

**HANDBOOK**

**FOR**

**HYDROELECTRIC PROJECT LICENSING**

**AND**

**5 MW EXEMPTIONS FROM LICENSING**

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Federal Energy Regulatory Commission  
Washington, DC

**April 2004**



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## FOREWORD

This licensing handbook updates and replaces the previous Hydroelectric Project Licensing Handbook of April 2001. Changes in the handbook reflect revisions to the Commission's hydroelectric licensing regulations issued in Order 2002 on July 23, 2003, which established a new licensing process--the integrated licensing process (ILP)--and modified certain other aspects of its filing requirements.

The ILP became effective October 23, 2003. The ILP provides a predictable, efficient, and timely licensing process that continues to ensure resource protection. It is designed to improve efficiency and timeliness of preparing and processing license applications by: combining a potential license applicant's pre-filing consultation with the Commission's scoping pursuant to the National Environmental Policy Act (NEPA), rather than conducting these activities sequentially; increasing public participation in pre-filing consultation; improving coordination between the Commission's processes and those of other participants; providing for increased staff assistance during the preparation of the application; and establishing schedules for all participants, including Commission staff.

Order 2002 establishes a 2-year transitional period, during which potential license applicants will be permitted to choose the traditional licensing process (TLP) or the ILP, or to request authorization to use the alternative licensing process (ALP). Effective July 23, 2005, the ILP process will become the default licensing process, and Commission approval will be required to use the TLP or ALP.

Concurrent with Order 2002, the Commission also issued a Tribal Consultation Policy, intended to improve consultation with Indian tribes.



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## **1.0 INTRODUCTION**

### **1.1 PURPOSE AND OVERVIEW OF THIS HANDBOOK**

This handbook is for all interested parties involved in the hydropower authorization process. It provides a step-by-step guide to applying for an original license, a new license or subsequent license (relicenses), and 5 MW exemption from licensing, and can be used to improve the quality and consistency of license or exemption applications (see Appendix D for definitions and acronyms). It also clarifies the responsibilities of the interested entities in these proceedings: prospective applicants, Commission staff, resource agencies, Indian tribes, non-governmental organizations, and members of the public.

The handbook presents an overview of the process for obtaining an original or new license in chapter 2, followed by detailed information on the steps involved in the integrated, traditional, and alternative licensing processes in chapters 3, 4, and 5, respectively. Detailed information on the steps for applying for exemptions from licensing is provided in chapter 6, and the Commission's rules of preference for competing applications are in chapter 7.

While this handbook provides helpful information about application procedures, it is not a substitute for the Commission's implementing regulations at 18 CFR Subchapter B. For specific guidance, prospective applicants and other participants in these proceedings should rely on the regulations, supplemented as necessary with legal advice.

### **1.2 THE FEDERAL ENERGY REGULATORY COMMISSION'S ROLE IN HYDROPOWER LICENSING**

Under the authority of the Federal Power Act (FPA), as amended,<sup>1</sup> the Federal Energy Regulatory Commission (Commission) has the exclusive authority to license most nonfederal hydropower projects located on navigable waterways or federal lands, or connected to the interstate electric grid. Appendix A contains the full text of Part 1 of the FPA.

The Commission is composed of five members appointed by the President with the advice and consent of the Senate. The Commission is supported by a staff, with environmental, engineering, and legal expertise, which evaluates hydropower license applications and makes recommendations to the Commission on hydropower licensing matters.

The Commission may issue an original license for up to 50 years for constructing, operating, and maintaining jurisdictional projects. When a license expires, the federal government can take over the project, the Commission can issue a new license (relicense) to either the existing licensee or a new licensee for a period of 30 to 50 years, or the project may be decommissioned.

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<sup>1</sup> 16 U.S.C. §§ 791(a)-825r.

## INTRODUCTION

Applicants for licenses may use either the integrated, traditional, or alternative licensing process.<sup>2</sup> Applicants for an exemption from licensing may use either the traditional or alternative licensing process.

In the integrated licensing process, Commission staff involvement begins during the pre-filing consultation process and is sustained throughout the licensing process. The integrated licensing process merges pre-filing consultation and the National Environmental Policy Act (NEPA) process, brings finality to pre-filing study disputes, and maximizes the opportunity for the federal and state agencies to coordinate their respective processes with the Commission's licensing process.

In the traditional licensing process, the Commission conducts scoping after an application is accepted for filing by the Commission, and there is little Commission involvement during the pre-filing consultation process prior to when the application is filed.

In the alternative licensing process, scoping is done prior to filing the application with the Commission, but Commission staff involvement during study plan development and other pre-filing activities is advisory in nature. The alternative process is flexible and collaborative in character, but it lacks the scheduling structure and consistent Commission staff assistance offered by the ILP (table 1).

The following principles, established in the FPA, guide the Commission's treatment of natural resources and its licensing decisions.

In deciding whether to issue a license, the Commission must give equal consideration to developmental and environmental values. Environmental values include: fish and wildlife resources, including their spawning grounds and habitat, visual resources, cultural resources, recreational opportunities, and other aspects of environmental quality. Developmental values include power generation, irrigation, flood control, and water supply.

**FPA Section  
4(e)**

**Equal  
Consideration  
Standard**

<sup>2</sup> Effective October 23, 2003, applicants can elect to use either the integrated or the traditional process or, with approval, the alternative licensing process. After July 23, 2005, use of the traditional licensing process as well as the alternative licensing process will require Commission approval.

**Table 1. Comparison of Three Hydroelectric Licensing Processes.**

	<b>Traditional Licensing Process (TLP)</b>	<b>Alternative Licensing Process (ALP)</b>	<b>Integrated Licensing Process (ILP)</b>
<b>Consultation with Resource Agencies and Indian Tribes</b>	Paper driven	Collaborative	Integrated
<b>Deadlines</b>	<ul style="list-style-type: none"> <li>Pre-filing - some deadlines for participants</li> <li>Post-filing - defined deadlines for participants</li> </ul>	<ul style="list-style-type: none"> <li>Pre-filing - deadlines defined by collaborative group</li> <li>Post-filing - defined deadlines for participants</li> </ul>	<ul style="list-style-type: none"> <li>Defined deadlines for all participants throughout the process, including FERC</li> </ul>
<b>Study Plan Development</b>	<ul style="list-style-type: none"> <li>No FERC involvement</li> <li>Developed by applicant based on early agency, tribal, and public recommendations</li> </ul>	<ul style="list-style-type: none"> <li>FERC staff advisory assistance</li> <li>Developed by collaborative group</li> </ul>	<ul style="list-style-type: none"> <li>Plan approved by FERC</li> <li>Developed through study plan meetings with FERC staff involvement</li> </ul>
<b>Study Dispute Resolution</b>	<ul style="list-style-type: none"> <li>OEP Director opinion advisory</li> </ul>	<ul style="list-style-type: none"> <li>OEP Director opinion advisory</li> </ul>	<ul style="list-style-type: none"> <li>Informal dispute resolution available to all participants</li> <li>Formal dispute resolution available to agencies w/ mandatory conditioning authority.</li> <li>OEP Director opinion binding on applicant</li> </ul>
<b>Application</b>	<ul style="list-style-type: none"> <li>Draft and final application include Exhibit E</li> </ul>	<ul style="list-style-type: none"> <li>Draft and final application includes applicant-prepared EA or 3rd party EIS</li> </ul>	<ul style="list-style-type: none"> <li>Preliminary licensing proposal (or draft application) and final application include Exhibit E that has form and contents of an EA</li> </ul>
<b>Additional Information Requests</b>	<ul style="list-style-type: none"> <li>Available to participants after filing of application</li> </ul>	<ul style="list-style-type: none"> <li>Available to participants primarily before filing of application</li> <li>Post-filing requests available but should be limited due to collaborative approach</li> </ul>	<ul style="list-style-type: none"> <li>Available to participants before filing of application</li> <li>No formal avenue to request additional info after application filed</li> </ul>
<b>Timing of Resource Agency Terms and Conditions</b>	<ul style="list-style-type: none"> <li>Terms and conditions filed 60 days after REA notice</li> <li>Schedule for filing final terms and conditions permitted</li> </ul>	<ul style="list-style-type: none"> <li>Terms and conditions filed 60 days after REA notice</li> <li>Schedule for filing final terms and conditions permitted</li> </ul>	<ul style="list-style-type: none"> <li>Terms and conditions filed 60 days after REA notice</li> <li>Modified terms and conditions 60 days after comments on the single EA or draft NEPA document</li> </ul>

## INTRODUCTION

The Commission must ensure that the project to be licensed is best adapted to a comprehensive plan for developing the waterway for beneficial public purposes. In making this judgment, the Commission considers comprehensive plans (including those that are resource-specific) prepared by federal and state entities, and the recommendations of federal and state resource agencies, Indian tribes, and the public.

In issuing licenses, the Commission must include conditions to adequately and equitably protect, mitigate damage to, and enhance fish and wildlife (and their habitats), based on recommendations of state and federal fish and wildlife agencies.

In cases where the proposed licensed project would be located on a federal reservation, the federal agency responsible for managing that land can file conditions to protect the reservation, and these conditions are required to be included in any license issued.

**FPA Section  
10(a)**

Comprehensive Development Standard

**FPA Section  
10(j)**

**FPA Section  
4(e)**

The Secretaries of Commerce and the Interior can prescribe fishways at licensed projects, and those conditions are required to be included in any license issued.

Exemptions from licensing are subject to mandatory terms and conditions from the Fish and Wildlife Service, the National Marine Fisheries Service, and the state fish and wildlife agency.

After a license or exemption from licensing is issued, the Commission monitors the licensee's or exemptee's compliance with the conditions of the license or exemption.

Failure to comply with these conditions would subject the licensee or exemptee to civil penalties or even, if the non-compliance is willful, rescission of the license or exemption.

**FPA Section  
18**

**FPA Section  
30(c)**

**FPA Section  
31(a)**

!

In addition to the requirements set forth in the FPA, many other federal laws affect the licensing process. See Appendix B for key federal laws particularly important to the licensing process.

## 2.0 APPLYING FOR A LICENSE

### 2.1 WHEN IS A LICENSE NEEDED?

A license (or exemption from licensing---see chapter 6) from the Commission is required to construct, operate, and maintain a non-federal hydroelectric project that is or would be (a) located on navigable waters of the United States; (b) occupy U.S. lands; (c) utilize surplus water or water power from a U.S. government dam; or (d) be located on a stream over which Congress has Commerce Clause<sup>3</sup> jurisdiction, where project construction or expansion occurred on or after August 26, 1935, and the project affects the interests of interstate or foreign commerce.

### 2.2 WHO MAY FILE FOR A LICENSE?

Any individual citizen of the United States, association of U.S. citizens, corporation organized under federal or state law, state, municipality, or Indian tribe may file a hydropower license application or a competing application for a license. In the case of a project under an existing license, the licensee must file an unequivocal statement of its intention to file or not to file an

application for a new license. This is done through the Notice of Intent. **18 CFR 4.31(a); 18 CFR 5.1(c); 18 CFR 16.6(b)**

The Commission will not accept an application for an original license for a project that:

! would develop the same water resources that would be developed by a project for which there is a preliminary permit in effect. But, if the permittee files an application for license, competition is allowed when the application is accepted by the Commission. **18 CFR 4.33(b)**

! is exempted from licensing, although the Commission may consider license applications proposing a more comprehensive development of the exempted site. **18 CFR 4.33(c)**

! is precluded by law. **18 CFR 4.32(e)(2)(ii)**

An existing licensee may join with other entities to form a new entity – a “joint venture” – for its application. Such a combined entity, however, is not considered an existing licensee. **18 CFR 16.13(c)**

*An existing licensee that files an application for a relicense in conjunction with an entity that is not currently a licensee of the project will not be considered an existing licensee.*

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<sup>3</sup> This is the Congress' broad power "to regulate Commerce with foreign Nations, and among the several States, and with Indian Tribes."

## 2.3 WHEN DO I FILE FOR A LICENSE?

### Original License

An applicant for an original license may file once it completes the pre-filing license application process. **18 CFR Part 5; 18 CFR 4.38**

### New License

An existing licensee must file for a new license at least 24 months in advance of the existing license expiration, or it will be barred from filing an application for the project. If no acceptable timely applications are filed, potential applicants other than the existing licensee may have an additional opportunity to file after the due date for filing a new license application.

**18 CFR 5.17; 18 CFR 16.25; 18 CFR 16.25**

If no application for a new license is filed, the existing licensee must then file an application for surrender of the project.

**18 CFR 16.25(c)**

*The Commission publishes each year both in the Federal Register and in its annual report a table showing the project licenses expiring in the subsequent 6 years, the name of the licensee, the license expiration date, and a project description. This information is also available on the Commission's web page.*

### Acceleration of the License Expiration Date

A licensee may file an amendment application to accelerate the expiration date of its existing license. The request must include a detailed explanation of the basis for seeking acceleration, which could include the licensee's desire to install new capacity, make major dam safety modifications, make fish and wildlife improvements, or for other legitimate purposes. If, after giving public notice and reviewing comments, the Commission deems that it is in the public interest, it will issue an order granting the amendment and accelerating the expiration date to a date not less than 5 years and 90 days from the Commission order.

A request for acceleration from a licensee is considered equivalent to a Notice of Intent (NOI) to relicense the project; therefore, the licensee is obligated to make available certain information about the project within 90 days from the date the Commission grants the request for acceleration.

**18 CFR 5.4; 18 CFR 16.4**

## 2.4 WHAT TYPE OF LICENSE DO I NEED?

Different types of licensing filings are possible, depending on specific circumstances:

- ! an original license for an unconstructed hydroelectric project;

- ! an original license or new license (relicense) for an existing hydroelectric project;
- ! a subsequent license for a project with an expiring minor or minor part license not subject to Sections 14 and 15 of the FPA;
- ! a temporary nonpower license for winding down generation operations, and for purposes of transferring regulatory authority to state and federal authorities.

## 2.5 HOW DO I APPLY FOR A LICENSE?

A potential applicant for an original, new, or subsequent license must file for a license using one of the three licensing processes---traditional, alternative, or integrated. Prior to July 23, 2005, a potential applicant may elect to use the traditional or integrated licensing process, or with approval the alternative licensing process. Effective July 23, 2005, Commission approval is required to use either the traditional or alternative licensing process. Additionally, the alternative licensing process can be used only if there is consensus among the interested entities, including the applicant, that the use of an alternative process is appropriate.

All of the licensing processes are based on consultation procedures designed to develop a record on which the Commission bases its licensing decision and to fulfill its responsibilities under the FPA,

NEPA, Fish and Wildlife Coordination Act, and other statutes.

**18 CFR 5.6-5.19; 18 CFR 4.38(b); 18 CFR 16.8(b)**

The following provides a brief summary of required actions common to all the licensing processes. Nuances specific to each of the licensing process are discussed in their respective chapters (3, 4, and 5).

### 2.5.1 NOTICE OF INTENT TO FILE A LICENSE

After July 23, 2005, a potential applicant must notify the Commission of its intent to seek an original, new, or subsequent license (A subsequent license means a new license for a minor (=1.5 MW) project not subject to sections 14 and 15 of the FPA). It must include in its notice of intent (NOI) a pre-application document (PAD). The NOI must be filed at least 5 but not more than 5.5 years before the expiration of the license. An NOI to file an application in competition with a license application must be filed not later than the prescribed intervention deadline for the initial license application. Prior to July 23, 2005, a PAD would not be required to be filed, but an applicant for a new or subsequent license would still need to file its NOI at least 5 but not more than 5.5 years before the expiration of the license.

**18 CFR 5.5(d) 18 CFR 16.6(c)**

The Commission intends to notify existing licensees about 1 year prior to the NOI deadline date, so that they can make decisions about licensing process selection.

**What must the NOI contain?**

The NOI, which may be in letter form, should clearly specify:

- the licensee's intention to file or not to file for a license;
- license expiration date (existing license);
- licensee's name and address;
- project number (or preliminary permit number for an original license if applicable);
- type of principal project features licensed;
- location of the project;
- plant installed capacity;
- location(s) where information required under **18 CFR 16.6** is available to the public; and
- the names and mailing addresses of: every county; every city, town, or similar local political subdivision in which any part of the project is located or has a population of 5,000 or more and is within 15 miles of the project dam; every irrigation district, drainage district, or similar special purpose political subdivision; and affected Indian tribes.      **18 CFR 5.5(b)** **18 CFR 16.6(b)**

**What is the Pre-Application Document and what is its purpose?**

Concurrent with filing of the NOI, an applicant must file a pre-application document (PAD), which makes known all existing engineering, economic, and environmental information relevant to licensing the project that is reasonably available, or can reasonably be obtained with due diligence, when the NOI is filed. The PAD serves as the foundation for issue identification, study plan development, and the Commission's environmental analysis. It will also set forth the applicant's proposed schedule for completing application preparation and filing the application with the Commission.

**18 CFR 5.6**

*An applicant is not expected to conduct studies to develop the PAD. A thorough PAD will permit stakeholders to define issues, understand existing information, identify information gaps, and better focus study requests in the licensing application process.*

The information contained in the PAD and ultimately produced throughout the license preparation must be made readily accessible to the public for review and reproduction at the licensee's principal place of business during regular business hours. The licensee or potential applicant must make copies of the information, if requested, and provide those copies either at its principal place of business or through the mail. The licensee can require payment of reasonable reproduction and postage costs.

An exception to the reimbursement rule is made for the U.S. Fish and Wildlife Service, the National Marine Fisheries Service, any state agency responsible for fish and wildlife resources, any affected federal land managing agencies, and Indian tribes. The required information must be provided to these entities without charge.

**18 CFR 5.2**

Anyone can file a petition with the Commission explaining the basis for the petitioner's belief that required information is not being made reasonably available.

**18CFR 5.2(d)**

**What should be included in the PAD?**

A potential applicant must include the following information in the PAD:

- ! process plan and schedule;
- ! project location, facilities, and operations (including names, business address, and phone numbers for each person authorized to act as an agent); detailed maps of all lands and waters;
- ! detailed description of all existing and proposed project facilities and components; and
- ! description of existing environment and impacts with respect to the following resources:
  - ◆ geology and soils resources;

- ◆ water resources;
  - ◆ fish and aquatic resources;
  - ◆ wildlife and botanical resources;
  - ◆ wetlands, riparian, and littoral habitat;
  - ◆ rare, threatened, and endangered species;
  - ◆ recreation and land use;
  - ◆ aesthetic resources;
  - ◆ cultural resources;
  - ◆ socioeconomic resources;
  - ◆ tribal resources;
  - ◆ river basin description;
- ! a preliminary issues and studies list; and
  - ! summary of contacts.

Specific guidance on the required information for each topic is given in **18 CFR 5.6**. Sensitive cultural resources information should be

deleted from information made available to the public in accordance with **18 CFR 5.2(c)**.

#### **2.5.2 WHO SHOULD BE CONSULTED DURING APPLICATION PREPARATION?**

##### **Consultation with entities other than Commission staff**

Prior to filing an application, a potential applicant must consult with the relevant federal, state, and interstate resource agencies, affected Indian tribes, and the public on project design, the impact of the proposed project, reasonable hydropower alternatives, and required studies.

**18 CFR 5.1(d); 18 CFR 4.38**

Some entities that must be consulted include:

- ! National Marine Fisheries Service (NOAA Fisheries);
- ! U.S. Fish and Wildlife Service (FWS);
- ! National Park Service (NPS);
- ! U.S. Environmental Protection Agency (EPA);
- ! the federal agency administering any United States lands or facilities to be used or occupied by the project;
- ! any state agency with responsibility for fish, wildlife, and botanical resources, water quality, coastal zone

management plan consistency certification, shoreline management, and water resources;

- ! the State Historic Preservation Officer (SHPO) and Tribal Historic Preservation Officer (THPO---if applicable);
- ! local, state, and regional recreation agencies and planning commissions;
- ! local and state zoning agencies;
- ! any Indian tribe that may be affected by the project; and
- ! any potentially affected landowners.

*A list of federal and state resource agencies, non-governmental organizations, and tribes that may have an interest in the licensing proceedings can be found on the Commission's web page.*

##### **Consultation with Commission staff—*ex parte* communications**

An applicant is free and encouraged to seek procedural advice from Commission staff throughout the licensing process. However, the Commission has established rules concerning communications among persons outside the Commission and the Commission and its employees that pertain to the merits of the proceeding. These *ex parte* communication rules govern off-the-record communications with the Commission in a manner that permits fully informed

decision making by the Commission while ensuring the integrity and fairness of the Commission's decisional process. In any contested on-the-record proceeding, no person outside the Commission shall make or knowingly cause to be made to any decisional employee, and no decisional employee shall make or knowingly cause to be made to any person outside the Commission, any off-the-record communication.

**[18 CFR 385.2201]**

Under the ALP, communication between staff and participants occurs pre-filing, thus off-the-record communications do not present a problem. Nonetheless, the communications protocol established for the proceeding will govern how a record of consultation between participants and Commission staff will be maintained.

**18 CFR 4.34(i)**

Under the ILP, the Commission considers the proceeding to have begun when it issues the notice of commencement of proceeding which is issued within 60 days of when the NOI is filed. Even though the ex parte rule may not have been triggered, the regulations require that all communications regarding the merits of the proceeding must be summarized and put in the record.

**18 CFR 5.8(b)(3)(v)**

### **Settlements**

Collaborative licensing processes often result in settlement agreements. Successful teams of interested parties develop communication patterns that result in cooperative approaches to problem solving. This cooperative approach happens most often

when trust is established among team members, and the outcome is often a settlement that is then proposed as the preferred licensing alternative. When the process is successful, a common result is more local control and ownership of the licensing decision, and ongoing local participation during the term of the license.

Under Rule 602 (**18 CFR 385.602**), settlements may be filed by any participant at any time during the integrated, traditional, or alternative licensing processes. Comments on an offer of settlement may be filed not later than 20 days after the filing of the offer, and reply comments may be filed not later than 30 days after the filing of the offer, unless otherwise provided by the Commission.

The Commission will, where it has an option, include in a license only those matters included in a settlement that fall within its jurisdiction. Therefore, the Commission may be supportive of an entire settlement, but not adopt those elements of a settlement that are beyond the Commission's jurisdiction.

### **2.5.3      WHAT KIND OF STUDIES MAY BE EXPECTED?**

Studies performed for licensing can address a number of subject areas, but are based on the area's resource needs and sensitivity, and the nature, scope, and effects of the project. Studies are often needed to evaluate engineering, economics, and environmental issues. In the broadest terms, engineering studies for licensing typically emphasize project operations, safety and condition of the

facilities and equipment, and economic evaluations, all leading to a decision whether to propose project modifications.

The need for power evaluation should specify the following:

- ! load requirements and forecasted generating capacity; and
- ! how the project will:
  - ◆ stimulate economic growth;
  - ◆ support necessary reserve margins;
  - ◆ provide less expensive power;
  - ◆ displace depletable and foreign supplied oil; or
  - ◆ provide a reliable power source that is owned and controlled by the applicant and will be used to meet increasing load requirements and to reduce the applicant's reliance on an external power supplier to meet its needs.

***Engineering and environmental studies should be thoroughly integrated. A review of environmental resource values in the project vicinity may dictate what scheme of development and operation may be most beneficial.***

Operation and power studies should provide the following information:

- ! type of operation – manual or automatic (on-site or remote);
- ! annual plant factor and dependable capacity;
- ! average annual energy with minimum, maximum, and mean recorded flows at the site; flow duration and area-capacity curves; estimated hydraulic capacity of units; tailwater rating curve; and power plant capability vs. head curve;
- ! resource use and use of power generated;
- ! power value (capacity and energy); and
- ! plans for future developments.

Facility condition assessments should include a cost-effectiveness evaluation of upgrading existing equipment, along with an evaluation of measures taken or planned by the applicant to ensure safe management, operation, and maintenance of the project.

The safety evaluation should include the following items:

- current engineering assessment sufficient to demonstrate that project structures are safe and adequate for continued operation, and that they meet the safety criteria specified in the

Commission's Engineering Guidelines for Evaluation of Hydropower Projects available on the Commission's website;

- if the safety of the project structures has been evaluated pursuant to Part 12 of the Commission's regulations, a summary of that evaluation and reference to safety evaluation submittals under the Part 12 regulations will suffice;
- a description of existing and planned operation of the project during floods;
- a description of existing and planned measures taken to ensure the safety of operating personnel and the public;
- any proposed modifications to the project that would affect the Emergency Action Plan or the stability of the structure; and
- a description of monitoring devices.

***Licensed projects must meet current dam safety requirements as defined in the Commission's Engineering Guidelines for Evaluation of Hydropower Projects.***

Economic studies should provide the following information:

- ! cost of project power compared to the least cost equivalent alternative power;
- ! sources of economic information assumed such as fuel costs, escalation rates, growth rates in peak demand, and existing and planned generating resources;
- ! feasibility of financing a proposed project modification based upon the size of the economic benefits and the forecasted project revenues;
- ! estimate of the net present value of the project;
- ! capital and operations and maintenance costs of project modifications and all proposed protection, mitigation, and enhancement measures; and
- ! an estimate of the cost to prepare the license application **18 CFR 4.41(e)(9); 18 CFR 4.51(e)(9); 18 CFR 4.61(c)(9).**

***Because the Commission's method of evaluating the project economics may differ from the applicant's, it is important to document all assumptions including the year basis costs, any escalation factors, and other economic parameters used by the applicant to develop costs.***

The environmental studies should concentrate on alternative project configurations and operations to maximize developmental benefits,

minimize adverse environmental effects, and produce valuable resource benefits. In the environmental report accompanying the application, an applicant must submit the information required for the type of project being proposed. In addition, the Commission's regulations require an applicant to do any studies and provide any information the Commission staff considers necessary or relevant to determine the project's effect on the environment and potential environmental measures. An applicant should attempt to anticipate the information needs of a NEPA document and design studies accordingly.

Properly conducted environmental studies are those that provide the applicant, the Commission, and reviewing resource agencies and tribes clear and substantial information in three primary areas:

- ! description of the environment affected by the proposed project and its reasonable alternatives;
- ! project effects, both beneficial and adverse; and
- ! protection, mitigation, and enhancement measures.

