meetings held in the process may be used to satisfy this filing requirement. The applicant must also file with the Commission a copy of its initial information package, each scoping document, and the preliminary draft environmental review document. All filings with the Commission under this section must include the number of copies required by paragraph (h) of this section, and the applicant shall send a copy of these filings to each participant that requests a copy.

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

(iv) An applicant authorized to use alternative procedures may substitute a preliminary draft environmental review document and additional material specified by the Commission instead of Exhibit E to its application and need not supply additional documentation of the pre-filing consultation process. The applicant will file with the Commission the results of any studies conducted or other documentation as directed by the Commission, either on its own motion or in response to a motion by a party to the licensing or exemption proceeding.

(v) Pursuant to the procedures approved, the participants will set reasonable deadlines requiring all resource agencies, Indian tribes, citizens groups, and interested persons to submit to the applicant requests for scientific studies during the pre-filing consultation process, and additional requests for studies may be made to the Commission after the filing of the application only for good cause shown.

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

(vii) Any potential applicant, resource agency, Indian tribe, citizens group, or other entity participating in the alternative pre-filing consultation process may file a request with the Commission to resolve a dispute concerning the alternative process (including a dispute over required studies), but only after reasonable efforts have been made to resolve the dispute with other participants in the process. No such request shall be accepting for filing

unless the entity submitting it certifies that it has been served on all other participants. The request must document what efforts have been made to resolve the dispute.

(7) If the potential applicant or any resource agency, Indian tribe, citizens' group, or other entity participating in the alternative pre-filing consultation process can show that it has cooperated in the process but a consensus supporting the use of the process no longer exists and that continued use of the process will not be productive, the participant may petition the Commission for an order directing the use by the potential applicant of appropriate procedures to complete its application. No such request shall be accepted for filing unless the entity submitting it certifies that it has been served on all other participants. The request must recommend specific procedures that are appropriate under the circumstances.

(8) The Commission may participate in the pre-filing consultation process and assist in the integration of this process and the environmental review process in any case, including appropriate cases where the applicant, contractor, or consultant funded by the applicant is not preparing a preliminary draft environmental assessment or preliminary draft environmental impact statement, but where staff assistance is available and could expedite the processing.

~~(9) In all cases where the Commission has approved the use of alternative pre-filing consultation procedures prior to December 5, 1997, during the pre-filing process the potential applicant need not follow any additional requirements imposed by paragraph (i) of this section, if in so doing the applicant would repeat any steps already taken in the preparation of its application and supporting documentation or act inconsistently with any written agreement signed before December 5, 1997 by the applicant and other participants in the alternative process.~~

(i) *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 part, 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 Section 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.

- § 4.35 **Amendment of application; date or acceptance.**
- § 4.36 **Competing applications; deadlines for filing; notices of intent; comparisons of plans of development.**
- § 4.37 **Rules of preference among competing applications**
- § 4.38 **Consultation requirements.**

4.38(a) *Requirement to consult.* (1) Before it files any application for an original license or an exemption from licensing that is described in paragraph (a)(4) of this section, 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)), and 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.

(2) The Director of the ~~Office of Hydropower Licensing~~ Energy Projects or the Regional Director responsible for the area in which the project is located 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.

(3) An applicant for an exemption from licensing or an applicant for a license seeking benefits under section 210 of the Public Utility Regulatory Policies Act, as amended, for a project that would be located at a new dam or diversion must, in addition to meeting the requirements of this section, comply with the consultation requirements of § 4.301.

(4) The pre-filing consultation requirements of this section apply only to an application for:

- (i) Original license;
- (ii) Exemption;
- (iii) Amendment to an application for original license or exemption that materially amends the proposed plans of development as defined in § 4.35(f)(1);
- (iv) Amendment to an existing license that would increase the capacity of the project as defined in § 4.201(b), but that would involve:
 - (A) The construction of a new dam or diversion in a location where there is no existing dam or diversion;

(B) Any repair, modification, or reconstruction of an existing dam that would result in a significant change in the normal maximum surface area of elevation of an existing impoundment; or

(C) The addition of new water power turbines other than to replace existing turbines.

(5) Before it files a non-capacity related amendment as defined in § 4.201(c), an applicant must consult with the resource agencies and Indian tribes listed in paragraph (a)(1) of this section to the extent that the proposed amendment would affect the interests of the agencies or tribes. When consultation is necessary, the applicant must, at a minimum, provide the resource agencies and Indian tribes with copies of the draft application and allow them at least 60 days to comment on the proposed amendment. The amendment as filed with the Commission must summarize the consultation with the resource agencies and Indian tribes on the proposed amendment, propose reasonable protection, mitigation, or enhancement measures to respond to impacts identified as being caused by the proposed amendment, and respond to any objections, recommendations, or conditions submitted by the agencies or Indian tribes. Copies of all written correspondence between the applicant, the agencies, and the tribes must be attached to the application.

(6) This section does not apply to any application for a new license, a nonpower license, a subsequent license, or surrender of a license subject to Sections 14 and 15 of the Federal Power Act.

(7) If a potential applicant has any doubt as to whether a particular application or amendment would be subject to the pre-filing consultation requirements of this section or if a waiver or the pre-filing requirements would be appropriate, the applicant may file a written request for clarification or waiver with the Director, Office of Energy Projects ~~Hydropower Licensing~~.

4.38(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 § 5.3, provide a copy of the Pre-Application Document to the entities specified in § 5.4.

(2) A potential applicant for an exemption must promptly contact each of the appropriate resource agencies, ~~and~~ 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).

(32) 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), as applicable, information to the agencies, and 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, and 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, ~~and~~ 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.

~~(43) Members of the public must be informed of an invited to attend the joint meeting held pursuant to paragraph (b)(2)(i) of this section by means of the public notice provision published in accordance with paragraph (g) of this section. Members of the public attending the meeting are entitled to participate in the meeting and to express their views regarding resource issues that should be addressed in any application for license or exemption that may be filed by the potential applicant. Attendance of the public at any site visit held pursuant to paragraph (b)(2)(I) of this section will be at the discretion of the potential applicant. The potential applicant must make either audio recordings or written transcripts of the joint meeting, and must promptly provide copies of these recordings or transcripts to the Commission and, upon request, to any resource agency, ~~and~~ Indian tribe, or member of the public.~~

~~(54) 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, ~~or~~ Indian tribe, or members of the public for an additional 60 days by sending written notice to the applicant and the Director of ~~OHE~~ the Office of Energy Projects within the first 60 day period, with an explanation of the basis for the extension), each interested resource agency, ~~and~~ Indian tribe, 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, ~~or~~ Indian tribe, or member of the public in furthering its resource goals and objectives that are affected by the proposed project.~~

(65) *Study dispute resolution.* (i) If a potential applicant and a resource agency, or 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 ~~Hydropower Licensing~~ (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, or 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)(5)(i) or (b)(6)(5)(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)(5).

(iv) The Director will resolve the disputes by ~~letter provided to the potential applicant and all affected resource agencies and Indian tribes:~~ 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 potential applicant does not refer a dispute regarding a request for information (other than a dispute regarding the information specified in paragraph (b)(1) of this section) or a study to the Director under paragraph (b)(5)(i) of this section, or if a potential applicant disagrees with the Director's resolution of a dispute regarding a request for information (other than a dispute regarding the information specified in paragraph (b)(1) of this section) or a study, and if the potential applicant does not provide the requested information or conduct the requested study, the potential applicant must fully explain the basis for its disagreement in its application:~~

(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 subparagraph (b)(6)(iv) of this section, its application will be considered deficient.

~~—(vi) Filing and acceptance of an application will not be delayed, and an application will not be considered deficient or patently deficient pursuant to § 4.32 (e)(1) or (e)(2), merely because the application does not include a particular study or particular information if the Director had previously found, under paragraph (b)(5)(iv) of this section, that each such study or information is unreasonable or unnecessary for an informed decision by the Commission on the merits of the application or use of the study methodology requested is not a generally accepted practice.~~

(76) The first stage of consultation ends when all participating agencies, ~~and~~ Indian tribes, and members of the public provide the written comments required under paragraph (b)(5)(4) of this section or 60 days after the joint meeting held under paragraph (b)(3)(2) of this section, whichever occurs first, unless a resource agency or Indian tribe timely notifies the applicant and the Director of ~~OH~~ Energy Projects of its need for more time to provide written comments under paragraph (b)(5)(4) 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)(4) of this section or 120 days after the joint meeting held under paragraph (b)(5)(4) of this section, whichever occurs first.

4.38(c) *Second stage of consultation.* (1) Unless determined to be unnecessary by the Director pursuant to paragraph (b)(6)(5) of this section, a potential applicant must diligently conduct all reasonable studies and obtain all reasonable information requested by resource agencies, ~~and~~ Indian tribes, and members of the public under paragraph (b) of this section ~~that are necessary for the Commission to make an informed decision regarding the merits of the application~~ 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 subparagraph (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) ~~(6)~~ of this section, a resource agency, ~~or~~ 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)~~(4)~~ (i)-(vi) of this section, the potential applicant must promptly initiate the study or gather the information, ~~unless the study or information is unreasonable or unnecessary for an informed decision by the Commission on the merits of the application or use of the methodology requested by a resource agency on Indian tribe for conducting the study is not a generally accepted practice.~~ 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 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 ~~Hydropower Licensing~~ for dispute resolution under the procedures and subject to the other requirements set forth in paragraph (b)(6)~~(5)~~ of this section, ~~and need not conduct prior to filing any study determined by the Director to be unreasonable or unnecessary or to employ a methodology that is not generally accepted.~~

(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, ~~and~~ 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, ~~and~~ 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, ~~and~~ Indian tribe, or consulted member of the public and which were identified by the potential applicant pursuant to paragraph (b)(2)(~~H~~)(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) 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, ~~and~~ 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, ~~or~~ Indian tribe, ~~and~~ 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, ~~or~~ 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, ~~or~~ Indian tribe, ~~and~~ 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, ~~or~~ 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, or 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, or 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, or 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, or 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, or 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, or Indian tribe, or consulted member of the public has responded with substantive disagreements.

4.38(d) *Third Stage of Consultation.* (1) The third stage of consultation is initiated by the filing of an application for a license or exemption, accompanied by a transmittal letter certifying that at the same time copies of the application are being mailed to the resource agencies, Indian tribes, and other government offices, and consulted members of the public specified in paragraph (d)(2) of this section.

