

167 FERC ¶ 61,050
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

18 CFR Part 7

[Docket No. RM19-6-000; Order No. 858]

Hydroelectric Licensing Regulations Under the
America's Water Infrastructure Act of 2018

(Issued April 18, 2019)

AGENCY: Federal Energy Regulatory Commission.

ACTION: Final Rule.

SUMMARY: In this final rule, the Federal Energy Regulatory Commission (Commission) is establishing an expedited process for issuing original licenses for qualifying facilities at existing nonpowered dams and for closed-loop pumped storage projects, pursuant to sections 3003 and 3004 of the America's Water Infrastructure Act of 2018. Under the expedited licensing process, the Commission will seek to ensure that a final decision is issued no later than two years after the Commission receives a completed license application. The final rule will be codified in a new part that will be added to the Commission's regulations.

EFFECTIVE DATE: The rule will become effective **[INSERT DATE 90 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]**

Docket No. RM19-6-000

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SUPPLEMENTARY INFORMATION:

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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Docket No. RM19-6-000

ORDER NO. 858

FINAL RULE

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UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Neil Chatterjee, Chairman;
Cheryl A. LaFleur and Richard Glick.

Hydroelectric Licensing Regulations Under the
America's Water Infrastructure Act of 2018

Docket No. RM19-6-000

ORDER NO. 858

FINAL RULE

(Issued April 18, 2019)

1. On October 23, 2018, the America's Water Infrastructure Act (AWIA)¹ was signed into law. The AWIA requires the Federal Energy Regulatory Commission (Commission or FERC) to establish an expedited process for issuing and amending licenses for qualifying facilities at existing nonpowered dams and for closed-loop pumped storage projects. Under the expedited process, the Commission will seek to ensure that a final decision on a license application is issued no later than two years after the Commission receives a completed license application.
2. To comply with the AWIA, the Commission issues this final rule to amend its regulations governing hydroelectric licensing under the Federal Power Act (FPA) by establishing an expedited licensing process for qualifying facilities at existing

¹ Pub. L. No. 115-270, 132 Stat. 3765.

nonpowered dams and for closed-loop pumped storage projects. The final rule will be codified in a new part 7 that will be added to Title 18 of the Code of Federal Regulations.

I. Background

3. Sections 3003 and 3004 of the AWIA amended the FPA by adding new sections 34 and 35. Section 34 of the FPA gives the Commission discretion to issue or amend licenses, as appropriate, for any facility that the Commission determines is a qualifying facility at an existing nonpowered dam. Section 35 of the FPA gives the Commission discretion to issue or amend licenses, as appropriate, for closed-loop pumped storage projects. Congress directed the Commission to issue a rule, no later than 180 days after October 23, 2018, establishing an expedited licensing process for issuing and amending licenses for projects covered by FPA sections 34 and 35. In establishing the expedited licensing process, Congress directed the Commission to convene an interagency task force (ITF), with appropriate federal and state agencies and Indian Tribes represented, to coordinate the regulatory processes associated with the authorizations required to construct and operate qualifying facilities at nonpowered dams and closed-loop pumped storage projects.

4. On November 13, 2018, the Commission issued a notice inviting federal agencies, state agencies, and Indian Tribes to participate on the ITF.² The notice directed interested

² See *Notice Inviting Federal and State Agencies and Indian Tribes to Request Participation in the Interagency Task Force Pursuant to America's Water Infrastructure Act of 2018*, 83 FR 58,245 (Nov. 19, 2018).

agencies and Indian Tribes to file a statement of interest with the Commission by November 29, 2018. On December 6, 2018, the Commission issued a notice identifying 28 federal agencies, state agencies, and Indian Tribes as ITF participants.³

5. On December 12, 2018, the Commission convened a meeting with the ITF participants at the Commission's headquarters to discuss the Commission's preliminary proposal to coordinate the regulatory processes associated with the authorizations required to construct and operate qualifying facilities at nonpowered dams and closed-loop pumped storage projects. At the meeting, Commission staff presented for the ITF participants' consideration and comment a flowchart illustrating a draft expedited licensing process.⁴ In addition to soliciting comments at the meeting, Commission staff invited ITF participants to file comments on the process in Docket No. RM19-6-000 by December 26, 2018. Seven post-session comments were filed. The Commission's coordination and discussion with appropriate federal and state agencies and Indian Tribes, as part of the ITF, have informed this final rule.

II. Notice of Proposed Rulemaking

6. On January 31, 2019, the Commission issued a Notice of Proposed Rulemaking proposing to promulgate rules to establish an expedited process to license eligible

³ See Notice of Interagency Task Force (Dec. 6, 2018); *see also* FERC, Office of Energy Projects, Summary of Interagency Task Force Activities (Jan. 10, 2019) (Appendix A identifies the ITF participants).

⁴ See Commission staff's Letter to ITF Participants, Summary of Interagency Task Force Activities (Jan. 10, 2019).

projects at existing nonpowered dams and closed-loop pumped storage projects.⁵ In response to the NOPR, the Commission received 11 comments. Consumers Energy Company (Consumers),⁶ Daybreak Power, Inc. (Daybreak),⁷ Dominion Energy Services, Inc. (Dominion),⁸ the U.S. Department of Agriculture's Forest Service (Forest Service), the U.S. Department of the Interior (Interior),⁹ the National Hydropower Association (NHA),¹⁰ the National Marine Fisheries Service (NMFS), the Oregon Department of Fish and Wildlife (Oregon DFW), the Nature Conservancy, the Pennsylvania State Historic Preservation Office (PA SHPO), and Rye Development, LLC (Rye Development) filed

⁵ *Hydroelectric Licensing Regulations Under the America's Water Infrastructure Act of 2018*, 84 FR 2469, 166 FERC ¶ 61,083 (2019) (NOPR).

⁶ Consumers is a public utility that owns and operates thirteen FERC-licensed hydroelectric projects.

⁷ Daybreak is a developer of pumped storage projects.

⁸ Dominion holds a preliminary permit for the proposed Tazewell Hybrid Energy Center Project No. 14854, and states that it is currently investigating whether the Tazewell Project, or a similar project, could be configured as a closed-loop pumped storage project.

⁹ Interior represents the U.S. Bureau of Reclamation, the National Park Service, and U.S. Fish and Wildlife Service in its comment.

¹⁰ NHA represents the Edison Electric Institute, the National Rural Electric Cooperative Association, the American Public Power Association, and the Northwest Hydropower Association in its comment.

comments.¹¹ The proposal set forth in the NOPR, the comments received in response to the NOPR, and the Commission's determinations are discussed below.

III. Discussion

A. Scope of the Expedited Licensing Process

7. The NOPR explained that the Commission's current regulations provide three pre-filing process options for hydropower developers to use in preparing license applications: (i) the integrated licensing process (ILP), which is the default process, as described in part 5;¹² (ii) the traditional licensing process (TLP), as described in part 4, subparts D to H;¹³ or (iii) the alternative procedures (i.e., the alternative licensing process (ALP)), as described in section 4.34(i) of part 4.¹⁴ The NOPR did not propose to alter these existing licensing processes. Rather, the NOPR proposed to establish procedures for the Commission to determine, on a case-by-case basis, whether original license applications for qualifying hydropower projects at nonpowered dams or for closed-loop pumped storage projects, as defined in sections 34 and 35 of the FPA and the eligibility criteria below, qualify for expedited processing.

¹¹ Rye Development is developing a number of hydroelectric projects, including one that was licensed under the Commission's Two-Year Pilot Licensing Process, *FFP Project 92, LLC*, 155 FERC ¶ 62,089 (2016).

¹² 18 CFR pt. 5 (2018).

¹³ 18 CFR pt. 4, subpt. D-H (2018).

¹⁴ *Id.* 4.34(i).

8. As stated in the NOPR, the use of the expedited licensing process is voluntary. To apply for consideration under the expedited process, an applicant for an original license for a qualifying hydropower project or closed-loop pumped storage project must supplement its license application with a request for authorization to use the expedited licensing process.

9. The NOPR proposed that the expedited licensing process would begin with the receipt of a completed license application. Consistent with the statute, the proposed expedited licensing process envisioned a two-year framework that did not include the pre-filing stages of application development (i.e., all process milestones and consultation to obtain necessary authorizations that must occur before an applicant files a license application). For pre-filing activities, the NOPR explained that any applicant interested in pursuing authorization to use the expedited licensing process must use the default ILP, or request authorization to the use TLP or ALP, as required under our current regulations.

10. Finally, the scope of the NOPR was limited to original license applications. However, the Commission requested comments on whether the expedited licensing process should apply to applications for a new or subsequent license for a project that was originally licensed under the expedited licensing process.¹⁵

¹⁵ NOPR, 166 FERC ¶ 61,083 at P 7.

1. Pre-filing Process

11. NHA, Consumers, Dominion, and Rye Development encourage the Commission to improve the overall process to authorize hydroelectric facilities, which includes streamlining the pre-filing process.¹⁶ Rye Development estimates that the NOPR may not reduce the overall licensing time, which it calculates to be at least three years for the pre-filing process and two years for the post-filing process for a total of at least five years, because the NOPR does not address the pre-filing process time.¹⁷ This, it alleges, is contrary to Congressional intent.¹⁸ Rye Development explains that a shorter and more certain licensing schedule, which includes pre-filing process “reforms” and allows for off-ramps for more problematic projects, would allegedly make hydroelectric generation cost competitive with other types of power generation and help attract investors.¹⁹

12. NHA proposes, and Dominion supports, an alternative two-step pre-filing process that NHA posits will allow the Commission to determine, during pre-filing, whether a project would be eligible for the expedited licensing process.²⁰ If the Commission finds a

¹⁶ See NHA’s March 11, 2019 Comment at 4-6; Consumers’ March 11, 2019 Comment at 2; Dominion’s March 11, 2019 Comment at 1-2; Rye Development’s March 8, 2019 Comment at 2.

¹⁷ See Rye Development’s Comment at 2.

¹⁸ See *id.* at 2-3.

¹⁹ See *id.* at 3-4.

²⁰ See NHA’s Comment at 6-9 (proposing a two-step pre-filing eligibility determination that would culminate in Commission action on a request for authorization

project eligible, NHA recommends that the Commission also grant preliminary approval of draft study plans and establish milestones and a schedule for the expedited licensing process during pre-filing.²¹ Noting that the success of the expedited licensing process depends on the cooperation of all parties to the process, NHA and Dominion also encourage other federal and state agencies to align their policies and regulations with the expedited licensing process and urge consideration of an interagency memorandum of understanding.²²

13. The Commission understands the importance of a clear process schedule. It is for this reason that the Commission has made publicly available on its website diagrammatic representations of the ILP and TLP.²³ We will provide the same for the expedited licensing process under the new part 7.²⁴ This rulemaking, however, is limited to the

to use the expedited licensing following issuance of the Scoping Document 1); Dominion's Comment at 2-4.

²¹ NHA's Comment at 6-7; Dominion's Comment at 4.

²² NHA's Comment at 7-8; Dominion's Comment at 4.

²³ See FERC, the Integrated Licensing Process (ILP) – Tutorial, <https://www.ferc.gov/industries/hydropower/gen-info/licensing/ilp/ilp-tutorial/overview.asp> (updated Oct. 10, 2012); FERC, Processes for Hydropower Licenses – Traditional Licensing Process (Applicant's Pre-Filing Process), <https://www.ferc.gov/resources/processes/flow/hydro-1.asp>; FERC, Processes for Hydropower Licenses – Traditional Licensing Process (FERC Application Process), <https://www.ferc.gov/resources/processes/flow/hydro-2.asp>.