This may include the need for studies in some or all of the following areas. Water quality should be evaluated and alternatives considered that would improve water quality, dissolved oxygen, and temperature levels and minimize erosion and sedimentation associated with project operation.

Fisheries studies should evaluate existing resources and alternative project designs and operations to improve fish habitat and any needed fish passage.

Recreation studies should be designed to identify current and future recreational needs and how those needs can be best met.

Other resources should similarly be assessed to identify resource effects and project potentials for satisfying those needs.

The approach to assessing project effects is directed primarily at describing the existing (baseline) project-related environment and assessing the beneficial and adverse effects that the proposed project and its operation would have on these resources. Potential applicants do not have to routinely conduct studies directed at characterizing resources that existed prior to the original licensing and construction of the project.

Cumulative effect studies are not required of a potential applicant, but they will be considered, when appropriate, in the Commission's own environmental document and in the applicant's Exhibit E under the ILP. Commission staff may require additional information from the applicant to resolve cumulative impact issues. Commission staff will address and consider cumulative impact issues at original licensing and relicensing to the fullest extent possible. The Commission will use the standard **Areopener@** license condition to explore and address cumulative impacts only where such impacts were not known at the time of licensing or are the result of changed circumstances.

**18 CFR 2.23**

## 2.5.4 WHAT GOES IN THE APPLICATION?

All license applications require certain general information items, an initial statement, and several specified exhibits. Not all exhibits are required for certain types of smaller projects.

The specific contents of a license application depend on the type of project that is being proposed. The license application content required for each type of project is specified in detail in the Commission regulations **18 CFR 5.18, 4.32(a), 4.38(f), 4.41, 4.51, 4.61, 16.10, and 16.11**. Table 2 summarizes the basic content requirements for each type of project.

In the case of the integrated or traditional licensing process, the environmental report (Exhibit E) must meet the requirements of **18 CFR 5.18 (b)**, and **18 CFR 4.38(f)**, respectively, and as appropriate **18 CFR 4.41(f), 4.51(f), or 4.61(d)**, commensurate with the scope of the project. Additionally, this report must contain specific information about the affected water course and any designations under the National Wild and Scenic River System, state wild and scenic legislation, or the Wilderness Act. An applicant using the alternative licensing process files a draft environmental assessment in place of the Exhibit E (see chapter 4 for details).

***Although an applicant using the ILP files an Exhibit E, the exhibit takes the form and function of a draft environmental assessment.***

The license application also must contain various maps and drawings. All maps and drawings must conform to established formats, scales, and other specifications. See **18 CFR 4.39** and **4.41(h)** for detailed guidance. The Commission has established standards and procedures for handling certain maps and drawings it considers critical energy infrastructure information.

### Critical Energy Infrastructure Information

Critical energy infrastructure information (CEII) is information concerning proposed or existing critical infrastructure (physical or virtual) that:

- ! relates to the production, generation, transmission, or distribution of energy;
- ! could be useful to a person planning an attack on critical infrastructure;
- ! is exempt from mandatory disclosure under the Freedom of Information Act; and
- ! gives strategic information beyond the location of the critical infrastructure.

Examples of hydropower location-related information that the Commission considers to be CEII include: "(1) general design drawings of the principal project works (e.g., plan, elevation, profile, and section of dam and powerplant), such as those found in Exhibit

**Table 2. Guide to Application Contents for Each Exhibit in a License Application by Project Type**

Application Element	PROJECT TYPE <sup>a</sup>			
	Major Unconstructed or Major Modified (>5 MW)	Major Project-Existing Dam (>5 MW)	Minor Water Power Project (#1.5 MW), or Major Power Project Existing Dam (#5 MW)	Major Unconstructed or Major Modified (>1.5 MW but < 5 MW)
General Information	4.32(a)	4.32(a)	4.32(a)	4.32(a)
Initial Statement	4.41(a)	4.51(a)	4.61(b)	4.61(b)
Exhibit A	Project Description 4.41(b)	Project Description 4.51(b)	Project Description and Proposed Operating Mode 4.61(c)	Project Description and Proposed Operating Mode 4.61(c)
Exhibit B	Project Operation and Resource Utilization 4.41(c)	Project Operation and Resource Utilization 4.51(d)	Not Required	Not Required
Exhibit C	Proposed Construction Schedule 4.41(d)	Construction History and Proposed Construction 4.51(d)	Not Required	Not Required
Exhibit D	Statement of Costs and Financing 4.41(e)	Statement of Costs and Financing 4.51(e)	Not Required	Not Required

<b>Application Element</b>	<b>Major Unconstructed or Major Modified (&gt;5 MW)</b>	<b>Major Project-Existing Dam (&gt;5 MW)</b>	<b>Minor Water Power Project (#1.5 MW), or Major Power Project Existing Dam (#5 MW)</b>	<b>Major Unconstructed or Major Modified (&gt;1.5 MW but &lt; 5 MW)</b>
Exhibit E  (See Appendix D for Guidelines for Preparing Exhibit E)	Environmental Report 5.18(b), 4.41(f), 4.38(f) or draft environmental document 4.34(i)	Environmental Report 5.18(b), 4.51(f) and 4.38(f) or 16.8(f), or draft environmental document 4.34(i)	Environmental Report 5.18(b), 4.61(d) and 4.38(f) or 16.8(f) or draft environmental document 4.34(i)	Environmental Report 5.18(b), 4.41(f), 4.38(f) or draft environmental document 4.34(i)
Exhibit F	Design Drawings and Supporting Design Report 4.41(g)	Design Drawings and Supporting Design Report 4.51(g)	General Drawings 4.61(e)	General Drawings 4.61(e)
Exhibit G	Maps of Location, Boundary, Federal Lands, and Nonfederal Land Ownership must be GIS based 4.41(h)	Maps of Location, Boundary, Federal Lands, and Nonfederal Land Ownership must be GIS based 4.51(h)	Boundary and Project Map must be GIS based 4.61(f)	Boundary and Project Map must be GIS based 4.61(f)
Exhibit H	N/A	Plans and Ability of Applicant to Operate Project Efficiently for relicense 16.10	Plans and Ability of Applicant to Operate Project Efficiently for relicense 16.10	Plans and Ability of Applicant to Operate Project Efficiently for relicense 16.10

<sup>a</sup> Each project type is defined in appendix C, *Definitions and Acronyms*.

F; (2) maps of projects (including location of project works with respect to water bodies, permanent monuments, or other structures that can be noted on the map and recognized in the field), such as those found in Exhibit G; (3) drawings showing technical details of a project, such as plans and specifications, supporting design reports, Part 12 independent consultant reports, facility details, electrical transmission systems, and communication and control center information; (4) locations of critical or vulnerable components of the project; (5) inundation information; and (6) global positioning system (GPS) coordinates of any project features (precise surveyed or GPS coordinates at or above two decimal points of accuracy of equipment and structures)."

Certain location information is not considered CEII and important to licensing participants, but should not be posted on the internet: For example, USGS 7.5 minute topographic maps showing location of pipelines, dams, or other above ground facilities, drawings showing site or project boundaries, footprints, building locations, and reservoir extent, and general location maps. Such information is classified as non-Internet public (NIP) access, and will be available in hard copy and through the Commission's public reference room, but will not be available for reviewing or downloading from the Commission's databases.

Applicants are required to redact CEII from any filing made with the Commission. Applicants submitting information to the Commission should identify the information as either public, NIP, CEII, or privileged and indicate why it should be treated as such.

An applicant is strongly encouraged to segregate each type of information into separate volumes or appendices. An original plus the requisite number of copies of both the public and NIP volumes, if any, should be filed with the Secretary.

Applicants may provide CEII to any person independent of the Commission's filing and publication requirements, and are encouraged to limit distribution to persons who have executed an appropriate confidentiality agreement.

**18 CFR 4.32(k); 18 CFR 388.113(c); Order No. 2002, para. 428.**

If any part of the licensing process requires an applicant to reveal CEII, as defined by **18 CFR 388.113(c)**, to any person, the applicant shall omit the CEII from the information made available and insert the following in its place:

- ! A statement that CEII is being withheld;
- ! A brief description of the omitted information that does not reveal any CEII; and
- ! This statement: "Procedures for obtaining access to Critical Energy Infrastructure Information (CEII) may be found at **18 CFR 388.113**. Requests for access to CEII should be made to the Commission's CEII Coordinator."

**18 CFR 4.32(k)**

Additional information about CEII including information on how to file a CEII request may be obtained from the Commission's website at <http://www.ferc.gov/legal/ceii-foia/ceii.asp>.

## 2.5.5 THIRD-PARTY CONTRACTOR PROCESS

The National Energy Policy Act of 1992 allows the Commission to permit, at the applicant's request, use of a qualified third-party contractor to prepare an EIS for the Commission, with the Commission establishing the scope of work and procedures. Applicants for hydropower projects that elect to pay for the Commission's use of qualified third-party contractors are contractually responsible for paying the contractor. The Commission, however, has sole responsibility for determining the scope of work, reviewing and approving the work, and otherwise managing all third-party contractor activities necessary to complete the Commission's NEPA document.

Third-party contracting may be voluntarily implemented at any time during the consultation process, as part of an alternative or integrated process, or after an application has been filed, using the following general procedures.

- ! The applicant is encouraged to meet with Commission staff to discuss a potential third-party contract.
- ! An applicant must formally request use of the third-party contract procedures. At that time, the applicant must

recommend the use of one or more of the qualified third-party contractors selected through the following procedure. Applicants will be required to prepare a draft Request for Proposal (RFP) for review and approval by the Commission staff before it is issued. The RFP will be required to include screening criteria, and an explanation of how the criteria will be used to select among the contractors who respond to the RFP. Subsequently, applicants would issue the approved RFP and screen all proposals received for technical adequacy and Organizational Conflict of Interest (OCI). The applicant is responsible for reviewing carefully all OCI materials (submitted for the prime and each proposed subcontractor as part of each proposal) to determine whether the candidate is capable of impartially performing the environmental services required under the third-party contract. The applicant will then submit to Commission staff the technical and cost proposals and OCI statements of their three best qualified candidates.

- ! While staff will give substantial weight to the applicant's recommendation, staff is ultimately responsible for selecting the appropriate third-party contractor.
- ! The selected third-party contractor will be required to file an Organizational Conflict of Interest statement (OCI) with the Commission in which it certifies that it has no financial or other interest in the outcome of the project. The Commission staff will prepare a disclosure statement

certifying that staff has received and reviewed the OCI and that the third-party contractor has no financial or other interest in the project.

- ! The Commission staff will initiate a Memorandum of Agreement (MOA) among the three participants (applicant, third-party contractor, and Commission staff). If cooperative agency status is extended to another agency for the purpose of preparing the environmental document, that agency also will sign the MOA. The MOA will detail participant responsibilities.
- ! The applicant and the third-party contractor will determine the appropriate form of agreement for payment of the contractor by the applicant.
- ! The Commission staff controls the scope and quality of the third-party contractor's work.

Additional information about the third-party contractor process and a list of qualified third-party contractors may be obtained from the Commission's website at:

<http://www.ferc.gov/industries/hydropower/enviro/third-party/tpc.asp>.

## 2.6 How Do I FILE?

An original application and 8 copies must be filed with the Secretary, FERC, 888 First Street, NE, Washington, DC 20426. One copy should be served on the Regional Engineer at the Commission's regional office for the appropriate region and on each resource agency, Indian tribe, or member of the public previously consulted.

**18 CFR 5.17(d); 18 CFR 4.38(d); 18 CFR 16.8(d)**

An applicant must publish a notice twice of the filing of its application, no later than 14 days after the filing date. The notice must be published in a local in a daily or weekly newspaper of general circulation in which the project is located. The notice must include the filing date, applicant's name and address, type of facility applied for, proposed location, and where the information can be obtained. Proof of the notice must be provided to the Commission.

**18 CFR 5.17(d); 18 CFR 4.32(b)(6)**

## 2.7 WHAT HAPPENS AFTER THE APPLICATION IS FILED?

### 2.7.1 APPLICATION REVIEW

#### Tendering Notice

Processing an application begins when the Commission issues a public notice of the tendering of the application for filing. The tendering notice will be published in the Federal Register, local newspapers, and directly with tribes and agencies. The content of the notice will vary slightly among the application processes. Regardless of the process, the notice will contain a preliminary schedule for processing the application.

**18 CFR 5.19; 18 CFR 4.32(b)(7)**

The tendering notice will also establish procedures and the deadline for submission of final amendments and a schedule for processing applications.<sup>4</sup>

**18 CFR 5.19(a); 18 CFR 16.9(d)(2)**

In the case of the traditional licensing process, the notice will notify agencies, tribes, and other persons that they have 60 days to identify additional scientific studies that they believe is necessary to

form an adequate factual basis for completing an analysis of the application on its merits (see Chapter 4 for more details).

**18 CFR 4.32(b)(7)**

No similar provision is provided in the integrated or alternative licensing processes. Additional study requests are most often asked for during the second stage of consultation in the alternative licensing process, and thus are not requested again in the Commission's tendering notice.

#### Notice of Application Deficiencies

Within 30 days of filing the application, the Commission will notify the applicant by letter, or in the case of minor deficiencies, by telephone, describing any deficiencies in the application. The letter will establish a deadline for deficiency correction, generally 90 days after the date of the letter.

**18 CFR 5.2(a)(2); 18 CFR 4.32(e)(1)**

#### Last Date for Final Amendments

An applicant must make any final amendments to its application no later than the date specified in the Commission processing deadline notice or not later than 30 days after issuance of a ready for environmental analysis notice.

**18 CFR 5.27(d); 18 CFR 16.9(c)**

Occasionally, a filed application must be amended during application processing and before license issuance. If an applicant:

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<sup>4</sup> All Commission notices include a clear title to indicate the type of notice, the deadline date for responses, and whether any federal lands are located within the project boundaries.

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- ! amends its filed license application to change the status or identity of the applicant; or
- ! materially amends the proposed plans of development in a fundamental and significant manner;

Then,

- ! the official date of acceptance of the application becomes the date on which the amendment is filed.

Further, an application amended in these ways is considered a new filing for:

- ! the purpose of determining its timeliness with respect to filing competing applications; deciding among competing applications; and
- ! reissuing public notice of the application.

Additionally, for a material amendment, the applicant must comply with the pre-filing consultation requirements described in chapters 3 (integrated licensing process), 4 (traditional process), or 5 (alternative licensing process) of the licensing handbook. In addition, when an amendment is filed that would significantly change the proposed project development plans, any resource agency, Indian tribe, or member of the public may modify the recommendations, terms and conditions, or mandatory

prescriptions it previously submitted to the Commission. Finally, if the Commission's staff determines that the change in the proposed plan of development would have a material adverse effect on the water quality in the project's discharge, then a new request for water quality certification is required.

**18 CFR 4.35**

Definition of the terms: material amendment; change in the status of an applicant; and change in the identity of an applicant are found in the regulations.

**18 CFR 4.35(f)**

**18 CFR 4.35** does not apply to the following circumstances:

- ! corrections of deficiencies identified by the Commission in reviewing the filed application;
- ! any amendment made by a state or municipality in a competitive situation to make the proposed plan of development as well adapted as that of a nonpriority applicant; and
- ! any amendment made to satisfy either requests of resource agencies or tribes as a result of consultation, or concerns of the Commission.

### **Notice of Application Acceptance or Rejection**

The Commission will notify the applicant by letter if the application has been accepted for filing. The acceptance letter may include requests for additional information.

**18 CFR 4.32(d)(1);18 CFR 5.20, 5.22;18 CFR 16.9(d)**

The Commission can reject the application as patently deficient, with the understanding that the application cannot be refiled after the 24-month deadline for filing. This occurs if the Commission determines that the application patently fails to comply with basic regulatory requirements of content (**18 CFR 4.41, 4.51, or 4.61; 18 CFR 5.18**) and pre-filing consultation (**18 CFR 4.38(f); 18 CFR 16.8(f); 18 CFR 5.6-5.19**).

If the application is inadequate but not patently deficient, the Commission will issue a deficiency letter. The Commission will notify the applicant of any deficiencies, and the applicant will be afforded an appropriate period of time in which to correct deficiencies.

The applicant is provided an appropriate period of time not to exceed 90 days, in which to correct deficiencies and to provide the requested additional information.

**18 CFR 4.32(e)(1); 18 CFR 5.20**

### **Ready for EA Notice**

Under the integrated and traditional licensing processes, the Commission will publish a ready for environment assessment (REA) notice requesting comments, recommendations, terms and conditions, and prescriptions once it has determined that all studies have been completed and the record is complete to conduct its environmental analysis. Under the ILP the notice will be issued concurrently with the notice accepting the licensing application. After the close of the comment period, the Commission then prepares the NEPA document typically with a draft for public

comment. All comments, including mandatory conditions, must be filed no later than 60 days after issuance of the REA notice. All reply comments by applicants must be filed within 105 days of that notice.

**18 CFR 4.34(b); 18 CFR 5.22**

Under an alternative process where the applicant files a preliminary draft EA, or preliminary draft EIS prepared by a third-party contractor, no REA notice need be given by the Commission. Instead, the Commission will issue a notice requesting that agencies, affected Indian Tribes, and interested entities file final comments, recommendations, terms and condition, and prescriptions.

**18 CFR 4.34.(i)**

### **Request for 401 Certification**

To comply with Section 401(a)(1) of the Clean Water Act (CWA), the Commission requires that within 60 days from the date of issuance of the REA notice, the applicant must file a copy of the water quality certification; a copy of the request for certification, including proof of the date on which the certifying agency received the water quality certification request; or evidence of waiver of water quality certification. **18 CFR 4.34(b)(5)(i); 18 CFR 5.23(b)**

## **2.7.2 ENVIRONMENTAL REVIEW**

The National Environmental Policy Act (NEPA) requires federal agencies to evaluate the effects of their actions on the environment, disclose those effects, develop possible protection,

mitigation, and enhancement measures to minimize those effects, and make a finding that the action is:

- ! not a major federal action significantly affecting the quality of the human environment; or
- ! a major federal action significantly affecting the quality of the human environment, and therefore requires an EIS.

The Commission will scope the issues and level of analysis required for its licensing action by holding public meetings to solicit comments; or it may, in the case of less complex and controversial projects, solicit comments in writing only. The timing of these meetings will depend on the licensing process.

The Commission, in light of comments and responses received in response to the REA notice and during scoping, evaluates the license application to determine how it will be processed. If the Commission determines that an EA is adequate and that a draft EA is not required, the Commission will issue a single EA for comment. No additional EA will be issued. Comments on the EA will be addressed in any order issuing license. Otherwise, the Commission will issue a draft EA or EIS for comment and then prepare a final EA or EIS. The integrated licensing process has defined timeframes for completing NEPA documents; the traditional and alternative licensing processes do not have defined timeframes.

**18 CFR 5.24 and 5.25**

Comments on the single EA or draft environmental document, including comments in response to the Commission's preliminary determination with respect to fish and wildlife agency recommendations must be filed no later than the time (30 to 60 days) specified in the notice of availability of the environmental documents. Timeframes for modifying terms and conditions are specific to the licensing process and are discussed in their respective chapters.

**18 CFR 5.24, 5.25**

### **2.7.3 SECTION 10(j) PROCESSES**

The Commission is required under Section 10(j) of the FPA to include in any license fish and wildlife measures for the protection, mitigation of damages to, and enhancement of fish and wildlife resources potentially affected by the project based on recommendations from the National Marine Fisheries Service, the U.S. Fish and Wildlife Service, and state fish and wildlife agencies. The Commission will include those recommended measures unless it believes that they are inconsistent with the FPA or other applicable law. Submission of recommendations by fish and wildlife agencies in response to the REA notice marks the beginning of the process under Section 10(j) of the FPA.

**18 CFR 4.34(e)(1); 18 CFR 5.26(a)**

In connection with its environmental review of an application for license, the Commission will analyze all recommended conditions timely filed by fish and wildlife agencies. The agency must specifically identify and explain the recommendations and the relevant resource goals and objectives and their evidentiary or legal

***The applicant can help the 10(j) dispute resolution process by presenting in its license application a complete, organized, and well reasoned justification for its proposed protection, mitigation, and enhancement measures, including the cost of the measures and how the measures respond to resource needs.***

basis. Commission staff may seek clarification of any recommendation from the appropriate fish and wildlife agency. If Commission staff finds any recommendation inconsistent with the Federal Power Act or other applicable law, the staff will make a preliminary determination, after which the staff shall attempt to reach with the agencies a mutually acceptable resolution of any such inconsistency. **18 CFR 4.34(e); 18 CFR 5.26(b)**

Any entity, affected resource agency, or Indian tribe may file comments in response to the preliminary determination of inconsistency within the allotted time frame. A fish and wildlife agency may request a meeting, teleconference, or other procedure to attempt to resolve any preliminary determination of inconsistency. The Commission staff will attempt to resolve the differences with the resource agencies, giving due weight to the expertise and responsibilities of the agencies.

**18 CFR 4.34(e) (3) and (4); 18 CFR 5.26(c) and (d)**

The Commission will provide notice of any meeting, teleconference, or other additional procedure at least 15 days in advance. The Commission will schedule any meeting, teleconference, or

additional procedure within 90 days of the date of the preliminary determination of inconsistency.

The Commission is ultimately responsible for ensuring that each license contains conditions that adequately protect, mitigate for damages to, and enhance fish and wildlife resources in the project area. If the Commission decides to use its own conditions in lieu of those recommended by the agencies, then the Commission must be prepared to demonstrate that: **18 CFR 4.34(e)(5); 18 5.26(d)**

- ! the agency recommendation is inconsistent with the purpose of the FPA or other applicable law; and
- ! the license conditions selected by the Commission adequately protect fish and wildlife.

#### **2.7.4      LICENSE ISSUANCE AND MONITORING OF TERMS AND CONDITIONS**

The final step in the licensing process is the issuance of the Commission's decision on the license, which it makes as expeditiously as possible, consistent with its statutory responsibilities. In the case of an existing license, the target date for issuance of a relicensing decision is the expiration date of the original license. If processing extends beyond this date, annual licenses will be issued to the licensee until action on the new license is taken.

**18 CFR 16.18**

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The license order, which contains the terms and conditions under which the project must be operated, is issued by either the Commission or its delegate.

A license order typically contains the following:

- ! a description of the project works licensed;
- ! a description of the project operation;
- ! a discussion and findings of the issues raised in the proceeding
- ! term of license
- ! environmental conditions;
- ! engineering conditions; and
- ! administrative compliance conditions.

The license becomes final 30 days after the order for a license is issued, unless requests for rehearings and subsequent appeals are filed. Even if a request for rehearing and judicial review is filed, the license goes into effect when issued, unless the Commission orders otherwise.

If the Commission's review and processing of an application for a new major license is not completed at the time of expiration of the

original license, then the licensee is issued a statutorily mandated annual license (extending the terms of the expired license) until the relicensing proceeding is concluded. The existing licensee is obligated to continue operating the project as long as annual licenses are received.

***If the Commission orders the transfer of a project to another licensee, the existing licensee is owed compensation equal to the net investment in the project plus severance damages.***

After licensing or relicensing, the Commission administers the license through its ongoing monitoring of the licensee's compliance with the terms and conditions of the license. The Division of Hydropower Administration and Compliance (DHAC) has the primary responsibility for this task.

The Commission is empowered to monitor and investigate compliance and to issue formal orders directing compliance with license terms and conditions. **FPA Section 31**

Additionally, the Commission can impose appropriate fines or revoke a license when it can be shown that the licensee violated a license or compliance order. **FPA Section 31**

## 2.8 WHAT DOES THE COMMISSION CONSIDER IN ITS LICENSING DECISIONS?

When the Commission receives one or more acceptable applications for a license or relicense, it reviews and then evaluates the proposal(s) within the NEPA framework and according to a set of nine factors established by Section 15 of the FPA.

### 18 CFR 16.13

The Commission:

- (1) must evaluate and balance the various public interest issues to ensure the best comprehensive use of the waterway. **FPA Section 10(a)(1) and 4(e)**

The Commission must also find that the applicant:

- (2) can comply with the terms and conditions of a license;
- (3) can manage and operate the project safely;
- (4) can operate the project to provide efficient and reliable service;
- (5) can demonstrate its need for project power;

- (6) has adequate existing and proposed transmission facilities; and
- (7) will operate and maintain the project in a cost-effective manner. **FPA Section 15(a)(2)**

Also, in the case of a relicense application, the Commission will consider the following:

- (8) the licensee's record of compliance with the terms and conditions for the existing license, and
- (9) the actions taken by the licensee related to the project that affect the public. **FPA Section 15(a)(3)**

### 2.8.1 COMPREHENSIVE DEVELOPMENT PROVISIONS

#### **FPA Sections 10(a) and 4(e)**

For a project to receive a license or relicense, the Commission must judge that the project licensed will be best adapted to a comprehensive plan for the waterway that takes into account the following:

- ! potential benefits to interstate or foreign commerce;
- ! utilization of the site's hydroelectric potential;
- ! adequate protection, mitigation, and enhancement of fish and wildlife (including spawning grounds and habitat); and

- ! other beneficial public uses, including energy conservation, irrigation, flood control, water supply, recreational opportunities, and other aspects of environmental quality.

The Commission is required by law to give equal consideration to both developmental and nondevelopmental values. Equal consideration does not mean treating all those purposes equally or requiring that an equal amount of money be spent on each, but it does mean that developmental and environmental values must be given the same level of reflection and thorough evaluation in determining that the project licensed is best adapted. In balancing developmental and nondevelopmental objectives, the Commission will consider the relative value of the existing power generation, flood control, and other potential developmental objectives in relation to nondevelopmental objectives such as present and future needs for improved water quality, recreation, fish, wildlife, and other aspects of environmental quality.