(2) As soon as an applicant files such application documents with the Commission, or promptly after receipt in the case of documents described in paragraph (d)(2)(iii) of this section, as the Commission may direct, the applicant must serve on every resource agency and Indian tribe, members of the public consulted and on other government offices copies of:

(i) Its application for a license or an exemption from licensing;

(ii) Any deficiency correction, revision, supplement, response to additional information request, or amendment to the application; and

(iii) Any written correspondence from the Commission requesting the correction of deficiencies or the submittal of additional information.

4.38(e) *Waiver of compliance with consultation requirements.* (1) If a resource agency, or 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, or 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, or Indian tribe, or consulted member of the public to comply.

(3) The failure of a resource agency, or 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. Any such request must be accompanied by a:

(A) Specific description of how the element of the part 5 license application would fit into the pre-filing consultation process under this part; and

(B) 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.

4.38(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, or 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, or 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, or 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, or 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)(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):~~

~~—(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)(7)(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, subpart B, any application to amend an existing license, and any application to amend a pending application for a license, requires a new request for water quality certification pursuant to paragraph (f)(7)(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.~~

(78) A description of how the applicant's proposal addresses the significant resource issues raised at the joint meeting held pursuant to paragraph (b)(3)(2) of this section; and

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

4.38(g) *Public participation.* (1) At least 14 days in advance of the joint meeting held pursuant to paragraph (b)(3)(2) of this section, the potential applicant must publish notice, at least once, of the purpose location, and timing of the joint meeting, in a daily or weekly newspaper published in each county in which the proposed project or any part thereof is

situated. The notice shall include a summary of the major issues to be discussed at the joint meeting.

(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 the date of the joint meeting required by paragraph (b)(2) of this section: 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)(2) of this section at least two copies of the information specified in paragraph (b)(1) or (b)(2) of this section, as applicable.

4.38(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 part, 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 Section 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]**.

~~(1) The provisions of this section are not applicable to applications filed before June 19, 1991.~~

~~(2) The provisions of paragraphs (a) and (b) of this section are not applicable to potential applicants that complied with the provisions of paragraphs (a) and (b)(1) of this section prior to June 19, 1991.~~

~~(3) The provisions of paragraph (c) of this section are not applicable to potential applicants that complied with the provisions of paragraph (b)(2) of this section prior to June 19, 1991.~~

~~(4)(i) Any applicant that files its application on or after June 19, 1991, and that complied with the provisions of paragraphs (a) and (b)(1) of this section prior to June 19, 1991, must hold a public meeting, within 90 days from June 19, 1991, at or near the site of the proposed project, to generally explain the potential applicant's proposal for the site and to obtain the views of the public regarding resource issues that should be addressed in~~

~~any application for license or exemption that may be filed by the potential applicant. The public meeting must include both day and evening sessions, and the potential applicant must make either audio recordings or written transcripts of both sessions.~~

~~—(ii)(A) At least 15 days in advance of the meeting, the potential applicant must provide all affected resource agencies, Indian tribes, and 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.~~

~~—(B) At least 14 days in advance of the meeting, the potential applicant must publish notice, at least once, of the purpose, location, and timing of the meeting, in a daily or weekly newspaper published in each county in which the proposed project or any part thereof is situated.~~

~~—(iii)(A) A potential applicant must make available to the public for inspection and reproduction information comparable to that specified in paragraph (b)(1) of this section from the date on which the notice required by paragraph (h)(4)(ii) of this section is first published until the date of the public meeting required by paragraph (h)(4)(I) of this section.~~

~~—(B) 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.~~

~~—(C) A potential applicant must make available to the public for inspection at both sessions of the public meeting required by paragraph (h)(4)(i) of this section at least two copies of the information specified in paragraph (h)(4)(iii)(A) of this section.~~

~~—(D) A potential applicant must promptly provide copies of the audio recordings or written transcripts of the sessions of the public meeting to the Commission and, upon request, to any resource agency or Indian tribe consulted.~~

~~—(iv) Any applicant holding a public meeting pursuant to paragraph (h)(4)(i) of this section must include in its filed application a description of how the applicant's proposal addresses the significant resource issues raised during the public meeting. —~~

§ 4.39 Specifications for maps and drawings.

All required maps and drawings must conform to the following specifications, except as otherwise prescribed in this chapter:

(a) Each original map or drawing must consist of a print on silver or gelatin 35mm microfilm mounted on Type D (3 1/4" by 7 3/8" 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 drawings 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 under § 4.31(f).

.....

(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 § _____. **[insert when CEII rule final]**

(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.

Subpart E – Application for License for Major Unconstructed Project and Major Modified Project

§ 4.40 Applicability

§ 4.41 Contents of application.

(c)(4)(i) The 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 monthly flow duration curves indicating the period of record and the gauging stations used in deriving the curves; and a specification of the critical streamflow used to determine the dependable capacity;

(c)(4)(iii) The estimated minimum and maximum hydraulic capacity of the powerplant in terms of flow and efficiency (cubic feet per second and one-half, full and best gate), and the corresponding generator output in kilowatts.

(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, ~~and~~
- (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.

(e)(7) A statement and evaluation of the consequences of denial of the license application and a brief perspective of what future use would be made of the proposed site if the proposed project were not constructed; ~~and~~

(8) A statement specifying the sources and extent of financing and annual revenues available to the applicant to meet the costs identified in paragraphs (e)(1) and (4) of this section.;

(9) An estimate of the cost to develop the license application; and

(10) The on-peak and off-peak values of project power, and the basis for estimating the values, for project 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 georeferenced 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 ft, in order to comply with the National Map Accuracy Standards for maps at a 1:24,000 scale (the scale of the

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., North American 27, North American 83, etc.) and the units of measurement (i.e., feet, meters, miles, etc.). Three copies of the electronic maps must be submitted on CD's or DVD's. 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 indicating that portion of the project depicted on that sheet. Each sheet must contain a minimum of three known reference points. The latitude and longitude coordinates, or state plane coordinates, or each reference point must be shown. If at any time after the application is filed there is any change in the project boundary, the applicant must submit, within a reasonable period 90 days following the completion of project construction, a final exhibit G showing the extent of such changes. The map must show:

(h)(2) Project boundary. The map must show a project boundary enclosing all project works and other features described under paragraph (b) of this section (Exhibit A) that are to be licensed. If accurate survey information is not available at the time the license application is filed, the applicant must so state, and a tentative boundary may be submitted.

.....

(h)(3) (iv) The project location must include the most current information pertaining to affected federal lands as described under § 4.81(b)(5).

(h)(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 to be required 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.

Subpart F – Application for License for Major Project–Existing Dam

§ 4.50

Applicability

§ 4.51

Contents of Application.

(c)(2)(i) The 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 monthly flow duration curves indicating the period of record and the gauging stations used in deriving the curves; and a specification of the critical streamflow used to determine the dependable capacity;

(c)(2)(iii) The estimated hydraulic capacity of the powerplant (minimum and maximum flow through the powerplant) in cubic feet per second;

(e)(4) A statement of the estimated average annual cost of the total project as proposed, specifying any projected changes in the 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, and
- (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.

(e)(7) An estimate of the cost to develop the license application; and

(8) The on-peak and off-peak values of project power, and the basis for estimating the values, for projects which are proposed to operate in a mode other than run-of-river;

(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, limiting reservoir fluctuations).

(g) Exhibit F. See § 4.41(g). ~~consists of general design drawings of the principal project works described under paragraph (b) of this section (Exhibit A) and supporting information used to demonstrate that existing project structures are safe and adequate to fulfill their stated functions.~~

—(1) The drawings must show all major project structures in sufficient detail to provide a full understanding of the project, including:

- (i) Plans (overhead view);
- (ii) Elevations (front view); and
- (iii) Sections (side view).

—(2) Supporting design report. The applicant must furnish, at a minimum, the following supporting information to demonstrate that existing structures are safe and adequate to fulfill their stated functions, and must submit such information in a separate report at the time the application is filed. The report must include:

- (i) A description of the physical condition or state of maintenance and repair of any existing and proposed structures or equipment; and
- (ii) Information relating to composition and competency of foundations and other structures, gradation of filter and riprap material, design strength and ultimate strength of concrete and steel, stress and stability analysis, spillway rating curves, water levels, and other appropriate data.

—(3) The applicant must submit two copies of the supporting design report as described in paragraph (g)(2) of this section at the time general design drawings are submitted to the Commission for review.

(h) Exhibit G, [See § 4.41\(h\)](#), is a map of the project. The map must conform to the specifications of Sec. 4.39. If more than one sheet is used, the sheets must be numbered consecutively and each sheet must bear a small inset sketch showing the entire project (or development) and indicating the portion depicted on the sheet. The map must show:

—(1) Location of the project and principal features. The map must show the location of the project as a whole with reference to the affected stream or other body of water and, if possible, to a nearby town or any permanent monuments or objects, such as roads, transmission lines or other structures, that can be noted on the map and recognized in the field. The map must also show the relative locations and physical interrelationships of the principal project works and other features described under paragraph (b) of this section (Exhibit A).

—(2) Project boundary. The map must show a project boundary enclosing all of the principal project works and other features described under paragraph (b) of this section (Exhibit A) that are to be licensed. If accurate survey information is not available at the time the license application is filed, the applicant must so state, and a tentative boundary may be submitted. The boundary must enclose only those lands necessary for operation and maintenance of the project and for other project purposes, such as recreation, shoreline

control, or protection of environmental resources (see paragraph (f) of this section (Exhibit E)). Existing residential, commercial, or other structures may be included within the boundary only to the extent that underlying lands are needed for project purposes (e.g., for flowage, public recreation, shoreline control, or protection of environmental resources). If the boundary is on land covered by a public land survey, ties must be shown on the map at sufficient points to permit accurate platting of the position of the boundary relative to the lines of the public land survey. If the lands are not covered by a public land survey, the best available legal description of the position of the boundary must be provided, including distances and directions from fixed monuments or physical features. The boundary must be described as follows:

—(i) Impoundments. (A) The boundary around a project impoundment may be described by any of the following:

—(1) Contour lines, including the contour elevation (preferred method);

—(2) Specified courses and distances (metes and bounds);

—(3) If the project lands are covered by a public land survey, lines upon or parallel to the lines of the survey; or

—(4) Any combination of the above methods.