²⁴ Commission staff will provide a flowchart on the Commission's website shortly after the final rule is issued.

post-filing period as mandated by the AWIA. Congress required the Commission to issue a rule establishing a two-year expedited licensing process that begins from the receipt of a completed license application.²⁵ Completion of the pre-filing process is necessary to develop a completed application. We therefore decline to revise the established pre-filing schedule in our existing regulations in this rulemaking. Furthermore, the Commission's existing ALP framework provides the flexibility that could accommodate, on a case by case basis, the type of pre-filing schedule NHA has proposed.²⁶

14. While we encourage federal and state agencies to cooperate with the Commission's licensing schedules, we have no authority to require other agencies to modify their own regulations or policies to suit our licensing process as encouraged by NHA and Dominion. Nor will we dictate to other agencies how their regulations or policies should be interpreted. Expedited processing is possible when applicants and stakeholders work closely during pre-filing to gather information, conduct studies, and address information gaps. Expedited licensing is further aided by well-developed license applications that provide a detailed project proposal, a comprehensive summary of existing facilities and natural resources, and a thorough examination of the resource issues at hand and study needs.

²⁵ See 16 U.S.C.A. §§ 823e(a)(4), 823f(a)(4) (West 2019).

²⁶ The ALP framework was designed to be flexible in order for an applicant to tailor the pre-filing consultation process to the circumstances of each case. See *Regulations for the Licensing of Hydroelectric Projects*, Order No. 596, FERC Stats & Regs ¶ 31,057, at P 6 (1997) (cross-referenced at 81 FERC ¶ 61,103).

2. Relicense Proceedings

15. The NOPR requested comments on whether the expedited licensing process should be available for applications for new or subsequent licenses,²⁷ provided that the project was originally licensed under the expedited licensing process.²⁸

16. Daybreak and Consumers recommend that the proposed rule be expanded to include relicensing of projects licensed under the expedited licensing process.²⁹ NHA did not explicitly express opposition or support in response to the Commission's relicensing inquiry, but observed that the first new or subsequent license applications for projects originally licensed under the expedited licensing process would not be filed for another 40 years.³⁰ Absent a significant change in the regulatory landscape, NHA finds it highly unlikely that future relicensing of a project that was originally licensed under the expedited licensing process could not be completed within two years.³¹

²⁷ A new license is a license that is issued under FPA section 15(a) after an original license expires. A subsequent license is a license that is issued under FPA Part I after a minor or minor-part license that was not subject to FPA sections 14 and 15 expires. Both new and subsequent licenses are considered relicenses. *See* 18 CFR 16.2(a), (d) (2018).

²⁸ NOPR, 166 FERC ¶ 61,083 at P 7.

²⁹ Daybreak's February 25, 2019 Comment at 1; Consumers' Comment at 1-2.

³⁰ *See* NHA's Comment at 17.

³¹ *Id.* at 17. NHA further states that a new or subsequent license application for a project previously licensed at an existing dam would not qualify for the expedited licensing process because it would not satisfy the requirement set forth in section 34(e)(1)(A) of the FPA that the project not already be licensed.

17. The AWIA's eligibility criteria for qualifying facilities at existing nonpowered dams exclude facilities that are already licensed or exempted from license requirements in the FPA.³² Thus, future new or subsequent license applications for projects at existing nonpowered dams that were originally licensed under the expedited process would be ineligible to participate in the expedited process. Furthermore, we agree with NHA's observation that, in most cases, a relicense proceeding for a project that was originally licensed under the expedited licensing process should be completed within an average of two years under the Commission's existing regulations. Accordingly, the expedited licensing process set forth in this final rule remains limited in scope to original license applications for projects at qualifying facilities at existing nonpowered dams and for closed-looped pumped storage projects.

3. Amendment Proceedings

18. The NOPR explained that FPA sections 34(a)(1) and 35(a)(1) give the Commission discretion to amend licenses, as appropriate, for any facility that the Commission determines is a qualifying facility. As part of this rulemaking, the Commission is required to establish an expedited process for amending licenses for qualifying facilities. FPA sections 34(a)(4) and 35(a)(4) explicitly define the expedited process for license applications as a two-year process for the Commission to issue a final decision on a license application once it receives a completed license application. These

³² See 16 U.S.C.A. § 823e(e)(1)(A) (West 2019).

sections, however, are silent on the length of time to process applications to amend licenses.

19. Because the Commission already processes the majority of amendments within two years, the NOPR proposed to process applications to amend licenses for projects located at qualifying nonpowered dams and for closed-loop pumped storage projects under the Commission's existing regulations for amendments in 18 CFR part 4, subpart L.³³

20. NHA contends that once a project is licensed, there is no reason that applications to amend licenses issued under the expedited licensing process should receive preferential treatment over applications to amend licenses issued under the ILP, TLP, or ALP framework.³⁴ No other comments addressed or advocated for an expedited amendment process separate and apart from the Commission's existing procedures for license amendment applications.

21. Therefore, we are satisfied that the Commission's existing procedures will continue to result in expeditious action on any application to amend a license originally licensed under the expedited process, well within the two-year benchmark established in the AWIA. Accordingly, the final rule does not establish a separate process for acting on applications to amend licenses issued under the expedited licensing process.

³³ NOPR, 166 FERC ¶ 61,083 at PP 42-44 (estimating that about 98 percent of amendment-related filings were processed in two years during the past five years).

³⁴ NHA's Comment at 18.

B. Expedited Licensing Process**1. Section 7.1 – Applicability and Definitions**

22. In § 7.1(c)(3) of the NOPR, the Commission restated the Commission’s current definition of a closed-loop pumped storage project as “a pumped storage project that is not continually connected to a naturally-flowing water feature.”³⁵ The NOPR also incorporated the statutorily-defined “qualifying criteria,” “qualifying nonpowered dam,” and “qualifying facility.”

23. We received several comments that the key terms, such as “continually,” “connected,” and “naturally-flowing water features” are unclear, which could potentially result in the expeditious licensing of an environmentally-harmful pumped storage project.³⁶ Some commenters argue that a pumped storage project may not be “continually” connected to a naturally-flowing water feature, but those intermittent periods when the project is connected to the naturally-flowing water feature could result in substantial resource impacts.³⁷ On the other hand, NHA, Consumers, and Dominion

³⁵ NOPR, 166 FERC ¶ 61,083 at PP 21 & 36. The NOPR’s preamble mistakenly used “continuously” instead of “continually” to describe the Commission’s current definition of closed-loop pumped storage.

³⁶ See Interior’s March 8, 2019 Comment at 2-3, Forest Service’s March 8, 2019 Comment at 2, Oregon DFW’s March 11, 2019 Comment at 1-2.

³⁷ See Forest Service’s Comment at 2; Interior’s Comment at 3; Oregon DFW’s Comment at 1.

encourage the Commission to generously interpret terms, such as closed-loop pumped storage, in order to allow more projects to be eligible for the expedited process.³⁸

24. In addition, commenters contend that the term “connected” is ambiguous as to whether the connection only refers to a physical hydraulic connection or includes a separate and independent hydrologic connection.³⁹ Some commenters suggest that for a project to qualify for expedited processing as a closed-loop pumped storage project, there should be no hydrologic connection between the project and surface or groundwater features.⁴⁰ Interior notes that subsurface or surface hydrologic connections might adversely affect lake levels and associated recreational use and access on lakes which would lead to longer processing times.⁴¹ NHA and Dominion allege that excluding projects from eligibility based on a mere physical hydraulic or a hydrologic connection to surface waters or groundwater would disqualify almost all closed-loop pumped storage projects, and therefore request that our definition focus on how the water would be used by the project rather than how the project is connected to the water feature.⁴²

³⁸ See NHA’s Comment at 10-15; Consumers’ Comment at 2; Dominion’s Comment at 4-8.

³⁹ See, e.g., Forest Service’s Comment at 2.

⁴⁰ See Oregon DFW’s Comment at 2; Nature Conservancy’s March 11, 2019 Comment at 4; Forest Service’s Comment at 2.

⁴¹ See Interior’s Comment at 3.

⁴² See NHA’s Comment at 14; Dominion’s Comment at 7.

25. As for “naturally-flowing water features,” the Forest Service asks whether such water features include groundwater aquifers, existing lakes, or other isolated waterbodies.⁴³ Commenters note that although flow is generally not significant in the hydrologic mass balance of lakes or other isolated, surface water features,⁴⁴ use of the term “naturally-flowing” could result in eligibility for projects that would significantly adversely affect lakes, endorheic basins,⁴⁵ and other isolated surface water features,⁴⁶ as well as wildlife that inhabit these areas.⁴⁷

26. We received several proposed alternative definitions of a closed-loop pumped storage project.

27. The Forest Service recommends that a closed-loop pumped storage project be defined as a pumped storage project “whose operation causes little to no change in discharge, flow, water quality, or other hydrologic characteristics of naturally-occurring surface or groundwater features, or the species and habitats that depend on these features.”⁴⁸ Oregon DFW suggests defining closed-loop pumped storage as “projects that

⁴³ See Forest Service’s Comment at 2.

⁴⁴ See *id.*

⁴⁵ Endorheic basins are hydrologically-landlocked drainage basins that do not discharge to other bodies of water.

⁴⁶ See Forest Service’s Comment at 2; Interior’s Comment at 3; Oregon DFW’s Comment at 2.

⁴⁷ See Oregon DFW’s Comment at 2.

⁴⁸ Forest Service’s Comment at 1.

utilize artificial reservoirs that have been constructed and operated for purposes authorized in the original license; that rely on temporary connections to flowing water features or groundwater for initial fill and periodic recharge; and whose construction and operation causes little to no change in discharge, flow, water quality, or other hydrologic characteristics of naturally occurring surface or groundwater features, or to the fish and wildlife and their habitats associated with these features.”⁴⁹ NHA and Dominion encourage the Commission to expand its definition, and suggest that the Commission define a closed-loop pumped storage project as: “a pumped storage project that: (1) does not obtain its principal water supply from a naturally-flowing water feature; (2) obtains its water from a naturally-flowing surface water feature only for the purpose of initial fill and periodic replenishment, or (3) is not located on a navigable waterway.”⁵⁰

28. As noted by the resource agencies, we recognize that use of the term “not continually connected” in our definition might capture pumped storage projects that would potentially require additional time and agency resources to determine their environmental effects, and may not be appropriate for expedited processing. Therefore, in the final rule, we adopt a definition of a closed-loop pumped storage project that focuses on the extent and type of a project’s use of surface waters or groundwater rather

⁴⁹ Oregon DFW’s Comment at 2.

⁵⁰ NHA’s Comment at 15; *see* Dominion’s Comment at 7. NHA contends that the location of a proposed project on non-navigable waterways (e.g., small creeks or streams which do not contain or affect significant environmental resources) should not disqualify the project from the expedited licensing process.

than on its physical, hydraulic connection to such features. Further, we agree with the resource agencies that the term “naturally-flowing water features” in terms of a connected use is overly narrow and does not account for the environmental significance of water withdrawals from such features as groundwater, lakes, and wetlands. We see the benefit in specifying in our definition how we expect closed-loop pumped storage projects would utilize water from these water features (i.e., initial fill and periodic recharge), as suggested by many commenters.⁵¹

29. In addition, as required by section 35(g)(2) of the FPA, a request to use the expedited licensing process must demonstrate that a closed-loop pumped storage project will cause little to no change to existing surface and groundwater flows and uses, and is unlikely to adversely affect species listed as threatened or endangered under the Endangered Species Act of 1973 (ESA).⁵² If the proposed project does not meet these two aforementioned statutory criteria, then the project will not qualify under the AWIA for use of the expedited process. Therefore, we have incorporated these criteria into the final rule’s definition of a closed-loop pumped storage project.

30. As to the statutory requirement that the project cause little to no change to the existing surface flows and uses, the mere presence of a pumped storage project reservoir on a surface water feature, such as a natural waterway, lake, or wetland would undeniably

⁵¹ See, e.g., NHA’s Comment at 11, 14-15; Dominion’s Comment at 5; Oregon DFW’s Comment at 2.

⁵² 16 U.S.C. §§ 1531-1544 (2012).

change existing surface water flows and uses in direct contravention of FPA section 35(g)(2)(A). For this reason and for clarification, the revised definition requires closed-loop pumped storage projects to use reservoirs that are not located on natural surface water features.