Several specific considerations guide the Commission's evaluation of whether a project is best adapted to a comprehensive plan for the waterway:

- ! The extent to which the project is consistent with qualifying comprehensive water resource plans;

To qualify as a "comprehensive plan," a plan must:

**18 CFR 2.19**

- (1) be prepared by a federal or state agency authorized to conduct such planning;
- (2) be a comprehensive study of one or more of the beneficial uses of a waterway or waterways;
- (3) include a description of the standards, data, and methodologies used; and
- (4) be filed with the Commission.

Commission staff will include a list of relevant comprehensive plans in any scoping document issued during a licensing proceeding. If a federal, state, or regional plan does not qualify as a comprehensive plan, the Commission will still consider it in its licensing decision, as it considers all relevant studies and recommendations. The weight accorded any plan or recommendation depends on the quality and extent of documentation that supports it and the number of public uses considered. A current list of Commission-approved Comprehensive Plans is available from the Commission website.

- ! Recommendations of federal and state agencies with expertise on the resource potentially affected, recommendations of Indian tribes affected by the project, and comments from other members of the public; and

- ! The applicant's electricity consumption efficiency improvement program. This consideration only comes into play if the applicant is a state, municipality, or electric utility.

**2.8.2 PLANS AND ABILITY OF THE APPLICANT TO COMPLY WITH THE TERMS AND CONDITIONS OF A LICENSE**  
**FPA Section 15(a)(2)(A)**

License terms and conditions require the start and finish of project construction within specified time periods and may include requirements for post-license studies and additional resource protection measures. Therefore, the Commission may evaluate the following aspects:

- ! soundness of the applicant's project financing plan and the applicant's ability to secure financing if a license is issued;
- ! applicant's personnel, facilities, and past experience in hydroelectric development or similar endeavors related to the specific license terms and conditions; and
- ! whether an applicant and/or its contractors have personnel adequate in number and training to oversee project construction and to competently operate and maintain the project.

**2.8.3 APPLICANT'S PLAN TO MANAGE, OPERATE, AND MAINTAIN THE PROJECT SAFELY**  
**FPA Section 15(a)(2)(B)**

This factor encompasses an examination of all safety-related aspects of an applicant's proposal, including the following:

- ! compliance with the Commission's Engineering Guidelines for the Evaluation of Hydropower Projects, prepared by the Commission staff;
- ! plans to improve safety at the site;
- ! plans for training project personnel as they may affect safety;
- ! the safety ramifications of the applicant's proposed mode of operation;
- ! plans to protect employees and the general public; and
- ! plans to comply with the Commission's dam safety requirements.

In the case of an existing licensee, the Commission will use the applicant's past safety record as an indication of whether the licensee is likely to carry out its plans to manage, operate, and maintain the project safely.

**2.8.4 APPLICANT'S PLAN TO MANAGE, OPERATE, AND MAINTAIN THE PROJECT TO PROVIDE EFFICIENT AND RELIABLE ELECTRIC SERVICE**  
**FPA Section 15(a)(2)(C)**

The Commission will consider various aspects of the applicant's project reliability and system efficiency, such as the following:

- ! plans and abilities to maintain the project to minimize downtime, train operation and maintenance personnel, maximize generation at the site, and automate certain project operations; and
- ! plans to coordinate the operation of the proposed project with other projects on the same stream to maximize generation within the context of overall system efficiency.

**2.8.5 NEED OF THE APPLICANT FOR THE ELECTRICITY GENERATED BY THE PROJECT**  
**FPA Section 15(a)(2)(D)**

The need for power criterion is broad. The Commission may take into account the cost and availability of alternative sources of power and the comparative effects of that power on the applicant's operating and load characteristics, on the communities served by the project, and on providers of alternative sources of power.

***Alternatives***

The Commission will consider whether there is a reasonable alternative source of power that an applicant could use to replace the power generated by the project being considered for relicensing, whether any increased costs would be associated with the use of such an alternative, and the alternative's potential impact on the environment. The Commission will consider any reasonable type of alternative, including purchasing power, constructing new operating facilities, returning previously retired capacity to service, using excess reserve capacity, and utilizing conservation measures.

When the Commission identifies the lowest-cost, reasonably available alternative the applicant can use to replace the power generated by the project under consideration for relicensing, estimates will be made of the short-term and long-term costs to the applicant and its customers of relying on that alternative. This cost analysis will include any payments associated with the transfer of the project from the existing licensee and any potential cost impact on the existing licensee due to the loss of the project.

***Effect on Communities***

The Commission will review the effect of the use of alternative sources of power on recipient communities by comparing the aggregate costs and benefits to the customers of, and communities served by, each alternative source of power.

***Effect on Providers of Alternative Power***

In the case of a power purchase alternative, the scope of the Commission's assessment will include the effect on the provider of the alternative power and on that provider's customers and system.

***Effect on Operating and Load Characteristics***

The Commission will consider whether the project does or will provide the applicant with needed and otherwise unavailable peaking capacity, whether the project power does or will provide reliability benefits not otherwise available, and whether the load characteristics of the applicant dictate that a particular type of resource be used to meet its load. In the case of an existing licensee that uses the project's power for its own industrial operations, the Commission will consider the impact of the licensee's obtaining or failing to obtain the relicense on the operations and efficiency of the industrial facility and on the facility's workers and the related community.

**2.8.6 APPLICANT'S TRANSMISSION SERVICES**

FPA Section 15(a)(2)(E)

The Commission is required to consider system reliability, costs, and other technical and economic factors associated with an applicant's existing and planned transmission services related to the project.

Among other considerations, the Commission will review an applicant's plans to maintain and upgrade relevant transmission facilities and will assess whether obtaining a relicense is likely to

forestall the need to build additional transmission lines in other segments of its system. However, the fact that an applicant does not have a transmission system is not a criterion in comparing competing relicense proposals.

**2.8.7 APPLICANT'S ACHIEVEMENT OF COST-EFFECTIVENESS**

FPA Section 15(a)(2)(F)

The Commission will assess whether the plan proposed by the applicant is cost-effective, achieving an appropriate balance of project purposes at reasonable cost.

The final two factors relate only to an applicant who is the existing project licensee.

**2.8.8 APPLICANT'S RECORD OF COMPLIANCE**

FPA Section 15(a)(3)(A)

The Commission will evaluate a licensee's record of compliance with the terms and conditions of the existing license.

**2.8.9 ACTIONS TAKEN BY THE APPLICANT RELATED TO THE PROJECT AFFECTING THE PUBLIC**

FPA Section 15(a)(3)(B)

The Commission's evaluation of compliance and determination for whether the existing licensee has operated the project in the public interest will be affected by both the positive and negative aspects of a licensee's operating history. Among such aspects are the following:

## APPLYING FOR A LICENSE

- ! compliance with the Commission's general policies on recreational use of project land and waters;
- ! licensee's cooperation with appropriate resource agencies in lessening the project's detrimental impact on fish, wildlife, and other resources;
- ! setting aside land adjacent to the project for future environmental purposes;
- ! willingness to adopt measures ensuring the safety of the public;
- ! number of license compliance violations, length of time violations continued, and diligence with which violations were addressed;
- ! handling of complaints presented by the public;
- ! operation of the project for maximum efficiency and overall benefit to the applicant's electrical system; and
- ! maintenance of the project's nonpower facilities and resources, such as recreational facilities and public access.

If the existing licensee is an applicant, the Commission cannot award the relicense to a competing applicant on the basis of insignificant differences among the applications, unless the existing

licensee's performance during the license term has been poor. There are two principal aspects of performance:

- ! Record of compliance with the terms and conditions of the existing license; and
- ! Actions related to the project (either positive or negative) that have affected the public.

Congress specified that the plans of an applicant concerning fish and wildlife will **not** be subject to a comparative evaluation. When applicants propose different schemes of development for the same project, the Commission must determine whether the protection, mitigative, and enhancement measures of each proposal are adequate under the circumstances of that specific proposal. The Commission will specify conditions concerning fish and wildlife in the issued license.

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## 3.0 THE INTEGRATED LICENSING PROCESS<sup>5</sup>

This chapter describes the major steps in the integrated licensing process (figure 1), which may be used to obtain an original license, a new license for an existing project subject to sections 14 and 15 of the FPA, or subsequent license.

**18 CFR 5.1**

Accompanying each discussion are the appropriate regulatory citations for reference in boldface type next to the guidelines. Also see table 2 in chapter 2 for additional information regarding the contents of applications for a license specific to size and type of project.

This handbook is to be used as guidance. The regulations cited contain the specific rules governing each aspect of the licensing process.

### 3.1 STEP 1: DECISION TO FILE AND INITIAL ACTIONS

The licensing process begins when an applicant for a new, subsequent, or original license files its NOI and a Pre-Application Document (PAD) (see Chapter 2 for details). The NOI and PAD must be filed at least 5 years, but not more than 5.5 years before an existing license expires. The NOI and PAD must be distributed to federal and state resource agencies, Indian tribes, and members of the public likely to be interested in the proceeding.

The Commission also encourages applicants, if appropriate, to request at this time to be designated the Commission's non-federal representative for purposes of conducting consultation pursuant to Section 7 of the Endangered Species Act (ESA), Section 305(b) of the Magnuson-Stevens Fishery Conservation and Management Act, and Section 106 of the National Historic Preservation Act (NHPA).

**18 CFR 5.5(e); ESA: 50 CFR; Magnuson-Stevens:  
50 CFR 600.920; NHPA: 36 CFR 800.2**

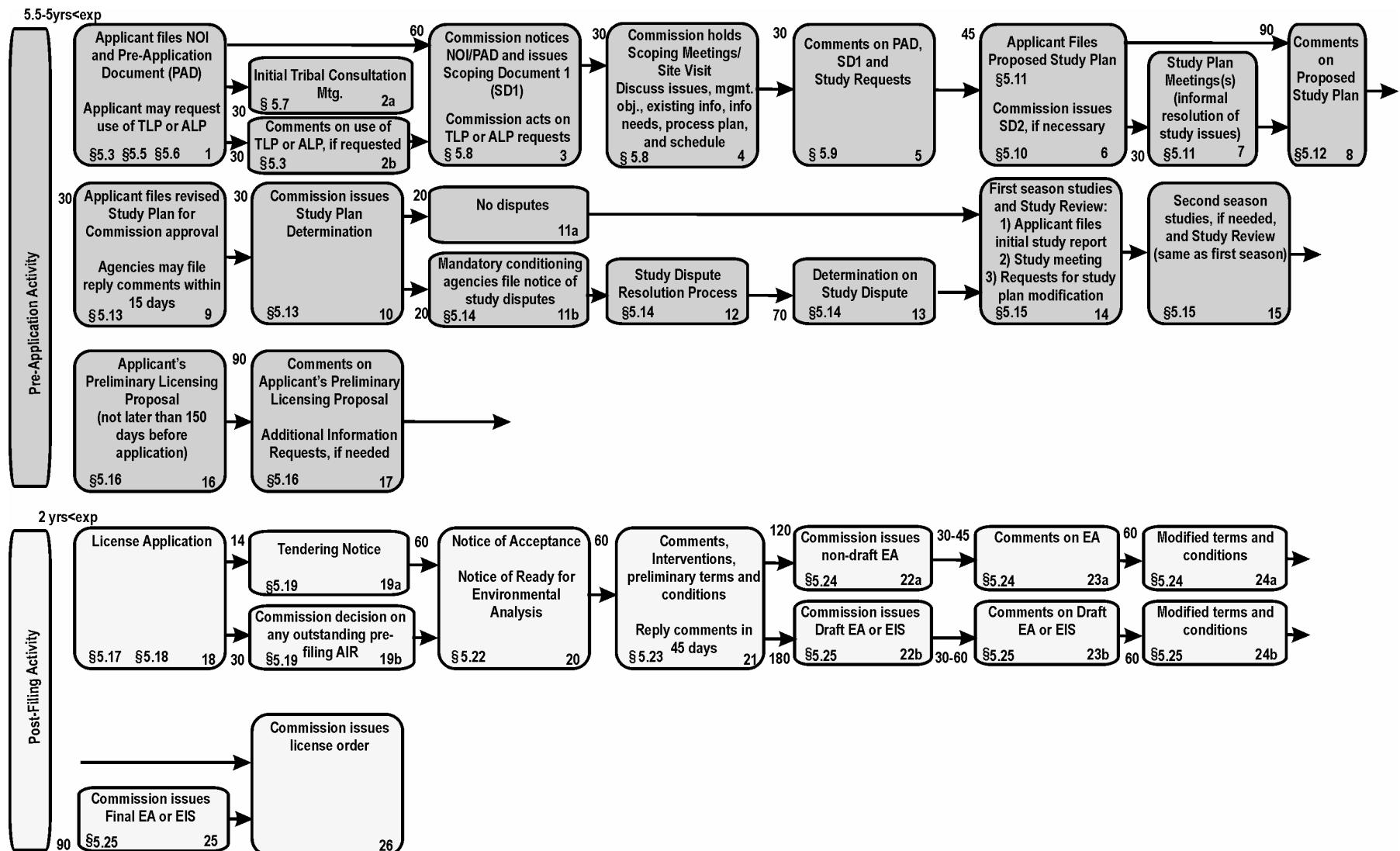
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<sup>5</sup> Effective October 23, 2003, an applicant can choose to use this process, the traditional licensing process, or, with approval the alternative licensing process. Effective July 23, 2005, all applications must follow the integrated licensing process unless they have received the Commission's approval to use the traditional or alternative processes subject to **18 CFR 5.6**.

## INTEGRATED LICENSING PROCESS

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Figure 1. Integrated Licensing Process



### 3.2 STEP 2: CONSULTATION, SCOPING, AND STUDY PLAN DEVELOPMENT

#### 3.2.1 CONSULTATION, SCOPING, AND COMMENCEMENT OF PROCEEDINGS

In the integrated licensing process, pre-filing consultation is conducted concurrently with the Commission's NEPA scoping process. The filing of the NOI and PAD begins the pre-filing consultation, and sets in motion the Commission's scoping and tribal consultation efforts. A proposed date and location for the scoping meeting must be included in the PAD.

**18 CFR 5.5; 18 CFR 5.6**

***A complete and thorough PAD will promote and focus issue identification and the development of study plans.***

Within 60 days of filing the NOI and PAD, the Commission will issue a notice of commencement of proceeding. This notice makes known:

- ! the applicant's intent to file a license application;
- ! initiation by the Commission of informal consultation under Section 7 of the ESA, Section 305(b) of the Magnuson-

Stevens Fishery Conservation and Management Act, and Section 106 of the National Historic Preservation Act, and, if applicable, designation of the applicant as the Commission's non-federal representative.

- ! the filing of the PAD;
- ! the commencement of the proceeding;
- ! the time frame for providing comments on the PAD (including the proposed process plan and schedule);
- ! the potential for other federal or state agencies or Indian tribes to request to be cooperating agencies for purposes of developing an environmental document;
- ! the Commission's intent with respect to preparation of an EA or EIS; and
- ! the date, time, and place of the public scoping meeting and site visit (to be held within 30 days of the notice).

**18 CFR 5.8; 18 CFR 4.38**

Where applicable, the Commission will also make known its decision on any request to use the traditional or alternative licensing process.

**18 CFR 5.8 (b)(1)**

Concurrently, the Commission staff will issue Scoping Document 1, which identifies staff's preliminary list of issues to be addressed in

its NEPA analysis, the level of analysis required, qualifying Federal, state, and tribal comprehensive waterway plans that would be considered in the analysis, and a process plan and schedule for processing the application.

The purpose of the scoping meeting and site visit is to:

- ! initiate issues scoping pursuant to NEPA;
- ! review and discuss existing conditions and resource management objectives;
- ! review and discuss existing information and make preliminary identification of information and study needs;
- ! review, discuss, and finalize the process plan and schedule for pre-filing activity; and

*The process plan is an essential part of the integrated licensing process as it incorporates and maximizes coordination of federal, state, and tribal permitting and certification processes with the Commission's licensing process to ensure process efficiency.*

- ! discuss the appropriateness of any federal or state agency or Indian tribe acting as a cooperating agency for development of an environmental document pursuant to NEPA.

*An important outcome of consultation is an understanding of the agencies', tribe's, and public's present and future resource goals and management objectives for the area in which the project is located.*

### 3.2.2 TRIBAL CONSULTATION

The Commission's policy statement, issued July 23, 2003, commits to promoting a government-to-government relationship with federally-recognized tribes potentially affected by a licensing proceeding. A meeting shall be held no later than 30 days following the filing of the NOI between Commission staff and each Indian tribe likely to be affected by a licensing action, if the Indian tribe agrees to such a meeting. The purpose of the meeting is to assure tribal issues and interests are known and considered by the Commission in its licensing decision and to facilitate the Indian tribe's participation in the ILP.

18 CFR 5.7

### 3.2.3 COMMENTS AND STUDY REQUESTS

Not later than 60 days after the Commission's notice of commencement of proceeding and scoping, interested resource agencies, Indian tribes, and members of the public must provide the Commission with written comments on the PAD and SD1. Comments must be accompanied by information needs and study requests, and should include information and studies needed for

consultation under Section 7 of the ESA and water quality certification under section 401 of the Clean Water Act.

Study requests must be based on the following criteria and include an explanation for each:

- ! describe the goals and objectives of each study proposal and the information to be obtained;
- ! explain the relevant resource management goals of the agencies or Indian tribes with jurisdiction over the resource to be studied;
- ! if the requester is not a resource agency, explain any relevant public interest considerations in regard to the proposed study;
- ! describe existing information concerning the subject of the study proposal, and the need for more information;
- ! explain the nexus between project operations and effects (direct, indirect, and/or cumulative) on the resource to be studied, and how the study results would inform the development of license requirements;
- ! explain how the study methodology is consistent with generally accepted practice in the scientific community or as appropriate, considers relevant tribal values and knowledge; and

- ! describe consideration of level of effort and cost and why the applicant's proposed alternative studies would not be sufficient to meet the stated information needs.

**18 CFR 5.9(b)**

Within 45 days following the deadline for filing scoping comments, the Commission staff shall, if necessary, issue a revised scoping document---Scoping Document 2---that addresses comments on the scope of issues and analysis.

**18 CFR 5.10**

### **3.2.4 PURPA BENEFITS**

Congress enacted the Public Utility Regulatory Policies Act of 1978 (PURPA), 16 U.S.C. § 2601 et seq., "to promote long-term economic growth by reducing the nation's reliance on oil and gas, to encourage the development of alternative energy sources and thereby to combat a nationwide energy crisis." If a potential applicant has stated that it intends to seek PURPA benefits, fish and wildlife agency comments on the PAD must also provide the potential applicant with a reasonable estimate of the total costs the agency anticipates it will incur and set mandatory terms and conditions for the proposed project. An agency may provide a potential applicant with an updated estimate as it deems necessary. If it believes that its most recent estimate will be exceeded by more than 25 percent, it must supply the potential applicant with a new estimate and submit a copy to the Commission.

**18 CFR 5.9(c)**

### **3.2.5 STUDY PLAN DEVELOPMENT**

Based on the scope of issues and study requests identified during scoping, the applicant must prepare and file a proposed study plan. The plan shall be filed within 45 days of the close of the 60-day comment period provided in the notice of commencement of proceeding and scoping. The applicant's proposed study plan must include with respect to each study:

- a detailed description of the study and the methodology to be used;
- a schedule for conducting the study;
- provisions for periodic progress reports, including the manner and extent to which information will be shared; and sufficient time for technical review of the analysis and results;
- an explanation as to why it did not adopt a requested study, with reference to the criteria set forth in section 5.9(b); and
- provisions for the initial and updated study reports provided for in section 5.15.

Like the study criteria for agency and tribal study requests, an applicant's proposed study plan must also:

- describe the goals and objectives of each study and the information to be obtained;

- address any known resource management goals of the agencies or Indian tribes with jurisdiction over the resource to be studied;
- describe existing information and need for additional information;
- explain the nexus between project operations and effects (direct, indirect, and cumulative) on the resource;
- explain how the study methods (including data collection and analysis techniques, or objectively quantified information, and a schedule including appropriate field seasons and duration) is consistent with generally accepted practice in the scientific community, or as appropriate, considers known tribal interests; and
- describe the level of effort and cost, as applicable.

**18 CFR 5.11**

### **3.2.6 STUDY PLAN MEETINGS AND COMMENTS ON PROPOSED STUDY PLAN**

The applicant's proposed study plan must provide for study plan meetings to discuss its study proposals and try to resolve any outstanding issues with respect to the proposed study plan. The meetings must be held no later than 30 days after the deadline date for filing the proposed study plan with the Commission.

**18 CFR 5.11(e)**

**A key focus of the ILP is early resolution of study needs. To achieve this, the process provides for the applicant, agencies, tribes, public, and Commission staff to work through information needs in an informal manner within defined time limits.**

Interested agencies, Indian tribes, or members of the public have 90 days to file comments after the proposed study plan is filed. Within this 90 day period, the agencies, tribes, and public should work with the applicant to resolve study disputes (as described above). Any filed comments should include any revised information or study requests, as well as, an explanation of any study plan concerns and accommodations worked out with the applicant. **18 CFR 5.12**

### **3.2.7 STUDY PLAN DETERMINATION**

Within 30 days from the close of the comment period on the proposed study plan, the applicant must file a revised study plan for Commission approval. The revised study plan shall include the comments provided on the proposed study plan and a description of the efforts made to resolve differences over study requests. Interested agencies, Indian tribes, or members of the public have 15 days to file comments after the revised study plan is filed. Within 30 days from the filing of a revised study plan, the Director of the Office of Energy Projects will issue a study plan determination that approves a study plan with any needed modifications determined to

be necessary in light of the record. The Director will explain its decision on each dispute in light of the study criteria, and applicable Commission policies and practices.

If no notice of study dispute is filed within 20 days of the determination, the study plan shall be deemed to be approved, and the applicant shall proceed with the approved studies.

**18 CFR 5.13**

***If a potential applicant fails to conduct a study as required by the Director's study plan determination, its license application may be considered deficient.***

### **3.2.8 FORMAL STUDY DISPUTE RESOLUTION**

The Commission's study plan determination represents the culmination of an intensive consultation process geared toward informally resolving study disputes between an applicant and agencies, tribes and the public.

***Applicants should make every effort to resolve study disputes during the informal consultation process.***

Because agencies with mandatory conditioning authority under sections 4(e) and 18 of the FPA and agencies and tribes with mandatory conditioning authority under section 401 of the Clean

## INTEGRATED LICENSING PROCESS

Water Act must make reasoned decisions based on substantial evidence, there may arise disputes between these agencies and tribes and the Commission over studies needed to develop an evidentiary record to support their recommendations. Therefore, these agencies may request the use of a formal dispute resolution process. The formal dispute resolution process must be concluded by 70 days from the filing of the notice requesting formal dispute resolution.

Within 20 days of the notice of study plan determination, any federal agency or Tribe with authority to provide mandatory conditions on a license may file a notice of study dispute with respect to studies pertaining directly to the exercise of their authorities under sections 4(e) and 18 of the FPA or section 401 of the Clean Water Act.

***Studies or portions of study plans approved in the study plan determination that are not the subject of a notice of study dispute shall be deemed approved, and the applicant shall proceed with those studies or portions thereof.***

**18 CFR 5.14(c)**

Within 20 days of a notice of study dispute, the Commission will assemble a three person dispute-resolution panel(s) consisting of

- ! a person from the Commission staff not otherwise involved in the proceeding who shall serve as the panel chair;

- ! a person designated by the federal or state agency or Indian tribe that filed the dispute who is not otherwise involved in the proceeding; and
- ! a third person selected by the other two panelists from a pre-established list of persons with expertise in the resource area.

Within 25 days of the notice of study dispute, the applicant may file with the Commission comments and information regarding the dispute.

Prior to engaging in deliberative meetings, the panel shall hold a technical conference for the purpose of clarifying the matters in dispute with reference to the study criteria. The meetings will be open to all the participants.

Within 50 days following the notice of study dispute, the panel shall make and deliver its finding and recommendations to the Director of the Office of Energy Projects. The panel shall also file all of the materials available to the panel. Once the panel has concluded, the Director of the Office of Energy Projects will review the panel's recommendations and issue a written determination no later than 70 days from the date of filing the notice of study dispute.

**18 CFR 5.14**

***The panel's findings and recommendations must be based on the record in the proceeding.***

### 3.3 STEP 3: STUDIES AND PRELIMINARY LICENSING PROPOSAL PREPARATION

#### 3.3.1 CONDUCT OF STUDIES

With study plans finalized, the potential applicant should proceed with the studies identified and approved in the final study plan. The potential applicant must prepare and provide study results to participants seeking progress reports in accordance with the approved process plan and schedule. In addition, no later than one year from the Commission's approval of the study plan, the applicant must prepare and file with the Commission an initial study report describing overall progress, schedule, and data collected, including an explanation of any variance from the study plan and schedule.

***The applicant's study program should enable all the participants in the licensing process to focus on the relationships between environmental resources, power production, flood control, irrigation, and other potential uses of the waterway.***

Based on results reported in the initial study report, participants may request modifications to the studies and new studies. However, the hurdle for requesting and approving study modifications and new studies gets higher as the process proceeds. Any proposal to

modify an ongoing study must be accompanied by a showing of good cause why the proposal should be approved and demonstrate that:

- ! approved studies were not conducted as provided for in the approved study plan; or
- ! the study was conducted under anomalous environmental conditions or that environmental conditions have changed in a material way.

Any proposal for new information gathering or studies must be accompanied by a showing of good cause why the proposal should be approved, and include statements explaining:

- ! any material changes in the law or regulations applicable to the information request;
- ! why the goals and objectives of any approved study could not be met with the approved study methodology;
- ! why the request was not made earlier;
- ! significant changes in the project proposal or that significant new information material to the study objectives has become available; and
- ! why the new study request satisfies the study criteria in Section 5.9(b)

**18 CFR 5.15**

### 3.3.2 PRELIMINARY LICENSING PROPOSAL

Once the studies are near completion, but no later than 150 days prior to the deadline for filing a new or subsequent license application, a potential applicant must file a preliminary licensing proposal. The proposal should clearly describe:

- existing and proposed project facilities;
- existing and proposed project operation and maintenance plan;
- measures for protection, mitigation and enhancement for each resource affected by the proposal; and
- and a draft environmental analysis by resource area of continuing and incremental impacts of the preliminary licensing proposal, including the results of its studies conducted under the approved study plan.