—(B) The boundary must be located no more than 200 feet (horizontal measurement) from the exterior margin of the reservoir, defined by the normal maximum surface elevation, except where deviations may be necessary in describing the boundary according to the above methods, or where additional lands are necessary for project purposes, such as public recreation, shoreline control, or protection of environmental resources:

—(ii) Continuous features. The boundary around linear (continuous) project features such as access roads, transmission lines, and conduits may be described by specified distances from center lines or offset lines of survey. The width of such corridors must not exceed 200 feet, unless good cause is shown for a greater width. Several sections of a continuous feature may be shown on a single sheet, with information showing the sequence of contiguous sections:

—(iii) Noncontinuous features. (A) the boundary around noncontinuous project works such as dams, spillways, and powerhouses may be described by:

—(1) Contour lines;

—(2) Specified courses and distances;

—(3) If the project lands are covered by a public land survey, lines upon or parallel to the lines of the survey; or

—(4) Any combination of the above methods.

~~—(B) The boundary must enclose only those lands that are necessary for safe and efficient operation and maintenance of the project, or for other specified project purposes, such as public recreation or protection of environmental resources.~~

~~—(3) Federal lands. Any public lands and reservations of the United States (see 16 U.S.C. 796(1) and (2)) (Federal lands) that are within the project boundary, e.g., lands administered by the U.S. Forest Service, Bureau of Land Management, National Park Service, or Indian tribal lands, and the boundaries of those Federal lands, must be identified on the map:~~

~~—(i) By legal subdivisions of a public land survey of the affected area (a protraction of identified township and section lines is sufficient for this purpose);~~

~~—(ii) By the Federal agency, identified by symbol or legend if desired, that maintains or manages each identified subdivision of the public land survey within the project boundary; and~~

~~—(iii) In the absence of a public land survey, by the location of the Federal lands according to the distances and directions from fixed monuments or physical features. When a Federal survey monument or a Federal bench mark will be destroyed or rendered unusable by the construction of project works, at least two permanent, marked, witness monuments or bench marks must be established at accessible points. The maps must show the location (and elevation, for bench marks) of the survey monument or bench mark which will be destroyed or rendered unusable, as well as of the witness monuments or bench marks. Connecting courses and distances from the witness monuments or bench marks to the original must also be shown.~~

~~—(4) Non-Federal lands. For those lands within the project boundary not identified under paragraph (h)(3) of this section, the map must identify by legal subdivision:~~

~~—(i) Lands owned in fee by the applicant and lands that the applicant plans to acquire in fee; and~~

~~—(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 required 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.

Subpart G – Application for License for Minor Water Power Projects 5 Megawatts or Less

§ 4.60 Applicability and notice to agencies.

§ 4.61 Contents of application.

- (c) Exhibit A is a description of the project and the proposed mode of operation.
- (1) The exhibit must include, in tabular form if possible, as appropriate:

- (vii) The estimated minimum and maximum hydraulic capacity of the plant (flow through the plant) in cubic feet per second and estimated average flow of the stream or water body at the plant or point of diversion; for projects with installed capacity of more than 1.5 megawatts, a monthly flow duration curves and a description of the drainage area for the project site must be provided;

- (x) The estimated capital costs and estimated annual operation and maintenance expense of each proposed environmental measure.

- (2) State the purposes of the project (for example, use of power output).

- (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). ~~consists of general drawings of the principal project~~

works. The drawings need not conform to the specifications of Sec. 4.39. The exhibit must conform to the following requirements:

—(1) The exhibit must consist of ink drawings, or drawings of similar quality, on sheets no smaller than 8 and one-half inches by 11 inches, drawn to a scale no smaller than 1 inch equals 50 feet for plans, elevations, and profiles, and 1 inch equals 10 feet for sections. After initial review of the application, an original and 2 copies of any drawing must be submitted on 35mm microfilm, if requested by Commission staff.

—(2) The drawings must show a plan, elevation, profile, and section of the dam structure and powerplant. Generating and auxiliary equipment proposed must be clearly and simply depicted and described. A north arrow must be included on the plan view:

(f) Exhibit G. See § 4.41(h), is a map of the project. The map need not conform to the specifications of Sec. 4.39. The exhibit must instead conform to the following requirements:

—(1) The exhibit is a map or maps that show the location of all project works and their location in relation to the stream or other water body on which the project is located and to the nearest town or any permanent monuments or objects, such as roads, transmission lines, or other structures, that can be noted on the map and recognized in the field. In the case of unsurveyed public land, or land that is not public land, give the best legal description available. If surveyed land, provide sections, subdivisions, range and township, and principal base and meridian.

—(2) The map must consist of ink drawings or drawings of similar quality on sheets no smaller than 8 and one-half inches by 11 inches and not larger than 24 inches by 36 inches, drawn to a scale no smaller than one inch equals 1,000 feet. After review of the application, the applicant must submit an original of the map(s), if requested by Commission staff. Each original map must consist of a print on silver or gelatin 35mm microfilm mounted on Type D (3 1/4 x 7 3/8) aperture cards. Two duplicates of each original must also be submitted at that time.

—(3)(i) If an application for a license for a minor water power project that will not occupy any public lands or reservations of the United States does not contain a statement that the applicant requests the Commission to apply the provisions of Part I of the Federal Power Act enumerated in Sec. 4.60(c), the applicant:

—(A) Must provide a reasonably accurate description of the project location and all project works and features; and

—(B) Must identify, in Exhibit G of its application, the owners of all lands necessary for the construction and operation of the project; but

—(C) Need not show a project boundary.

—(ii) If an application for a license for a minor water power project contains a statement that the applicant requests the Commission to apply the provisions of Part I of the Federal Power Act enumerated in Sec. 4.60(c), the applicant must show the project boundary on the map it submits as Exhibit G to its application, as specified in Sec. 4.41(h)(2).

—(iii) If an application for a license for a minor water power project proposes that the project would occupy any public lands or reservations of the United States, the applicant must show the project boundaries on public lands and reservations on the map it submits as Exhibit G to its application, as specified in Sec. 4.41(h)(2).

—(4) Water power projects not excepted by paragraph (f)(3) of this section must include a project boundary as follows:

—(i) The project boundary must enclose all project works, such as the dam, reservoir, pipelines, access and other roads, powerplant, and transmission lines. The boundary must be set at the minimum feasible distance from project works necessary to allow operation and maintenance of the project and control of the shoreline and reservoir. The project boundary may be contour elevation lines, specified courses and distances, or lines upon or parallel to public land survey lines.

—(ii) The project boundary must be depicted on the map by use of contour lines (preferred method), courses and distances, public land survey, or lines parallel to the lines of the survey, or any combination of those methods for reservoirs and impoundments, and the project boundary around dams, spillways, and powerhouses; and must be depicted by specified distances from a surveyed center line or offset lines of survey for continuous features such as access roads, transmission lines, pipelines, or canals. A tape-compass survey is acceptable for determining courses and distances.

—(iii) Federal lands. Any public lands and reservations of the United States (see 16 U.S.C. 796 (1) and (2)) (Federal lands) that are within the project boundary, e.g., lands administered by the U.S. Forest Service, Bureau of Land Management, National Park Service, or Indian tribal lands, and the boundaries of those Federal lands, must be identified on the map:

—(A) By legal subdivisions of a public land survey of the affected area (a protraction of identified township and section lines is sufficient for this purpose);

—(B) By the Federal agency, identified by symbol or legend if desired, that maintains or manages each identified subdivision of the public land survey within the project boundary; and

—(C) In the absence of a public land survey, by the location of the Federal lands according to the distances and directions from fixed monuments or physical features.

—(iv) For clarity, use inset sketches to a larger scale than that used for the overview map to show relationships of project works, natural features, and property lines.

—(v) Show one or more ties by distance and bearing from a definite, identifiable point or points on project works or the project boundary to established corners of the public land survey or other survey monuments, if available.

—(vi) If the project affects unsurveyed Federal lands, the protraction of township and section lines must be shown. Such protractions, whenever available, must be those recognized by the agency of the United States having jurisdiction over the lands. On unsurveyed lands, show ties by distance and bearing to fixed recognizable objects.

(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.

Subpart H – Application for License for Transmission Line Only

§ 4.70 Applicability

§ 4.71 Contents of Application

Subpart I – Application for Preliminary Permit; Amendment and Cancellation of Preliminary Permit

§ 4.80 Applicability

§ 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 protractors 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.

§ 4.82 Amendments

§ 4.83 Cancellation and loss of priority

Subpart J- Exemption of Small Conduit Hydroelectric Facilities

§ 4.90 Applicability and purpose.

§ 4.91 [reserved]

§ 4.92 Contents of exemption application.

(a) An application for exemption for this subpart must include:

...

(2) Exhibits ~~A, B, E, and G.~~ **A, E, F, and G.**

(c) *Exhibit A.* Exhibit A must describe the small conduit hydroelectric facility and proposed mode of operation with appropriate references to Exhibits ~~BF~~ and G. To the extent feasible the information in this exhibit may be submitted in tabular form. The following information must be included.

(d) Exhibit ~~B~~**G**. Exhibit ~~B~~ is a general location map that must show the following information:

~~(1) The physical structures of the small conduit hydroelectric facility in relation to the conduit and any dam to which any of these structures is attached;~~

~~—(2) A proposed project boundary enclosing all project works to be exempted from licensing; and~~

~~—(3) The ownership of the parcels of land within the proposed boundary for the small conduit hydroelectric facility G is a map of the project and boundary and must conform to the specifications of § 4.41(h).~~

(f) Exhibit GF. Exhibit GF is a set of drawings showing the structures and equipment of the small conduit hydroelectric facility. ~~The drawings must include plan, elevation, profile, section views of the power plant, and any other principal facility structure and of any dam to which a facility structure is attached. Each drawing must be an ink drawing or a drawing of similar quality on a sheet no small than eight and one-half inches by eleven inches, with a scale no smaller than one inch equals 50 feet for plans and profiles and one inch equals 10 feet for section. Generating and auxiliary equipment must be clearly and simply depicted and described. For purposes of this subpart, these drawing specifications replace those required in § 4.39 of the Commission's regulations, 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.