31. Therefore, informed by the comments received on the NOPR, and for the purposes of expediting processing under the AWIA, § 7.1(c)(3) is revised, as follows: “pumped storage projects that: (1) cause little to no change to existing surface and groundwater flows and uses; (2) are unlikely to adversely affect species listed as a threatened species or endangered species, or designated critical habitat of such species, under the Endangered Species Act of 1973; (3) utilize only reservoirs situated at locations other than natural waterways, lakes, wetlands, and other natural surface water features; and (4) rely only on temporary withdrawals from surface waters or groundwater for the sole purposes of initial fill and periodic recharge needed for project operation.”

2. Section 7.2 – Use of Expedited Licensing Process

32. Section 7.2 of the NOPR described the information that an applicant must include in any license application that accompanies a request to use the expedited licensing process. The information includes design and environmental criteria mandated by sections 34 and 35 of the FPA and documentation demonstrating early consultation with relevant agencies, Indian Tribes, and dam owners.⁵³

⁵³ See NOPR, 166 FERC ¶ 61,083 at PP 15-17 (CWA), PP 18-22 (ESA), PP 23-24 (NHPA).

a. **Statutory Criteria for Qualifying Facilities at Nonpowered Dams**

33. FPA section 34(e)(1) sets forth the “qualifying criteria” that a proposed project at an existing “qualifying nonpowered dam” must meet in order to be considered a “qualifying facility”⁵⁴ eligible to apply for the expedited licensing process.

Section 34(e)(1) states that such a facility must: (A) as of October 23, 2018, not be licensed under, or exempted from, the license requirements contained in Part I of the FPA; (B) be associated with a qualifying nonpowered dam; (C) be constructed, operated, and maintained for the generation of electric power; (D) generate electricity by using any withdrawals, diversions, releases, or flows from the associated qualifying nonpowered dam, including its associated impoundment or other infrastructure; and (E) not result, due to operation of the facility, in any material change to the storage, release, or flow operations of the associated qualifying nonpowered dam.⁵⁵

34. Section 34(e)(3) defines “qualifying nonpowered dam” as any dam, dike, embankment, or other barrier, constructed on or before October 23, 2018, that is or was operated for the control, release, or distribution of water for agricultural, municipal, navigational, industrial, commercial, environmental, recreational, aesthetic, drinking water, or flood control purposes, and that, as of October 23, 2018, is not generating

⁵⁴ FPA section 34(e)(2) defines “qualifying facility” as any facility that is determined to meet the “qualifying criteria” under section 34(e)(1).

⁵⁵ 16 U.S.C.A. § 823e(e)(1) (West 2019).

electricity with hydropower generating works licensed under, or exempted from, the license requirements of Part I of the FPA.⁵⁶

35. NHA and the Nature Conservancy ask the Commission to define the term “material change” contained in FPA section 34(e)(1)(E).⁵⁷ Concerned that the Commission’s interpretation of this statutory qualifying criterion might unnecessarily preclude from the expedited process projects that would have only minor effects on existing dam operations,⁵⁸ NHA proposes to define a “material change” as a change that would “(1) significantly modify the pre-license storage, release, or flow operations of the associated qualifying nonpowered dam, or (2) would impair the ability of the dam owner to control operation of the dam.”⁵⁹ The Nature Conservancy proposes an alternative definition: “little or no change to the subdaily, daily, seasonal and interannual operations, or to the sediment, nutrient, dissolved oxygen, and temperature components of water quality upstream and downstream of the facility, unless it is clearly demonstrated that

⁵⁶ *Id.* § 823e(e)(3).

⁵⁷ FPA section 34(e)(1)(E) states that “the operation of the facility will not result in any *material change* to the storage, release, or flows from the associated qualifying nonpowered dam, including associated impoundment or other infrastructure.” 16 U.S.C.A. § 823e(e)(1)(E) (emphasis added).

⁵⁸ NHA’s and Dominion’s comments generally advocate that the Commission interpret statutory language generously and broadly in order to capture more projects in the expedited licensing process. *See, e.g.*, NHA’s Comment at 11; Dominion Comment at 5 (interpret “cause little to no change” in FPA section 35(g)(2)(A) broadly).

⁵⁹ NHA’s Comment at 10.

such changes will not conflict with the existing public uses and will also result in a new ecological benefit.”⁶⁰

36. NHA also requests that the final rule identify operational regimes, such as “run-of-river” or “run-of-release,” that would categorically not rise to the level of a “material change” to the storage, release, or flow operations.⁶¹

37. We decline to define “material change” as requested by NHA and the Nature Conservancy. The statute provides sufficiently clear guidance, such that a further definition is unnecessary. The term “material” is well understood to mean significant or consequential. Further, we do not believe that it would be possible to develop a definition of “material” that could be applied in all cases. We will examine the facts of any case in which the materiality of changes that be may caused by a proposed project is at issue, and make a case-by-case decision.

38. Rye Development recommends that we create alternative eligibility criteria for projects at nonpowered dams, to include projects that will (i) add new generating capacity to nonpowered dams, (ii) not include new dams or impoundments, (iii) not materially change any existing storage and release regimes, (iv) not include federal lands except for those associated with an existing federal dam, and (v) not require more than one

⁶⁰ Nature Conservancy’s Comment at 3.

⁶¹ NHA’s Comment at 10.

environmental study season.⁶² Nature Conservancy recommends that an eligible facility not materially change water quality and that qualifying nonpowered dams exclude those that it terms “obsolete.”⁶³ Because section 34 of the FPA does not authorize the Commission to replace or revise the statutory eligibility criteria that Congress established for qualifying facilities at nonpowered dams, we will not make the additions recommended by Rye Development and Nature Conservancy.

b. Qualifying Criteria for Closed-Loop Pumped Storage Projects

39. FPA section 35(g)(1) directs the Commission to establish criteria that a pumped storage project must meet to be eligible for the expedited licensing process. FPA section 35(g)(2) further instructs the Commission to include criteria that an eligible closed-loop pumped storage project cause little to no change to existing surface and groundwater flows and uses, and is unlikely to adversely affect species listed as threatened or endangered under the ESA.

40. We received several comments requesting that the final rule include additional or revised qualifying criteria for closed-loop pumped storage projects to be eligible for the expedited licensing process under FPA section 35(g)(2). Specifically, we received recommendations that the final rule include additional qualifying criteria to ensure that a

⁶² Rye Development’s Comment at 7.

⁶³ See Nature Conservancy’s Comment at 3 (recommending the addition of a criterion to ensure that an associated nonpowered dam actively serves a public purpose).

closed-loop pumped storage project eligible for the expedited licensing process will: (i) not be hydrologically connected to natural water bodies;⁶⁴ (ii) cause little to no change to existing aquatic habitats, water quality, and water quantity;⁶⁵ (iii) cause little to no change to river, lacustrine, and groundwater-dependent ecosystems;⁶⁶ (iv) cause little to no change to existing recreational access and uses;⁶⁷ (v) meet the intent of comprehensive land management plans for all applicable resources if the project will be located on federal reservations;⁶⁸ and (vi) not degrade or act as a source of contaminants to surface or groundwater features if the project will use abandoned mines as storage reservoirs.⁶⁹

⁶⁴ See Oregon DFW's Comment at 2; Nature Conservancy's Comment at 4.

⁶⁵ See Oregon DFW's Comment at 2; Nature Conservancy's Comment at 4; NMFS' February 15, 2019 Comment at 2; Forest Service's Comment at 2-3; Interior's Comment at 3.

⁶⁶ See Forest Service's Comment at 3; Oregon DFW's Comment at 2.

⁶⁷ See Interior's Comment at 3.

⁶⁸ See Forest Service's Comment at 3; Interior's Comment at 3; Nature Conservancy's Comment at 4. Nature Conservancy also recommends a qualifying criterion that the project not be located on a river reach protected under the National Wild and Scenic Rivers Act, or similar state statute. However, pursuant to section 7(a) of the Wild and Scenic Rivers Act, the Commission is already prohibited from licensing the construction of any "dam, water conduit, reservoir, powerhouse, transmission line, or other project works . . . on or directly affecting" a river segment that Congress has designated as component of the National Wild and Scenic Rivers System. 16 U.S.C. § 1278(a) (2012).

⁶⁹ See Forest Service's Comment at 3; Nature Conservancy's Comment at 4.

41. We believe that the Commission's revised definition of a "closed-loop pumped storage project,"⁷⁰ in combination with the Commission's existing licensing requirements, will ensure that only projects meeting the Congressional criteria qualify for expedited treatment, and that therefore no additional definition is needed.

42. With regard to the qualifying criteria, we also received requests to clarify the statutory language. NMFS, Interior, and Oregon DFW recommend that the qualifying criteria set forth in FPA section 35(g)(2)(i) be revised to specify "the construction and operation" of the project will cause little to no change to existing surface and groundwater flows and uses.⁷¹

43. We cannot revise the criteria established by Congress. However, we note that Congress did not exclude project construction and operation from the criteria in section 35(g)(2)(i).

44. Pursuant to the authority in FPA section 35(g)(2) that directs the Commission to establish additional qualifying criteria for closed-loop pumped storage projects, we proposed in the NOPR to add "designated critical habitat of species of [threatened or endangered] species" in § 7.2(b)(2)(ii) to ensure the qualifying criterion conforms with the ESA.⁷²

⁷⁰ See *supra* PP 28-31.

⁷¹ See NMFS' Comment at 2; Interior's Comment at 3; Oregon DFW's Comment at 2.

⁷² NOPR, 166 FERC ¶ 61,083 at P 22 (explaining that section 7(a)(2) of the ESA, 16 U.S.C. § 1536(a)(2) (2012), requires agencies to ensure that their actions are not likely

45. NHA does not oppose this additional criterion because it assumes that an applicant would be unlikely to request use of the expedited licensing process if a proposed project would require preparation of a Biological Opinion.⁷³ Forest Service endorses the addition.⁷⁴ We therefore have retained the additional critical habitat criterion in § 7.2(b)(2)(ii) of the final rule.

c. Commission-Defined Criteria for the Expedited Licensing Process

46. The NOPR established criteria for applications to be eligible for the new expedited licensing process. The FERC-defined criteria for the expedited process, as set forth in §§ 7.2(b)(3) to 7.2(b)(7), modify the timing of existing licensing requirements by requiring an applicant interested in pursuing the expedited process to submit certain documentation of consultation at the same time that an application is filed.

i. Early Consultation with Agencies

47. Several commenters recommended early and frequent consultation with federal and state agencies. The Nature Conservancy recommends that § 7.2(b) include a requirement that applicants engage in early coordination with mandatory conditioning agencies and any resource agencies with jurisdiction over resources that may be affected

to result in the destruction or adverse modification of designated critical habitat of such species).

⁷³ NHA's Comment at 13.

⁷⁴ See Forest Service's Comment at 3.

by the proposed project.⁷⁵ Interior also requests additional guidance on the form and content of the required pre-filing documentation.⁷⁶

48. Consultation with agencies will be crucial to the success of the expedited licensing process. Moreover, the consultation criteria discussed below are designed to promote early engagement between applicants and agencies. However, because the Commission's existing regulations already require applicants to consult with these agencies prior to filing a license application,⁷⁷ we decline to include Nature Conservancy's suggested requirement in § 7.2(b) of the final rule.

ii. Clean Water Act Documentation

49. In the NOPR, § 7.2(b)(3) proposed to require an applicant, as part of its application, to provide its request for certification under section 401(a)(1) of the Clean Water Act, including proof of the date on which the certifying agency received the request; and one of the following: (1) a copy of water quality certification, (2) evidence of a waiver of the certification, or (3) documentation from the state certifying agency that the water quality certification application is complete, or in the event a certifying agency denies certification, a copy of the denial within 30 days after the applicant receives it.

⁷⁵ See Nature Conservancy's Comment at 5.

⁷⁷ See 18 CFR 4.38, 4.34(i), 5.1(d).