A draft license application that includes the contents required by **18 CFR 5.18** may be filed in lieu of the preliminary licensing proposal if the potential applicant includes notice of its intent to do so in the updated study report required by **18 CFR 5.15(f)**.

Within 90 days of the filing of a preliminary licensing proposal or draft license application, participants and Commission staff may file comments that include recommendations on whether the Commission should prepare an EA (with or without a draft) or EIS.

*Applicants are encouraged to review the Commission's guidance on preparing environmental assessments and to structure their analysis accordingly. A copy of the guidance can be found on the Commission's web page or obtained through the Commission's public reference room.*

Under certain circumstances, an applicant and the other parties to the proceeding may want to forego developing the preliminary licensing proposal and devote resources to other informative efforts, such as settlement negotiations. An applicant may request a waiver to file the preliminary licensing proposal or draft application if there is a consensus of the participants in favor of such a waiver.

**18 CFR 5.16(f).**

## 3.4 STEP 4: APPLICATION FILING

### 3.4.1 TENDERING OF THE APPLICATION

Filing the complete application initiates the post-filing stage of the integrated licensing process (see Chapter 2 for additional details). The application must be filed no later than 24 months before the existing license expires. The original application and eight copies must be filed with the Secretary, FERC, 888 First Street, NE, Washington, DC 20426.

**An existing licensee will be precluded from filing an application for a relicense if it fails to file its application by the 24-month due date.**

Concurrent with filing the application, the applicant must provide copies of the filed application to all resource agencies, Indian tribes, and consulted members of the public.

**18 CFR 5.17**

No later than 14 days after the filing date with the Commission, the applicant must publish a notice twice in a daily or weekly newspaper published in the county or counties in which the project or any part thereof or the lands affected are situated. The notice must disclose the filing date and briefly summarize the application including the applicant's name and address, type of facility, proposed location, and places where the information can be inspected and reproduced.

The Commission will issue a tendering notice within 14 days of the filing date of the application that includes target dates for:

- ! issuance of the acceptance for filing and ready for environmental analysis;
- ! filing of recommendations, preliminary terms and conditions, and fishway prescriptions;
- ! issuance of a draft EA or EIS, or an EA not preceded by a draft;
- ! filing of comments on the DEA or DEIS;

- ! filing of modified recommendations, mandatory terms and conditions and fishway prescriptions in response to a draft NEPA document;
- ! issuance of a final NEPA document;
- ! a deadline of submission of final amendments, if any, to the application; and
- ! readiness for Commission decision.

### **3.4.2 APPLICATION CONTENTS**

The application must contain certain general information and some specific information dependant on the size and type of the project (e.g. minor, or major). See chapter 2 for details.

**18 CFR 5.18; and as applicable 18 CFR 4.41, 4.51, 4.61**

Under the ILP, the license application contains an Exhibit E that has the form and contents of an environmental assessment (EA) and is prepared in accordance with the Commission's guidelines for preparing EAs. The Exhibit E must address the resources listed in the PAD provided for in Section 5.6 of the Commission's regulations (18 CFR) in addition to the format and content requirements listed in Section 5.18. Exhibit E must describe the existing and proposed (if any) project facilities and operations, provide information on the existing environment and existing data or studies relevant to the

existing environment, and any known and potential impacts of the proposed project and environmental measures on the specified resources.

### 3.4.3 ADEQUACY REVIEW

Upon filing, a team of engineering and environmental specialists review the application for adequacy.

Two courses of action are open to the Commission if the application is deemed deficient in complying with the regulations.

- (1) The Commission can reject the application as patently deficient, with the understanding that the relicense application cannot be refiled after the 24-month deadline for filing.
  - ! This occurs if the Commission determines that the application patently fails to comply with basic regulatory requirements of content (**18 CFR 5.17, 18 CFR 4.41, 4.51, or 4.61 as applicable**) and pre-filing consultation (**18 CFR Part 5**).
  - ! This decision can be appealed, but regardless of outcome, the existing licensee is obligated to continue operating the project until the Commission disposes of the proceeding.

- (2) If the application is deficient but not patently deficient, the Commission will issue a deficiency letter. The applicant is then provided an appropriate period of time, not to exceed 90 days, in which to correct deficiencies. **18 CFR 5.20(a)**

*If the Commission rejects or dismisses an application because it is patently deficient or because the applicant fails to correct deficiencies or respond to an additional information request in a timely manner, the applicant cannot refile its application if the 24-month filing deadline has passed.*

If responses to requested deficiency corrections or additional information requests are not timely filed, the Commission may reject the application. If all deficiencies are corrected, the Commission issues the applicant a letter of acceptance specifying the date upon which the application was accepted for filing. **18 CFR 5.22(a)**

Although the content of the application may comply with the regulations, Commission staff may request additional information or documents it considers relevant for an informed decision on the application. The information requested must take the form, and must be submitted within the time the Commission prescribes. The applicant may be required to file the information with other interested agencies, tribes, and the public. If an applicant fails to provide the additional information, the Commission may dismiss the application, hold it in abeyance, or take other appropriate action. **18 CFR 5.21**

## 3.5 STEP 5: APPLICATION PROCESSING AND NEPA COMPLIANCE

### 3.5.1 READY FOR ENVIRONMENTAL ANALYSIS

Once the Commission has determined that the application meets all of the filing requirements, the studies have been completed, any deficiencies have been resolved, and no additional information is required, the Commission will issue the notice of acceptance and ready for environmental analysis (REA). The acceptance/REA notice solicits comments, protests, and interventions; recommendations; preliminary terms and conditions; and preliminary fishway prescriptions, including all supporting documentation. It also must include an updated schedule for application processing. Comments, protests, interventions, recommendations, and preliminary terms and conditions or preliminary fishway prescriptions must be filed within 60 days of the notice. **18 CFR 5.22(a); 18 CFR 4.32(d)(2)(i); 18 CFR 16.9(d)(1)**

The applicant then has 45 days to respond to submitted comments (105 days from the REA notice). Responses should be sent to the entity providing the original comment, with a copy to the Commission. **18 CFR 5.23**

No later than 60 days following the notice of acceptance and REA, the license applicant must also file a copy of the water quality certification; a copy of the request for certification, including proof of

the date on which the certifying agency received the water quality certification request; or evidence of waiver of water quality certification.

**18 CFR 5.23**

### 3.5.2 EA OR EIS PREPARATION

Unlike the traditional or alternative licensing processes, the regulations specify how long the Commission has to complete its NEPA process. The Commission staff will issue a single EA within 120 days from the date responses are due to the REA notice. The EA will include draft license articles, a preliminary determination of consistency of each fish and wildlife agency recommendation made pursuant to section 10(j) of the FPA (discussed further below) with the requirements of the FPA and other applicable law, and any preliminary mandatory terms and conditions and fishway prescriptions. All comments on the EA must be filed with the Commission no later than the time specified in the notice issuing the EA (30 or 45 days). All modified mandatory prescriptions or terms and conditions, if any, must be filed no later than 60 days following the close of the comment period specified in the notice.

**18 CFR 5.24**

When the Commission decides that a draft EA or EIS is needed, the Commission staff will issue a draft EA or draft EIS within 180 days of the REA notice. Contents of the NEPA document and the period and procedures for providing modified mandatory prescriptions or terms and conditions would be the same as described above for the issuance of a single EA, except that time period for filing comments on the draft EA or EIS may be longer (30 to 60 days). **18 CFR 5.25**

**3.6 STEP 6: COMPLETION OF THE SECTION 10(j) PROCESS**

The Commission is required under Section 10(j) of the FPA to include in any license fish and wildlife measures for the protection, mitigation of damages to, and enhancement of fish and wildlife resources potentially affected by the project based on recommendations from the National Marine Fisheries Service, the U.S. Fish and Wildlife Service, and state fish and wildlife agencies, unless it finds the measures to be inconsistent with the FPA or other applicable law. See chapter 2, section 2.2.10, for guidelines on the Section 10(j) process, which is same for all three processes.

**18 CFR 4.34(e)(1).**

**3.7 STEP 7: LICENSE ISSUANCE AND MONITORING**

The licensing process concludes with the issuance of a licensing order by either the Commission or its delegate. License issuance and monitoring is the same for all processes and is discussed in detail in chapter 2.

## **4.0 THE TRADITIONAL LICENSING PROCESS**

The traditional licensing process consists of three stages (figure 2).

**8 CFR 4.38 (license)**

**18 CFR 16.8 (relicense)**

- (1) The first stage is a series of interactions among the applicant, resource agencies, affected Indian tribes, and the public sharing the initial information about the project and notifying all interested parties. First stage consultation ends when a set of resource-by-resource study plans and detailed documentation of the agency consultation process have been completed. **18 CFR 4.38(b); 18 CFR 16.8(b)**
- (2) The second stage involves the applicant's distribution of the draft application to resource agencies with a written request for review and comment. The applicant may request that the Commission review the draft application at this stage as well. This stage of consultation should be documented by the applicant in a written summary of agreements reached with the resource agencies, as well as remaining disagreements. **8 CFR 4.38(c); 18 CFR 16.8(c)**
- (3) Filing the final application with the Commission initiates the third stage of consultation.  
**CFR 4.38(d); 18 CFR 16.8(d)**

After July 22, 2005, an applicant must submit to the Commission a request to use traditional procedures for pre-filing consultation and the filing and processing of an application for an original, new, or subsequent hydropower license.

**18 CFR 5.3**

This chapter describes the major steps in the traditional licensing process. Accompanying each discussion are the appropriate regulatory citations for applications for projects subject to Sections 14 and 15 of the FPA. Table 2 in chapter 2 shows the regulatory citations for the contents of applications for license.

### **4.1 STEP 1: FIRST STAGE CONSULTATION**

#### **4.1.1 NOTICE OF INTENT AND INITIAL INFORMATION**

The initial steps and filing requirements of the first stage consultation depend on whether a potential applicant commences pre-filing consultation prior to or after July 23, 2005.

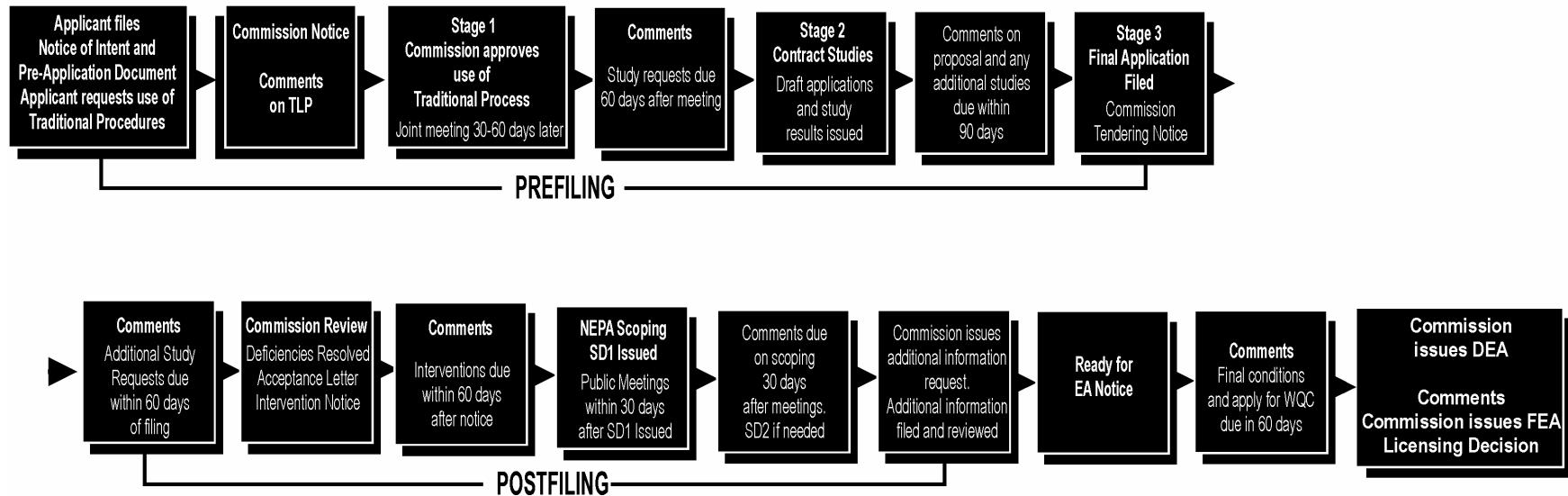
##### **Prior to July 23, 2005**

An applicant for a non-power license or subsequent license, or applicant that elects to use the traditional process to pursue a new or original license and which starts pre-filing consultation prior to July 23, 2005, must promptly contact each state and federal resource agency, affected tribe, and the public with an interest in the project. The applicant must provide them with detailed information about the project (boundaries, engineering design, and

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Figure 2. Traditional Licensing Process



operation), a description of the environmental and anticipated effects of the proposed project, stream flow and water regime information, and a detailed list of proposed studies and methodologies to be employed. The applicant must also provide notice of its intent to seek a new license (see chapter 2).

**8 CFR 4.38; 18 CFR 16.8**

#### **After July 23, 2005**

Any potential applicant that must file its NOI to seek a new or subsequent license or begins its pre-filing consultation for an original license on or after July 23, 2005, must seek authorization to use the traditional licensing process. The potential applicant's request must accompany the NOI and PAD (which describes existing information about the project, its environs, known project effects, and proposed studies – see chapter 2 for details) and address the following considerations:

- ! likelihood of timely license issuance;
- ! complexity of the resource issues;
- ! level of anticipated controversy;
- ! relative cost of the traditional process compared to the integrated process;
- ! the amount of available information and potential for significant disputes over studies; and

- ! other factors believed pertinent.

**18 CFR 5.5; 18 CFR 4.38(b); 18 CFR 16.7(d)**

The authorization request must be provided to all affected resource agencies, Indian tribes, and members of the public likely to be interested in the proceeding. The applicant must also publish notice of the filing of the NOI, PAD and request to use the TLP in a daily or weekly newspaper of general circulation in each county in which the project is located. The request must solicit comments to be filed with the Commission within 30 days of the filing date of the request. The solicitation should specify that comments on the request to use the traditional process should address the likelihood of timely license issuance, complexity of the resource issues, level of anticipated controversy, relative cost compared to the integrated process and any other factors that the commenter believes are pertinent.

**18 CFR 5.3**

The decision of the director of the Office of Energy Project on any request to use the traditional process will be included in the notice of commencement of proceeding, which will be issued within 60 days of the filing of the NOI.

*An applicant wishing to use the traditional process after July 23, 2005, should be prepared to proceed pursuant to the ILP regulations, in case the Commission does not approve the use of the TLP.*

The Commission shall grant requests to use the traditional process if they believe that there is good cause shown. The more likely it appears from the participant's filings that an application will have relatively few issues, little controversy, can be expeditiously processed, and can be processed less expensively under the traditional process, the more likely the Commission is to approve the request.

#### **4.1.2 MEETING**

Within 30 but no later than 60 days from the Commission's approval to use the TLP, the applicant shall consult with the agencies, Tribes, and public to schedule a joint meeting. The joint meeting should be held at a convenient place and time, and the applicant must notify all participants. Members of the public are invited to attend the joint meeting and to participate fully. A potential applicant that begins pre-filing consultation prior to July 23, 2005, must also hold a joint meeting no earlier than 30 days, but no later than 60 days from the date the potential applicant's letter transmitting the initial information about the project discussed above.

**18 CFR 4.38(b);18 CFR 16.8(b)**

The potential applicant should develop an agenda for the meeting and be sure that it includes an opportunity for a site visit. The objectives of this joint meeting, in association with the site visit, are to:

- ! develop a common understanding of the proposed project;

- ! discuss current and potential resource needs and management objectives for the project area;
- ! decide what information is needed and what studies are to be done; and
- ! agree on a time frame and format for discussion of study results. **18 CFR 4.38(b)(3)(iii); 18 CFR 16.8(b)(3)(i)**

In addition, there are two principal meeting notification requirements:

- ! At least 15 days before the scheduled joint meeting date, the potential applicant must provide the Commission with written notice of the meeting's time and place and an agenda.
- ! At least 14 days before the joint meeting, the potential applicant must publish the meeting arrangements and agenda in a daily or weekly newspaper in each county in which the project is located.

When applicable, the potential applicant also must make the information contained in the PAD available to the public for inspection and copying. It must be made available, at a minimum, from the date the notice of the joint meeting is published until a final order is issued on the license application.

**18 CFR 4.38(g)(2)(i); 18 CFR 16.8(i)**

Additionally, two copies of the consultation package must be made generally available for review at the joint meeting.

**18 CFR 4.38(g)(2)(iii)**

The potential applicant must record the meeting, using either audio recordings or written transcripts. After the meeting, the applicant must, upon request, provide a copy of the meeting record to the Commission and to any resource agency, Indian tribe, or members of the public.

**18 CFR 4.38(b)(4); 18 CFR 16.8(b)(4)**

#### 4.1.3 COMMENTS AND STUDY REQUESTS

Unless otherwise extended by the Commission, not later than 60 days after the joint meeting each interested resource agency, Indian tribe, and members of the public must provide the potential applicant with written comments (study requests) that include:

- ! identifying its determination of necessary studies to be performed or information to be provided by the potential applicant;
- ! the basis for the agency's determination;
- ! the agency's understanding of the resource issues involved, and its goals and objectives for these resources;
- ! justification of recommended study methodology;

- ! documentation that the use of each study method it recommends is a generally accepted practice; and
- ! explanation of how the studies and information requested will be useful to the agency, Indian tribe, or members of the public in furthering its resource goals and objectives as related to the proposed project.

**18 CFR 4.38(b)(4); 18 CFR 16.8(b)(4)**

If needed, any resource agency, Indian tribe, or member of the public is given a chance to request an extension of the 60 day comment period. To request such an extension, which itself cannot exceed 60 days, the resource agency, Indian tribe, or members of the public must send a written notice explaining the basis for the extension to both the applicant and the Commission within 60 days of the joint meeting.

**18 CFR 4.38(b)(5); 18 CFR 16.8(b)(5)**

*Studies done by applicants must be forward-looking, in that they help define desirable and feasible conditions for environmental resource protection, mitigation, and enhancement, as well as developmental interests such as optimum power production.*

The agency, Indian tribe, and members of the public comments are to be provided to the applicant within 60 days after the joint meeting is held (or up to 120 days, if extended). If a resource

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agency fails to participate in the joint meeting, fails to provide comment within the 60 days allotted, or otherwise fails to comply with a consultation requirement, the potential applicant may proceed to the next sequential step in the consultation process without waiting for the resource agency, Indian tribe, or public to comply. Failure of an agency, Indian tribe, or public to timely comply with a consultation requirement does not preclude that agency's participation in subsequent consultation process stages.

**18 CFR 4.38(e)(2 and 3); 18 CFR 16.8(e)(2 and 3)**

The public may forward its comments directly to the potential applicant or to the Commission.

If an applicant and resource agency or Indian tribe disagree on the need to do a study or gather information, the applicant, resource agency, or Indian tribe may refer the dispute in writing to the Commission for resolution by following these steps:

**18 FR 4.38(b)(6); 18 CFR 16.8(b)(6)**

- ! The entity referring the dispute must serve a copy of its written request for resolution on the Commission, the disagreeing party, and any affected resource agency or Indian tribe.
- ! The disagreeing party and any affected resource agency, Indian tribe, and members of the public may submit to the Commission a written response on the dispute within 15 days of the submittal of the dispute.

- ! Written referrals to the Commission and written responses must be filed with the Secretary of the Commission in accordance with the Commission's Rules of Practice and Procedure (Part 385).
- ! The Commission will resolve disputes by letter provided to the potential applicant and all affected resource agencies and Indian tribes. Any decision by the Commission on disputed studies will be made on the basis of two criteria:
  - ◆ whether the requested study is reasonable and necessary in relation to the resource goals and management objectives of the resource agencies, and
  - ◆ whether it is generally accepted practice to use the study method requested by the agency or tribe.

The Commission's resolution will be provided by letter to the potential applicant and to the disagreeing resource agency.

If the Commission finds that a study or information is unnecessary or use of the study method requested is not a generally accepted practice, then the absence of the study or information in a filed application will not cause a delay in application acceptance, nor will it cause the application to be considered deficient.

If an applicant does not refer a dispute regarding a request for information or if an applicant decides to depart from the

Commission's decision, the applicant must explain the basis for its disagreement in its application and fully justify the course pursued.

The risk of proceeding without agreement is the potential rejection of the application in the event the Commission deems that the application lacks essential information.

If an agency, tribe, or member of the public believes that a study should be done, even after the Commission finds it unreasonable, then the agency, tribe, or member of the public may decide to conduct the study.

The first stage of consultation ends when all participating agencies, Indian tribes, and members of the public provide written comments or 60 days after the joint meeting is held (up to 120 days, if extended), whichever occurs first.

At the completion of first stage consultation, there should be a set of resource-by-resource study plans and detailed documentation of the agency consultation process including all agreements on design, steps toward dispute resolution, and a summary of reasons why the applicant may have elected not to do certain agency requested studies. Each element of the first stage consultation record is important for subsequent consultation and license application steps. It is good practice for potential applicants to modify their proposed study plans as agreed upon and to provide the revised plans to the relevant agencies for their records.

*Post-filing requests for additional information are a principal cause of delay. Conversely, minimizing the need for additional information requests is the applicant's primary avenue for expediting licensing. Participants are encouraged to ask the Commission to resolve disputes as soon as possible.*

## 4.2 STEP 2: BEGINNING OF SECOND STAGE CONSULTATION: STUDIES AND DRAFT APPLICATION PREPARATION

With study plans finalized, the potential applicant should proceed with all reasonable studies identified during first stage consultation and obtain all reasonable information requested by resource agencies, Indian tribes, and members of the public that is necessary for the Commission to make an informed decision regarding the merits of the application.

**18 CFR 4.38(c); 18 CFR 16.8(c)**

For an original license, these studies must be completed and the information obtained before filing the application, if the results:

- ! would influence the financial or technical feasibility of the project; or

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- ! are needed to determine the design or location of project features, reasonable alternatives to the project, the impact of the project on important natural or cultural resources, or suitable mitigative and enhancement measures.

A study may be completed after application filing but before license issuance if:

- ! the potential applicant initiates formal consultation not later than 4 years prior to the expiration date of the license;
- ! the study would take longer to conduct and evaluate than the time available between first stage consultation completion and the application filing deadline; and
- ! the nature of the study does not dictate it being conducted after license issuance.

A study may have to be postponed until after license issuance if the study:

- ! must be performed after construction of new project facilities or change in operation of the proposed project;
- ! is designed to determine the success of implemented measures; or
- ! would be used to refine project operation or modify project facilities.

If, after first stage consultation is concluded, a resource agency requests that the potential applicant do a necessary and appropriate study not previously identified, the applicant should promptly initiate the study, or gather the information unless the study or information is unreasonable or unnecessary for an informed decision by the Commission on the merits of the application or use of the methodology is not a generally accepted practice. The applicant may refer the request to the Commission for dispute resolution. The results of such a study will be treated as additional information, and the filing and acceptance of the application will not be delayed, even if the study is not complete before the application is filed. However, final action by the Commission should not be expected until the results of the additional study are submitted and evaluated.

**18 CFR 4.38(c)(2); 18 CFR 16.8(c)(2)**

A draft license application is the primary document developed during second stage consultation.

The draft application must:

- ! indicate the type of application the potential applicant intends to file;
- ! respond to any comments and recommendations made by any resource agency and Indian tribe during the first stage of consultation;

- ! contain the results of studies requested by the resource agencies and Indian tribes; and
- ! include a discussion of the study results and any proposed protection, mitigation, and enhancement measures.

The format of the application depends upon the category of the project—major, minor, or nonpower (see chapter 2).

#### Access to the Site

An existing licensee must allow project access to a potential competing applicant for the purposes of gathering information, conducting studies, or holding a resource agency site visit. This requirement becomes effective when the following occurs:

- the potential competing applicant has complied with the first stage consultation information requirements, and
- the potential competing applicant has notified the existing licensee in writing of the need for and extent of required access to the project site.

Any disputes relating to the timing and conditions of access, the need for access, or the reimbursement of reasonable expenses incurred by existing licensees, may be referred to the Commission.

**18 CFR 16.5**

#### 4.3 STEP 3: COMPLETION OF SECOND STAGE CONSULTATION

The next major step in the licensing process begins with the applicant's distribution of the draft application to resource agencies, Indian tribes, and other interested parties with a written request for review and comment.

**18 CFR 4.38(c)(4); 18 CFR 16.8(c)(4)**

A resource agency, Indian tribe or member of the public is given 90 days to provide written comments on the information provided by the potential applicant in the draft application.

**18 CFR 4.38(c)(5); 18 CFR 16.8(c)(5)**

If the written comments show that a resource agency, Indian tribe, or member of the public has a substantive disagreement with a potential applicant's conclusions on resource impacts or proposed protection, mitigation, or enhancement measures, the potential applicant must

**18 CFR 4.38(c)(6); 18 CFR 16.8(c)(6)**

- ! within 60 days schedule and hold a joint meeting in consultation with the disagreeing agency, tribe, members of the public and other consulted agencies; and
- ! provide the Commission with written notice of meeting time, place, and agenda at least 15 days in advance.

The applicant and any disagreeing resource agency, Indian tribe, or member of the public may conclude a joint meeting with a document embodying any agreement reached and any issues remaining unresolved.

Second stage consultation should be documented by the applicant in the form of a written summary of agreements reached with the resource agencies, as well as remaining disagreements.

Particularly when disagreement exists with one or more resource agencies or the public, the basis for the applicant's position should be clearly presented in the context of the applicant's consideration of the full range of developmental and nondevelopmental values.

**18 CFR 4.38(c)(8); 18 CFR 16.8(c)(8)**

The applicant should justify its balancing of resource needs to achieve the best adapted project for improving or developing the waterway.

The applicant next finalizes the application in preparation for filing.