§ 4.93 Action on exemption applications.

§ 4.94 Standard terms and conditions of exemption.

§ 4.95 Surrender of exemption.

§ 4.96 Amendment of exemption.

Subpart K- Exemption of Small Hydroelectric Power Projects of 5 Megawatts or Less.

§ 4.101 Applicability.

§ 4.102 Surrender of Exemption.

§ 4.103 General provisions for case-specific exemption.

§ 4.104 Amendment of exemption.

§ 4.105 Action on exemption applications .

§ 4.106 Standard terms and conditions of case-specific exemption from licensing.

§ 4.107 Contents of application for exemption from licensing.

(d) ~~Exhibit BG. Exhibit G is a map of the project and boundary and must conform to the specifications of § 4.41(h). Exhibit B is a general location map, which may be prepared on United States Geological Survey topographic quadrangle sheets or similar topographic maps of a state agency, enlarged, if necessary, to show clearly and legibly all of the information required by this paragraph. The map must show the following information:~~

-
- ~~—(1) The location of the existing and proposed physical structures of the small hydroelectric power project, including any dam or diversion structure, reservoir or impoundment, penstocks, pipelines, power plants, access roads, transmission lines, and other important features.~~
 - ~~—(2) The relationship of the project structures to the stream or other body of water on which the project is located and to the nearest town or other permanent objects that can be readily recognized in the field.~~
 - ~~—(3) A description of who owns or otherwise has real property interests in any tract of land occupied by the small hydroelectric power project or the structures to which it is directly connected.~~
 - ~~—(4) A proposed project boundary enclosing project works to be exempted from licensing.~~

(f) ~~Exhibit FG. 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). Exhibit G is a set of drawings showing the structures and equipment, that is, the proposed and existing project works, of the small hydroelectric power project. The drawings must include plan, elevation, and section views of the power plant, any existing dam or diversion structure, and any other principal structure of the project.~~

(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.

§ 4.108 Contents of application for exemption from provisions other than licensing.

Subpart L- Application for Amendment of License

§ 4.200 Applicability.

§ 4.201 Contents of Application.

§ 4.202 Alteration and extension of license.

Subpart M — Fees Under Section 30(e) of the Act

PART 5

PART 5—INTEGRATED LICENSE APPLICATION PROCESS

Sec.

§ 5.1 Applicability, definitions, requirement to consult, process selection.

- (a) This part applies to the filing and processing of an application for an:
- (1) Original license;
 - (2) New license for an existing project subject to sections 14 and 15 of the Federal Power Act; or
 - (3) Subsequent license.

(b) *Definitions.* The definitions in § 4.30(b) and § 16.2 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 C.F.R. Part 4, Subparts D-H and, as applicable, Part 16 (*i.e.*, traditional process), pursuant to subsection (c) of this section; or

(2) Section 4.34(i) *Alternative procedures.*

(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 of this part.

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

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

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

(ii) Submit a communications protocol, supported by interested entities, governing how the applicant and other participants in the pre-filing consultation process, including the Commission staff, may communicate with each other regarding the merits of the applicant's proposal and proposals and recommendations of interested entities; and

(iii) 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) (A) 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.

(B) 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:

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

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

(iii) Include the potential applicant's name and address, and telephone number, the type of facility proposed to be applied for, its proposed location, the places where the Pre-Application Document is available for inspection and reproduction;

(iv) Include a statement that comments on the request to use the traditional process or alternative procedures are due to the Commission and the potential applicant no later than 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

(v) 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, N.E., Washington, D.C. 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) and a detailed explanation of the basis for the acceleration request.

(2) If the Commission grants the request for acceleration pursuant to paragraph (c), the Commission will deem the request for acceleration to be a notice of intent under §16.6 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:

(A) Publishing notice in the Federal Register;

(B) 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

(C) 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) (A) and (B) and the written notice given pursuant to paragraph (b)(1)(C) will be considered as fulfilling the notice provisions of § 16.6(d) 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) *Requirement to Notify.* 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*, must distribute to appropriate Federal, state, and interstate resource agencies, Indian tribes, and members of the public likely to be interested in the proceeding the notification of intent provided for in paragraph (a) of this section.

(d) *When to notify.* An existing licensee 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 C.F.R. Part 402, Section 305(b) of the Magnuson-Stevens Fishery Conservation and Management Act and the implementing regulations at 50 C.F.R. § 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 apply to projects to which this part applies.

(h) The provisions of this part and parts 4 and 16 shall be construed in a manner that best implements the purposes of each part and gives full effect to applicable provisions of the Federal Power Act.

§ 5.4 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 parts 4 and, as appropriate, part 16, (e.g., the traditional process) including an application pursuant to § 4.34(i), *alternative procedures*, 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 section 5.2 of this part. 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) *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: (i) Land use and cover; (ii) Hazardous waste disposal sites; (iii) Federal or tribal lands; (iv) Dams and diversions, whether or not used for hydropower generation, within the basin; (v) 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 website at www.ferc.gov/hydro/docs/complan.pdf).

(E) If applicable, a description of all project facilities and associated components. The description must include: (i) 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; (ii) 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; (iii) The number, type, and the hydraulic and installed (rated) capacity of any proposed turbines or generators to be included as part of the project; (iv) The number, length, voltage and interconnections of any primary transmission lines proposed to be included a part of the project; (v) The description of any additional mechanical, electrical, and transmission equipment appurtenant to the project; and (vi) 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: (i) the current and proposed operation of the project; (ii) any new facilities or components to be constructed at the project; (iii) the construction history of the project; and (iv) any plans for future development or rehabilitation of the project.

(G) (i) The potential applicant should discuss, with respect to each of the resources set forth below: (a) the existing environment to the level of detail indicated below; (b) any existing data or studies regarding the resource; (c) any known or potential adverse impacts

and issues associated with the construction, operation or maintenance of the proposed project; (d) 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; (e) 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;

(viii) **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: (i) plan view; (ii) elevation view; and (iii) section view.

(I) Copies of any approved Exhibit G showing: (i) the location of the project and principle project features; (ii) project boundary, if required under the current license; (iii) recreation facilities or areas; and (iv) Federal, tribal, state lands.

(J) A list of issues, by resource area, in the form of a scoping document. The applicant should identify: (i) resource issues by resource area, including any issues raised during any initial contact with the entities identified in paragraph (b)(1) of this section; (ii) resource management plans and objectives related to the project area and prepared by the potential applicant or any resource agency; (iii) existing studies that have already been completed; and (iv) preliminary information or studies needed.

(K) The following construction and operation information, if applicable: (i) 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 above, including as-built exhibits; any order issuing amendments or approving exhibits, and any order issuing annual licenses for the existing project ; and (ii) a copy of any state issued water quality certificate under section 401 of the Clean Water Act; (iii) 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; (iv) 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; (v) 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; (vi) Any reports on original project costs, current net investment, and available funds in the amortization reserve account; and (vii) 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: (i) The most recent emergency action plan for the project or a letter exempting the project from the emergency action plan requirement; (ii) Any independent consultant's reports required by part 12 of the Commission's regulations and filed on or after January 1, 1981; (iii) 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; (iv) Any construction report for an existing project; (v) 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: (i) plan of the licensee; (ii) public correspondence; and (iii) 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) 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:

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

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

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

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

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

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

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

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

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

(viii) A public 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) 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 of the notification of intent and Pre-Application Document pursuant to § 5.5 of this part. 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 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 a not resource agency, explain any relevant public interest considerations in regard to the proposed study;
- (4) Describe existing information concerning the subject of the study proposal, and the need for additional information;
- (5) Explain any nexus between project operations and effects (direct, indirect, and/or cumulative) on the resource to be studied;
- (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 section 5.10 of this part.

(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 section 5.13 of this part 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. ~~and~~

§ 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 C.F.R. § 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.

(i) 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 (2) above, 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) above shall be filed within 15 days.

(6) No later than 15 days following the due date for responses provided for in paragraph (5) above, 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) 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 address, 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 of this part.

(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, 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) of this part.

(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) of this part.

§ 5.16 Filing of application.

(a) An application for a new or subsequent license shall be filed no later than 24 months before the existing license expires.

(b) (1) 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) 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.

(d) (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 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 violated 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

(a) 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) (1) Every application for a license for a project with a capacity of 80 megawatts or less must include in its application copies of the statements made under § 4.38(b)(1)(vi).

(2) If an applicant reverses a statement of intent not to seek PURPA benefits:

(A) 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:

(i) Repeat the pre-filing consultation process under this part; and

(ii) Satisfy all the requirements in § 292.208 of this chapter; or

(B) 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) apply to license applications filed under this section.

(g) *Applicant notice.* An applicant for a subsequent license that proposes to expand an existing project to encompass additional lands must include in its application a statement that the applicant has notified, by certified mail, property owners on the additional lands to be encompassed by the project and governmental agencies and subdivisions likely to be interested in or affected by the proposed expansion.

§ 5.17 Application procedures and 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):

(A) Every county in which any part of the project, and any Federal facilities that would be used by the project, would be located;

(B) Every city, town, or similar local political subdivision:

(i) In which any part of the project, and any Federal facilities that would be used by the project, would be located; or

(ii) That has a population of 5,000 or more people and is located within 15 miles of the project dam;

(C) Every irrigation district, drainage district, or similar special purpose political subdivision:

(i) In which any part of the project, and any Federal facilities that would be used by the project, would be located; or

(ii) That owns, operates, maintains, or uses any project facilities that would be used by the project;

(D) 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

(E) All Indian tribes that may be affected by the project.

(3)(A) 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:

(i) 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

(ii) 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.

(B) Such notification must contain the name, business address, and telephone number of the applicant and a copy of the Exhibit G contained in the application, and must state that a license application is being filed with the Commission.

(4)(A) As to any facts alleged in the application or other materials filed, be subscribed and verified under oath in the form set forth in paragraph (a)(3)(B) of this section by the person filing, an officer thereof, or other person having knowledge of the matters set forth. If the subscription and verification is by anyone other than the person filing or an officer thereof, it shall include a statement of the reasons therefor.