50. Daybreak contends that section 401 of the Clean Water Act does not require that a state certify a water quality certification application is complete in order to start the clock on the one-year statutory deadline for a state to act on an application.⁷⁸

51. Daybreak is correct. Section 401(a)(1) of the Clean Water Act states that “[i]f the State . . . fails or refuses to act on a request for certification, within a reasonable period of time (which shall not exceed one year) after receipt of such request, the certification requirements . . . shall be waived with respect to such Federal application.”⁷⁹ A state’s one-year review period begins when the applicable state agency receives the request for water quality certification, not when the state agency deems an application “complete.”⁸⁰

52. The purpose of proposed § 7.2(b)(3)(iii) was not to inform the Commission when to start the one-year clock for state action on a section 401 application. Rather, proposed § 7.2(b)(3)(iii) sought to ensure that all of the necessary authorizations, including water quality certification, could be obtained in a timely enough manner so as to enable the Commission to act on a license application within two years from the date of application filing.

53. However, recognizing that requiring applicants to submit documentation from a state certifying agency that the water quality certification application is “complete” may

⁷⁸ Daybreak’s Comment at 2.

⁷⁹ 33 U.S.C. § 1341(a)(1) (2012).

⁸⁰ *N.Y. State Dep’t of Environmental Conservation v. FERC*, 884 F.3d 450, 455-456 (2d Cir. 2018).

prove difficult, we have revised § 7.2(b)(3)(iii) to remove this requirement. Accordingly, at the time of application filing, an applicant will be required to submit a copy of the request for certification, including proof of the date on which the certifying agency received the request; a copy of water quality certification; or evidence of waiver of water quality certification. This information will still enable us to assess the likelihood that a water quality certification will be obtained in a timely enough manner so as to facilitate Commission action on a license application within two years from the date of application filing.

iii. ESA Documentation

54. NMFS recommends that the Commission require that applicants, in proposed § 7.2(b)(4), begin early coordination with NMFS during pre-filing if the project would affect resources protected under the ESA or Magnuson-Stevens Fishery Conservation and Management Act (MSA).⁸¹ NMFS states that the benefits of early coordination include improved license applications, efficient environmental reviews, and a higher likelihood of a settlement.⁸² Interior requests that the same requirement be added with regard to early coordination with FWS and lists similar benefits.⁸³

55. Pursuant to § 4.38 of the Commission's regulations, a potential applicant must consult with the relevant federal, state, and interstate resource agencies, including NMFS

⁸¹ 16 U.S.C. §§ 1801 *et seq.* (2012); *See* NMFS' Comment at 2.

⁸² *See id.*

⁸³ *See* Interior's Comment at 3.

and FWS, prior to filing an application for an original license. We agree with NMFS and Interior that early consultation on resources protected under the ESA or MSA would allow applicants to avoid or minimize effects to listed species by negotiating protection, mitigation, and enhancement measures. However, this request for pre-filing consultation does not differ from the Commission's existing licensing requirements. Moreover, in the NOPR,⁸⁴ the Commission proposed to require that any application filed with a request for authorization to use the expedited licensing process include: a no-effect determination that includes documentation that no listed species or critical habitat are present at the proposed project site; (ii) documentation of concurrence from FWS and NMFS, as necessary, on a not likely to adversely affect determination; or (iii) a draft biological assessment that includes documentation of consultation with FWS and NMFS, as necessary. Therefore, we find it unnecessary to add NMFS and Interior's request as a requirement of the expedited licensing process.⁸⁵

56. Interior recommends that the applicant file concurrently with its application written concurrence from applicable stakeholders concerning potential project impacts on natural, cultural, or recreation resources.⁸⁶

⁸⁴ NOPR, 166 FERC ¶ 61,083 at P 11.

⁸⁵ We also decline to issue guidance pertaining to how to consult with the FWS or how to interpret FWS's or NMFS' regulations and policies, as requested by Interior and NMFS.

⁸⁶ Interior's Comment at 1-2.

57. After a license application is filed and accepted as complete, the Commission will issue a Ready for Environmental Analysis (REA) notice to seek input from stakeholders on an applicant's license application in advance of preparing the Environmental Assessment (EA) or Environmental Impact Statement (EIS) required by the National Environmental Policy Act of 1969 (NEPA). In terms of the licensing process, seeking input from stakeholders at the time of the REA notice does not delay or slow down the license process timeline. Therefore, we find the recommendation that the applicant include with its application written concurrence from applicable stakeholders concerning potential project impacts on natural, cultural, or recreation resources unduly burdensome and unnecessary to expedite the licensing process.

58. To conform to ESA regulations, NMFS and Interior recommend that the Commission revise § 7.2(b)(4)(i) to replace "at the proposed project site" with "in the action area, as defined by the ESA regulations at 50 CFR 402.02."⁸⁷ Interior explains that limiting evaluation to a "proposed project site" would not adequately consider impacts to National Park Services (NPS) resources and recreational use.⁸⁸ All aspects of the project, Interior suggests, should be evaluated, such as staging and construction laydown areas, roads and other conduits and/or transmission line or interconnections.⁸⁹

⁸⁷ NMFS' Comment at 2; Interior's Comment at 4.

⁸⁸ See Interior's Comment at 2.

⁸⁹ See *id.*

Interior recommends that the Commission evaluate a proposal and determine the impacts in “action areas” under the ESA and/or “area of potential effects” under the National Historic Preservation Act (NHPA)⁹⁰ in order to identify the potential adverse effects on natural and recreational resources near a NPS unit.⁹¹

59. We accept NMFS’ and Interior’s recommendation and replace the term “at the proposed project site” with the term “in the action area” in § 7.2(b)(4)(i) to bring the language into accord with the ESA. With respect to commenters’ other concerns about the Commission’s responsibilities under the ESA and the NHPA, the expedited licensing process does not change the Commission’s responsibilities under existing federal laws, such as the ESA and the NHPA, and Commission staff will continue to comply with all pertinent federal laws during the review of a license application.

60. NMFS and Interior request that the Commission clarify in § 7.2(b)(4)(i) that the Commission has the responsibility to determine whether ESA consultation is necessary under section 7 of the ESA.⁹² Both assert that the Commission has the ultimate responsibility to ensure compliance with section 7 of the ESA.⁹³

⁹⁰ 36 CFR 800.16(d) (2018).

⁹¹ *See* Interior’s Comment at 2 and n.2.

⁹² NMFS’ Comment at 2; Interior’s Comment at 4.

⁹³ NMFS’ Comment at 3; Interior’s Comment at 4.

61. Section 7 of the ESA speaks for itself and there is thus no need for the requested clarification in § 7.2(b)(4)(i).

62. NMFS and Interior request that the Commission clarify in § 7.2(b)(4)(ii) that the Commission will designate an applicant to be a non-federal representative under ESA regulations⁹⁴ at the beginning of the expedited process in order for the applicant to participate in informal ESA consultation.⁹⁵

63. Section 5.5(e) of the Commission's regulations⁹⁶ provides that a potential license applicant may, as early as the same time it files its notification of intent and distributes its pre-application document (PAD) at the beginning of the pre-filing period, request to be designated as the Commission's non-federal representative for purposes of consultation under section 7 of the ESA and the joint agency regulations thereunder at 50 CFR part 402, section 305(b) of the MSA and the implementing regulations at 50 CFR 600.902. Even if it chooses not to request such designation at the time of the filing of the notification of intent, an applicant could make such a request at any time later in the pre-filing period. The Commission typically grants such requests as a routine process matter. Therefore, there is no need for the requested clarification to § 7.2(b)(4)(ii).

⁹⁴ See 50 CFR 402.02, 402.08, 402.13 (2018).

⁹⁵ NMFS' Comment at 2; Interior's Comment at 3.

⁹⁶ 18 CFR 5.5(e).

64. NMFS recommends that the Commission, with the assistance of NMFS, develop guidance on informal ESA consultations and preparation of biological assessments to provide to the designated non-federal representative.⁹⁷ NMFS and Interior further recommend that we provide a template letter for the Commission to use to designate a non-federal representative to conduct consultation or prepare a draft biological assessment.⁹⁸

65. Commission staff typically prepares guidance documents for use by prospective license applicants, federal and state resource agencies, and the public regarding various aspects of the licensing process.⁹⁹ We will instruct our staff to review the license process guidance material to determine what modifications and additional guidance are needed to facilitate the efficient implementation of the new part 7 regulations.

66. Interior recommends that proposed § 7.2(b)(4)(ii) should require consultation documentation “that the action is not likely to adversely affect ESA-listed species or critical habitat.”¹⁰⁰ We agree that Interior’s recommended revision is more precise, and have revised § 7.2(b)(4)(ii) accordingly.

⁹⁷ See NMFS’ Comment at 3.

⁹⁸ NMFS’ Comment at 3 and Attachment 1 (providing a sample template letter); Interior’s Comment at 3-4 and Attachment 1 (providing a sample template letter).

⁹⁹ Commission staff’s licensing guidance material is available on the Commission’s web site at <http://www.ferc.gov/industries/hydropower/gen-info/licensing.asp>.

¹⁰⁰ Interior’s Comment at 4.

67. NMFS requests clarification of the language “documentation of consultation with the Service(s)” in proposed § 7.2(b)(4)(iii). NMFS explains that the Commission must be involved with the applicant’s ESA consultation with NMFS, as required by ESA regulations.¹⁰¹ Interior requests that the phrase should be revised to “documentation of communication.”¹⁰²

68. We decline to make this change. As the ESA regulations allow, the intent here is that the applicant will act as our designated non-federal representative in seeking the documentation of consultation specified by § 7.2(b)(4)(iii).

69. NHA submits that Commission action on the request to use the expedited process comes too late in the process if it coincides with the REA notice.¹⁰³ Instead, NHA contends, a request for expedited processing should be approved during the pre-filing process if an applicant is able to provide, concurrent with its Notice of Intent to File a License Application and PAD submittal, a no effect determination, FWS and/or NMFS concurrence on a not likely to adversely affect determination, or a draft biological assessment with documentation of consultation and draft mitigation measures.¹⁰⁴

70. As noted above, the clear mandate of the AWIA is that the expedited licensing process begin with the filing of a completed license application, and therefore, we make

¹⁰¹ NMFS’ Comment at 3 (citing 50 CFR 402.08).

¹⁰² Interior’s Comment at 4.

¹⁰³ NHA’s Comment at 13.

¹⁰⁴ NHA’s Comment at 13; Dominion’s Comment at 6.

no changes to the existing pre-filing processes. If an applicant requesting to use the expedited licensing process is able to demonstrate that its project satisfies the eligibility criteria and submits a complete license application without the need for Commission staff to request additional information or correct deficiencies, then Commission staff will be able to approve the request sooner than 180 days from the date the application was filed. Generally, Commission staff issues an REA notice when it determines that the contents of a license application meet the Commission's requirements and no additional information is needed to process the application.¹⁰⁵ In the context of the expedited licensing process, if Commission staff determines a request and application are satisfactory, then we will issue an REA notice no later than 180 days from the date of receipt of a completed application.

iv. NHPA Documentation

71. PA SHPO contends that the requirement in proposed § 7.2(b)(5) that an applicant provide documentation demonstrating that consultation with a SHPO or Tribal Historic Preservation Office has been initiated is insufficient to satisfy section 106 of the NHPA.¹⁰⁶ In addition to consultation, PA SHPO requests that the Commission provide guidance to applicants regarding the consultation procedures for each state SHPO. PA

¹⁰⁵ 18 CFR 5.22.

¹⁰⁶ PA SHPO's March 5, 2019 Comment at 1.

SHPO recommends hiring consultants that meet Interior's standards.¹⁰⁷ PA SHPO further encourages applicants to initiate consultation early and to identify potentially affected historic properties as soon as possible.¹⁰⁸ PA SHPO also notes some projects may be more likely to affect historic properties, which would require more consultation time under section 106 and may warrant exclusion from the expedited process.¹⁰⁹ PA SHPO also requests that we consider the impacts on historic properties of transmission lines associated with projects eligible for the expedited process.¹¹⁰

72. PA SHPO states that existing nonpowered dams may be eligible to be listed as historic properties in the National Register.¹¹¹ For a dam to be eligible in Pennsylvania, PA SHPO explains that the dam must have engineering significance or retain its historic setting and integrity in a surrounding historic district.¹¹² PA SHPO also recommends that applicants should begin, and if possible finish, locating National Register significant archaeological properties during pre-filing.¹¹³

¹⁰⁷ *Id.* (citing Secretary of Interior, *Archeology and Historic Preservation; Secretary of the Interior's Standards and Guidelines*, 48 FR 44,738-39 (1983)).