**18 CFR 4.38(c)(9); 18 CFR 16.8(c)(9)**

Exhibit E of the application must include:

**18 CFR 4.38(f); 18 CFR 16.8(f)**

- ! evidence of all consultation efforts, including documents showing the conclusions of second stage consultation;
- ! evidence of any agency waivers;

- ! all resource agency letters with comments, recommendations, and preliminary terms and conditions;
- ! the consultation summary document outlining any remaining disagreements;
- ! explanation of the project's compliance or lack of compliance with relevant comprehensive plans, along with relevant resource agency determinations regarding consistency. The Commission's website contains a list of Comprehensive Plans in the Licensing Process;
- ! any letters from the public containing comments and recommendations; and
- ! descriptions of how the applicant's proposal addresses the issues raised by the public during the first stage consultation joint meeting.

**4.4 STEP 4: THIRD STAGE  
CONSULTATION: APPLICATION  
FILING AND ACCEPTANCE BY  
THE COMMISSION**

Filing the complete application initiates third stage consultation and is the first activity in step 4 in the TLP. The application must be filed no later than 24 months before the existing license expires.

The original application and 8 copies must be filed with the Secretary, FERC, 888 First Street, NE Washington, DC 20426.

**18 CFR 4.38(d)(1); 18 CFR 16.8(d)(1)**

***An existing licensee will be precluded from filing an application for a relicense if it fails to file its application by the 24-month due date.***

Concurrent with filing the application, the applicant provides copies of the filed application to all resource agencies, Indian tribes, and members of the public previously consulted.

**18 CFR 4.38(d)(2); 18 CFR 16.8(d)(2)**

The Commission will issue a tendering notice within 14 days of the filing of the application. The notice will solicit requests for additional scientific studies and initiate consultation with the State Historic Preservation Officer under Section 106 of the National Historic Preservation Act.

The applicant must subsequently also provide to participants any:

- ! deficiency correction, revision, supplement, response to additional information request, or amendment to the application; and
- ! written correspondence from the Commission requesting the correction of deficiencies or the submittal of additional information.

The filed application is reviewed for adequacy by a Commission team of engineering and environmental specialists.

The application should contain the following

- ! minimum content requirements under **18 CFR 4.38; 18 CFR 16.8 (18 CFR 4.41, 4.51, or 4.61, and 16.10);**
- ! complete protection, mitigation, and enhancement proposals;
- ! evidence of completion of pre-filing consultation; and
- ! Coastal Zone Management Act (CZMA) compliance.

The Commission then completes its adequacy review and, if the application is deemed acceptable, issues the applicant a letter of acceptance. The Commission can proceed along one of two courses of action.

- (1) The Commission can reject the application as patently deficient, with the understanding that the application cannot be refiled after the 24-month deadline for filing.
  - A. This occurs if the Commission determines that the application patently fails to comply with basic regulatory requirements of content (**18 CFR 4.41, 4.51, or 4.61**) and pre-filing consultation (**18 CFR 4.38(f); 18 CFR 16.8(f)**).

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- B. This decision can be appealed, but regardless of the outcome, the licensee is obligated to continue operating the project until the Commission disposes of the proceeding.
- (2) If the application is inadequate but not patently deficient, the Commission will issue a deficiency letter.

The Commission will notify the applicant of any deficiencies, and the applicant will be afforded an appropriate period of time in which to correct deficiencies.

Additional information may also be requested at this time. The applicant is provided an appropriate period of time not to exceed 90 days, in which to correct deficiencies and to provide the requested additional information. **18 CFR 4.32(e)(1)**

Although the content of the application may comply with the regulations, Commission staff may request additional information or documents it considers relevant for an informed decision on the application. The information requested must take the form, and must be submitted within the time the Commission prescribes. The applicant may be required to file the information on other interested agencies, tribes, and the public. If an applicant fails to provide the additional information, the Commission may dismiss the application, hold it in abeyance, or take other appropriate action. **18 CFR 4.32(g)**

All amendments, including final amendments, must be filed no later than the date specified by the Commission in its procedural notice of processing deadlines. **18 CFR 16.9 (c)**

If responses to requested deficiency corrections or additional information requests are not timely filed, the application may be dismissed. If all deficiencies are corrected, the Commission issues the applicant a letter of acceptance specifying the project number assigned and the date upon which the application was accepted for filing. **18 CFR 4.32(d)(1) and 4.32 (e)(1)**

*If the Commission rejects or dismisses an application because it is patently deficient or because the applicant fails to correct deficiencies or respond to an additional information request in a timely manner, the applicant cannot refile its application if the 24-month filing deadline has passed.*

If the application is accepted, the Commission provides public notice in the Federal Register, local newspapers, and directly to resources agencies and Indian tribes. It identifies dates for comment, intervention, and protests. **18 CFR 4.34(b); 18 CFR 16.9(d)(1)**

## 4.5 STEP 5: APPLICATION PROCESSING AND NEPA COMPLIANCE

### 4.5.1 SCOPING

Depending on the nature and extent of comments received in response to the notice of application accepted for filing, the Commission may conduct public scoping meetings or just solicit written comments. The Commission typically issues a scoping document (SD) for public comment. The Commission issues the SD 30 days prior to any public scoping meeting. The SD will include a tentative schedule for a REA notice and a list of the pertinent comprehensive plans.

### 4.5.2 ADDITIONAL INFORMATION AND REA NOTICE

Based on additional study requests, and comments received during scoping, the Commission may request additional information. If additional information is required, the applicant is requested to provide it, usually within 60 to 90 days, but often longer. Applicants must serve responses to additional information requests on commenting agencies and parties to proceedings.

**18 CFR 4.32(g)**

When resource agencies receive copies of applicant's responses to additional information requests, they should anticipate an REA notice issuance. When the information is deemed adequate, the

Commission issues the REA notice soliciting final comments, recommendations, terms and conditions, and prescriptions.

Agencies, tribes, and the public will have 60 days to file comments, recommendations, terms and conditions and prescriptions. The Any reply comments will be due in 45 days (see chapter 2 for further details).

**18 CFR 4.34(b)**

If an applicant has not already done so, within 60 days following the notice of acceptance and REA, the license applicant must also file a copy of the water quality certification; a copy of the request for certification, including proof of the date on which the certifying agency received the water quality certification request; or evidence of waiver of water quality certification pursuant to **18 CFR 4.34(b)(5)(i)**.

### 4.5.3 EA OR EIS PREPARATION

The Commission now begins preparing its environmental and engineering analysis of the applicant's proposal and alternatives to that proposal. An EA will typically be the NEPA document prepared for a license application. Depending on the scope of issues, or resources affected, the Commission may issue a single EA or a draft and final EA, and in specific circumstances and EIS. (see chapter 2 for additional details).

**4.6 STEP 6: COMPLETION OF THE SECTION 10(j) PROCESS**

Under Section 10(j) of the FPA, the Commission receives recommendations from the National Marine Fisheries Service, the U.S. Fish and Wildlife Service, and state fish and wildlife agencies on licensing measures for the protection, mitigation of damages to, end enhancement of fish and wildlife resources affected by the project. The Commission will include these measures unless it finds them inconsistent with the FPA or other applicable law. See chapter 2, section 2.2.10, for guidelines on the Section 10(j) process, which are the same for the integrated and traditional licensing processes.

The Commission's application review process also entails the specific findings required for relicensing (see chapter 2, section 2.5) and, possibly, consideration of a federal takeover.

**4.7 STEP 7: LICENSE ISSUANCE AND MONITORING**

The licensing process concludes with the issuance of a licensing order by either the Commission or its delegate. License issuance and monitoring is the same for all processes and is discussed in detail in chapter 2.

## 5.0 THE ALTERNATIVE LICENSING PROCESS

The alternative licensing process provides the applicant an opportunity to conduct scoping during the pre-filing consultation and to substitute a preliminary draft EA or EIS prepared by a third-party contractor for Exhibit E of the license or relicense application. All of the other existing regulatory requirements discussed in chapter 2 still apply, but the sequence of steps differs. Figure 3 illustrates the steps in the alternative licensing process.

An applicant must request and receive Commission approval to use alternative procedures for filing an application for an original, new, or subsequent hydropower license that is subject to **18 CFR 4.38** or **18 CFR 16.8**, or for the amendment of a license that is subject to the provisions of **18 CFR 4.38**.

The goals of an alternative process are to: **18 CFR 4.34(i)(2)**

- ! coordinate the pre-filing consultation process, the environmental review process under NEPA, and administrative processes associated with the CWA and other statutes;
- ! facilitate greater participation by and improve communication among the applicant, resource agencies, Indian tribes, the public, and Commission staff in a

flexible pre-filing consultation process tailored to the circumstances of each case (Note: Even under the traditional and integrated licensing processes the applicant can facilitate and promote greater participation by and improve coordination among stakeholders.);

- ! allow for the preparation of a preliminary draft EA by an applicant or its contractor or consultant, or of a draft EIS by a contractor or consultant chosen and directed by the Commission and funded by the applicant;
- ! promote cooperative efforts by the potential applicant and interested entities and encourage them to share information about resource impacts and protection, mitigation, and enhancement proposals and to narrow any areas of disagreement and reach agreement or settlement of the issues raised by the hydropower proposal; and
- ! facilitate an orderly and expeditious review of an agreement or offer of settlement of an application for a hydropower license, or amendment to a license. (Note: settlements can also be reached under the traditional and integrated licensing procedures.)

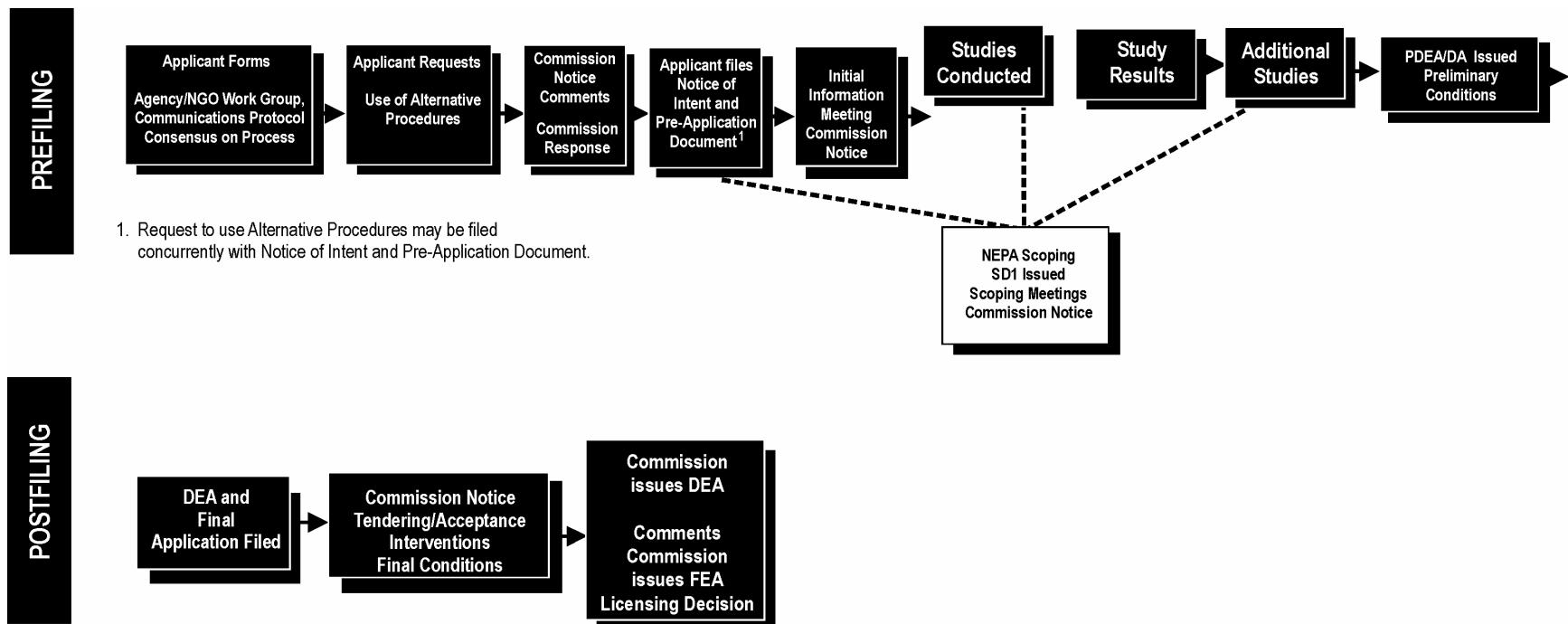
The Commission staff may participate in the pre-filing consultation of an alternative licensing process and assist in integrating the environmental review and pre-filing consultation.

**18 CFR 4.34(i)(8)**

## ALTERNATIVE LICENSING PROCESS

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Figure 3. Alternative Licensing Process



## 5.1 STEP 1: DECISION TO FILE AND FORMATION OF STAKEHOLDER WORKGROUP AND COMMUNICATIONS PROTOCOL

The decision to file and the initial considerations are the same as described in chapter 2. An applicant may also want to consider recommendations contained in *Guidelines to Consider for Participating in the Alternative Licensing Process* prepared by the ITF, which is available on the Commission's website.

An applicant for a new or subsequent license must file its NOI to do so, and if applicable, its PAD (see chapter 2).

***Commission approval of the potential applicant's request to use the alternative procedures prior to the deadline date for filing of the notification of intent does not waive the potential applicant's obligation to file the NOI required by 18 CFR 5.5 and PAD required by 18 CFR 5.6.***

The initial action taken by the potential applicant is the formation of a stakeholder work group and the development of a communications protocol.

## 5.2 STEP 2: APPLICANT REQUESTS PERMISSION TO USE THE ALTERNATIVE PROCESS

### 5.2.1 REQUEST FOR AUTHORIZATION

The request for authorization to use the alternative process must:

**18 CFR 5.3**

- ! demonstrate that a reasonable effort has been made to contact all resource agencies, Indian tribes, citizen's groups, and others affected by the applicant's proposal;
- ! demonstrate that a consensus exists that the use of the alternative licensing process is appropriate under the circumstances;
- ! submit a written communications protocol, supported by interested entities, governing how the applicant and other participants in the pre-filing consultation of the alternative licensing process, including the Commission staff, will communicate with each other regarding the merits of the applicant's proposal and proposals and recommendations of interested entities; and
- ! serve a copy of the written request on all affected resource agencies and Indian tribes and on all entities contacted by the applicant that have expressed an interest in the alternative licensing process.

As appropriate under the circumstances of the case, the alternative licensing process would include provisions for:

**18 CFR 4.34(i)(4)**

- ! distribution of an initial information package (IIP) or PAD and conduct of an initial information meeting open to the public;
- ! the cooperative scoping of environmental issues (including necessary scientific studies), the analysis of completed studies, and any further scoping; and
- ! the preparation of a preliminary draft EA or preliminary draft EIS prepared by a third-party contractor, and related application.

**5.2.2 PUBLIC NOTICE AND COMMENT**

If the request is filed prior to July 23, 2005, or if it is filed on or after July 23, 2005 and prior to the deadline for filing the NOI to seek a new or subsequent license, the Commission will give public notice in the Federal Register inviting comment on the applicant's request to use an alternative licensing process. The Commission will consider comments in determining whether to grant or deny the applicant's request to use the alternative licensing process, and the Commission's decision will not be subject to rehearing or appeal.

If the request is filed on or after July 23, 2005, and is at the same time as the filing of the NOI, the Commission will follow the notification procedures defined in **18 CFR 5.3**, which requires the applicant to provide a copy of the request to all participants interested in the proceeding and to notify the participants that their comments on the request to us the alternative procedures must be filed with the Commission within 30 days of the filing of the request. The applicant also must publish notice of the NOI, PAD and the request to use the alternative procedures no later than the filing date of the NOI in a daily or weekly newspaper of general circulation in each county in which the project is located.

**18 CFR 4.34(i)(5); 18 CFR 5.3**

If the Commission accepts the use of an alternative licensing process, then the following general provisions apply:

**18 CFR 4.34(i)(6)**

- ! To the extent feasible under the circumstances of the case, the Commission gives notice in the Federal Register and the applicant gives notice, in a local newspaper of general circulation in the county or counties in which the project is located, of the initial information meeting and the scoping of environmental issues. The applicant also sends notice of these stages to a mailing list approved by the Commission.
- ! Every 6 months, the applicant files with the Commission a report summarizing the progress made in the alternative licensing process and referencing the applicant's public

file, where additional information on that process can be obtained. Summaries or minutes of meetings held during the alternative licensing process pre-filing consultation may be filed in lieu of a report. The applicant also files with the Commission an original and eight copies of its PAD, each scoping document, and the preliminary draft EA or preliminary draft EIS prepared by a third-party contractor.

- ! At a suitable location, the applicant maintains a public file of all relevant documents, including scientific studies, correspondence, and minutes or summaries of meetings, compiled during the alternative licensing process. The Commission maintains a public file of the applicant's PAD, scoping documents, periodic reports on the pre-filing consultation process, and the preliminary draft EA or EIS.
- ! The applicant may substitute a preliminary draft EA, or EIS prepared by a third-party contractor, and additional material specified by the Commission in lieu of Exhibit E to its application. The applicant files with the Commission the results of any studies conducted or other documentation as the Commission directs, either on its own motion or in response to a motion by a party to the licensing proceeding.
- ! Pursuant to the procedures approved, participants set reasonable deadlines requiring all resource agencies, Indian tribes, citizen's groups, and interested parties to submit to the applicant requests for scientific studies during

the pre-filing consultation of the alternative licensing process and may make additional requests to the Commission after filing of the application only for good cause.

- ! During the pre-filing consultation of the alternative licensing process, the Commission may require the filing of preliminary fish and wildlife recommendations, prescriptions, mandatory conditions, and comments, to be submitted in final form after the filing of the application; no notice that the application is ready for environmental analysis need be given by the Commission after the filing of an application under an approved alternative licensing process.
- ! Any participant in the alternative licensing process may file a request with the Commission, certifying that the request has been served on all participants, to resolve a dispute concerning the alternative process (including a dispute over required studies), but only after reasonable efforts have been made to resolve the dispute with other participants in the process and documentation of these efforts is provided.
- ! If any of the stakeholders participating in the pre-filing consultation of the alternative licensing process can show that it has cooperated in the process but a consensus supporting the use of the process no longer exists and that continued use of the alternative process will not be

productive, the participant may petition the Commission, with copies to the service list, and recommend specific procedures for an order directing the use by the applicant of appropriate procedures to complete its application.

### 5.3 STEP 3: PRE-FILING CONSULTATION PROCESS AND SCOPING OF ENVIRONMENTAL ISSUES

Under an alternative licensing process, the potential applicant would distribute the PAD, publish notice of an information meeting open to the public, and conduct scoping for the environmental review required under NEPA. To the extent feasible under the circumstances of the proceeding, the Commission also will give notice in the Federal Register and local newspaper of the initial information and scoping meeting. **18 CFR 4.34(i)(4) - 4.34(i)(6)**

The PAD is the first step under each of the three processes and is further detailed in section 3.3. The PAD could be the primary focus of the initial information meeting and, in this case, should solicit agency, Indian tribe, and other interested parties=comments on resource values and their relative importance in the region and in the project's immediate locale, resource goals and management objectives, and the project's plan for satisfying those goals and objectives.

During the scoping process, the applicant and stakeholders identify the need for scientific studies. Factors that would be considered in

determining the need for studies would be the same as in the integrated licensing process and the traditional licensing process as described in chapters 3 and 4, section 3.3 and 4.3, respectively.

### 5.4 STEP 4: STUDIES AND DRAFT APPLICATION PREPARATION

The applicant and stakeholders may invest considerable time and resources during pre-filing consultation working toward agreement on the key issues to be addressed during licensing or relicensing. The applicant and stakeholders also strive for agreement on the scope and level of effort necessary.

Once any necessary studies are completed, the applicant would proceed with the preparation of a preliminary draft EA, or EIS prepared by a third-party contractor, and its application. The specific requirements for information to be included in the license application are contained in; **18 CFR 4.41;18 CFR 4.51, 18 CFR 4.61; or 18 CFR 16.9**. Table 2 in chapter 2 provides the specific regulatory citation for each of the components of a license application.

Any participant in the pre-filing consultation process may file a request with the Commission to resolve a dispute concerning the alternative licensing process (including a dispute over required studies) but only after reasonable efforts have been made to resolve the dispute with other participants in the process. The

request must be served on all other participants and must document what efforts were made to resolve the dispute.

**18 CFR 4.34(i)(7)**

### **Terminating an Alternative Licensing Process**

If any participant in the alternative licensing process can show that it has cooperated in the process but a consensus supporting the use of the process no longer exists, and that the continued use of the alternative licensing process will not be productive, the participant may petition the Commission for an order directing the use by the potential applicant of appropriate procedures to complete its application. The request must be served on all other participants and must recommend specific procedures that are appropriate under the circumstances.

### **5.5 STEP 5: NEPA DOCUMENT AND APPLICATION FILED AND SENT TO AGENCIES**

Filing the complete application, including the preliminary draft EA, or EIS prepared by a third-party contractor, completes the pre-filing consultation of the alternative licensing process. The original application and eight copies are filed with the Secretary, FERC, 888 First Street, NE, Washington, DC 20426. The applicant must provide, concurrently, copies of the filed application and the NEPA documents to all resource agencies, Indian tribes, and other entities involved in the collaborative process.

Application processing milestones are established by the Commission's procedural notice. As discussed in chapter 2, no notice that the application is ready for environmental analysis need be given by the Commission after the filing of an application pursuant to an alternative licensing process.

### **5.6 STEP 6: APPLICATION PROCESSING**

#### **5.6.1 TENDERING AND ACCEPTANCE**

The filed application is reviewed for adequacy by a Commission team of engineering and environmental specialists.

The application should contain the following

- ! minimum content requirements under **18 CFR 4.38;18 CFR 16.8 (18 CFR 4.41, 4.51, or 4.61, and 16.10);**
- ! complete protection, mitigation, and enhancement proposals;
- ! evidence of completion of pre-filing consultation;
- ! Coastal Zone Management Act (CZMA) compliance; and
- ! documentation satisfying 401 Certification requirements.

The application also may include a draft preliminary EA, or preliminary draft EIS prepared by a third-party contractor which incorporates the preliminary comments, recommendations, terms and conditions, and prescriptions filed by fish and wildlife resource agencies in response to the Commission notice, if such notice was issued.

The Commission then completes its adequacy review and, if the application is deemed acceptable, issues the applicant a letter of acceptance. Two courses of action are open to the Commission if the application is deemed inadequate:

- (1) The Commission can reject the application as patently deficient, with the understanding that the application cannot be refiled after the 24-month deadline for filing.
  - A. This occurs if the Commission determines that the application patently fails to comply with basic regulatory requirements of content (**18 CFR 4.41, 4.51, or 4.61**) and pre-filing consultation (**18 CFR 4.38(f);18 CFR 16.8(f)**).

*If the Commission rejects or dismisses an application because it is patently deficient or because the applicant fails to correct deficiencies or respond to an additional information request in a timely manner, the applicant cannot refile its application if the 24-month filing deadline has passed.*

- B. This decision can be appealed, but regardless of outcome, the licensee is obligated to continue operating the project until the Commission disposes of the proceeding.
- (2) If the application is inadequate but not patently deficient, the Commission will issue a deficiency letter.
- ! The Commission will notify the applicant of any deficiencies, and the applicant will be afforded an appropriate period of time in which to correct deficiencies.

Although the content of the application may comply with the regulations, Commission staff may requested additional information or documents it considers relevant for an informed decision on the application. The information requested must take the form, and must be submitted within the time the Commission prescribes. The applicant may be required to file the information on other interested agencies, tribes, and the public. If an applicant fails to provide the additional information, the Commission may dismiss the application, hold it in abeyance, or take other appropriate action.

**18 CFR 4.32(g)**

*Because of the collaborative efforts prefilng, additional information should not be necessary to develop protection, mitigation, and enhancement measures. One of the goals of the alternative process is to facilitate agreement on resource studies to expedite Commission review of license applications.*

If the application is accepted, the Commission provides public notice in the Federal Register, local newspapers, and directly to resources agencies and Indian tribes. It identifies dates for comment, intervention, and protests.

In its notice, the Commission invites protests and interventions and requests the final fish and wildlife recommendations, prescriptions, mandatory conditions, and comments from the resource agencies and Indian tribes.

The Commission will review the preliminary draft EA or EIS to ensure that it is consistent with the Commission requirements as discussed in chapter 3, section 3.3. The Commission need not issue a notice that the application is ready for environmental analysis.

## 5.6.2 EA OR EIS PREPARATION

The Commission now begins preparing its environmental and engineering analysis of the applicant's proposal and alternatives to

that proposal. An EA will typically be the NEPA document prepared for a license application. Depending on the scope of issues, or resources affected, the Commission may issue a single EA or a draft and final EA, and in specific circumstances and EIS. (see Chapter 2 for additional details).

The Commission makes the environmental documents and comments received available to the public at the Commission's Public Reference Room in Washington, DC; at the Commission's Regional Office nearest the project; and on the Commission website. The applicant also makes all relevant documents, including scientific studies, correspondence, and minutes or summaries of meetings, compiled during the pre-filing consultation process available at a suitable location.

## 5.7 STEP 7: COMPLETION OF THE SECTION 10(J) PROCESS

Under Section 10(j) of the FPA, the Commission receives recommendations from the National Marine Fisheries Service, the U.S. Fish and Wildlife Service, and state fish and wildlife agencies on measures for the protection, mitigation of damages to, and enhancement of fish and wildlife resources affected by the project. The Commission will include these measures unless it finds them inconsistent with the FPA or other applicable law. Under an alternative licensing process where the application contains a consensus for the proposed protection, mitigation, and enhancement measures, the Commission likely could avoid 10(j)

disputes. See chapter 2 for guidelines on the Section 10(j) process, which are the same for the integrated, traditional, and alternative licensing processes.

## **5.8 STEP 8: LICENSE ISSUANCE AND MONITORING**

The licensing process concludes with the issuance of a licensing order by either the Commission or its delegate. License issuance and monitoring is the same for all processes and is discussed in detail in chapter 2.