(B) 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:

- (A) License for a minor water power project and a major water power project 5 MW or less: § 4.61;
- (B) License for a major unconstructed project and a major modified project: § 4.41;
- (C) License for a major project--existing dam: § 4.51; or
- (D) 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 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 the subparagraphs below, as appropriate. The Environmental Document must address resources listed in the Pre-Application Document provided for in Section 5.3 of this part. 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 website or through its Public Reference Room.

(1) Environmental Document Contents:

(A) **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

(B) **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.

(C) **Applicable Laws.** Include a discussion of the status of compliance with or consultation under the following laws, if applicable:

(i) **Section 401 of the Clean Water Act.** The applicant must file a request for a water quality certification (WQC), 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.

(ii) **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.

(iii) **Magnuson-Stevens Fishery Conservation and Management Act.** Document from the National Marine Fisheries Service (NMFS) and/or the appropriate Regional Fishery Management Council any essential fish habitat (EFH) that may be affected by the project. Briefly discuss each managed species and life stage for which EFH was designated. Include, as appropriate, the abundance, distribution, available habitat, and habitat use by the managed species. If the project may affect EFH, prepare an "EFH Assessment" of the impacts of the project. The EFH Assessment should contain the information outlined in 50 CFR 600.920(e).

(iv) **Coastal Zone Management Act (CZMA).** Section 307(c)(3) of the CZMA requires that all Federally licensed and permitted activities be consistent with approved state Coastal Zone Management Programs. If the project is located within a coastal zone boundary or if a project affects a resource located in the boundaries of the designated

coastal zone, the applicant must certify that the project is consistent with the state Coastal Zone Management Program. If the project is within or affects a resource within the coastal zone, provide the date the applicant sent the consistency certification information to the state agency, the date the state agency received the certification, and the date and action taken by the state agency (for example, the agency will either agree or disagree with the consistency statement, waive it, or ask for additional information). Describe any conditions placed on the state agency's concurrence and assess the conditions in the appropriate section of the license application. If the project is not in or would not affect the coastal zone, state so and cite the coastal zone program office's concurrence.

(v) **National Historic Preservation Act (NHPA).** Section 106 of NHPA requires the Commission to take into account the effect of licensing a hydropower project on any historic properties, and allow the Advisory Council on Historic Preservation (Advisory Council) a reasonable opportunity to comment on the proposed action. "Historic Properties" are defined as any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register of Historic Places (NRHP). If there would be an adverse effect on historic properties, **the applicant 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.

(vi) **Pacific Northwest Power Planning and Conservation Act (Act).** If the project is not within the Columbia River Basin, this section shall not be included. The Columbia River Basin Fish and Wildlife Program (Program) developed under the Act directs agencies to consult with Federal and state fish and wildlife agencies, appropriate Indian tribes, and the Northwest Power Planning Council (Council) during the study, design, construction, and operation of any hydroelectric development in the basin. Section 12.1A of the Program outlines conditions that should be provided for in any original or new license. The program also designates certain river reaches as protected from development. The applicant 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.

(vii) **Wild and Scenic Rivers and Wilderness Acts.** Include a description of any areas within or in the vicinity of the proposed project boundary that are included in, or have been designated for study for inclusion in, the National Wild and Scenic Rivers System, or that have been designated as wilderness area, recommended for such designation, or designated as a wilderness study area under the Wilderness Act.

(D) **Proposed Action and Action Alternatives.** Explain the effects of the applicant's proposal on environmental resources. For each resource area addressed include: (a) a

discussion of the affected environment; (b) an analysis of the proposed action and any other recommended alternatives or measures ; and (c) any unavoidable adverse impacts. 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*:

(i) **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.

(ii) **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.

(iii) **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.

(iv) **Unavoidable Adverse Impacts.** Based on the environmental analysis, discuss any adverse impacts that would occur despite the recommended environmental measures. Discuss whether any such impacts are short or long-term, minor or major, cumulative or site-specific.

(E) **Developmental Analysis.** 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: (1) the existing conditions --the way the project operates now; (2) as proposed by the applicant (the proposed action); and (3)

any other action alternatives. 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.

(F) **Consistency with Comprehensive Plans**. Identify relevant comprehensive plans and explain how and why the proposed project would, would not, or should not comply with such plans and a description of any relevant resource agency or Indian tribe determination regarding the consistency of the project with any such comprehensive plan. (G)

Consultation Documentation. Include a list containing the name, and address of every Federal, state, and interstate resource agency, Indian tribe, or member of the public with which the applicant consulted in preparation of the Environmental Document.

(H) **Literature cited**. Cite all materials referenced including final study reports, journal articles, other books, agency plans, and local government plans.

(2) The applicant must also provide in the Environmental Document:

(A) Functional design drawings of any fish passage and collection facilities or any other facilities necessary for implementation of environmental measures, indicating whether the facilities depicted are existing or proposed (these drawings must conform to the specifications of § 4.39 regarding dimensions of full-sized prints, scale, and legibility);

(B) A description of operation and maintenance procedures for any existing or proposed measures or facilities;

(C) An implementation or construction schedule for any proposed measures or facilities, showing the intervals following issuance of a license when implementation of the measures or construction of the facilities would be commenced and completed;

(D) An estimate of the costs of construction, operation, and maintenance, of any proposed facilities, and of implementation of any proposed environmental measures, including a statement of the sources and extent of financing; and

(E) A map or drawing that conforms to the size, scale, and legibility requirements of § 4.39 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:

(A) A discussion of the plans and ability of the applicant to operate and maintain the project in a manner most likely to provide efficient and reliable electric service, including efforts and plans to:

(i) Increase capacity or generation at the project;

(ii) Coordinate the operation of the project with any upstream or downstream water resource projects; and

(iii) Coordinate the operation of the project with the applicant's or other electrical systems to minimize the cost of production.

(B) A discussion of the need of the applicant over the short and long term for the electricity generated by the project, including:

(i) 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;

(ii) 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;

(iii) The effect of each alternative source of power on:

(a) The applicant's customers, including wholesale customers;

(b) The applicant's operating and load characteristics; and

(c) The communities served or to be served, including any reallocation of costs associated with the transfer of a license from the existing licensee.

(C) The following data showing need and the reasonable cost and availability of alternative sources of power:

(i) The average annual cost of the power produced by the project, including the basis for that calculation;

(ii) The projected resources required by the applicant to meet the applicant's capacity and energy requirements over the short and long term including:

(a) 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;

(b) A resource analysis, including a statement of system reserve margins to be maintained for energy and capacity; and

(c) If load management measures are not viewed as resources, the effects of such measures on the projected capacity and energy requirements indicated separately;

(iii) 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:

(a) The total annual cost of each alternative source of power to replace project power;

(b) The basis for the determination of projected annual cost; and

(c) 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

(iv) The effect on the direct providers (and their immediate customers) of alternate sources of power.

(D) If an applicant uses power for its own industrial facility and related operations, the effect of obtaining or losing electricity from the project on the operation and efficiency of such facility or related operations, its workers, and the related community.

(E) If an applicant is an Indian tribe applying for a license for a project located on the tribal reservation, a statement of the need of such tribe for electricity generated by the project to foster the purposes of the reservation.

(F) A comparison of the impact on the operations and planning of the applicant's transmission system of receiving or not receiving the project license, including:

(i) 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;

(ii) An analysis of the advantages that the applicant's transmission system would provide in the distribution of the project's power; and

(iii) Detailed single-line diagrams, including existing system facilities identified by name and circuit number, that show system transmission elements in relation to the project and other principal interconnected system elements. Power flow and loss data that represent system operating conditions may be appended if applicants believe such data would be useful to show that the operating impacts described would be beneficial.

(G) If the applicant has plans to modify existing project facilities or operations, a statement of the need for, or usefulness of, the modifications, including at least a reconnaissance-level study of the effect and projected costs of the proposed plans and any

alternate plans, which in conjunction with other developments in the area would conform with a comprehensive plan for improving or developing the waterway and for other beneficial public uses as defined in section 10(a)(1) of the Federal Power Act.

(H) If the applicant has no plans to modify existing project facilities or operations, at least a reconnaissance-level study to show that the project facilities or operations in conjunction with other developments in the area would conform with a comprehensive plan for improving or developing the waterway and for other beneficial public uses as defined in section 10(a)(1) of the Federal Power Act.

(I) A statement describing the applicant's financial and personnel resources to meet its obligations under a new license, including specific information to demonstrate that the applicant's personnel are adequate in number and training to operate and maintain the project in accordance with the provisions of the license.

(J) If an applicant proposes to expand the project to encompass additional lands, a statement that the applicant has notified, by certified mail, property owners on the additional lands to be encompassed by the project and governmental agencies and subdivisions likely to be interested in or affected by the proposed expansion.

(K) The applicant's electricity consumption efficiency improvement program, as defined under section 10(a)(2)(C) of the Federal Power Act, including:

(i) 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

(ii) A statement describing the compliance of the applicant's energy conservation programs with any applicable regulatory requirements.

(L) The names and mailing addresses of every Indian tribe with land on which any part of the proposed project would be located or which the applicant reasonably believes would otherwise be affected by the proposed project.

(2) *Information to be provided by an applicant licensee.* An existing licensee that applies for a new license must provide:

(A) The information specified in paragraph (c)(1).

(B) A statement of measures taken or planned by the licensee to ensure safe management, operation, and maintenance of the project, including:

(i) A description of existing and planned operation of the project during flood conditions;

(ii) A discussion of any warning devices used to ensure downstream public safety;

(iii) 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;

(iv) 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

(v) A discussion of the project's employee safety and public safety record, including the number of lost-time accidents involving employees and the record of injury or death to the public within the project boundary.

(C) A description of the current operation of the project, including any constraints that might affect the manner in which the project is operated.

(D) A discussion of the history of the project and record of programs to upgrade the operation and maintenance of the project.

(E) A summary of any generation lost at the project over the last five years because of unscheduled outages, including the cause, duration, and corrective action taken.

(F) A discussion of the licensee's record of compliance with the terms and conditions of the existing license, including a list of all incidents of noncompliance, their disposition, and any documentation relating to each incident.

(G) A discussion of any actions taken by the existing licensee related to the project which affect the public.

(H) A summary of the ownership and operating expenses that would be reduced if the project license were transferred from the existing licensee.

(I) A statement of annual fees paid under Part I of the Federal Power Act for the use of any Federal or Indian lands included within the project boundary.