¹⁰⁸ PA SHPO's Comment at 1.

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.* at 2.

¹¹² *See id.*

¹¹³ *See id.*

73. PA SHPO recommends that the Commission, with the intent to improve efficiency, provide guidance on the anticipated effects and alternatives to adverse effects typically caused by projects located at nonpowered dams and closed-loop pumped storage projects.¹¹⁴

74. As we acknowledged in the NOPR,¹¹⁵ the requirement that a part 7 applicant provide documentation demonstrating that section 106 consultation has been initiated does not differ from the Commission's existing licensing requirements.¹¹⁶ We expect our applicants, as the project proponents, to work collaboratively with a SHPO and any affected tribes to conduct information gathering and to complete any studies the Commission determines necessary to support its section 106 decision-making as the Commission will make the final determination. However, because consultation practices vary, we do not believe this rulemaking is the appropriate forum to provide guidance on each state SHPO's section 106 consultation procedures and preferences. Moreover, because projects at nonpowered dams and closed-loop pumped storage projects can vary drastically in size and scope, the Commission prefers to analyze anticipated impacts on historic properties and resolution of any adverse impacts on a project-by-project basis, rather than providing a generalized or over-simplistic forecast of anticipated effects and

¹¹⁴ *Id.*

¹¹⁵ NOPR, 166 FERC ¶ 61,083 at PP 23-24.

¹¹⁶ *See* 18 CFR 4.41(f)(4), 5.18(b)(3)(v).

alternatives for projects to be proposed at nonpowered dams and for closed-loop pumped storage projects.

v. **Dam Owner Documentation**

75. The NOPR proposed to require an applicant to provide confirmation that the federal or non-federal dam owner is not opposed to hydropower development at the dam if the proposed project would be located at an existing nonpowered dam.¹¹⁷

76. The Forest Service requests clarification concerning the requirement in proposed § 7.2(b)(6)(ii) that an applicant provide confirmation that the federal entity is not opposed to hydropower development at the location.¹¹⁸ The Forest Service recommends that the documentation include confirmation that the applicant and federal entity discussed the possible license conditions that may be required by the federal entity, as well as confirmation of discussions about planning, permitting, and management issues related to all aspects of the development and operation of a hydropower facility, not only the location.¹¹⁹ According to the Forest Service, the requirement should also apply to applicants for closed-loop pumped storage projects.¹²⁰

¹¹⁷ See NOPR, 166 FERC ¶ 61,083 at P 25.

¹¹⁸ Forest Service's Comment at 3.

¹¹⁹ See *id.*

¹²⁰ See *id.*

77. In contrast, Rye Development recommends that the final rule exclude the proposed requirement in § 7.2(b)(6)(ii) that the federal dam owner must state the project is feasible.¹²¹ Rye Development states that the U.S. Army Corps of Engineers' (Army Corps) practice is to refuse to provide such documentation and it does not favor projects at its facilities.¹²² In effect, Rye Development contends the requirement would exclude many projects from the expedited process.¹²³

78. NHA also opposes the requirement that an applicant must submit documentation demonstrating that the federal dam owner does not oppose project development.¹²⁴ NHA states that the federal dam owner's opposition to the project should not be determinative, but also notes that the federal entity could prevent project development even after issuance of a Commission license by denying necessary authorizations under its purview.¹²⁵ According to NHA, a federal dam owner's concerns about a proposed project should be addressed by the applicant outside of the Commission's licensing process.¹²⁶

¹²¹ Rye Development's Comment at 7.

¹²² *See id.*

¹²³ *See id.*

¹²⁴ NHA's Comment at 16.

¹²⁵ *See id.*

¹²⁶ *See id.*

Moreover, NHA observes that if the federal agency opposes the project, it is unlikely that an application will ever be filed.¹²⁷

79. Dominion supports the NOPR's proposal to require applicants to provide documentation of consultation with a non-federal dam owner that confirms the owner is not opposed to project development.¹²⁸ Dominion notes that allowing a developer to obtain an expedited license at an existing non-federal dam without the owner's consent could impair the intended use of the dam and water resource.¹²⁹

80. The Commission's intent is to avoid significant staff expenditures of time and effort that would be needed to shepherd an application through the expedited licensing process to ensure a license decision can be made two years from application filing, only to have a project stalled by a federal dam owner's general opposition to hydropower development at its facility. The required documentation must demonstrate a preliminary confirmation that the federal dam owner is not opposed to use of the facility for hydropower development; there is no need for the federal entity to agree to specific design components or specifications at the time of application filing. We also note that neither the Army Corps nor Interior (on behalf the Bureau of Reclamation) commented on this documentation requirement.

¹²⁷ *See id.*

¹²⁸ Dominion's Comment at 8.

¹²⁹ *See id.*

81. Accordingly, the final rule retains the requirement that an applicant provide documentation demonstrating that the dam owner, whether a federal or non-federal entity, is not opposed to project development.

vi. **Public Parks, Recreation Areas, and Wildlife Areas Documentation**

82. If a proposed project would use any public park, recreation area, or wildlife refuge established under state or local law, the NOPR proposed in § 7.2(b)(7) to require an expedited licensing applicant to provide, at the time of application filing, documentation from the managing entity demonstrating that it is not opposed to use of the park, area, or wildlife refuge for hydropower development.¹³⁰

83. Referencing § 7.2(b)(7) as proposed in the NOPR, Interior recommends that any license application submitted alongside a request to use the expedited licensing process address the following areas of interest to the National Park Service (NPS): (1) NPS areas; (2) Wild and Scenic Rivers; (3) Nationwide Rivers Inventory and eligible/suitable rivers; (4) recreation grant programs, and (5) recreation management.¹³¹ Specifically, Interior requests that if the project or any appurtenant structure or conduit is located in the vicinity of a NPS unit, consultation with NPS should begin as soon as possible and an

¹³⁰ NOPR, 166 FERC ¶ 61,083 at P 26 (explaining that section 21 of the FPA, as amended by the Energy Policy Act of 1992, limits the use of eminent domain to acquire any lands included within any public park, recreation area, or wildlife refuge established under state or local law).

¹³¹ Interior's Comment at 5-6.

application should include a concurrence from the NPS that the project is not likely to adversely affect NPS-managed lands, or natural, cultural, or recreational resources.¹³² Interior also reminds the Commission that it must comply with the Wild and Scenic Rivers Act if a project is proposed to be located in the proximity of a designated Wild and Scenic River or Congressionally-authorized study segments.¹³³ Further, if the project would require a conversion under various NPS-administered recreation grant programs, Interior recommends that an application identify a suitable replacement property approved by NPS.¹³⁴ Lastly, Interior recommends that an application include an explanation of a recreation strategy, a draft or final recreation management plan, and documentation of consultation with interested stakeholders.¹³⁵

84. Pursuant to § 4.38 of the Commission's regulations,¹³⁶ a potential applicant must consult with the relevant federal, state, and interstate resource agencies, including NPS, prior to filing an application for an original license. Further, §§ 4.41 and 5.18 of our

¹³² *Id.* at 5.

¹³³ *Id.* Interior also recommends that an application for a project proposed to be located on eligible or suitable wild and scenic rivers, including Nationwide Rivers Inventory, should include a determination from the NPS as to whether the project would preclude Wild and Scenic Rivers designation for Nationwide Rivers Inventory segments and other eligible and suitable river segments.

¹³⁴ *Id.* at 5-6 (citing 36 CFR 59.3, 72.72, and 40 U.S.C. §§ 550(b) and (e)).

¹³⁵ Interior's Comment at 6.

¹³⁶ 18 CFR 4.38.

regulations require an application to include documentation of consultation; describe existing recreation facilities, existing and potential recreational use, and any new recreation development proposed by the applicant (e.g., recreation management plan); and identify any designated waters and lands including any areas within or in the vicinity of the proposed project boundary that are included in, or have been designated for the 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.¹³⁷ Therefore, with the exception of the need for an application to identify suitable replacement property under NPS-administered grant programs, Interior's requests do not differ from the Commission's existing requirements with respect to the recreation-related content of a license application. Identifying suitable replacement property under NPS-administered grant programs is not a prerequisite for issuance of a Commission license. The Commission does not anticipate that this information, or the lack thereof, will preclude the Commission's expedited processing of the license application. Therefore, we will not require the additional information requested by Interior.

3. Section 7.3 – Adequacy Review of Application

85. In the NOPR, the Commission proposed to review a license application that is accompanied by a request to use the expedited licensing process under part 4 (TLP or ALP) or part 5 (ILP) of the Commission's regulations, depending on the applicant's

¹³⁷ See 18 CFR 4.41, 5.18.

elected licensing process. If the application is deemed deficient and rejected under part 4 or 5, the NOPR explained that the request to use the expedited licensing process would likewise be rejected.

86. We received no comments on this aspect of the NOPR. The final rule retains § 7.3 as originally proposed.

4. Section 7.4 – Additional Information

87. In the NOPR, the Commission proposed to include § 7.4, requiring an applicant under part 7 to submit additional information or documentation to the Commission in the form and time frame prescribed by the Commission. As proposed, § 7.4 would also allow the Commission to direct a part 7 applicant to submit copies of the application or other filed materials to any person, agency, Indian Tribe, or other entity specified by the Commission. Failure to provide the requested information or documentation as specified may result in dismissal or abeyance of the license application.

88. We received no comments on this aspect of the NOPR. The final rule retains § 7.4 as originally proposed.

5. Section 7.5 – Decision on Request to Use Expedited Licensing Process

89. In the NOPR, the Commission proposed that the Director of the Office of Energy Projects (OEP) would act on a request to use the expedited licensing process within six months from the date of application filing. If Commission staff is unable to find that the application meets the requirements of parts 4, 5, and 7, deficiencies remain, or additional information is still needed six months after the date the application is filed, the Director

will deny the request to use the expedited licensing process. If the expedited licensing request is denied, proposed § 7.5 explained that the license application would be processed pursuant to a standard processing schedule under parts 4 or 5 of the Commission's regulations, as appropriate.

90. Daybreak recommends that the Director of OEP should only have 60 to 90 days, not six months as proposed in § 7.5, to review a request to use the expedited process to determine whether the project is eligible for the expedited process.¹³⁸ Similarly, NMFS recommends 30 to 60 days to make this determination,¹³⁹ while the Nature Conservancy recommends 60 days.¹⁴⁰ If an application is complete, NMFS recommends that the Commission issue a Notice of Acceptance and Ready for Environmental Analysis immediately and not wait for the six-month period to run.¹⁴¹ Alternatively, Daybreak recommends that the time for the applicants to respond to the Commission staff's deficiency requests should not be counted toward the two-year deadline.¹⁴²

¹³⁸ Daybreak's Comment at 3.

¹³⁹ NMFS' Comment at 3.

¹⁴⁰ Nature Conservancy's Comments at 5.

¹⁴¹ NMFS' Comment at 3.

¹⁴² Daybreak's Comment at 3.

91. The Nature Conservancy asks the Commission to clarify whether the two-year timeframe begins once the Director of OEP determines whether the use of the expedited licensing process is appropriate.¹⁴³

92. To clarify, the Director of OEP will act on a request to use the expedited licensing process no later than 180 days after an application and request to use the expedited process has been filed. However, earlier action by the Director of OEP is possible if an application clearly demonstrates compliance with the expedited licensing eligibility criteria. The timeliness of the Director's action on such a request will also be directly tied to the completeness of the license application as well as the applicant's prompt resolution of any deficiencies and additional information requests. If an applicant is unable to correct all deficiencies within 180 days after the application filing date, the Director will deny the request to use the expedited licensing process, and processing of the application will proceed under the Commission's standard licensing process.