## 6.0 EXEMPTIONS FROM LICENSING

Exemptions from licensing are exactly that: exemptions from the licensing provisions of Part I of the FPA, and subject only to the conditions attached to the exemption. This means that the exemption is not subject to the comprehensive development standard of FPA Section 10(a)(1); mandatory conditions under FPA sections 4(e) and 18; eminent domain authority of FPA section 21; and so forth.

**16 USC 823A; 16 USC 2705, 2708**

### 6.1 TYPES OF EXEMPTIONS AND WHO CAN APPLY

Two types of small hydroelectric projects are eligible for exemptions from licensing:

- ! A small conduit hydroelectric facility up to 15 MW (up to 40 MW for certain projects) may be eligible for a Conduit Exemption (see **18 CFR 4.31(b)(2)**). The applicant must have all the real property interests necessary to develop and operate the project, or an option to obtain the interests. The facility cannot occupy federal lands. The conduit is not a project work. Applications for exemptions of small hydroelectric conduits are categorically exempt from the requirement to prepare an EA or EIS. See Hydroelectric Project Handbook for Filings Other Than Licenses and 5-

MW Exemptions for information on how to obtain a conduit exemption.

- A small hydroelectric project of 5 MW or less may be eligible for a 5 MW exemption. The applicant must propose to install or add capacity to a project located at a non-federal, pre-1977 dam, or at a natural water feature. If *only federal lands are involved*, any applicant is eligible. If *some federal lands are involved*, any applicant who has all the real property interests in the nonfederal lands necessary to develop and operate the project or an option to obtain the interests is eligible.

**18 CFR 4.31(c)(2)**

There are several limitations on submission and acceptance of exemption applications:

- If there is an unexpired preliminary permit in effect for the project, an initial exemption application will be accepted only from the permit holder. **q18 CFR 4.33(d)(1)(i)**
- If there is an unexpired license in effect for the project, an exemption application will be accepted only from the licensee. **18 CFR 4.33(d)(1)(ii)**
- If a license application has been accepted which was submitted in a timely manner by the holder of a preliminary permit, an exemption application will only be accepted from the former permittee. **18 CFR 4.33(d)(2)**

- If a license application is filed by a qualified exemption applicant, and that license application is the first (or only) accepted application, then the applicant may request its license application be treated as an application for exemption.  
**18 CFR 4.33(d)(3)**

## **6.2 OBTAINING AN EXEMPTION**

The procedures for applying for an exemption, including pre-filing consultation, are the same as those described for a license (see chapter 2, section 2.3), with the following specific exceptions:

- ! An applicant has less time (up to 45 days instead of 90) to correct any deficiencies in the application.  
**18 CFR 4.32(e)(1)**
- ! Exemption orders for 5 MW or less exemptions are typically supported by an EA and seldom require an EIS.
- ! Procedures for post-filing consultation among the Commission, fish and wildlife agencies, and Indian tribes are distinct for exemption applications. All timely fish and wildlife recommendations under 30(c) of FPA are mandatory.  
**18 CFR 4.94; 18 CFR 4.105; 18 CFR 4.34(g)**

The applicant is required to submit a fee accompanying the application to reimburse fish and wildlife agencies for costs incurred

in connection with their review of the application pursuant to section 30(e) of the FPA.  
**18 CFR 4.302**

The procedures for filing competing exemption applications are the same as those for competing licenses (see chapter 7).

## **6.3 5 MW OR LESS EXEMPTIONS**

This section describes aspects of the regulations that pertain specifically to exemptions for small hydroelectric projects of 5 MW or less.  
**18 CFR 4.101**

### **6.3.1 APPLICATION CONTENT**

An application for exemption for a small hydroelectric project of 5 MW or less must include the following:

- ! Introductory statement.
- ! Exhibit A describes the small hydroelectric project and its proposed mode of operation.
- ! Exhibit B provides a general location map that must show the location of the physical structures and their relationship to the water body and identifiable landmarks, land ownership information, and a proposed project boundary.

- ! Exhibit E, or a draft preliminary EA if using an alternative process, is the environmental report and must reflect pre-filing consultation requirements. Commensurate with the scope and degree of environmental impact, it must include a description of the project's environmental setting, the expected environmental impacts, and proposed measures to protect the environment.
- ! Exhibit G is a set of drawings showing the project structures and equipment.
- ! Identification of all Indian tribes potentially affected.
- ! Appendix containing evidence that the applicant has the necessary real property interests in any nonfederal lands.  
**18 CFR 4.107**
- ! Fish and wildlife agency reimbursement fees must accompany filed applications.  
**18 CFR 4.302**

### 6.3.2 DEVELOPMENT OF TERMS AND CONDITIONS

The procedural steps for a 5 MW or less exemption application are essentially the same as those that govern applications for license, including the three-stage consultation process or alternative licensing process. See chapters 4 and 5 for descriptions of the procedures, from initial actions through the public notice declaring the application ready for environmental analysis. After completion

of the EA, the procedural steps for an exemption application differ from those for a license application.

*The Commission must include those terms and conditions that the fish and wildlife agencies determine, in a timely manner, are appropriate to prevent loss of, or damage to, fish and wildlife resources. 18 CFR 4.34(f)(2)*

Deadlines and procedures for filing comments and terms and conditions are the same as those that govern license applications (see chapter 2).

The Commission then prepares an EA and determines whether an exemption is to be granted. In granting an exemption from licensing, the Commission will impose certain standard terms and conditions (see **18 CFR 4.106**) and may set additional non-standard terms and conditions.  
**18 CFR 4.105(b)(2)**

If the exemption application is dismissed, the process is terminated. There is no opportunity to convert the exemption application to an application for license.

## 7.0 COMPETING APPLICATIONS

An original license application can be filed in competition with an original application for license, but the competing application must be filed by a specified deadline. The deadline depends on whether or not the competing applicant files an NOI.

**18 CFR 4.36(b)**

An NOI must include:

- ! the name, business address, and telephone number of the competing applicant; and
- ! an unequivocal statement of intent to submit an application.

Any NOI must be filed no later than the prescribed intervention deadline for the initial application.

The competing license application, if it is not filed in conjunction with a previous NOI, must be submitted no later than the prescribed intervention deadline. If it is filed in conjunction with a previous NOI, then the competing application for license must be submitted no later than 120 days after the set intervention deadline.

Effective July 23, 2005, all applicants will be required to file a NOI and PAD, and be required to follow the integrated licensing

process to prepare its application, unless the Commission approves the use of the traditional or alternative licensing process.

**18 CFR 5.5(d) and 5.6(d)(1)**

The competing application must:

- ! conform to all the requirements that apply to an initial license application; and
- ! include proof that a copy of the competing application was served on the persons designated in the Commission's public notice of the initial application.

The Commission notifies each applicant to ensure that each is aware of the identity of the others.

Within 60 days of the Commission notification, each license applicant must file a thorough statement describing how its project plans are as well or better adapted than the other plans to develop the water resource in the public interest.

Upon receipt of the statements, the Commission evaluates the plans and selects among the competing applications.

The regulations provide rules of preference that determine how the Commission selects from among competing applications.

## *COMPETING APPLICATIONS*

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The factors for determining preference of selection between competing original applications include:

**18 CFR 4.37**

- ! whether the applicants have demonstrated the ability to carry out their plans;
- ! filing date (order of time in filing the applications);
- ! whether applicants are private entities or municipalities or states (municipalities and states have preference); and
- ! for development applications (exemptions and licenses), the best adapted plan.

A new or subsequent license can be filed in competition with a new or subsequent license. An applicant must notify the Commission of its intent to file a competing application at least five years, but not more than five and one-half years, before the existing license for which it is competing expires. The applicant must include with its NOI and PAD and must request to use the traditional or alternative licensing process. The competing new or subsequent license application must be filed at least 24 months before the existing license expires.

**18 CFR 5.5(d) and 5.6(d)(1); 18 CFR 16.9(b); 18 CFR 16.20(c)**

The factors for determining preference of selection between competing new or subsequent license applications include:

- the best adapted plan;
- existing licensee's record of compliance with the terms and conditions of the license; and
- actions taken by the existing licensee related to the project which affects the public.

APPENDIX A  
FEDERAL POWER ACT, PART 1



## FEDERAL POWER ACT: PART 1

Be it enacted by the Senate and House of Representatives of the United States of America assembled, That a commission is created and established to be known as the Federal Power Commission (hereinafter referred to as the "Commission") which shall be composed of five commissioners who shall be appointed by the President, by and with the advice and consent of the Senate, one of whom shall be designated by the President as chairman and shall be the principal executive officer of the commission. Each chairman, when so designated, shall act as such until the expiration of his term of office.

The commissioners first appointed under this section, as amended, shall continue in office for terms of one, two, three, four, and five years, respectively, from June 23, 1930, the term of each to be designated by the President at the time of nomination. Their successors shall be appointed each for a term of five years from the date of the expiration of the term for which his predecessor was appointed and until his successor is appointed and has qualified, except that he shall not so continue to serve beyond the expiration of the next session of Congress subsequent to the expiration of said fixed term of office, and except that any person appointed to fill a vacancy occurring prior to the expiration of the term for which his predecessor was appointed shall be appointed only for the unexpired term. Not more than three of the commissioners

shall be appointed from the same political party. No person in the employ of or holding any official relation to any licensee or to any person, firm, association, or corporation engaged in the generation, transmission, distribution, or sale of power, or owning stock or bonds thereof, or who is in any manner pecuniarily interested therein, shall enter upon the duties of or hold the office of commissioners. Said commissioners shall not engage in any other business, vocation, or employment. No vacancy in the Commission shall impair the right of the remaining commissioners to exercise all the powers of the Commission. Three members of the Commission shall constitute a quorum for the transaction of business, and the Commission shall have an official seal of which judicial notice shall be taken. The Commission shall annually elect a vice chairman to act in case of the absence or disability of the chairman or in case of a vacancy in the office of chairman.

Each commissioner shall receive necessary traveling and subsistence expenses, or per diem allowance in lieu thereof, within the limitation prescribed by law, while away from the seat of government upon official business.

The principal office of the Commission shall be in the District of Columbia, where its general sessions shall be held; but whenever the convenience of the public or of the parties may be promoted or delay or expense prevented thereby, the

Commission may hold special sessions in any part of the United States.

**Section 2.** The Commission shall have authority to appoint, prescribe the duties, and fix the salaries of, a secretary, a chief engineer, a general counsel, a solicitor, and a chief accountant; and may, subject to the civil service laws, appoint such other officers and employees as are necessary in the execution of its functions and fix their salaries in accordance with the Classification Act. The Commission may request the President to detail an officer or officers from the Corps of Engineers, or other branches of the United States Army, to serve the Commission as engineer officer or officers, or in any other capacity, in field work outside the seat of government, their duties to be prescribed by the Commission; and such detail is authorized. The President may also, at the request of the Commission, detail, assign, or transfer to the Commission, engineers in or under the Departments of the Interior or Agriculture for field work outside the seat of government under the direction of the Commission.

The Commission may make such expenditures (including expenditures for rent and personal services at the seat of government and elsewhere, for law books, periodicals, and books of reference, and for printing and binding) as are necessary to execute its functions. Expenditures by the Commission shall be allowed and paid upon the presentation of itemized vouchers therefore, approved by the chairman of the Commission or by

such other member or officer as may be authorized by the Commission for that purpose subject to applicable regulations under the Federal Property and Administrative Services Act of 1949, as amended.

**Section 3.** The words defined in this section shall have the following meanings for purposes of this Act, to wit:

(1) "public lands" means such lands and interest in lands owned by the United States as are subject to private appropriation and disposal under public land laws. It shall not include "reservations", as hereinafter defined;

(2) "reservations" means national forests, tribal lands embraced within Indian reservations, military reservations, and other lands and interests in lands owned by the United States, and withdrawn, reserved, or withheld from private appropriation and disposal under the public land laws; also lands and interests in lands acquired and held for any public purposes; but shall not include national monuments or national parks;

(3) "corporation" means any corporation, joint-stock company, partnership, association, business trust, organized group of persons, whether incorporated or not, or a receiver or receivers, trustee or trustees of any of the foregoing. It shall not include "municipalities" as hereinafter defined;

(4) "person" means an individual or a corporation;

(5) "licensee" means any person, State, or municipality licensed under the provisions of section 4 of this Act, and any assignee or successor in interest thereof;

(6) "State" means a State admitted to the Union, the District of Columbia, and any organized Territory of the United States;

(7) "municipality" means a city, county, irrigation district, drainage district, or other political subdivision or agency of a State competent under the laws thereof to carry on the business of developing, transmitting, utilizing, or distributing power;

(8) "navigable waters" means those parts of streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States, and which either in their natural or improved condition notwithstanding interruptions between the navigable parts of such streams or waters by falls, shallows, or rapids compelling land carriage, are used or suitable for use for the transportation of persons or property in interstate or foreign commerce, including therein all such interrupting falls, shallows, or rapids, together with such other parts of streams as shall have been authorized by Congress for improvement by the United States or shall have been recommended to Congress for such improvement after investigation under its authority;

(9) "municipal purposes" means and includes all purposes within municipal powers as defined by the constitution or laws of the State or by the charter of the municipality;

(10) "Government dam" means a dam or other work constructed or owned by the United States for Government purposes with or without contribution from others;

(11) "project" means complete unit of improvement or development, consisting of a power house, all water conduits, all dams and appurtenant works and structures (including navigation structures) which are a part of said unit, and all storage, diverting, or forebay reservoirs directly connected therewith, the primary line or lines transmitting power there from to the point of junction with the distribution system or with the interconnected primary transmission system, all miscellaneous structures used and useful in connection with said unit or any part thereof, and all water-rights, rights-of-way, ditches, dams, reservoirs, lands, or interest in lands the use and occupancy of which are necessary or appropriate in the maintenance and operation of such unit;

(12) "project works" means the physical structures of a project;

(13) "net investment" in a project means the actual legitimate original cost thereof as defined and interpreted in the "classification of investment in road and equipment of steam roads, issue of 1914, Interstate Commerce Commission", plus

## APPENDIX A

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similar costs of additions thereto and betterments thereof, minus the sum of the following items properly allocated thereto, if and to the extent that such items have been accumulated during the period of the license from earnings in excess of a fair return on such investment: (a) Unappropriated surplus, (b) aggregate credit balances of current depreciation accounts, and (c) aggregate appropriations of surplus or income held in amortization, sinking fund, or similar reserves, or expended for additions or betterments or used for the purposes for which such reserves were created. The term "cost" shall include, insofar as applicable, the elements thereof prescribed in said classification, but shall not include expenditures from funds obtained through donations by States, municipalities, individuals, or others, and said classification of investment of the Interstate Commerce Commission shall insofar as applicable be published and promulgated as a part of the rules and regulations of the Commission;

(14) "Commission" and "Commissioner" means the Federal Power Commission, and a member thereof, respectively;

(15) "State commission" means the regulatory body of the State or municipality having jurisdiction to regulate rates and charges for the sale of electric energy to consumers within the State or municipality;

(16) "security" means any note, stock, treasury stock, bond, debenture, or other evidence of interest in or indebtedness of a corporation subject to the provisions of this Act;

(17)(A) "small power production facility" means a facility which is an eligible solar, wind, waste, or geothermal facility, or a facility which

(i) produces electric energy solely by the use, as a primary energy source, of biomass, waste, renewable resources, geothermal resources, or any combination hereof; and

(ii) has a power production capacity which, together with any other facilities located at the same site (as determined by the Commission), is not greater than 80 megawatts;

(B) "primary energy source" means the fuel or fuels used for the generation of electric energy, except that such term does not include, as determined under rules prescribed by the Commission, in consultation with the Secretary of Energy -

(i) the minimum amounts of fuel required for ignition, startup, testing, flame stabilization, and control uses, and

(ii) the minimum amounts of fuel required to alleviate or prevent -

(I) unanticipated equipment outages, and

(II) emergencies, directly affecting the public health, safety, or welfare, which would result from electric power outages;

(C) "qualifying small power production facility" means a small power production facility-

(i) which the Commission determines, by rule, meets such requirements (including requirements respecting fuel use, fuel

efficiency, and reliability) as the Commission may, by rule, prescribe; and

(ii) which is owned by a person not primarily engaged in the generation or sale of electric power (other than electric power solely from cogeneration facilities or small power production facilities);

(D) "qualifying small power producer" means the owner or operator of a qualifying small power production facility;

(E) "eligible solar, wind, waste or geothermal facility" means a facility which produces electric energy solely by the use, as a primary energy source, of solar energy, wind energy, waste resources or geothermal resources; but only if -

(i) either of the following is submitted to the Commission not later than December 31, 1994:

(I) an application for certification of the facility as a qualifying small power production facility; or

(II) notice that the facility meets the requirements for qualification; and

(ii) construction of such facility commences not later than December 31, 1999, or, if not, reasonable diligence is exercised toward the completion of such facility taking into account all factors relevant to construction of the facility.

(18)(A) "cogeneration facility" means a facility which produces -

(i) electric energy, and

(ii) steam or forms of useful energy (such as heat) which are used for industrial, commercial, heating, or cooling purposes;

(B) "qualifying cogeneration facility" means a cogeneration facility which -

(i) the Commission determines, by rule, meets such requirements (including requirements respecting minimum size, fuel use, and fuel efficiency) as the Commission may, by rule, prescribe; and

(ii) is owned by a person not primarily engaged in the generation or sale of electric power (other than electric power solely from cogeneration facilities or small power production facilities);

(C) "qualifying cogenerator" means the owner or operator of a qualifying cogeneration facility;

(19) "Federal power marketing agency" means any agency or instrumentality of the United States (other than the Tennessee Valley Authority) which sells electric energy;

(20) "evidentiary hearings" and "evidentiary proceeding" mean a proceeding conducted as provided in sections 554, 556, and 557 of title 5, United States Code;

(21) "State regulatory authority" has the same meaning as the term "State commission", except that in the case of an electric utility with respect to which the Tennessee Valley Authority has ratemaking authority (as defined in section 3 of the Public Utility Regulatory policies Act of 1978), such term means the Tennessee Valley Authority;

(22) "electric utility" means any person or State agency (including any municipality) which sells electric energy; such term includes the Tennessee Valley Authority, but does not include any Federal power marketing agency.

(23) Transmitting utility. - The term "transmitting utility" means any electric utility, qualifying cogeneration facility, qualifying small power production facility, or Federal power marketing agency which owns or operates electric power transmission facilities which are used for the sale of electric energy at wholesale.

(24) Wholesale transmission services. - The term "wholesale transmission services" means the transmission of electric energy sold, or to be sold, at wholesale in interstate commerce.

(25) Exempt wholesale generator. - The term "exempt wholesale generator" shall have the meaning provided by section 32 of the Public Utility Holding Company Act of 1935.

**Section 4.** The Commission is hereby authorized and empowered

(a) To make investigations and to collect and record data concerning the utilization of the water resources of any region to be developed, the water-power industry and its relation to other industries and to interstate or foreign commerce, and concerning the location, capacity, development costs, and relation to markets of power sites, and whether the power from Government dams can be advantageously used by the United States for its public

purposes, and what is a fair value of such power, to the extent the Commission may deem necessary or useful for the purposes of this Act.

(b) To determine the actual legitimate original cost of and the net investment in a licensed project, and to aid the Commission in such determinations, each licensee shall, upon oath, within a reasonable period of time to be fixed by the Commission, after the construction of the original project or any addition thereto or betterment thereof, file with the Commission in such detail as the Commission may require, a statement in duplicate showing the actual legitimate original cost of construction of such project addition, or betterment, and of the price paid for water rights, rights-of-way, lands, or interest in lands. The licensee shall grant to the Commission or to its duly authorized agent or agents, at all reasonable times, free access to such project, addition, or betterment, and to all maps, profiles, contracts, reports of engineers, accounts, books, records, and all other papers and documents relating thereto. The statement of actual legitimate original cost of said project, and revisions thereof as determined by the Commission, shall be filed with the Secretary of the Treasury.

(c) To cooperate with the executive departments and other agencies of State or National Governments in such investigations; and for such purpose the several departments and agencies of the National Government are authorized and directed upon the request of the Commission, to furnish such records, papers, and information in their possession as may be requested by the

Commission, and temporarily to detail to the Commission such officers or experts as may be necessary in such investigations.

(d) To make public from time to time the information secured hereunder, and to provide for the publication of its reports and investigations in such form and manner as may be best adapted for public information and use. The Commission, on or before the 3d day of January of each year, shall submit to Congress for the fiscal year preceding a classified report showing the permits and licenses issued under this Part, and in each case the parties thereto, the terms prescribed, and the moneys received if any, or account thereof.

(e) To issue licenses to citizens of the United States, or to any association of such citizens, or to any corporation organized under the laws of the United States or any State thereof, or to any State or municipality for the purpose of constructing, operating, and maintaining dams, water conduits, reservoirs, power houses, transmission lines, or other project works necessary or convenient for the development and improvement of navigation and for the development, transmission, and utilization of power across, along, from, or in any of the streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States, or upon any part of the public lands and reservations of the United States (including the Territories), or for the purpose of utilizing the surplus water or water power from any Government dam, except as herein provided: Provided, That licenses shall be issued within any reservation only after a

finding by the Commission that the license will not interfere or be inconsistent with the purpose for which such reservation was created or acquired, and shall be subject to and contain such conditions as the Secretary of the department under whose supervision such reservation falls shall deem necessary for the adequate protection and utilization of such reservations: Provided further, That no license affecting the navigable capacity of any navigable waters of the United States shall be issued until the plans of the dam or other structures affecting the navigation have been approved by the Chief of Engineers and the Secretary of the Army. Whenever the contemplated improvement is, in the judgment of the Commission, desirable and justified in the public interest for the purpose of improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, a finding to that effect shall be made by the Commission and shall become a part of the records of the Commission: Provided further, That in case the Commission shall find that any Government dam may be advantageously used by the United States for public purposes in addition to navigation, no license therefore shall be issued until two years after it shall have reported to Congress the facts and conditions relating thereto, except that this provision shall not apply to any Government dam constructed prior to June 10, 1920: And provided further, That upon the filing of any application for a license which has not been preceded by a preliminary permit under subsection (f) of this section, notice shall be given and published as required by the proviso of said subsection. In deciding whether to issue any

license under this Part for any project, the Commission, in addition to the power and development purposes for which licenses are issued, shall give equal consideration to the purposes of energy conservation, the protection, mitigation of damage to, and enhancement of, fish and wildlife (including related spawning grounds and habitat), the protection of recreational opportunities, and the preservation of other aspects of environmental quality.

(f) To issue preliminary permits for the purpose of enabling applicants for a license hereunder to secure the data and to perform the acts required by section 9 hereof: Provided, however, That upon the filing of any application for a preliminary permit by any person, association, or corporation the Commission, before granting such application, shall at once give notice of such application in writing to any State or municipality likely to be interested in or affected by such application; and shall also publish notice of such application once each week for four weeks in a daily or weekly newspaper published in the county or counties in which the project or any part hereof or the lands affected thereby are situated.

(g) Upon its own motion to order an investigation of any occupancy of, or evidenced intention to occupy, for the purpose of developing electric power, public lands, reservations, or streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States by any person, corporation, State, or municipality and to issue such order as it may find appropriate, expedient, and in the public interest to

conserve and utilize the navigation and water-power resources of the region.

**Section 5.** Each preliminary permit issued under this Part shall be for the sole purpose of maintaining priority of application for a license under the terms of this Part for such period or periods, not exceeding a total of three years, as in the discretion of the Commission may be necessary for making examinations and surveys, for preparing maps, plans, specifications, and estimates, and for making financial arrangements. Each such permit shall set forth the conditions under which priority shall be maintained. Such permits shall not be transferable, and may be canceled by order of the Commission upon failure of permittees to comply with the conditions thereof or for other good cause shown after notice and opportunity for hearing.

**Section 6.** Licenses under this Part shall be issued for a period not exceeding fifty years. Each such license shall be conditioned upon acceptance by the licensee of all of the terms and conditions of this Act and such further conditions, if any, as the Commission shall prescribe in conformity with this Act, which said terms and conditions and the acceptance thereof shall be expressed in said license. Licenses may be revoked only for the reasons and in the manner prescribed under the provisions of this Act, and may be altered or surrendered only upon mutual agreement between the licensee and the Commission after thirty days' public notice.

**Section 7.** (a) In issuing preliminary permits hereunder or original licenses where no preliminary permit has been issued, the Commission shall give preference to applications therefore by States and municipalities, provided the plans for the same are deemed by the Commission equally well adapted, or shall within a reasonable time to be fixed by the Commission be made equally well adapted, to conserve and utilize in the public interest the water resources of the region; and as between other applicants, the Commission may give preference to the applicant the plans of which it finds and determines are best adapted to develop, conserve, and utilize in the public interest the water resources of the region, if it be satisfied as to the ability of the applicant to carry out such plans.

(b) Whenever, in the judgment of the Commission, the development of any water resources for public purposes should be undertaken by the United States itself, the Commission shall not approve any application for any project affecting such development, but shall cause to be made such examinations, surveys, reports, plans, and estimates of the cost of the proposed development as it may find necessary, and shall submit its findings to Congress with such recommendations as it may find appropriate concerning such development.

(c) Whenever, after notice and opportunity for hearing, the Commission determines that the United States should exercise its right upon or after the expiration of any license to take over any project or projects for public purposes, the Commission shall not issue a new license to the original licensee or to a new

licensee but shall submit its recommendation to Congress together with such information as it may consider appropriate.

**Section 8.** No voluntary transfer of any license, or of the rights thereunder granted, shall be made without the written approval of the Commission; and any successor or assign of the rights of such licensee, whether by voluntary transfer, judicial sale, foreclosure sale, or otherwise, shall be subject to all the conditions of the license under which such rights are held by such licensee and also subject to all the provisions and conditions of this Act to the same extent as though such successor or assign were the original licensee hereunder: Provided, That a mortgage or trust deed or judicial sales made thereunder or under tax sales shall not be deemed voluntary transfers within the meaning of this section.