(3) *Information to be provided by an applicant who is not an existing licensee.* An applicant that is not an existing licensee must provide:

(A) The information specified in paragraph (c)(1).

(B) A statement of the applicant's plans to manage, operate, and maintain the project safely, including:

(i) 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;

(ii) 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;

(iii) A description of the applicant's plans to continue safety monitoring of existing project instrumentation and any proposed changes; and

(iv) 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) The information required to be provided by this paragraph (c) must be included in the application as a separate exhibit labeled ``Exhibit H."

(d) 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) 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) (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:

(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)(7)(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, subpart B, any application to amend an existing license, and any application to amend a pending application for a license, requires a new request for water quality certification pursuant to § 4.34(b)(5) 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.

§ 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).

(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:

(A) The application will be rejected by order of the Commission, if the Commission determines that it is patently deficient; or

(B) 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 and the disposition of competing applications under § 4.37.

§ 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 of this part, 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

(65) 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 Policies 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-analysis 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-analysis, as specified in the notice accompanying issuance of the environmental assessment-analysis.

(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 subsection (1)(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 subsection (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) 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 Section 5.21.

§ 5.27 **Competing applications**

(a) *Site access for a competing applicant.* The provisions of § 16.5 shall govern site access for a potential license application to be filed in competition with an application for a new or subsequent license by an existing licensee pursuant to this part, except that references in § 16.5 to the pre-filing consultation provisions in parts 4 and 16 shall be construed in a manner compatible with the effective administration of this part..

(b) *Competing applications.* The provisions of § 4.36 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) 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.

§ 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) The Director 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*. (A) 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.

(B) 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.

(C) 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.

(D) 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.

(E) 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:

(A) The existing licensee's record of compliance with the terms and conditions of the existing license; and

(B) The actions taken by the existing licensee related to the project which affect the public.

(C) 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, 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 of this part, 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) 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 pre-filing 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).

PART 16

Part 16 – Procedures Relating to Takeover and Relicensing of Licensed Projects

Subpart A – General Provisions

§ 16.1 Applicability.

(c) Any potential applicant for a new or subsequent license for which the deadline for the notice of intent required by § 16.6 falls 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.

§ 16.2 Definitions.

§ 16.3 Public notice of projects under expiring licenses.

§ 16.4 Acceleration of a license expiration date.

§ 16.5 Site access for a competing applicant.

**Subpart B –Applications for Project Subject to
Sections 14 and 15 of the Federal Power Act**

§ 16.6 Notification procedures under section 15 of the Federal Power Act.

16.6(a) *Applicability.* This section applies to a licensee of an existing project subject to sections 14 and 15 of the Federal Power Act.

16.6(b) *Requirement to Notify.* In order to notify the Commission under section 15 of the Federal Power Act whether a licensee intends to file or not to file an application for a new license, the licensee must file with the Commission an original and fourteen copies of a letter that contains the following information:

- (1) The licensee's name and address.
- (2) The project number.
- (3) The license expiration date.
- (4) An unequivocal statement of the licensee's intention to file or not to file an application for a new license.
- (5) The type of principal project works licensed, such as dam and reservoir, powerhouse, or transmission lines.
- (6) Whether the application is for a power or nonpower license.

- (7) The location of the project by state, county, and stream, and, when appropriate, by city or nearby city.
- (8) The installed plant capacity.
- (9) The location or locations of all the sites where the information required under § 16.167 is available to the public.
- (10) 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 by the project is located;
 - (ii) Every city, town, Indian tribe, or similar political subdivision:
 - (A) In which any part of the project is located and any Federal facility that is 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 project dam,
 - (iii) Every irrigation district, drainage district, or similar special purpose political subdivision:
 - (A) In which any part of the project is located and any Federal facility that is used by the project is located, or
 - (B) That owns, operates, maintains, or uses any project facility or any Federal facility that is used by the project; and
 - (iv) Every other political subdivision in the general area of the project that there is reason to believe would be likely to be interested in, or affected by, the notification.

16.6(c) *When to notify.* The 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.

16.6(d) *Commission notice.* Upon receipt of the notification required under paragraph (c) of this section, the Commission will provide notice of the licensee's intent to file or not to file an application for a new license by:

- (1) 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 likely to be interested in the proceedings by mail.

§ 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.

16.7(a) *Applicability.* This section applies to a licensee of an existing project subject to sections 14 and 15 of the Federal Power Act.

16.7(b) *Requirement to make information available.* A licensee must make the information specified in paragraph (d) of this section reasonably available to the public for inspection and reproduction, from the date on which the licensee notifies the Commission pursuant to § 16.6(c) of this part until the date any relicensing proceeding for the project is terminated.

16.7(c) *Requirement to supplement information.* A licensee must supplement the information it is required to make available under the provisions of paragraph (d) with any additional information developed after the filing of a notice of intent.

16.7(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, provide a copy of the Pre-Application Document required by § 5.4 to the entities specified in that paragraph. A licensee must make the following information regarding its existing project reasonably available to the public as provided in paragraph (b) of this section:

- ~~—(1) The following construction and operation information:~~
- ~~—(i) the original license application and the order issuing the license and any subsequent license application and subsequent order issuing a license for the existing project, including~~
- ~~—(A) Approved Exhibit drawings, including as-built exhibits;~~
- ~~—(B) Any order issuing amendments or approving exhibits;~~
- ~~—(C) Any order issuing annual licenses for the existing project;~~
- ~~—(ii) 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;~~
- ~~—(iii) 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;~~
- ~~—(iv) Any public correspondence related to the existing project;~~

- ~~—(v) Any report on the total actual annual generation and annual operation and maintenance costs for the period beginning five years before the filing of a notice of intent;~~
- ~~—(vi) Any reports on original project costs, current net investment, and available funds in the amortization reserve account;~~
- ~~—(vii) A current and complete electrical single-line diagram of the project showing the transfer of electricity from the project to the area utility system or point of use; and~~
- ~~—(viii) Any bill issued to the existing licensee for annual charges under Section 10(e) of the Federal Power Act.~~
- ~~—(2) The following safety and structural adequacy information:~~
 - ~~—(i) The most recent emergency action plan for the project or a letter exempting the project from the emergency action plan requirement~~
 - ~~—(ii) Any independent consultant's reports required by part 12 of the Commission's regulations and filed on or after January 1, 1981;~~
 - ~~—(iii) 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;~~
 - ~~—(iv) Any construction report for the existing project; and~~
 - ~~—(v) Any public correspondence relating to the safety and structural adequacy of the existing project.~~
- ~~—(3) The following fish and wildlife resources information:~~
 - ~~—(i) Any report on the impact of the project's construction and operation on fish and wildlife resources;~~
 - ~~—(ii) Any existing report on any threatened or endangered species or critical habitat located in the project area, or affected by the existing project outside the project area;~~
 - ~~—(iii) Any fish and wildlife management plan related to the project area prepared by the existing licensee or any resource agency; and~~
 - ~~—(iv) Any public correspondence relating to the fish and wildlife resources within the project area.~~
- ~~—(4) The following recreation and land use resources information:~~
 - ~~—(i) Any report on past and current recreational uses of the project area;~~
 - ~~—(ii) Any map showing recreational facilities and areas reserved for future development in the project area, designated or proposed wilderness areas in the project area, Land and Water Conservation Fund lands in the project area, and designated or proposed Federal or state wild and scenic river corridors in the project area.~~

- ~~—(iii) Any documentation listing the entity responsible for operating and maintaining any existing recreational facilities in the project area; and~~
- ~~—(iv) Any public correspondence relating to recreation and land use resources within the project area.~~
- ~~—(5) The following cultural resources information:~~
- ~~—(i) Except as provided in paragraph (d)(5)(ii) of this section, a licensee must make available:~~
- ~~—(A) Any report concerning documented archeological resources identified in the project area;~~
- ~~—(B) Any report on past or present use of the project area and surrounding areas by Native Americans; and~~
- ~~—(C) Any public correspondence relating to cultural resources within the project area.~~
- ~~—(ii) A licensee must delete from any information made available under paragraph (d)(5)(i) of this section, specific site or property locations the disclosure of which would create a risk of harm, theft, or destruction of archeological or Native American cultural resources or to the site at which the resources are located, or would violate any Federal law, including the Archeological Resources Protection Act of 1979, 16 U.S.C. 470w-3, and the National Historic Preservation Act of 1966, 16 U.S.C. 470hh.~~
- ~~—(6) 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:~~
- ~~—(i) Any plan of the licensee;~~
- ~~—(ii) Any public correspondence; and~~
- ~~—(iii) Any other pertinent information relating to a conservation plan.~~

(e) Form, place, and hours of availability, and cost of reproduction.

(1) A licensee must make the Pre-Application Document information specified in paragraph (d) of this section available to the public for inspection:

(i) At its principal place of business or at any other location or locations that are more accessible to the public, provided that all of the information is available in at least one location:

(ii) During regular business hours; and

(iii) In a form that is readily accessible, reviewable, and reproducible.

(2) Except as provided in paragraph (e)(3) of this section, a licensee must make requested copies of the information specified in paragraph (c) of this section available either:

(i) At its principal place of business or at any other location or locations that are more accessible to the public, after obtaining reimbursement for reasonable cost of reproduction; or

(ii) Through the mail, after obtaining reimbursement for reasonable costs of reproduction.

(3) A licensee must make requested copies of the information specified in paragraph (d) of this section available to the United States Fish and Wildlife Service, the National Marine Fisheries Service, and the state agency responsible for fish and wildlife resources without charge for the costs of reproduction or postage.

16.7(f) *Unavailability of required information.* Anyone may file a petition with the Commission requesting access to the information specified in paragraph (d) of this section if it believes that a licensee 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.

16.7(g) *Public correspondence.* A licensee may compile and make available in one file all the public correspondence required to be made available for inspection and reproduction by §16.167(d)(1)(iv), (d)(2)(v), (d)(3)(iv), (d)(4)(iv), and (d)(6)(ii).

16.7(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 the Commission's regulations as promulgated prior to **[insert date three months following issuance date of final rule]**.

§ 16.8 Consultation Requirements.

16.8(a) *Requirement to consult.* (1) Before it files any application for a new license, a non-power license, an exemption from licensing, or, pursuant to §16.25 or §16.26 of this part, a surrender of a project, 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)), and any Indian tribe that may be affected by the project, and members of the public.