93. If the Director approves a request to use the expedited licensing process, the two-year process will be deemed to have begun on the date the application was filed. Therefore, whether the Director approves an expedited licensing request within 30 days or 180 days from the date the application was filed, the two-year schedule commences on the date the application was filed. For the sake of precision, we have revised §§ 7.5 and 7.6 in the final rule to replace "6 months" with "180 days."

¹⁴³ Nature Conservancy's Comment at 5.

6. **Section 7.6 – Notice of Acceptance and Ready for Environmental Analysis**

94. As proposed in the NOPR, section 7.6 explained that if the Director of OEP approves a request to use the expedited licensing process, the Commission will issue a public notice no later than six months from the application filing date. The notice will accept the application and confirm the acceptance date as the application filing date; find the application ready for environmental analysis; request comments, protests, and interventions; request recommendations, preliminary terms and conditions, and preliminary fishway prescriptions; and establish a schedule for the application's expedited processing.

95. The expedited schedule will include date estimates for: (i) the filing of recommendations, preliminary terms and conditions, and fishway prescriptions; (ii) issuance of the draft NEPA document, or an EA not preceded by a draft; (iii) filing of responses, if applicable, to requests for concurrence or formal consultation under ESA, or to other Commission staff requests to agencies or Indian Tribes under other federal laws, including the MSA and the NHPA; (iv) filing of comments on a draft NEPA document, if applicable; (v) filing of modified recommendations, mandatory terms and conditions, and fishway prescriptions in response to a draft NEPA document or, if no draft NEPA document is issued, to an EA; and (vi) issuance of a final NEPA document, if applicable.

96. NMFS and Interior request that the Commission, prior to issuing public notice of the application, seek concurrence on the proposed schedule from the agencies responsible

for the various environmental reviews and authorizations.¹⁴⁴ NMFS and Interior also request that the Commission issue a final decision on an application as soon as possible after the issuance of the final NEPA document to allow resource agencies sufficient time within the two-year expedited process to complete the requisite environmental reviews and authorizations.¹⁴⁵

97. The expedited processing schedule provided for in § 7.6(e) will be determined on case-by-case basis. Agencies should memorialize any anticipated timing or scheduling concerns during pre-filing correspondence with the applicant. In addition, once an application with a request for expedited processing is filed with the Commission, agencies should strive to promptly notify the Commission of any schedule-related concerns or requests. The Commission will consider any such agency input prior to issuing the public notice containing a project's expedited licensing schedule.

7. Section 7.7 – Amendment of Application

98. Section 7.7 of the NOPR proposed a process for amending a pending part 7 application following the Commission's issuance of the notice accepting the application and finding it ready for environmental analysis.

99. The Forest Service recommends that amendments to a license application filed under part 7 only be permitted before the Commission issues a notice of acceptance of

¹⁴⁴ NMFS' Comment at 3; Interior's Comment at 4.

¹⁴⁵ NMFS' Comment at 3; Interior's Comment at 4.

the application.¹⁴⁶ Permitting amendments after a notice of acceptance has been issued would not allow sufficient time for the applicant and agencies to negotiate and modify license terms and conditions.¹⁴⁷

100. We agree that a request to amend a part 7 license application after the acceptance of the application and issuance of the expedited processing schedule may interfere with the Commission's ability to act on a license application within two years from the date of application filing. Therefore, we have revised § 7.7 to allow the Director of OEP to remove an application from the expedited licensing process if the applicant files a significant amendment to its application. If an application is removed from the expedited licensing process, Commission staff will continue to process the application under the Commission's standard licensing process.

8. Section 7.8 – Other Provisions

101. Section 7.8, as proposed in the NOPR, authorized the Director of OEP to waive or modify provisions of part 7 for good cause. Proposed § 7.8 also explained that the Commission may consider late-filed recommendations by authorized fish and wildlife agencies under the Fish and Wildlife Coordination Act¹⁴⁸ and FPA section 10(j),¹⁴⁹ and

¹⁴⁶ Forest Service's Comment at 4.

¹⁴⁷ Forest Service's Comment at 4.

¹⁴⁸ 16 U.S.C. §§ 661-666c (2012).

¹⁴⁹ *Id.* § 803(j).

late-filed FPA section 4(e)¹⁵⁰ terms and conditions or FPA section 18¹⁵¹ prescriptions as cause to remove the application from the expedited licensing process under this part. In addition, proposed § 7.8(c)(5) stated that “[t]he 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 [FPA].”¹⁵²

102. NMFS and Interior recommend that the Commission expand or generalize the circumstances listed in proposed § 7.8 that would cause the Commission to remove a project from the expedited process.¹⁵³ NMFS provides two examples, one in which the an applicant fails to provide sufficient information to complete ESA or essential fish habitat (EFH) consultation due to unanticipated delays, and another in which the scope of the project changes unexpectedly.¹⁵⁴

103. Once an applicant has received approval to use the expedited licensing process, circumstances such as late-filed recommendations, terms and conditions, or prescriptions that may cause a project to be removed from the expedited licensing process will be evaluated on a case-by-case basis. The scenarios posed by NMFS (i.e., insufficient

¹⁵⁰ *Id.* § 797(e).

¹⁵¹ *Id.* § 811.

¹⁵² NOPR, 166 FERC ¶ 61,083 at § 7.8(c)(5) (emphasis added).

¹⁵³ NMFS’ Comment at 4; Interior’s Comment at 4.

¹⁵⁴ NMFS’ Comment at 4.

information to complete ESA or EFH consultation and unanticipated changes to the scope of the project) could impact the aspirational two-year processing timeline, but depending on the circumstances, may not be cause to remove the project from the expedited licensing process. In the alternative, rather than removing the project from the expedited licensing process, Commission staff may instead choose to document the reason for the delay and issue a revised processing schedule that may extend the original two year timeline.

104. NMFS and Interior state that the Commission lacks the authority to reject a mandatory license condition prescribed by an agency under section 4(e) of the FPA or a fishway prescription prescribed by agency under section 18 of the FPA based on a deadline set forth by the Commission.¹⁵⁵ Therefore, NMFS recommends that the word “timely” be removed from proposed § 7.8(c)(5).¹⁵⁶

105. As NMFS and Interior correctly observe, the Commission has no authority to reject mandatory conditions filed under FPA section 4(e) or fishway prescriptions filed under FPA section 18 even if the mandatory condition or prescription is filed late.¹⁵⁷ Accordingly, we have deleted the word “timely” from § 7.8(c)(5).

¹⁵⁵ NMFS’ Comment at 4; Interior’s Comment at 2 and 5.

¹⁵⁶ NMFS’ Comment at 4.

¹⁵⁷ See *City of Tacoma, WA v. FERC*, 460 F.3d 53, 64-65 (D.C. Cir. 2006).

9. Section 7.9 – Transition Provision

106. The NOPR proposed including a transition provision to clarify that the new part 7 would only apply to original license applications filed on or after the effective date of the final rule.

107. The Commission received no comments on this aspect of the NOPR. The final rule retains § 7.9 as originally proposed.

C. Other Matters

1. Projects that Require an EIS

108. The NOPR requested comments on whether the expedited licensing process should be available for projects that otherwise meet the eligibility criteria, but will require the preparation of an EIS.¹⁵⁸

109. The Forest Service, Oregon DFW, Interior, and the Nature Conservancy support excluding projects that would require the preparation of an EIS from the expedited process because the expedited process should only be available for projects that would have limited environmental impacts.¹⁵⁹

110. In contrast, Daybreak believes that an expedited process that would exclude closed-loop pumped storage projects that would require an EIS would be overly

¹⁵⁸ NOPR, 166 FERC ¶ 61,083 at PP 45-47.

¹⁵⁹ Forest Service's Comment at 4; Oregon DFW's Comment at 2; Interior's Comment at 7; Nature Conservancy's Comment at 2.

restrictive.¹⁶⁰ Daybreak warns that “virtually” no closed-loop pumped storage project would qualify for the expedited process and would violate the purpose of the statute.¹⁶¹

111. Rather than categorically excluding projects that will require preparation of an EIS, NHA suggests that the Commission should make a case-by-case determination at the conclusion of the pre-filing NEPA scoping on whether the particular circumstances warrant approval of the expedited licensing process.¹⁶²

112. As further described in the discussion regarding the One Federal Decision process,¹⁶³ the final rule will not categorically exclude applications for projects that would require the preparation of an EIS.¹⁶⁴ In light of NHA’s recommendation, Commission staff will decide, on a case-by-case basis, whether to approve a request to use the expedited process after completing pre-filing scoping. By waiting until more information about a proposal’s possible environmental effects is available, we ensure that EIS projects that can be licensed within two years are not unreasonably excluded from

¹⁶⁰ Daybreak’s Comment at 2-3.

¹⁶¹ *Id.*

¹⁶² NHA’s Comment at 18.

¹⁶³ *See infra* PP 114-115.

¹⁶⁴ Under the Commission’s existing regulations, an EIS is normally prepared for licenses for construction of any unconstructed water power projects. 18 CFR 380.6(a)(4) (2018). If, however, the Commission finds a license application may not significantly affect the quality of the human environment, an EIS may not be required to be prepared. *Id.* 380.6(b).

the expedited process. Yet, we would also be able to exclude from expedited processing EIS projects that would require more resources, thereby ensuring that these projects are not hastily licensed under the expedited process. Accordingly, the final rule will not restrict part 7 eligibility to only projects that require preparation of an EA.

113. The Forest Service and NMFS request clarification on the processing timeline for an application for a project that would be eligible for both the expedited licensing process and the One Federal Decision process.¹⁶⁵

114. By signing a Memorandum of Understanding Implementing One Federal Decision Under Executive Order 13807,¹⁶⁶ federal agencies, including the Commission, committed to completing within an average of two years all required environmental reviews and authorization decisions for “major infrastructure projects.”¹⁶⁷ In general for hydropower projects, this two-year timeframe starts on the date the Commission publishes a Notice of

¹⁶⁵ Forest Service’s Comment at 4; NMFS’ Comment at 1.

¹⁶⁶ *Establishing Discipline and Accountability in the Environmental Review and Permitting Process for Infrastructure Projects*, Exec. Order No. 13,807, 82 FR 40,463 (Aug. 15, 2017); Memorandum of Understanding Implementing the One Federal Decision under Executive Order 13807, <https://www.ferc.gov/legal/mou/2018/MOU-One-Federal-Decision.pdf> (One Federal Decision MOU).

¹⁶⁷ A major infrastructure project is defined as an infrastructure project for which multiple authorizations by Federal agencies will be required to proceed with construction, the lead Federal agency has determined that it will prepare an EIS, and the project sponsor has identified the reasonable availability of funds sufficient to complete the project. Exec. Order No. 13,807, § 3(e).

Intent to prepare an EIS and ends with the issuance of all federal environmental reviews and authorization decisions.¹⁶⁸

115. Projects that qualify as “major infrastructure projects” and receive approval to use the expedited licensing process will be processed under the two-year expedited licensing process set forth in part 7 of the Commission’s regulations. The two-year timeframe for the expedited licensing process will begin on the date of application filing, and will follow the procedures set forth in part 7 of the Commission’s regulations. Under the expedited licensing process, the Commission will strive to ensure that a final order is issued within two years from the date of application filing, as directed by the AWIA. We believe this outcome fulfills the spirit of the One Federal Decision MOU.

2. FPA Section 35(c) Exceptions

116. When issuing or amending a license for a closed-loop pumped storage project under the expedited licensing process, FPA section 35(c) gives the Commission discretion to “grant an exception from any other requirement of [FPA Part I] with respect to any part of the closed-loop pumped storage project (not including any dam or other impoundment).”¹⁶⁹ The NOPR did not propose regulations implementing this section of the AWIA.

¹⁶⁸ FERC’s One Federal Decision Implementation Plan, Attachment C. Under our One Federal Decision Implementation Plan, we will issue NOIs to prepare an EIS in post-filing for hydropower projects.

¹⁶⁹ 16 U.S.C.A. § 823f(c) (West 2019).