**Section 9.** (a) Each applicant for a license hereunder shall submit to the Commission -

(1) Such maps, plans, specifications, and estimates of cost as may be required for a full understanding of the proposed project. Such maps, plans, and specifications when approved by the Commission shall be made a part of the license; and thereafter no change shall be made in said maps, plans, or specifications until such changes shall have been approved and made a part of such license by the Commission.

(2) Satisfactory evidence that the applicant has complied with the requirements of the laws of the State or States within which the

proposed project is to be located with respect to bed and banks and to the appropriation, diversion, and use of water for power purposes and with respect to the right to engage in the business of developing, transmitting and distributing power, and in any other business necessary to effect the purposes of a license under this Act.

(b) Upon the filing of any application for a license (other than a license under section 15) the applicant shall make a good faith effort to notify each of the following by certified mail:

(1) Any person who is an owner of record of any interest in the property within the bounds of the project.

(2) Any Federal, State, municipal or other local governmental agency likely to be interested in or affected by such application.

(c) Such additional information as the Commission may require.

**Section 10.** All licenses issued under this Part shall be on the following conditions:

(a) (1) That the project adopted, including the maps, plans, and specifications, shall be such as in the judgment of the Commission will be best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water-power development, for the adequate protection, mitigation, and enhancement of fish and wildlife (including related spawning grounds and habitat), and for other beneficial public uses, including irrigation, flood control, water supply, and recreational and other purposes referred to in section 4(e); and if necessary in order to secure such plan the

Commission shall have authority to require the modification of any project and of the plans and specifications of the project works before approval.

(2) In order to ensure that the project adopted will be best adapted to the comprehensive plan described in paragraph (1), the Commission shall consider each of the following:

(A) The extent to which the project is consistent with a comprehensive plan (where one exists) for improving, developing, or conserving a waterway or waterways affected by the project that is prepared by -

(i) an agency established pursuant to Federal law that has the authority to prepare such a plan; or

(ii) the State in which the facility is or will be located.

(B) The recommendations of Federal and State agencies exercising administration over flood control, navigation, irrigation, recreation, cultural and other relevant resources of the State in which the project is located, and the recommendations (including fish and wildlife recommendations) of Indian tribes affected by the project.

(C) In the case of a State or municipal applicant, or an applicant which is primarily engaged in the generation or sale of electric power (other than electric power solely from cogeneration facilities or small power production facilities), the electricity consumption efficiency improvement program of the applicant, including its plans, performance and capabilities for encouraging or assisting its customers to conserve electricity cost-effectively, taking into account the published policies, restrictions, and

requirements of relevant State regulatory authorities applicable to such applicant.

(3) Upon receipt of an application for a license, the Commission shall solicit recommendations from the agencies and Indian tribes identified in subparagraphs (A) and (B) of paragraph (2) for proposed terms and conditions for the Commission's consideration for inclusion in the license.

(b) That except when emergency shall require for the protection of navigation, life, health, or property, no substantial alteration or addition not in conformity with the approved plans shall be made to any dam or other project works constructed hereunder of an installed capacity in excess of two thousand horsepower without the prior approval of the Commission; and any emergency alteration or addition so made shall thereafter be subject to such modification and change as the Commission may direct.

(c) That the licensee shall maintain the project works in a condition of repair adequate for the purposes of navigation and for the efficient operation of said works in the development and transmission of power, shall make all necessary renewals and replacements, shall establish and maintain adequate depreciation reserves for such purposes, shall so maintain, and operate said works as not to impair navigation, and shall conform to such rules and regulations as the Commission may from time to time prescribe for the protection of life, health, and property. Each licensee hereunder shall be liable for all damages occasioned to the property of others by the construction, maintenance, or operation of the project works or of the works appurtenant or

accessory thereto, constructed under the license and in no event shall the United States be liable therefore.

(d) That after the first twenty years of operation, out of surplus earned thereafter, if any, accumulated in excess of a specified reasonable rate of return upon the net investment of a licensee in any project or projects under license, the licensee shall establish and maintain amortization reserves, which reserves shall, in the discretion of the Commission, be held until the termination of the license or be applied from time to time in reduction of the net investment. Such specified rate of return and the proportion of such surplus earnings to be paid into and held in such reserves shall be set forth in the license. For any new license issued under section 15, the amortization reserves under this subsection shall be maintained on and after the effective date of such new license.

(e) (1) That the licensee shall pay to the United States reasonable annual charges in an amount to be fixed by the Commission for the purpose of reimbursing the United States for the costs of the administration of this Part, including any reasonable and necessary costs incurred by Federal and State fish and wildlife agencies and other natural and cultural resource agencies in connection with studies or other reviews carried out by such agencies for purposes of administering their responsibilities under this Part; for compensating it for the use, occupancy, and enjoyment of its lands or other property; and for the expropriation to the Government of excessive profits until the respective States shall make provision for preventing excessive profits or for the expropriation thereof to themselves, or until the period of

amortization as herein provided is reached, and in fixing such charges the Commission shall seek to avoid increasing the price to the consumers of power by such charges, and any such charges may be adjusted from time to time by the Commission as conditions may require: Provided,

That, subject to annual appropriations Acts, the portion of such annual charges imposed by the Commission under this subsection to cover the reasonable and necessary costs of such agencies shall be available to such agencies (in addition to other funds appropriated for such purposes) solely for carrying out such studies and reviews and shall remain available until expended: Provided, That when licenses are issued involving the use of Government dams or other structures owned by the United States or tribal lands embraced within Indian reservations the Commission shall, subject to the approval of the Secretary of the Interior in the case of such dams or structures in reclamation projects and, in the case of such tribal lands, subject to the approval of the Indian tribe having jurisdiction of such lands as provided in section 16 of the Act of June 18, 1934 (48 Stat. 984), fix a reasonable annual charge for the use thereof, and such charges may with like approval be readjusted by the Commission at the end of twenty years after the project is available for service and at periods of not less than ten years thereafter upon notice and opportunity for hearing:

Provided further, That licenses for the development, transmission, or distribution of power by States or municipalities shall be issued and enjoyed without charge to the extent such power is sold to the public without profit or is used by such State

or municipality for State or municipal purposes, except that as to projects constructed or to be constructed by States or municipalities primarily designed to provide or improve navigation, licenses therefore shall be issued without charge; and that licenses for the development, transmission, or distribution of power for domestic, mining, or other beneficial use in projects of not more than two thousand horsepower installed capacity may be issued without charge, except on tribal lands within Indian reservations; but in no case shall a license be issued free of charge for the development and utilization of power created by any Government dam and that the amount charged therefore in any license shall be such as determined by the Commission: Provided however, That no charge shall be assessed for the use of any Government dam or structure by any licensee if, before January 1, 1985, the Secretary of the Interior has entered into a contract with such licensee that meets each of the following requirements:

- (A) The contract covers one or more projects for which a license was issued by the Commission before January 1, 1985.
- (B) The contract contains provisions specifically providing each of the following:
  - (i) A powerplant may be built by the licensee utilizing irrigation facilities constructed by the United States.
  - (ii) The powerplant shall remain in the exclusive control, possession, and ownership of the licensee concerned.
  - (iii) All revenue from the powerplant and from the use, sale, or disposal of electric energy from the powerplant shall be, and remain, the property of such licensee.
- (C) The contract is an

amendatory, supplemental and replacement contract between the United States and: (i) the Quincy-Columbia Basin Irrigation District (Contract No. 14-06-100-6418); (ii) the East Columbia Basin Irrigation District (Contract No. 14-06-100-6419); or, (iii) the South Columbia Basin Irrigation District (Contract No. 14-06-100-6420).

This paragraph shall apply to any project covered by a contract referred to in this paragraph only during the term of such contract unless otherwise provided by subsequent Act of Congress. In the event an overpayment of any charge due under this section shall be made by a licensee, the Commission is authorized to allow a credit for such overpayment when charges are due for any subsequent period.

(2) In the case of licenses involving the use of Government dams or other structures owned by the United States, the charges fixed (or readjusted) by the Commission under paragraph (1) for the use of such dams or structures shall not exceed 1 mill per kilowatt-hour for the first 40 gigawatt-hours of energy a project produces in any year, 1 1/2 mills per kilowatt-hour for over 40 up to and including 80 gigawatt-hours in any year, and 2 mills per kilowatt-hour for any energy the project produces over 80 gigawatt-hours in any year. Except as provided in subsection (f) of this section, such charge shall be the only charge assessed by any agency of the United States for the use of such dams or structures.

(3) The provisions of paragraph (2) shall apply with respect to -

- (A) all licenses issued after the date of enactment of this paragraph; and
  - (B) all licenses issued before such date, which -
    - (i) did not fix a specific charge for the use of the Government dam or structure involved; and
    - (ii) did not specify that no charge would be fixed for the use of such dam or structure.
- (4) Every 5 years, the Commission shall review the appropriateness of the annual charge limitations provided for in this subsection and report to Congress concerning its recommendations thereon.
- (f) That whenever any licensee hereunder is directly benefited by the construction work of another licensee, a permittee, or of the United States of a storage reservoir or other headwater improvement, the Commission shall require as a condition of the license that the licensee so benefited shall reimburse the owner of such reservoir or other improvements for such part of the annual charges for interest, maintenance, and depreciation thereon as the Commission may deem equitable. The proportion of such charges to be paid by any licensee shall be determined by the Commission. The licensees or permittees affected shall pay to the United States the cost of making such determination as fixed by the Commission. Whenever such reservoir or other improvement is constructed by the United States the Commission shall assess similar charges against any licensee directly benefited thereby, and any amount so assessed shall be paid into the Treasury of the United States,

to be reserved and appropriated as a part of the special fund for headwater improvements as provided in section 17 hereof.

Whenever any power project not under license is benefited by the construction work of a licensee or permittee, the United States or any agency thereof, the Commission, after notice to the owner or owners of such unlicensed project, shall determine and fix a reasonable and equitable annual charge to be paid to the licensee or permittee on account of such benefits, or to the United States if it be the owner of such headwater improvement.

(g) Such other conditions not inconsistent with the provisions of this Act as the Commission may require.

(h) (1) Combinations, agreements, arrangements, or understandings, express or implied, to limit the output of electrical energy, to restrain trade, or to fix, maintain, or increase prices for electrical energy or service are hereby prohibited. (2) That conduct under the license that: (A) results in the contravention of the policies expressed in the antitrust laws; and (B) is not otherwise justified by the public interest considering regulatory policies expressed in other applicable law (including but not limited to those contained in Part II of this Act) shall be prevented or adequately minimized by means of conditions included in the license prior to its issuance. In the event it is impossible to prevent or adequately minimize the contravention, the Commission shall refuse to issue any license to the applicant for the project and, in the case of an existing project, shall take appropriate action to provide thereafter for the operation and maintenance of the affected project and for the issuing of a new license in accordance with section 15 of this Part.

(i) In issuing licenses for a minor part only of a complete project, or for a complete project of not more than two thousand horsepower installed capacity, the Commission may in its discretion waive such conditions, provisions, and requirements of this Part, except the license period of fifty years, as it may deem to be to the public interest to waive under the circumstances: Provided, That the provisions hereof shall not apply to annual charges for use of lands within Indian reservations.

(j)(1) That in order to adequately and equitably protect, mitigate damages to, and enhance, fish and wildlife (including related spawning grounds and habitat) affected by the development, operation, and management of the project, each license issued under this Part shall include conditions for such protection, mitigation, and enhancement. Subject to paragraph (2), such conditions shall be based on recommendations received pursuant to the Fish and Wildlife Coordination Act (16 U.S.C. 661 et seq.) from the National Marine Fisheries Service, the United States Fish and Wildlife Service, and State fish and wildlife agencies.

(2) Whenever the Commission believes that any recommendation referred to in paragraph (1) may be inconsistent with the purposes and requirements of this Part or other applicable law, the Commission and the agencies referred to in paragraph (1) shall attempt to resolve any such inconsistency, giving due weight to the recommendations, expertise, and statutory responsibilities of such agencies. If, after such attempt, the Commission does not adopt in whole or in part a recommendation of any such agency, the Commission shall publish each of the following findings (together with a statement of the basis for each of the findings):

- (A) A finding that adoption of such recommendation is inconsistent with the purposes and requirements of this Part or with other applicable provisions of law.
- (B) A finding that the conditions selected by the Commission comply with the requirements of paragraph (1). Subsection (i) of this section shall not apply to the conditions required under this subsection.

**Section 11.** That if the dam or other project works are to be constructed across, along, or in any of the navigable waters of the United States, the Commission may, insofar as it deems the same reasonably necessary to promote the present and future needs of navigation and consistent with a reasonable investment cost to the licensee, include in the license any one or more of the following provisions or requirements:

- (a) That such licensee shall, to the extent necessary to preserve and improve navigation facilities, construct, in whole or in part, without expense to the United States, in connection with such dam, a lock or locks, booms, sluices, or other structures for navigation purposes, in accordance with plans and specifications approved by the Chief of Engineers and the Secretary of the Army and made part of such license.
- (b) That in case such structures for navigation purposes are not made a part of the original construction at the expense of the licensee, then whenever the United States shall desire to complete such navigation facilities the licensee shall convey to the United States, free of cost, such of its land and its

rights-of-way and such right of passage through its dams or other structures, and permit such control of pools as may be required to complete such navigation facilities.

- (c) That such licensee shall furnish free of cost to the United States power for the operation of such navigation facilities, whether constructed by the licensee or by the United States.

**Section 12.** That whenever application is filed for a project hereunder involving navigable waters of the United States, and the Commission shall find upon investigation that the needs of navigation require the construction of a lock or locks or other navigation structures, and that such structures cannot, consistent with a reasonable investment cost to the applicant, be provided in the manner specified in section 11, subsection (a) hereof, the Commission may grant the application with the provision to be expressed in the license that the licensee will install the necessary navigation structures if the Government fails to make provision therefore within a time to be fixed in the license and cause a report upon such project to be prepared, with estimates of cost of the power development and of the navigation structures, and shall submit such report to Congress with such recommendations as it deems appropriate concerning the participation of the United States in the cost of construction of such navigation structures.

**Section 13.** That the licensee shall commence the construction of the project works within the time fixed in the license, which

shall not be more than two years from the date thereof, shall thereafter in good faith and with due diligence prosecute such construction, and shall within the time fixed in the license complete and put into operation such part of the ultimate development as the Commission shall deem necessary to supply the reasonable needs of the then available market, and shall from time to time thereafter construct such portion of the balance of such development as the Commission may direct, so as to supply adequately the reasonable market demands until such development shall have been completed. The periods for the commencement of construction may be extended once but not longer than two additional years and the period for the completion of construction carried on in good faith and with reasonable diligence may be extended by the Commission when not incompatible with the public interests. In case the licensee shall not commence actual construction of the project works, or of any specified part thereof, within the time prescribed in the license or as extended by the Commission, then, after due notice given, the license shall, as to such project works or part thereof, be terminated upon written order of the Commission. In case the construction of the project works, or of any specified part thereof, has been begun but not completed within the time prescribed in the license, or as extended by the Commission, then the Attorney General, upon the request of the Commission, shall institute proceedings in equity in the district court of the United States for the district in which any part of the project is situated for the revocation of said license, the sale of the works constructed, and

such other equitable relief as the case may demand, as provided for in section 26 hereof.

**Section 14.** (a) Upon not less than two years' notice in writing from the Commission the United States shall have the right upon or after the expiration of any license to take over and thereafter to maintain and operate any project or projects as defined in section 3 hereof, and covered in whole or in part by the license, or the right to take over upon mutual agreement with the licensee all property owned and held by the licensee then valuable and serviceable in the development, transmission, or distribution of power and which is then dependent for its usefulness upon the continuance of the license, together with any lock or locks or other aids to navigation constructed at the expense of the licensee, upon the condition that before taking possession it shall pay the net investment of the licensee in the project or projects taken, not to exceed the fair value of the property taken, plus such reasonable damages, if any, to property of the licensee valuable, serviceable, and dependent as above set forth but not taken, as may be caused by the severance therefrom of property taken, and shall assume all contracts entered into by the licensee with the approval of the Commission. The net investment of the licensee in the project or projects so taken and the amount of such severance damages, if any, shall be determined by the Commission after notice and opportunity for hearing. Such net investment shall not include or be affected by the value of any lands, rights-of-way, or other property of the United States licensed by the Commission under this Act, by the license or by

good will, going value, or prospective revenues; nor shall the values allowed for water rights, rights-of-way, lands, or interest in lands be in excess of the actual reasonable cost thereof at the time of acquisition by the licensee: Provided, That the right of the United States or any State or municipality to take over, maintain, and operate any project licensed under this Act at any time by condemnation proceedings upon payment of just compensation is expressly reserved.

(b) In any relicensing proceeding before the Commission any Federal department or agency may timely recommend, pursuant to such rules as the Commission shall prescribe, that the United States exercise its right to take over any project or projects. Thereafter, the Commission, if it does not itself recommend such action pursuant to the provisions of section 7(c) of this part, shall upon motion of such department or agency stay the effective date of any order issuing a license, except an order issuing an annual license in accordance with the proviso of section 15(a), for two years after the date of issuance of such order, after which period the stay shall terminate, unless terminated earlier upon motion of the department or agency requesting the stay or by action of Congress. The Commission shall notify the Congress of any stay granted pursuant to this subsection.

**Section 15.** (a) (1) If the United States does not, at the expiration of the existing license, exercise its right to take over, maintain, and operate any project or projects of the licensee, as

provided in section 14 hereof, the Commission is authorized to issue a new license to the existing licensee upon such terms and conditions as may be authorized or required under the then existing laws and regulations, or to issue a new license under said terms and conditions to a new licensee, which license may cover any project or projects covered by the existing license, and shall be issued on the condition that the new licensee shall, before taking possession of such project or projects, pay such amount, and assume such contracts as the United States is required to do in the manner specified in section 14 hereof: Provided, That in the event the United States does not exercise the right to take over or does not issue a license to a new licensee, or issue a new license to the existing licensee, upon reasonable terms, then the Commission shall issue from year to year an annual license to the then licensee under the terms and conditions of the existing license until the property is taken over or a new license is issued as aforesaid.

(2) Any new license issued under this section shall be issued to the applicant having the final proposal which the Commission determines is best adapted to serve the public interest, except that in making this determination the Commission shall ensure that insignificant differences with regard to subparagraphs (A) through (G) of this paragraph between competing applications are not determinative and shall not result in the transfer of a project. In making a determination under this section (whether or not more than one application is submitted for the project), the Commission shall, in addition to the requirements of section 10 of this Part,

consider (and explain such consideration in writing) each of the following:

- (A) The plans and abilities of the applicant to comply with (i) the articles, terms, and conditions of any license issued to it and (ii) other applicable provisions of this Part.
- (B) The plans of the applicant to manage, operate, and maintain the project safely.
- (C) The plans and abilities of the applicant to operate and maintain the project in a manner most likely to provide efficient and reliable electric service.
- (D) The need of the applicant over the short and long term for the electricity generated by the project or projects to serve its customers, including, among other relevant considerations, the reasonable costs and reasonable availability of alternative sources of power, taking into consideration conservation and other relevant factors and taking into consideration the effect on the provider (including its customers) of the alternative source of power, the effect on the applicant's operating and load characteristics, the effect on communities served or to be served by the project, and in the case of an applicant using power for the applicant's own industrial facility and related operations, the effect on the operation and efficiency of such facility or related operations, its workers, and the related community. In the case of an applicant that is an Indian tribe applying for a license for a project located on the tribal reservation, a statement of the need of such tribe for electricity generated by the project to foster the purposes of the reservation may be included.

(E) The existing and planned transmission services of the applicant, taking into consideration system reliability, costs, and other applicable economic and technical factors.

(F) Whether the plans of the applicant will be achieved, to the greatest extent possible, in a cost effective manner.

(G) Such other factors as the Commission may deem relevant, except that the terms and conditions in the license for the protection, mitigation, or enhancement of fish and wildlife resources affected by the development, operation, and management of the project shall be determined in accordance with section 10, and the plans of an applicant concerning fish and wildlife shall not be subject to a comparative evaluation under this subsection.

(3) In the case of an application by the existing licensee, the Commission shall also take into consideration each of the following:

- (A) The existing licensee's record of compliance with the terms and conditions of the existing license.
  - (B) The actions taken by the existing licensee related to the project which affect the public.
- (b) (1) Each existing licensee shall notify the Commission whether the licensee intends to file an application for a new license or not. Such notice shall be submitted at least 5 years before the expiration of the existing license.
- (2) At the time notice is provided under paragraph (1), the existing licensee shall make each of the following reasonably available to the public for inspection at the offices of such licensee: current maps, drawings, data, and such other information as the

Commission shall, by rule, require regarding the construction and operation of the licensed project. Such information shall include, to the greatest extent practicable pertinent energy conservation, recreation, fish and wildlife, and other environmental information. Copies of the information shall be made available at reasonable costs of reproduction. Within 180 days after the enactment of the Electric Consumers Protection Act of 1986, the Commission shall promulgate regulations regarding the information to be provided under this paragraph.

(3) Promptly following receipt of notice under paragraph (1), the Commission shall provide public notice of whether an existing licensee intends to file or not to file an application for a new license. The Commission shall also promptly notify the National Marine Fisheries Service and the United States Fish and Wildlife Service, and the appropriate State fish and wildlife agencies.

(4) The Commission shall require the applicant to identify any Federal or Indian lands included in the project boundary, together with a statement of the annual fees paid as required by this Part for such lands, and to provide such additional information as the Commission deems appropriate to carry out the Commission's responsibilities under this section.

(c) (1) Each application for a new license pursuant to this section shall be filed with the Commission at least 24 months before the expiration of the term of the existing license. Each applicant shall consult with the fish and wildlife agencies referred to in subsection (b) of this section and, as appropriate, conduct studies with such agencies. Within 60 days after the statutory

deadline for the submission of applications, the Commission shall issue a notice establishing expeditious procedures for relicensing and a deadline for submission of final amendments, if any, to the application.

(2) The time periods specified in this subsection and in subsection (b) of this section shall be adjusted, in a manner that achieves the objectives of this section, by the Commission by rule or order with respect to existing licensees who, by reason of the expiration dates of their licenses, are unable to comply with a specified time period.

(d) (1) In evaluating applications for new licenses pursuant to this section, the Commission shall not consider whether an applicant has adequate transmission facilities with regard to the project.

(2) When the Commission issues a new license (pursuant to this section) to an applicant which is not the existing licensee of the project and finds that it is not feasible for the new licensee to utilize the energy from such project without provision by the existing licensee of reasonable services, including transmission services, the Commission shall give notice to the existing licensee and the new licensee to immediately enter into negotiations for such services and the costs demonstrated by the existing licensee as being related to the provision of such services. It is the intent of the Congress that such negotiations be carried out in good faith and that a timely agreement be reached between the parties in order to facilitate the transfer of the license by the date established when the Commission issued the new license. If such parties do not notify the Commission that within the time

## APPENDIX A

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established by the Commission in such notice (and if appropriate, in the judgment of the Commission, one 45-day extension thereof), a mutually satisfactory arrangement for such services that is consistent with the provisions of this Act has been executed, the Commission shall order the existing licensee to file (pursuant to section 205 of this Act) with the Commission a tariff, subject to refund, ensuring such services beginning on the date of transfer of the project and including just and reasonable rates and reasonable terms and conditions. After notice and opportunity for a hearing, the Commission shall issue a final order adopting or modifying such tariff for such services at just and reasonable rates in accordance with section 205 of this Act and in accordance with reasonable terms and conditions. The Commission, in issuing such order, shall ensure the services necessary for the full and efficient utilization and benefits for the license term of the electric energy from the project by the new licensee in accordance with the license and this Part, except that in issuing such order the Commission -

(A) shall not compel the existing licensee to enlarge generating facilities, transmit electric energy other than to the distribution system (providing service to customers) of the new licensee identified as of the date one day preceding the date of license award, or require the acquisition of new facilities, including the upgrading of existing facilities other than any reasonable enhancement or improvement of existing facilities controlled by the existing licensee (including any acquisition related to such enhancement or improvement) necessary to carry out the purposes of this paragraph;

(B) shall not adversely affect the continuity and reliability of service to the customers of the existing licensee;  
(C) shall not adversely affect the operational integrity of the transmission and electric systems of the existing licensee;  
(D) shall not cause any reasonably quantifiable increase in the jurisdictional rates of the existing licensee; and  
(E) shall not order any entity other than the existing licensee to provide transmission or other services.

Such order shall be for such period as the Commission deems appropriate, not to exceed the term of the license. At any time, the Commission, upon its own motion or upon a petition by the existing or new licensee and after notice and opportunity for a hearing, may modify, extend, or terminate such order.

(e) Except for an annual license, any license issued by the Commission under this section shall be for a term which the Commission determines to be in the public interest but not less than 30 years, nor more than 50 years, from the date on which the license is issued.

(f) In issuing any licenses under this section except an annual license, the Commission, on its own motion or upon application of any licensee, person, State, municipality, or State commission, after notice to each State commission and licensee affected, and after opportunity for hearing, whenever it finds that in conformity with a comprehensive plan for improving or developing a waterway or waterways for beneficial public uses all or part of any licensed project should no longer be used or adapted for use for power purposes, may license all or part of the project works for nonpower use. A license for nonpower use shall be issued to a

new licensee only on the condition that the new licensee shall, before taking possession of the facilities encompassed thereunder, pay such amount and assume such contracts as the United States is required to do, in the manner specified in section 14 hereof. Any license for nonpower use shall be a temporary license. Whenever, in the judgment of the Commission, a State, municipality, interstate agency, or another Federal agency is authorized and willing to assume regulatory supervision of the lands and facilities included under the nonpower license and does so, the Commission shall thereupon terminate the license. Consistent with the provisions of the Act of August 15, 1953 (67 Stat; 16 U.S.C. 828-828c), every licensee for nonpower use shall keep such accounts and file such annual and other periodic or special reports concerning the removal, alteration, nonpower use, or other disposition of any project works or parts thereof covered by the nonpower use license as the Commission may by rules and regulations or order prescribe as necessary or appropriate.