(2) The Director of the Office of ~~Hydropower Licensing~~ Energy Projects or the Regional Director responsible for the area in which the project is located 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.

(3)(i) Before it files an amendment that would be considered as material under § 4.35 of this part, to any application subject to this section, an applicant must consult with the resource agencies and Indian tribes listed in paragraph (a)(1) of this section allow such agencies and tribes at least 60 days to comment on a draft of the proposed amendment and to submit recommendations and conditions to the applicant. The amendment as filed must summarize the consultation with the resource agencies and Indian tribes on the proposed amendment and respond to any obligations, recommendations or conditions submitted by the agencies or Indian tribes.

(ii) If the applicant has any doubt as to whether a particular amendment would be subject to the pre-filing consultation requirements of this section, the applicant may file a written request for clarification with the Director, ~~Energy Projects Office of Hydropower Licensing~~.

16.8(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, provide a copy of the Pre-Application Document required by § 5.4 to the entities specified in that paragraph.

(2)(~~1~~) A potential applicant for a nonpower license or exemption must promptly contact each of the appropriate resource agencies, and 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

(viii) Any statement required by § 4.301(a) of this chapter.

(3)(2) 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 information to the agencies, and 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, and 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, and 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)(3) ~~Members of the public are invited to attend the joint meeting held pursuant to paragraph (b)(2)(i) of this section. Members of the public attending the meeting are entitled to participate fully in the meeting and to express their views regarding resource issues that should be addressed in any application for a new license that may be filed by the potential applicant. Attendance of the public at any site visit held pursuant to paragraph (b)(2)(i) of this section shall be at the discretion of the potential applicant. The potential applicant must make either audio recordings or written transcripts of the joint meeting, and~~

must upon request promptly provide copies of these recordings or transcripts to the Commission and any resource agency, ~~and~~ Indian tribe, or member of the public.

(5)(4) Unless otherwise extended by the Director of Office of ~~Hydropower Licensing~~ Energy Projects pursuant to paragraph (b)(6)(5) of this section, not later than 60 days after the joint meeting held under paragraph (b)(3)(2) 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)(1)(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, ~~or~~ Indian tribe, or member of the public in furthering its resource goals and objectives.

(6)(5)(i) If a potential applicant and a resource agency, ~~or~~ 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 ~~Hydropower Licensing~~ (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 of the Office of Energy Projects ~~Hydropower Licensing~~ a written response to the referral within 15 days of the referral's submittal to the Director.

(iii) Written referrals to the Director of the Office of Energy Projects ~~Hydropower Licensing~~ and written responses thereto pursuant to paragraphs (b)(6)(5)(i) or (b)(6)(5)(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 ~~Hydropower Licensing~~ pursuant to § 16.8(b)(6)(5).

(iv) The Director of the Office of Energy Projects Hydropower Licensing will resolve disputes by letter provided to the potential applicant and the disagreeing resource agency or Indian tribe: 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 potential applicant does not refer a dispute regarding a request for information (other than a dispute regarding the information specified in paragraph (b)(1) of this section) or a study to the Director under paragraph (b)(5)(i) of this section, or if a potential applicant disagrees with the Director's resolution of a dispute regarding a request for information (other than a dispute regarding the information specified in paragraph (b)(1) of this section) or a study, and if the potential applicant does not provide the requested information or conduct the requested study, the potential applicant must fully explain the basis for its disagreement in its application.~~

(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 subparagraph (b)(6)(iv) of this section, its application will be considered deficient.

~~—(vi) Filing and acceptance of an application will not be delayed, and an application will not be considered deficient or patently deficient pursuant to § 4.32 (e)(1) or (e)(2) of this chapter, merely because the application does not include a particular study or particular information if the Director had previously found, under paragraph (b)(5)(iv) of this section, that such study or information is unreasonable or unnecessary.—~~

(7)(3) Unless otherwise extended by the Director of the Office of Energy Projects Hydropower Licensing pursuant to paragraph (b)(6)(5) of this section, the first stage of consultation ends when all participating agencies, and Indian tribes, and members of the public provide the written comments required under paragraph (b)(5)(4) of this section or 60 days after the joint meeting held under paragraph (b)(3)(2) of this section, whichever occurs first.

16.8(c) *Second stage of consultation.* (1) Unless determined otherwise by the Director of the Office of Hydropower Licensing Energy Projects pursuant to paragraph (b)(6)(5) of this section, a potential applicant must complete all reasonable and necessary studies and obtain all reasonable and necessary information requested by resource

agencies, and 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 subparagraph (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)(6) of this section, a resource agency, or 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)(4) (i)-(vi) of this section, the potential applicant will promptly initiate the study or gather the information unless the Director of the Office of Hydropower Licensing determines under paragraph (b)(5) of this section either that the study or information is unreasonable or unnecessary or that use of the methodology requested by a resource agency or Indian tribe for conducting the study is not a generally accepted practice; 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) merely because the study or information gathering is not complete before the application is filed.

(4) A potential applicant must provide each resource agency, ~~and~~ 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, ~~and~~ 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 that resource agency, ~~and~~ 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, ~~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, ~~and~~ 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 at least one joint meeting with the resource agency, ~~or~~ Indian tribe, ~~and 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, ~~or~~ 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, ~~or~~ Indian tribe, ~~and~~ 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, ~~or~~ 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, ~~or~~ 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, ~~or~~ 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, ~~or~~ 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, ~~or~~ 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, ~~or~~ 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, ~~or~~ 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, ~~or~~ Indian tribe, or consulted member of the public has responded with substantive disagreements.

16.8(d) *Third Stage of Consultation.* (1) The third stage of consultation is initiated by the filing of an application for a new license, non-power license, exemption from licensing,

or surrender of license, accompanied by a transmittal letter certifying that at the same time copies of the application are being mailed to the resource agencies, Indian tribes, ~~and~~ other government offices, and consulted members of the public specified in paragraph (d)(2) of this section and § 16.10(f) of this part, if applicable.

(2) As soon as an applicant files such application documents with the Commission, or promptly after receipt in the case of documents described in paragraph (d)(2)(iii) of this section, as the Commission may direct, the applicant must serve on every resource agency, ~~and~~ Indian tribe, and member of the public consulted, on other government offices, and, in the case of applications for surrender or nonpower license, any state, municipal, interstate, or Federal agency which is authorized to assume regulatory supervision over the land, waterways, and facilities covered by the application for surrender or nonpower license, copies of:

(i) Its application for a new license, a nonpower licence, an exemption from licensing, or a surrender of the project;

(ii) Any deficiency correction, revision, supplement, response to additional information request, or amendment to the application; and

(iii) Any written correspondence from the Commission requesting the correction of deficiencies or the submittal of additional information.

16.8(e) *Resource agency, ~~or~~ Indian tribe, or member of the public waiver of compliance with consultation requirements.* (1) If a resource agency, ~~or~~ 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, or consulted member of the public.

(2) If a resource agency, ~~or~~ 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, ~~or~~ Indian tribe, or consulted member of the public to comply.

(3) The failure of a resource agency, ~~or~~ 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. Any such request must be accompanied by a:

(A) Specific description of how the element of the part 5 license application would fit into the pre-filing consultation process under this part; and

(B) 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.

16.8(f) *Application requirements documenting consultation and any disagreements with resource agencies, or 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, or 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, or 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, or 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, or 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)(i) With regard to certification requirements for a license applicant under section 401(a)(1) of the Clean Water Act:~~

~~(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)(7)(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) Any amendment to an application for license requires a new request for certification if the amendment would have a material adverse impact on the water quality in the discharge from the project or proposed project.~~

(78) 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.

16.8(g) *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 paragraph (b)(1) of this section), 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.

16.8(h) *Other meetings.* Prior to holding a meeting with a resource agency, ~~or~~ Indian tribe, or member of the public, other than a joint meeting pursuant to paragraph (b)(2)(i) or (c)(6)(i) of this section, a potential applicant must provide the Commission and each resource agency or Indian tribe (with an area of interest, expertise, or responsibility similar or related to that of the resource agency or Indian tribe with which the potential applicant is to meet) 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.

16.8(i) *Public participation.* (1) At least 14 days in advance of the joint meeting held pursuant to paragraph (b)(2) of this section, the potential applicant must publish notice, at least once, of the purpose location, and timing of the joint meeting, in a daily or weekly newspaper published in the county or counties in which the existing project or any part thereof or the lands affected thereby are situated. The notice shall include a copy of the written agenda of the issues to be discussed at the joint meeting prepared pursuant to paragraph (b)(2) of this section.

(2)(i) A potential applicant must make available to the public for inspection and reproduction the information specified in paragraph (b)(1) of this section from the date on

which the notice required by paragraph (i)(1) of this section is first published until the date of the joint meeting required by paragraph (b)(2) of this section: a final order is issued on the license application.

(ii) The provisions of § 16.7(e) shall 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)(2) of this section the information specified in paragraph (b)(1) of this section.