117. NHA notes that the NOPR did not discuss FPA section 35(c), and asks the Commission to provide guidance on the kinds of exceptions to the FPA Part I requirements that it will adopt or consider.¹⁷⁰ NHA posits that section 35(c) allows the Commission to ease the burden of license conditions for closed-loop pumped storage projects that qualify for expedited processing, noting that the Commission could refrain from requiring recreation improvements or could ease monitoring and reporting requirements unrelated to dam and project safety for these types of projects.¹⁷¹

118. Pursuant to section 35(c) of the FPA, any applicant interested in pursuing the expedited licensing process may request an exception from any of the requirements of Part I of the FPA with respect to any part of the applicant's proposed closed-loop pumped storage project (not including any dam or other impoundment). An applicant may request a section 35(c) exception concurrently with a license application and the request for authorization to use the expedited licensing process. A request for a section 35(c) exception should clearly identify the requirement under Part I of the FPA from which the applicant is seeking to be excepted and provide reasoned justification for the request.

¹⁷⁰ NHA's Comment at 19.

¹⁷¹ NHA's Comment at 19.

IV. Regulatory Requirements

A. Information Collection Statement

119. The Paperwork Reduction Act¹⁷² requires each federal agency to seek and obtain the Office of Management and Budget's (OMB) approval before undertaking a collection of information directed to ten or more persons or contained in a rule of general applicability. OMB regulations require approval of certain information collection requirements contained in final rules published in the *Federal Register*.¹⁷³ Upon approval of a collection of information, OMB will assign an OMB control number and an expiration date. Respondents subject to the filing requirements of a rule will not be penalized for failing to respond to the collection of information unless the collection of information displays a valid OMB control number.

120. **Public Reporting Burden:** In this final rule, the Commission establishes an expedited process for issuing original licenses for qualifying facilities at nonpowered dams and for closed-loop pumped storage projects, as directed by Congress in the AWIA.

¹⁷² 44 U.S.C. §§ 3501-3521 (2012).

¹⁷³ See 5 CFR 1320.12 (2018).

121. This final rule modifies certain reporting and recordkeeping requirements included in FERC-500 (OMB Control No. 1902-0058)¹⁷⁴ and FERC-505 (OMB Control No. 1902-0115).¹⁷⁵

122. The revisions to the Commission's regulations, associated with the FERC-500 and FERC-505 information collections, are intended to comply with the requirements of the AWIA. While the information to be included in the license application and the required federal and state authorizations would remain the same under the expedited licensing process, consultation documentation regarding these authorizations will need to be submitted to the Commission at an earlier point in the licensing process. Therefore, preparing the request to use the expedited licensing process represents a slight increase in the reporting requirements and burden information for FERC-500 and FERC-505.

123. The estimated burden and cost for the requirements contained in this final rule follow.

¹⁷⁴ FERC-500 includes the reporting and recordkeeping requirements for "Application for License/Relicense for Water Projects with More than 5 Megawatt (MW) Capacity."

¹⁷⁵ FERC-505 includes the reporting and recordkeeping requirements for "Small Hydropower Projects and Conduit Facilities including License/Relicense, Exemption, and Qualifying Conduit Facility Determination."

Revisions Due to the Final Rule in Docket No. RM19-6-000					
	No. of Respondents (1)	No. of Responses per Respondent (2)	Total No. of Responses (1)x(2)=(3)	Avg. Burden Hrs. & Cost Per Response¹⁷⁶ (4)	Total Annual Burden Hours & Total Annual Cost (3)X(4)=5
FERC-500	5	1	5	40 \$3,160	200 hrs.; \$15,800
FERC-505	5	1	5	40 \$3,160	200 hrs.; \$15,800
TOTAL			10		400 hrs.; \$31,600

124. **Titles:** FERC-500 (Application for License/Relicense for Water Projects with More than 5 Megawatt (MW) Capacity) and FERC-505 (Small Hydropower Projects and Conduit Facilities including License/Relicense, Exemption, and Qualifying Conduit Facility Determination).

125. **Action:** Revisions to information collections FERC-500 and FERC-505.

126. **OMB Control Nos.:** 1902-0058 (FERC-500) and 1902-0115 (FERC-505).

127. **Respondents:** Municipalities, businesses, private citizens, and for-profit and not-for-profit institutions.

128. **Frequency of Information:** Ongoing.

¹⁷⁶ The estimates for cost per response are derived using the following formula: Average Burden Hours per Response * \$79 per Hour = Average Cost per Response. The hourly cost figure of \$79 is the 2018 average FERC employee wage plus benefits. Commission staff assumes that respondents earn at a similar rate to FERC employees.

129. **Necessity of Information:** The revised regulations implement the AWIA's directive to establish an expedited licensing process for two types of hydropower projects – qualifying facilities at existing nonpowered dams and closed-loop pumped storage projects. The revised regulations would affect only those entities that opt to request authorization to use the expedited process at the time they file a license application proposing one of the two aforementioned project types. The revised regulations would impose a new, albeit slight, information collection requirement.

130. The new requirement for an applicant to file a request for authorization to use the expedited process concurrently with its license application is necessary for the Commission to carry out its responsibilities under the FPA, as amended by the AWIA. The information provided by the applicants will enable the Commission to review the features of the proposed project and make a determination on whether the proposed project meets the statutory criteria enumerated in the AWIA, as well as the early consultation requirements that the Commission has determined will help it seek to ensure that the proposed project's license application will be acted on no later than two years after the date of application filing.

131. **Internal Review:** The Commission has reviewed the revisions and has determined that they are necessary. These requirements conform to the Commission's need for efficient information collection, communication, and management within the energy industry. The Commission has assured itself, by means of internal review, that there is specific, objective support for the burden estimates associated with the information collection requirements.

132. Interested persons may obtain information on the reporting requirements by contacting the Federal Energy Regulatory Commission, 888 First Street, NE, Washington, DC 20426 [Attention: Ellen Brown, Office of the Executive Director], by email to DataClearance@ferc.gov, by phone (202) 502-8663, or by fax (202) 273-0873.

133. Comments concerning the collections of information and the associated burden estimates may also be sent to: Office of Information and Regulatory Affairs, Office of Management and Budget, 725 17th Street, NW, Washington, DC 20503 [Attention: Desk Officer for the Federal Energy Regulatory Commission]. Due to security concerns, comments should be sent electronically to the following email address:

oir_submission@omb.eop.gov. Comments submitted to OMB should refer to FERC-500 (OMB Control No. 1902-0058) and FERC-505 (OMB Control No. 1902-0115).

B. Environmental Analysis

134. The Commission is required to prepare an EA or an EIS for any action that may have a significant adverse effect on the human environment.¹⁷⁷ The Commission has categorically excluded certain actions from this requirement as not having a significant effect on the human environment. Excluded from this requirement are rules that are clarifying, corrective, or procedural, or that do not substantially change the effect of legislation or the regulations being amended.¹⁷⁸ This final rule establishes an expedited

¹⁷⁷ *Regulations Implementing the National Environmental Policy Act*, Order No. 486, 52 FR 47897 (Dec. 17, 1987), FERC Stats. & Regs. ¶ 30,783 (1987) (cross-referenced at 41 FERC 61,284).

¹⁷⁸ 18 CFR 380.4(a)(2)(ii) (2018).

licensing process for qualifying facilities at nonpowered dams and for closed-loop pumped storage projects, as directed by Congress in the AWIA. Because this final rule is procedural in nature and does not substantially change the effect of the underlying legislation, preparation of an EA or EIS is not required.

C. Regulatory Flexibility Act

135. The Regulatory Flexibility Act of 1980 (RFA)¹⁷⁹ generally requires a description and analysis of final rules that will have significant economic impact on a substantial number of small entities. The RFA mandates consideration of regulatory alternatives that accomplish the stated objectives of a final rule and minimize any significant economic impact on a substantial number of small entities.¹⁸⁰ In lieu of preparing a regulatory flexibility analysis, an agency may certify that a final rule will not have a significant economic impact on a substantial number of small entities.¹⁸¹

136. The Small Business Administration's (SBA) Office of Size Standards develops the numerical definition of a small business.¹⁸² The SBA size standard for electric utilities is based on the number of employees, including affiliates.¹⁸³ Under SBA's current size

¹⁷⁹ 5 U.S.C. §§ 601-612 (2012).

¹⁸⁰ *Id.* § 603(c).

¹⁸¹ *Id.* § 605(b).

¹⁸² 13 CFR 121.101 (2018).

¹⁸³ *Id.* § 121.201.

standards, a hydroelectric power generator (NAICS code 221111)¹⁸⁴ is small if it, including its affiliates, employs 500 or fewer people.¹⁸⁵

137. This final rule will directly affect only those entities that file an application for a qualifying facility at a nonpowered dam or for a closed-loop pumped storage project, and a request to use the expedited licensing process. While the information to be included in the licensing application and the required federal and state authorizations would remain the same, documentation regarding these authorizations will need to be submitted at an earlier point in the licensing process. Therefore, preparing a request to use the expedited licensing process would represent a slight increase (40 hours of reporting burden and corresponding wage costs of \$3,160 per entity on an annual basis) in the information collection reporting requirements and burden for FERC-500 and FERC-505. However, we do not anticipate the impact of the final rule on affected entities, regardless of their status as a small entity or not, to be significant.

138. Accordingly, pursuant to section 605(b) of the RFA, the Commission certifies that this final rule will not have a significant economic impact on a substantial number of small entities.

¹⁸⁴ The North American Industry Classification System (NAICS) is an industry classification system that Federal statistical agencies use to categorize businesses for the purpose of collecting, analyzing, and publishing statistical data related to the U.S. economy. United States Census Bureau, *North American Industry Classification System*, <https://www.census.gov/eos/www/naics/>.

¹⁸⁵ 13 CFR 121.201 (2018) (Sector 22 - Utilities).

D. Document Availability

139. In addition to publishing the full text of this document in the *Federal Register*, the Commission provides all interested persons an opportunity to view and/or print the contents of this document via the Internet through the Commission's Home Page (<http://www.ferc.gov>) and in the Commission's Public Reference Room during normal business hours (8:30 a.m. to 5:00 p.m. Eastern time) at 888 First Street, NE, Room 2A, Washington DC 20426.

140. From the Commission's Home Page on the Internet, this information is available on eLibrary. The full text of this document is available on eLibrary in PDF and Microsoft Word format for viewing, printing, and/or downloading. To access this document in eLibrary, type the docket number, excluding the last three digits of this document, in the docket number field.

141. User assistance is available for eLibrary and the Commission's website during normal business hours from the Commission's Online Support at (202) 502-6652 (toll free at 1-866-208-3676) or email at ferconlinesupport@ferc.gov, or the Public Reference Room at (202) 502-8371, TTY (202) 502-8659. Email the Public Reference Room at public.referenceroom@ferc.gov.

E. Effective Date and Congressional Notification

142. These regulations are effective **[INSERT DATE 90 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]**. The Commission has determined, with the concurrence of the Administrator of the Office of Information and Regulatory Affairs of OMB, that this rule is not a major rule as defined in section 251 of the Small

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Business Regulatory Enforcement Fairness Act of 1996.¹⁸⁶ This rule is being submitted to the Senate, House, Government Accountability Office, and Small Business Administration.

List of Subjects in 18 CFR Part 7

Administrative practice and procedure, Electric power, Reporting and recordkeeping requirements

By direction of the Commission. Commissioner McNamee is not participating.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

¹⁸⁶ 5 U.S.C. § 804(2) (2012).

In consideration of the foregoing, the Commission adds Part 7, Chapter I, Title 18, Code of Federal Regulations, as follows:

PART 7 – EXPEDITED LICENSING PROCESS FOR QUALIFYING NON-FEDERAL HYDROPOWER PROJECTS AT EXISTING NONPOWERED DAMS AND FOR CLOSED-LOOP PUMPED STORAGE PROJECTS

Sec.

7.1 Applicability and Definitions.

7.2 Use of Expedited Licensing Process.

7.3 Adequacy Review of Application.

7.4 Additional Information.

7.5 Decision on Request to Use Expedited Licensing Process.

7.6 Notice of Acceptance and Ready for Environmental Analysis.

7.7 Amendment of Application.

7.8 Other Provisions.

7.9 Transition Provision.

Authority: 16 U.S.C. 791a-825r; Pub. L. No. 115-270, 132 Stat. 3765.

§ 7.1 Applicability and definitions.

(a) This part applies to the processing of applications for original licenses for qualifying non-federal hydropower projects at existing nonpowered dams and for closed-loop pumped storage projects pursuant to sections 34 and 35 of the Federal Power Act.

(b) *Applicability of Existing Regulations.* Except where superseded by the expedited licensing process set forth in this part, the regulations governing license applications under parts 4 and 5 of this chapter, as applicable, also apply to license applications filed under this part.

(c) *Definitions.* The definitions in § 4.30(b) of this chapter apply to this part. In addition, for the purposes of this part –

(1) *Qualifying nonpowered dam* means any dam, dike, embankment, or other barrier –

- (i) the construction of which was completed on or before October 23, 2018;
- (ii) that is or was operated for the control, release, or distribution of water for agricultural, municipal, navigational, industrial, commercial, environmental, recreational, aesthetic, drinking water, or flood control purposes; and
- (iii) that, as of October 23, 2018, was not generating electricity with hydropower generating works that were licensed under, or exempted from the license requirements contained in, Part I of the Federal Power Act.

(2) *Qualifying facility* means a facility that is determined under section 34 of the Federal Power Act to meet the qualifying criteria for non-federal hydropower projects at existing nonpowered dams.

(3) *Qualifying Criteria for Closed-Loop Pumped Storage Projects* means criteria that a pumped storage project must meet in order to qualify as a closed-loop pumped storage project eligible for the expedited process established under this part. These criteria require that the pumped storage project:

- (i) cause little to no change to existing surface and groundwater flows and uses;
- (ii) is unlikely to adversely affect species listed as a threatened species or endangered species, or designated critical habitat of such species, under the Endangered Species Act of 1973;
- (iii) utilize only reservoirs situated at locations other than natural waterways, lakes, wetlands, and other natural surface water features; and
- (iv) rely only on temporary withdrawals from surface waters or groundwater for the sole purposes of initial fill and periodic recharge needed for project operation.

(d) *Who may file.* Any citizen, association of citizens, domestic corporation, municipality, or state that develops and files a license application under 18 CFR parts 4 and 5, as applicable, may request expedited processing under this part.

(e) *Use of expedited licensing process.* An applicant wishing to use this expedited licensing process must apply for and receive authorization from the Commission under this part. An applicant under this part may elect to use the licensing process provided for in 18 CFR part 5 (i.e., integrated license application process), or as provided under 18 CFR § 5.1:

- (1) 18 CFR part 4, subparts D-H (i.e., traditional process); or
- (2) § 4.34(i) of this chapter, *Alternative procedures.*

§ 7.2 Use of Expedited Licensing Process.

(a) In order to pursue the expedited licensing process, an applicant must request authorization for the expedited process, as provided for in paragraph (b) of this section. The licensing procedures in this part do not apply to an application for a new or subsequent license.

(b) An application that accompanies a request for authorization to use the expedited licensing process must include the information specified below.

(1) *Section 34 of the Federal Power Act Qualification – Projects at Nonpowered Dams.* The application must demonstrate that the proposed facility meets the following qualifications pursuant to section 34(e) of the Federal Power Act:

(i) as of October 23, 2018, the proposed hydropower facility was not licensed under or exempted from the license requirements contained in Part I of the Federal Power Act;

(ii) the facility will be associated with a qualifying nonpowered dam;

(iii) the facility will be constructed, operated, and maintained for the generation of electric power;

(iv) the facility will use for such generation any withdrawals, diversions, releases, or flows from the associated qualifying nonpowered dam, including its associated impoundment or other infrastructure; and

(v) the operation of the facility will not result in any material change to the storage, release, or flow operations of the associated qualifying nonpowered dam.

(2) *Section 35 of the Federal Power Act Qualification – Closed-Loop Pumped Storage Projects.* The application must demonstrate that the proposed closed-loop pumped storage project meets the following qualifications pursuant to section 35(g)(2) of the Federal Power Act:

(i) the project will cause little to no change to existing surface and groundwater flows and uses; and

(ii) the project is unlikely to adversely affect species listed as a threatened species or endangered species, or designated critical habitat of such species, under the Endangered Species Act of 1973.

(3) *Section 401 of the Clean Water Act.* The application must include a copy of a request for certification under section 401(a)(1) of the Clean Water Act, including proof of the date on which the certifying agency received the request; or

(i) a copy of water quality certification; or

(ii) evidence of waiver of water quality certification. 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.

(4) *Endangered Species Act (ESA).* The application must include:

(i) A no-effect determination that includes documentation that no listed species or critical habitat are present in the action area;

(ii) Documentation of concurrence from the U.S. Fish and Wildlife Service and the National Marine Fisheries Service (Service(s)), as necessary, that the action is not likely to adversely affect ESA-listed species or critical habitat; or

(iii) A draft Biological Assessment that includes documentation of consultation with the Service(s).

(5) *Section 106 of the National Historic Preservation Act.* Documentation that section 106 consultation has been initiated with the state historic preservation officer(s) and any Indian Tribes identified as having an interest in the project.

(6) *Dam Owner Documentation.* For projects to be located at existing nonpowered dams:

(i) Documentation of consultation with any nonfederal owner of the nonpowered dam if the applicant is not the owner and confirmation that the owner is not opposed to a hydropower development at the location; or

(ii) Documentation from the federal entity that non-federal hydropower development is not precluded at the proposed location and confirmation that the federal entity is not opposed to a hydropower development at the location.

(7) *Public Parks, Recreation Areas, and Wildlife Refuges.* If the project would use any public park, recreation area, or wildlife refuge established under state or local law, documentation from the managing entity indicating it is not opposed to the site's use for hydropower development.

§ 7.3 Adequacy Review of Application.

(a) *Adequacy Review of License Applications.* Review of the original license application for which expedited processing under this part is requested will be conducted pursuant to 18 CFR part 4 or 5, as applicable.

(b) *Deficient License Applications.* If an original license application for which expedited processing is requested under this part is rejected under 18 CFR parts 4 and 5, as applicable, the request for authorization for the expedited licensing process under this part is deemed rejected.

§ 7.4 Additional information.

An applicant may be required to submit any additional information or documentation that the Commission considers relevant for an informed decision on the application for authorization under this part. The information or documents must take the form, and must be submitted within the time, that the Commission prescribes. An applicant may also be required to provide within a specified time additional copies of the application, or any of the additional information or documents that are filed, to the Commission or to any person, agency, Indian Tribe or other entity that the Commission specifies. If an applicant fails to provide timely additional information, documents, or copies of submitted materials as required, the Director of the Office of Energy Projects (Director) may dismiss the application, hold it in abeyance, or take other appropriate action under this chapter or the Federal Power Act.

§ 7.5 Decision on request to use expedited licensing process.

When the Commission has determined that the original license application is complete insofar as it meets the Commission's requirements as specified in 18 CFR parts 4, 5, and this part; any deficiencies have been cured; and no other additional information is needed, the Director will make a decision on the request to use the expedited licensing process under this part no later than 180 days after receipt of a request for authorization to use the expedited process. If the Commission cannot deem the application complete within 180 days of application filing, the Director will deny the request to use the expedited licensing process. If the Director denies the request to use the expedited

licensing process, the original license application will be processed pursuant to a standard processing schedule under 18 CFR parts 4 and 5, as applicable.

§ 7.6 Notice of acceptance and ready for environmental analysis.

If the Director deems the application complete and approves the request to use the expedited licensing process under § 7.5, the Commission will issue a public notice as required in the Federal Power Act, no later than 180 days after application filing, that:

- (a) Accepts the application for filing and specifies the date upon which the application was accepted for filing;
- (b) Finds the application ready for environmental analysis;
- (c) Requests comments, protests, and interventions;
- (d) Requests recommendations, preliminary terms and conditions, and preliminary fishway prescriptions, including all supporting documentation; and
- (e) Establishes an expedited licensing process schedule, including estimated dates for:
 - (1) Filing of recommendations, preliminary terms and conditions, and fishway prescriptions;
 - (2) Issuance of a draft National Environmental Policy Act (NEPA) document, or an environmental assessment not preceded by a draft;
 - (3) Filing of a response, as applicable, to Commission staff's request for ESA concurrence or request for formal consultation under the ESA, or responding to other Commission staff requests to federal and state agencies, or Indian Tribes pursuant to

Federal law, including the Magnuson-Stevens Fishery Conservation and Management Act and the National Historic Preservation Act;

(4) Filing of comments on the draft NEPA document, as applicable;

(5) Filing of modified recommendations, mandatory terms and conditions, and fishway prescriptions in response to a draft NEPA document or environmental assessment, if no draft NEPA document is issued; and

(6) Issuance of a final NEPA document, if any.

§ 7.7 Amendment of application.

(a) Any proposed amendments to the pending license application after issuance of the notice of acceptance and ready for environmental analysis under this section must include:

(1) an amended or new section 401 of the Clean Water Act water quality certification if the amendment would have a material adverse impact on the water quality in the discharge from the proposed project; and

(2) updates to all other material submitted under § 7.2(b).

(b) If based on the information provided under paragraph (a) of this section, the proposed project under the amended license application no longer meets the requirements for expedited processing under § 7.2 of this part or if the proposed amendment significantly amends the license application, the Director will notify the applicant that the application will no longer be processed under the expedited licensing process under this part and that further processing of the application will proceed under parts 4 and 5 of this chapter, as applicable.

(c) If the Director approves the continued processing of the amended application under this part and the amendment to the application would materially change the project's proposed plans of development, as provided in § 4.35 of this chapter, an agency, Indian Tribe, or member of the public may modify the recommendations or terms and conditions or prescriptions it previously submitted to the Commission pursuant to § 7.6. Such modified recommendations, terms and conditions, or prescriptions must be filed no later than the due date specified by the Commission for comments on the amendment.

(d) *Date of acceptance.* The date of acceptance of an amendment of application for an original license filed under this part is governed by the provisions of § 4.35 of this chapter.

§ 7.8 Other provisions.

(a) Except for provisions required by statute, the Director may waive or modify any of the provisions of this part for good cause.

(b) Late-filed recommendations by fish and wildlife agencies pursuant to the Fish and Wildlife Coordination Act and section 10(j) of the Federal Power Act for the protection, mitigation of damages to, and enhancement of fish and wildlife affected by the development, operation, and management of the proposed project and late-filed terms and conditions or prescriptions filed pursuant to sections 4(e) and 18 of the Federal Power Act, respectively, may be considered by the Commission as cause to remove the application from the expedited licensing process. If the Director determines that late-filed recommendations, terms and conditions, or prescriptions are likely to prevent the Commission from issuing a final licensing decision within two years from application

receipt, the Director will notify the applicant that the application will no longer be processed under the expedited licensing process under this part and that further processing of the application will proceed under 18 CFR parts 4 and 5, as applicable.

(c) *License conditions and required findings.* (1) All licenses shall be issued on the conditions specified in section 10 of the Federal Power Act and such other conditions as the Commission determines are lawful and in the public interest.

(2) Subject to paragraph (b) of this section, fish and wildlife conditions shall be based on recommendations timely received from the fish and wildlife agencies pursuant to the Fish and Wildlife Coordination Act.

(3) The Commission will consider the timely recommendations of resource agencies, other governmental units, and members of the public, and the timely recommendations (including fish and wildlife recommendations) of Indian Tribes affected by the project.

(4) Licenses for a project located within any Federal reservation shall be issued only after the findings required by, and subject to, any conditions that may be filed pursuant to section 4(e) of the Federal Power Act.

(5) The Commission will require the construction, maintenance, and operation of such fishways as may be prescribed by the Secretary of Commerce or the Secretary of the Interior, as appropriate, pursuant to section 18 of the Federal Power Act.

§ 7.9 Transition provision.

This part shall only apply to original license applications filed on or after
[INSERT DATE 90 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL*
***REGISTER*].**

Document Content(s)

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