16.8(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 Commission's regulations as promulgated prior to **[insert date three months following issuance date of final rule]**. ~~(1) The provisions of this section are not applicable to applications filed before July 3, 1989.~~

~~(2) The provisions of paragraphs (a) and (b) of this section are not applicable to potential applicants that complied with the provisions of § 4.38 (a) and (b)(1) of this section prior to July 3, 1989.~~

~~(3) The provisions of paragraph (c) of this section are not applicable to potential applicants that complied with the provisions of § 4.38(b)(2) of this section prior to July 3, 1989.~~

~~(4)(i) Any applicant that files its application on or after July 3, 1989, and that complied with the provisions of § 4.38 (a) and (b)(1) of this section prior to July 3, 1989, must hold a public meeting, within 90 days from July 3, 1989, at or near the site of the existing project to generally explain the potential applicant's proposal for the site and to obtain the views of the public regarding resource issues that should be addressed in any application for new license that may be filed by the potential applicant. The public meeting must include both day and evening sessions, and the potential applicant must make either audio recordings or written transcripts of both sessions.~~

~~(ii) At least 14 days in advance of the meeting, the potential applicant must publish notice, at least once, of the purpose, location, and timing of the meeting, in a daily or weekly newspaper published in the county or counties in which the existing project or any part thereof or the lands affected thereby are situated.~~

- ~~—(iii)(A) A potential applicant must make available to the public for inspection and reproduction information comparable to that specified in paragraph (b)(1) from the date on which the notice required by paragraph (j)(4)(ii) is first published until the date of the public meeting required by paragraph (j)(4)(I).~~
- ~~—(B) The provisions of § 16.7(e) shall govern the form and manner in which the information is to be made available for public inspection and reproduction.~~
- ~~—(C) A potential applicant must make available to the public for inspection at both sessions of the public meeting required by paragraph (j)(4)(I) of this section the information specified in paragraph (j)(4)(iii)(A).~~
- ~~—(D) A potential applicant must upon request promptly provide to the Commission and any resource agency or Indian tribe copies of the audio recordings or written transcripts of the sessions of the public meeting.~~
- ~~—(iv) Any applicant holding a public meeting pursuant to paragraph (j)(4)(I) must include in its filed application a description of how the applicant's proposal addresses the significant resource issues raised during the public meeting.~~
- ~~—(5) All requests for waiver of, or clarification regarding, the application of the provisions of this subsection to a proceeding must be submitted to the Director of the Office of Hydropower Licensing not later than 90 days after July 3, 1989 and will be subject to, and processed in accordance with, the provisions of paragraph (b)(5).~~
- ~~—(6) A potential applicant that has initiated consultation with resource agencies in accordance with this section must initiate consultation with Indian tribes meeting the criteria set forth in § 16.2(f) not later than February 9, 1990.~~

§ 16.9 Applications for new licenses and nonpower licenses for projects subject to Sections 14 and 15 of the Federal Power Act.

16.9(a) *Applicability.* This section applies to an applicant for a new license or nonpower license for a project subject to Sections 14 and 15 of the Federal Power Act.

16.9(b) *Filing Requirement.* (1) An applicant for a license under this section must file its application at least 24 months before the existing license expires.

(2) An application for a license under this section must meet the requirements of section 4.32 (except that the Director of the Office of Hydropower Licensing Energy Projects may provide more than 90 days in which to correct deficiencies in applications) and, as appropriate, §§ 4.41, 4.51, or 4.61 of this chapter.

(3) The requirements of § 4.35 of this chapter do not apply to an application under this section, except that the Commission will reissue a public notice of the application in accordance with the provisions of § 16.9(d)(1) if an amendment described in § 4.35(f) of this chapter is filed.

(4) If the Commission rejects or dismisses an application pursuant to the provisions of § 4.32 of this chapter, the application may not be refiled after the new license application filing deadline specified in § 16.9(b)(1).

16.9(c) *Final amendments.* All amendments to an application, 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 paragraph (d)(2).

16.9(d) *Commission notices.* (1) Upon acceptance of an application for a new license or nonpower license, the Commission will give notice of the application and of the dates for comment, intervention, and protests by:

(i) Publishing notice in the FEDERAL REGISTER;

(ii) 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;

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

(2) Within 60 days after the new license application filing deadline, the Commission will issue a notice on the processing deadlines established under § 4.32 of this chapter, estimated dates for further processing deadlines under § 4.32 of this chapter, deadlines for complying with the provisions of § 4.36(d)(2) (ii) and (iii) of this chapter in cases where competing applications are filed, and the date for final amendments and will:

(i) Publish notice in the FEDERAL REGISTER;

(ii) Provide the notice to appropriate Federal, state, and interstate resource agencies, and Indian tribes; and

(iii) Serve the notice on all parties to the proceeding pursuant to § 385.2010 of this chapter.

(3) Where two or more mutually exclusive competing applications have been filed for the same project, the final amendment date and deadlines for complying with the provisions of § 4.36(d)(2) (ii) and (iii) of this chapter established pursuant to the notice issued under paragraph (d)(2) of this section will be the same for all such applications.

(4) The provisions of § 4.36(d)(2)(i) of this chapter will not be applicable to applications filed pursuant to this section.

§ 16.10 Information to be provided by an applicant for new license: Filing requirements.

~~(d) *Extended deadline for certain applicants.* If an applicant must file an application under § 16.9 with 90 days after July 3, 1989, that applicant may provide the information required in this section within 90 days after the date on which it files the application.~~

~~(de) *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."~~

~~(f) *Filing requirements.* For all applications for new licenses due to be filed with the Commission on or after June 19, 1991, and prior to January 1, 1992, the following number of copies must be submitted to the Commission and served on resource agencies:~~

~~(1) If the application is hand-delivered to the Commission, as by messenger or courier service, only an original and five copies of the application need to be delivered to the Secretary, but the filing must be accompanied by a transmittal letter certifying that at the same time five copies of the application are being delivered to the Director, Division of Project Review, Office of Hydropower Licensing, and copies are being mailed to the resource agencies consulted and the government offices specified in § 16.8(d)(2) of this part, including each of the following:~~

~~(i) The Regional Office of the Commission for the area in which the project is located;~~

~~(ii) The U.S. Department of the Interior, Washington, D.C. (6 copies for projects located in the Eastern United States, including Minnesota, Iowa, Missouri, Arkansas, and Louisiana, and 9 copies for projects located in the Western United States westward of the western boundaries of Minnesota, Iowa, Missouri, Arkansas, and Louisiana;~~

~~(iii) The U.S. Bureau of Land Management District Office for the area in which the project is located; and~~

~~(iv) The U.S. Corps of Engineers District Office for the area in which the project is located.~~

~~(2) If the application is mailed to the Commission, only an original and ten copies of the application need be sent to the Secretary, but the application must be accompanied by a transmittal letter certifying that at the same time copies of the application are being mailed to each of the offices listed in paragraphs (f)(1) through (iv) of this section.~~

§ 16.11 Nonpower licenses.

~~(a)(2) If an applicant must file an application for a nonpower license under § 16.9 within 90 days after July 3, 1989, that applicant may provide the information required in paragraph (a)(1)(I), within 90 days after the date it files the application.~~

§ 16.12 Application for exemption from licensing by a licensee whose license is subject to sections 14 and 15 of the Federal Power Act.

§ 16.13 Standards and factors for issuing a new license.

Subpart C – Takeover Provisions for Projects Subject to Sections 14 and 15 of the Federal Power Act

§ 16.14 Departmental recommendation for takeover.

§ 16.15 Commission recommendation to Congress.

§ 16.16 Motion for stay by Federal department or agency.

§ 16.17 Procedures upon Congressional authorization of takeover.

Subpart D – Annual Licenses for Projects Subject to Sections 14 and 15 of the Federal Power Act

§ 16.18 Annual licenses for projects subject to sections 14 and 15 of the Federal Power Act.

Subpart E – Projects with Minor and Minor Part Licenses Not Subject to Sections 14 and 15 of the Federal Power Act

§ 16.19 Procedures for an existing licensee of a minor hydroelectric power project or of a minor part of a hydroelectric power project with a license not subject to sections 14 and 15 of the Federal Power Act.

~~—(b)(3) Except as provided in paragraph (b)(4) of this section, if the license of an existing licensee expires before October 17, 1994, the licensee must notify the Commission as required under §16.6(b) no later than September 1, 1989.~~

~~—(b)(4) The requirement in paragraph (b)(3) of this section does not apply if an applicant filed a notice of intent as required by §16.6(b) or an application for a subsequent license on or before July 3, 1989.~~

§ 16.20 Applications for subsequent license for a project with an expiring license not subject to sections 14 and 15 of the Federal Power Act.

~~(c) Requirement to file. (1) Except as provided in paragraphs (c)(2) and (c)(3) of this section, an~~ An applicant must file an application for subsequent license at least 24 months before the expiration of the existing license.

~~—(2) The requirement in paragraph (c)(1) does not apply if the license is due to expire within three years of July 3, 1989.~~

~~—(3) An applicant intending to file an application for subsequent license for a project whose license is due to expire within four years of July 3, 1989, must file an application at least 12 months before the date on which the existing license expires.~~

§ 16.21 Operation of projects with a minor or minor part license not subject to sections 14 and 15 of the Federal Power Act after expiration of a license.

§ 16.22 Application for an exemption by a licensee with a minor or minor part license for a project not subject to sections 14 and 15 of the Federal Power Act.

Subpart F – Procedural Matters

§ 16.23 Failure to timely file notices of intent.

§ 16.24 Prohibitions against filing applications for new license, nonpower license, exemption, or subsequent license.

§ 16.25 Disposition of a project for which no timely application is filed following a notice of intent to file.

§ 16.26 Disposition of a project for which no timely application is filed following a notice of intent not to file.

PART 385

§ 385.214 Intervention (Rule 214).

(a) *Filing.* (1) The Secretary of Energy is a party to any proceeding upon filing a notice of intervention in that proceeding. If the Secretary's notice is not filed within the period prescribed under Rule 210(b), the notice must state the position of the Secretary on the issues in the proceeding.

(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.

§ 385.2201 Rules governing off the record communications (Rule 2201)

(e) *Exempt off-the-record communications.* (1) Except as provided by paragraph (e)(2), the general prohibitions in paragraph (b) of this section do not apply to:

.....

(v) An off-the-record communication to or from a Federal, state, local or Tribal agency that is not a party in the Commission proceeding, subject to disclosure under paragraph (g) of this section, if the communication involves:

(A) an oral or written response to a request for information made by the Commission or Commission staff; or

(B) a matter before the Commission in which a Federal, state, local or Tribal agency has regulatory responsibilities, including authority to impose or recommend conditions in connection with a Commission license, certificate, or exemption;

(vi) An off-the-record communication, subject to disclosure under paragraph (g) of this section, that relates to:

(A) The preparation of an environmental impact statement if communications occur prior to the issuance of the final environmental impact statement; or

(B) The preparation of an environmental assessment where the Commission has determined to solicit public comment on the environmental assessment, if such communications occur prior to the issuance of the final environmental document.

.....

(g) Disclosure of exempt off-the-record communications. (1) Any document, or a summary of the substance of any oral communication, obtained through an exempt off-the-record communication under paragraphs (ii), (iv), (v), (vi), or (vii) of this section, promptly will be submitted to the Secretary and placed in the decisional record of the relevant Commission proceeding, unless the communication was with a cooperating agency as described by 40 CFR 1501.6, made under paragraph (e)(1)(v) of this section.

(2) The disclosure requirement of subparagraph (g)(1) 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.