**Section 16.** When in the opinion of the President of the United States, evidenced by a written order addressed to the holder of any license hereunder, the safety of the United States demands it, the United States shall have the right to enter upon and take possession of any project or part thereof, constructed, maintained, or operated under said license, for the purpose of manufacturing nitrates, explosives, or munitions of war, or for any other purpose involving the safety of the United States, to retain possession, management, and control thereof for such length of

time as may appear to the President to be necessary to accomplish said purposes, and then to restore possession and control to the party or parties entitled thereto; and in the event that the United States shall exercise such right it shall pay to the party or parties entitled thereto just and fair compensation for the use of said property as may be fixed by the Commission upon the basis of a reasonable profit in time of peace, and the cost of restoring said property to as good condition as existed at the time of the taking over thereof, less the reasonable value of any improvements that may be made thereto by the United States and which are valuable and serviceable to the licensee.

**Section 17.** (a) All proceeds from any Indian reservation shall be placed to the credit of the Indians of such reservation. All other charges arising from licenses hereunder, except charges fixed by the Commission for the purpose of reimbursing the United States for the costs of administration of this Part, shall be paid into the Treasury of the United States, subject to the following distribution: 12 1/2 per centum thereof is hereby appropriated to be paid into the Treasury of the United States and credited to "Miscellaneous receipts"; 50 per centum of the charges arising from licenses hereunder for the occupancy and use of public lands and national forests shall be paid into, reserved, and appropriated as a part of the reclamation fund created by the Act of Congress known as the Reclamation Act, approved June 17, 1902; and 37 1/2 per centum of the charges arising from licenses hereunder for the occupancy and use of national forests and public lands from development

within the boundaries of any State shall be paid by the Secretary of the Treasury to such State; and 50 per centum of the charges arising from all other licenses hereunder is reserved and appropriated as a special fund in the Treasury to be expended under the direction of the Secretary of the Army in the maintenance and operation of dams and other navigation structures owned by the United States or in the construction, maintenance, or operation of headwater or other improvements of navigable waters of the United States. The proceeds of charges made by the Commission for the purpose of reimbursing the United States for the costs of the administration of this Part shall be paid into the Treasury of the United States and credited to miscellaneous receipts.

(b) In case of delinquency on the part of any licensee in the payment of annual charges a penalty of 5 per centum of the total amount so delinquent may be added to the total charges which shall apply for the first month or part of month so delinquent with an additional penalty of 3 per centum for each subsequent month until the total of the charges and penalties are paid or until the license is canceled and the charges and penalties satisfied in accordance with law.

**Section 18.** The Commission shall require the construction, maintenance, and operation by a licensee at its own expense of such lights and signals as may be directed by the Secretary of the Department in which the Coast Guard is operating, and such fishways as may be prescribed by the Secretary of the Interior or the Secretary of Commerce, as appropriate. The operation of any

navigation facilities which may be constructed as a part of or in connection with any dam or diversion structure built under the provisions of this Act, whether at the expense of a licensee hereunder or of the United States, shall at all times be controlled by such reasonable rules and regulations in the interest of navigation, including the control of the level of the pool caused by such dam or diversion structure as may be made from time to time by the Secretary of the Army; and for willful failure to comply with any such rule or regulation such licensee shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished as provided in section 316 hereof.

**Section 19.** That as a condition of the license, every licensee hereunder which is a public-service corporation, or a person, association, or corporation owning or operating any project and developing, transmitting, or distributing power for sale or use in public service, shall abide by such reasonable regulation of the services to be rendered to customers or consumers of power, and of rates and charges of payment therefor, as may from time to time be prescribed by any duly constituted agency of the State in which the service is rendered or the rate charged. That in case of the development, transmission, or distribution, or use in public service of power by any licensee hereunder or by its customer engaged in public service within a State which has not authorized and empowered a Commission or other agency or agencies within said State to regulate and control the services to be rendered by such licensee or by its customer engaged in public service, or the rates and charges of payment therefor, or the

amount or character of securities to be issued by any of said parties, it is agreed as a condition of such license that jurisdiction is conferred upon the Commission, upon complaint of any person aggrieved or upon its own initiative, to exercise such regulation and control until such time as the State shall have provided a Commission or other authority for such regulation and control: Provided, That the jurisdiction of the Commission shall cease and determine as to each specific matter of regulation and control prescribed in this section as soon as the State shall have provided a Commission or other authority for the regulation and control of that specific matter.

**Section 20.** That when said power or any part thereof shall enter into interstate or foreign commerce the rates charged and the service rendered by any such licensee, or by any subsidiary corporation, the stock of which is owned or controlled directly or indirectly by such licensee, or by any person, corporation, or association purchasing power from such licensee for sale and distribution or use in public service shall be reasonable, nondiscriminatory, and just to the customer and all unreasonable discriminatory and unjust rates or services are prohibited and declared to be unlawful; and whenever any of the States directly concerned has not provided a Commission or other authority to enforce the requirements of this section within such State or to regulate and control the amount and character of securities to be issued by any of such parties, or such States are unable to agree through their properly constituted authorities on the services to be

rendered, or on the rates or charges of payment therefore, or on the amount or character of securities to be issued by any of said parties, jurisdiction is conferred upon the Commission, upon complaint of any person, aggrieved, upon the request of any State concerned, or upon its own initiative to enforce the provisions of this section, to regulate and control so much of the services rendered, and of the rates and charges of payment therefore as constitute interstate or foreign commerce and to regulate the issuance of securities by the parties included within this section, and securities issued by the licensee subject to such regulations shall be allowed only for the bona fide purpose of financing and conducting the business of such licensee. The administration of the provisions of this section, so far as applicable, shall be according to the procedure and practice in fixing and regulating the rates, charges, and practices of railroad companies as provided in the Act to regulate commerce, approved February 4, 1887, as amended, and that the parties subject to such regulation shall have the same rights of hearing, defense, and review as said companies in such cases.

In any valuation of the property of any licensee hereunder for purposes of rate making, no value shall be claimed by the licensee or allowed by the Commission for any project or projects under license in excess of the value or values prescribed in section 14 hereof for the purposes of purchase by the United States, but there shall be included the cost to such licensee of the construction of the lock or locks or other aids of navigation and all other capital expenditures required by the United States, and no

value shall be claimed or allowed for the rights granted by the Commission or by this Act.

**Section 21.** That when any licensee cannot acquire by contract or pledges an unimproved dam site or the right to use or damage the lands or property of others necessary to the construction, maintenance, or operation of any dam, reservoir, diversion structure, or the works appurtenant or accessory thereto, in conjunction with any improvement which in the judgment of the Commission is desirable and justified in the public interest for the purpose of improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, it may acquire the same by the exercise of the right of eminent domain in the district court of the United States for the district in which such land or other property may be located, or in the State courts. The practice and procedure in any action or proceeding for that purpose in the district court of the United States shall conform as nearly as may be with the practice and procedure in similar action or proceeding in the courts of the State where the property is situated: Provided, That United States district courts shall only have jurisdiction of cases when the amount claimed by the owner of the property to be condemned exceeds \$3,000. Provided further, That no licensee may use the right of eminent domain under this section to acquire any lands or other property that, prior to October 24, 1992, were owned by a State or political subdivision thereof and were part of or included within any public park, recreation area or wildlife refuge established under State or local law. In the case of lands or other property that are owned

by a State or political subdivision and are part of or included within a public park, recreation area or wildlife refuge established under State or local law on or after October 24, 1992, no licensee may use the right of eminent domain under this section to acquire such lands or property unless there has been a public hearing held in the affected community and a finding by the Commission, after due consideration of expressed public views and the recommendations of the State or political subdivision that owns the lands or property, that the license will not interfere or be inconsistent with the purposes for which such lands or property are owned.

**Section 22.** That whenever the public interest requires or justifies the execution by the licensee of contracts for the sale and delivery of power for periods extending beyond the date of termination of the license, such contracts may be entered into upon the joint approval of the Commission and of the public-service Commission or other similar authority in the State in which the sale or delivery of power is made, or if sold or delivered in a State which has no such public-service commission, then upon the approval of the Commission, and thereafter, in the event of failure to issue a new license to the original licensee at the termination of the license, the United States or the new licensee, as the case may be, shall assume and fulfill all such contracts.

**Section 23.** (a) The provisions of this Part shall not be construed as affecting any permit or valid existing right-of-way heretofore granted or as confirming or otherwise affecting any claim, or as

affecting any authority heretofore given pursuant to law, but any person, association, corporation, State, or municipality holding or possessing such permit, right-of-way or authority may apply for a license under this Act, and upon such application the Commission may issue to any such applicant a license in accordance with the provisions of this Part and in such case the provisions of this Act shall apply to such applicant as a licensee hereunder: Provided, That when application is made for a license under this section for a project or projects already constructed the fair value of said project or projects determined as provided in this section, shall for the purposes of this Part and of said license be deemed to be the amount to be allowed as the net investment of the applicant in such project or projects as of the date of such license, or as of the date of such determination, if license has not been issued. Such fair value shall be determined by the Commission after notice and opportunity for hearing.

(b)(1) It shall be unlawful for any person, State, or municipality, for the purpose of developing electric power, to construct, operate, or maintain any dam, water conduit, reservoir, power house, or other works incidental thereto across, along, or in any of the navigable waters of the United States, or upon any part of the public lands or reservations of the United States (including the Territories), or utilize the surplus water or water power from any Government dam, except under and in accordance with the terms of a permit or valid existing right-of-way granted prior to June 10, 1920, or a license granted pursuant to this Act. Any

person, association, corporation, State, or municipality intending to construct a dam or other project works, across, along, over, or in any stream or part thereof, other than those defined herein as navigable waters, and over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States shall before such construction file declaration of such intention with the Commission, whereupon the Commission shall cause immediate investigation of such proposed construction to be made, and if upon investigation it shall find that the interests of interstate or foreign commerce would be affected by such proposed construction, such person, association, corporation, State, or municipality shall not construct, maintain, or operate such dam or other project works until it shall have applied for and shall have received a license under the provisions of this Act. If the Commission shall not so find, and if no public lands or reservations are affected, permission is granted to construct such dam or other project works in such stream upon compliance with State laws.

(2) No person may commence any significant modification of any project licensed under, or exempted from, this Act unless such modification is authorized in accordance with terms and conditions of such license or exemption and the applicable requirements of this Part. As used in this paragraph, the term "commence" refers to the beginning of physical on-site activity other than surveys or testing.

**Section 24.** Any lands of the United States included in any proposed projection under the provisions of this Part shall from the date of filing of application therefor be reserved from entry, location, or other disposal under the laws of the United States until otherwise directed by the Commission or by Congress. Notice that such application has been made, together with the date of filing thereof and a description of the lands of the United States affected thereby, shall be filed in the local land office for the district in which such lands are located. Whenever the Commission shall determine that the value of any lands of the United States so applied for, or heretofore or hereafter reserved or classified as power sites, will not be injured or destroyed for the purposes of power development by location, entry, or selection under the public-land laws, the Secretary of the Interior, upon notice of such determination, shall declare such lands open to location, entry, or selection, for such purpose or purposes and under such restrictions as the Commission may determine, subject to and with a reservation of the right of the United States or its permittees or licensees to enter upon, occupy, and use any part or all of said lands necessary, in the judgment of the Commission, for the purposes of this Part, which right shall be expressly reserved in every patent issued for such lands; and no claim or right to compensation shall accrue from the occupation or use of any of said lands for said purposes. The United States or any licensee for any such lands hereunder may enter thereupon for the purposes of this Part, upon payment of any damages to crops, buildings, or other improvements caused thereby to the owner thereof, or upon giving a good and sufficient

bond to the United States for the use and benefit of the owner to secure the payment of such damages as may be determined and fixed in an action brought upon the bond in a court of competent jurisdiction, said bond to be in the form prescribed by the Commission: Provided, That locations, entries, selections, or filings heretofore made for lands reserved as water-power sites, or in connection with water-power development, or electrical transmission may proceed to approval or patent under and subject to the limitations and conditions in this section contained: Provided further, That before any lands applied for, or heretofore or hereafter reserved, or classified as power sites, are declared open to location, entry, or selection by the Secretary of the Interior, notice of intention to make such declaration shall be given to the Governor of the State within which such lands are located, and such State shall have ninety days from the date of such notice within which to file, under any statute or regulation applicable thereto, an application for the reservation to the State, or any political subdivision thereof, of any lands required as a right-of-way for a public highway or as a source of materials for the construction and maintenance of such highways, and a copy of such application shall be filed with the Federal Power Commission; and any location, entry, or selection of such lands, or subsequent patent thereof, shall be subject to any rights granted the State pursuant to such application.

**Section 25.** [Repealed August 26, 1935.]

**Section 26.** That the Attorney General may, on request of the Commission or of the Secretary of the Army, institute proceedings in equity in the district court of the United States in the district in which any project or part thereof is situated for the purpose of revoking for violation of its terms any permit or license issued hereunder, or for the purpose of remedying or correcting by injunction, mandamus, or other process any act of commission or omission in violation of the provisions of this Act or of any lawful regulation or order promulgated hereunder. The district courts shall have jurisdiction over all of the above-mentioned proceedings and shall have power to issue and execute all necessary process and to make and enforce all writs, orders and decrees to compel compliance with the lawful orders and regulations of the Commission and of the Secretary of the Army, and to compel the performance of any condition imposed under the provisions of this Act. In the event a decree revoking a license is entered, the court is empowered to sell the whole or any part of the project or projects under license, to wind up the business of such licensee conducted in connection with such project or projects, to distribute the proceeds to the parties entitled to the same, and to make and enforce such further orders and decrees as equity and justice may require. At such sale or sales the vendee shall take the rights and privileges belonging to the licensee and shall perform the duties of such licensee and assume all outstanding obligations and liabilities of the licensee which the court may deem equitable in the premises; and at such sale or sales the United States may become a purchaser, but it

shall not be required to pay a greater amount than it would be required to pay under the provisions of section 14 hereof at the termination of the license.

**Section 27.** That nothing contained herein shall be construed as affecting or intending to affect or in any way to interfere with the laws of the respective States relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein.

**Section 28.** That the right to alter, amend, or repeal this Act is expressly reserved; but no such alteration, amendment, or repeal shall affect any license theretofore issued under the provisions of this Act or the rights of any licensee thereunder.

**Section 29.** That all Acts or parts of Acts inconsistent with this Act are repealed: Provided, That nothing contained herein shall be held or construed to modify or repeal any of the provisions of the Act of Congress approved December 19, 1913, granting certain rights-of-way to the city and county of San Francisco, in the State of California. Provided further, That section 18 of an Act making appropriations for the construction, repair and preservation, of certain public works on rivers and harbors, and for other purposes, approved August 8, 1917, is hereby repealed."

**Section 30.** (a) Except as provided in subsection (b) or (c), the Commission may grant an exemption in whole or in part, from the requirements of this part, including any license requirements contained in this part, to any facility (not including any dam or other impoundment) constructed, operated, or maintained for the generation of electric power which the Commission determines, by rule or order -

(1) is located on non-Federal lands, and  
(2) utilizes for such generation only the hydroelectric potential of a manmade conduit, which is operated for the distribution of water for agricultural, municipal, or industrial consumption and not primarily for the generation of electricity.

(b) The Commission may not grant any exemption under subsection (a) to any facility the installed capacity of which exceeds 15 megawatts (40 megawatts in the case of a facility constructed, operated, and maintained by an agency or instrumentality of a State or local government solely for water supply for municipal purposes).

(c) In making the determination under subsection (a) of this section the Commission shall consult with the United States Fish and Wildlife Service, National Marine Fisheries Service and the State agency exercising administration over the fish and wildlife resources of the State in which the facility is or will be located, in the manner provided by the Fish and Wildlife Coordination Act (16 U.S.C. 661, et seq.), and shall include in any such exemption -  
(1) such terms and conditions as the Fish and Wildlife Service, National Marine Fisheries Service and the State agency each determine are appropriate to prevent loss of, or damage to, such

resources and to otherwise carry out the purposes of such Act, and

(2) such terms and conditions as the Commission deems appropriate to insure that such facility continues to comply with the provisions of this section and terms and conditions included in any such exemption.

(d) Any violation of a term or condition of any exemption granted under subsection (a) shall be treated as a violation of a rule or order of the Commission under this Act.

(e) The Commission, in addition to the requirements of section 10(e), shall establish fees which shall be paid by an applicant for a license or exemption for a project that is required to meet terms and conditions set by fish and wildlife agencies under subsection (c). Such fees shall be adequate to reimburse the fish and wildlife agencies referred to in subsection (c) for any reasonable costs incurred in connection with any studies or other reviews carried out by such agencies for purposes of compliance with this section. The fees shall, subject to annual appropriations Acts, be transferred to such agencies by the Commission for use solely for purposes of carrying out such studies and shall remain available until expended.

**Section 31. Enforcement**

(a) Monitoring and investigation.--The Commission shall monitor and investigate compliance with each license and permit issued under this Part and with each exemption granted from any requirement of this Part. The Commission shall conduct such investigations as may be necessary and proper in accordance

with this Act. After notice and opportunity for public hearing, the Commission may issue such orders as necessary to require compliance with the terms and conditions of licenses and permits issued under this Part and with the terms and conditions of exemptions granted from any requirement of this Part.

(b) Revocation orders.--After notice and opportunity for an evidentiary hearing, the Commission may also issue an order revoking any license issued under this Part or any exemption granted from any requirement of this Part where any licensee or exemptee is found by the Commission:

(1) to have knowingly violated a final order issued under subsection (a) after completion of judicial review (or the opportunity for judicial review); and  
(2) to have been given reasonable time to comply fully with such order prior to commencing any revocation proceeding. In any such proceeding, the order issued under subsection (a) shall be subject to de novo review by the Commission. No order shall be issued under this subsection until after the Commission has taken into consideration the nature and seriousness of the violation and the efforts of the licensee to remedy the violation.

(c) Civil penalty.--Any licensee, permittee, or exemptee who violates or fails or refuses to comply with any rule or regulation under this Part, any term, or condition of a license, permit, or exemption under this Part, or any order issued under subsection (a) shall be subject to a civil penalty in an amount not to exceed \$10,000 for each day that such violation or failure or refusal continues. Such penalty shall be assessed by the Commission

after notice and opportunity for public hearing. In determining the amount of a proposed penalty, the Commission shall take into consideration the nature and seriousness of the violation, failure, or refusal and the efforts of the licensee to remedy the violation, failure, or refusal in a timely manner. No civil penalty shall be assessed where revocation is ordered.

(d) Assessment.--(1) Before issuing an order assessing a civil penalty against any person under this section, the Commission shall provide to such person notice of the proposed penalty. Such notice shall, except in the case of a violation of a final order issued under subsection (a), inform such person of his opportunity to elect in writing within 30 days after the date of receipt of such notice to have the procedures of paragraph (3) (in lieu of those of paragraph (2)) apply with respect to such assessment.

(2)(A) In the case of the violation of a final order issued under subsection (a), or unless an election is made within 30 calendar days after receipt of notice under paragraph (1) to have paragraph (3) apply with respect to such penalty, the Commission shall assess the penalty, by order, after a determination of violation has been made on the record after an opportunity for an agency hearing pursuant to section 554 of title 5, United States Code, before an administrative law judge appointed under section 3105 of such title 5. Such assessment order shall include the administrative law judge's findings and the basis for such assessment.

(B) Any person against whom a penalty is assessed under this paragraph may, within 60 calendar days after the date of the

order of the Commission assessing such penalty, institute an action in the United States court of appeals for the appropriate judicial circuit for judicial review of such order in accordance with Act 7 of title 5, United States Code. The court shall have jurisdiction to enter a judgment affirming, modifying, or setting aside in whole or in Part, the order of the Commission, or the court may remand the proceeding to the Commission for such further action as the court may direct.

(3)(A) In the case of any civil penalty with respect to which the procedures of this paragraph have been elected, the Commission shall promptly assess such penalty, by order, after the date of the receipt of the notice under paragraph (1) of the proposed penalty. (B) If the civil penalty has not been paid within 60 calendar days after the assessment order has been made under subparagraph (A), the Commission shall institute an action in the appropriate district court of the United States for an order affirming the assessment of the civil penalty. The court shall have authority to review de novo the law and the facts involved, and shall have jurisdiction to enter a judgment enforcing, modifying, and enforcing as so modified, or setting aside in whole or in Part, such assessment.

(C) Any election to have this paragraph apply may not be revoked except with the consent of the Commission.

(4) The Commission may compromise, modify, or remit, with or without conditions, any civil penalty which may be imposed under this subsection, taking into consideration the nature and seriousness of the violation and the efforts of the licensee to remedy the violation in a timely manner at any time prior to a final

decision by the court of appeals under paragraph (2) or by the district court under paragraph (3).

(5) If any person fails to pay an assessment of a civil penalty after it has become a final and unappealable order under paragraph (2), or after the appropriate district court has entered final judgment in favor of the Commission under paragraph (3), the Commission shall institute an action to recover the amount of such penalty in any appropriate district court of the United States. In such action, the validity and appropriateness of such final assessment order or judgment shall not be subject to review.

(6)(A) Notwithstanding the provisions of title 28, United States Code, or of this Act, the Commission may be represented by the general counsel of the Commission (or any attorney or attorneys within the Commission designated by the Chairman) who shall supervise, conduct, and argue any civil litigation to which paragraph (3) of this subsection applies (including any related collection action under paragraph (5)) in a court of the United States or in any other court, except the Supreme Court. However, the Commission or the general counsel shall consult with the Attorney General concerning such litigation, and the Attorney General shall provide, on request, such assistance in the conduct of such litigation as may be appropriate.

(B) The Commission shall be represented by the Attorney General, or the Solicitor General, as appropriate, in actions under this subsection, except to the extent provided in subparagraph (A) of this paragraph.

**Section. 32.** Alaska State Jurisdiction over Small Hydroelectric Projects.

(a) DISCONTINUANCE OF REGULATION BY THE COMMISSION- Notwithstanding sections 4(e) and 23(b), the Commission shall discontinue exercising licensing and regulatory authority under this part over qualifying project works in the State of Alaska, effective on the date on which the Commission certifies that the State of Alaska has in place a regulatory program for water-power development that--

(1) protects the public interest, the purposes listed in paragraph (2), and the environment to the same extent provided by licensing and regulation by the Commission under this part and other applicable Federal laws, including the Endangered Species Act (16 U.S.C. 1531 et seq.) and the Fish and Wildlife Coordination Act (16 U.S.C. 661 et seq.);

(2) gives equal consideration to the purposes of--

(A) energy conservation;

(B) the protection, mitigation of damage to, and enhancement of, fish and wildlife (including related spawning grounds and habitat);

(C) the protection of recreational opportunities;

(D) the preservation of other aspects of environmental quality;

(E) the interests of Alaska Natives; and

(F) other beneficial public uses, including irrigation, flood control, water supply, and navigation; and

(3) requires, as a condition of a license for any project works--

(A) the construction, maintenance, and operation by a licensee at its own expense of such lights and signals as may be directed by

the Secretary of the Department in which the Coast Guard is operating, and such fishways as may be prescribed by the Secretary of the Interior or the Secretary of Commerce, as appropriate;

(B) the operation of any navigation facilities which may be constructed as part of any project to be controlled at all times by such reasonable rules and regulations as may be made by the Secretary of the Army; and

(C) conditions for the protection, mitigation, and enhancement of fish and wildlife based on recommendations received pursuant to the Fish and Wildlife Coordination Act (16 U.S.C. 661 et seq.) from the National Marine Fisheries Service, the United States Fish and Wildlife Service, and State fish and wildlife agencies.

(b) DEFINITION OF 'QUALIFYING PROJECT WORKS'- For purposes of this section, the term 'qualifying project works' means project works--

(1) that are not part of a project licensed under this part or exempted from licensing under this part or section 405 of the Public Utility Regulatory Policies Act of 1978 prior to the date of the enactment of this section;

(2) for which a preliminary permit, a license application, or an application for an exemption from licensing has not been accepted for filing by the Commission prior to the date of the enactment of subsection (c) (unless such application is withdrawn at the election of the applicant);

(3) that are part of a project that has a power production capacity of 5,000 kilowatts or less;

- (4) that are located entirely within the boundaries of the State of Alaska; and
- (5) that are not located in whole or in part on any Indian reservation, a conservation system unit (as defined in section 102(4) of the Alaska National Interest Lands Conservation Act (16 U.S.C. 3102(4))), or segment of a river designated for study for addition to the Wild and Scenic Rivers System.
- (c) **ELECTION OF STATE LICENSING**- In the case of nonqualifying project works that would be a qualifying project works but for the fact that the project has been licensed (or exempted from licensing) by the Commission prior to the enactment of this section, the licensee of such project may in its discretion elect to make the project subject to licensing and regulation by the State of Alaska under this section.
- (d) **PROJECT WORKS ON FEDERAL LANDS**- With respect to projects located in whole or in part on a reservation, a conservation system unit, or the public lands, a State license or exemption from licensing shall be subject to--
  - (1) the approval of the Secretary having jurisdiction over such lands; and
  - (2) such conditions as the Secretary may prescribe.
- (e) **CONSULTATION WITH AFFECTED AGENCIES**- The Commission shall consult with the Secretary of the Interior, the Secretary of Agriculture, and the Secretary of Commerce before certifying the State of Alaska's regulatory program.
- (f) **APPLICATION OF FEDERAL LAWS**- Nothing in this section shall preempt the application of Federal environmental, natural

resources, or cultural resources protection laws according to their terms.

(g) **OVERTSIGHT BY THE COMMISSION**- The State of Alaska shall notify the Commission not later than 30 days after making any significant modification to its regulatory program. The Commission shall periodically review the State's program to ensure compliance with the provisions of this section.

(h) **RESUMPTION OF COMMISSION AUTHORITY**- Notwithstanding subsection (a), the Commission shall reassert its licensing and regulatory authority under this part if the Commission finds that the State of Alaska has not complied with one or more of the requirements of this section.

(i) **DETERMINATION BY THE COMMISSION**- (1) Upon application by the Governor of the State of Alaska, the Commission shall within 30 days commence a review of the State of Alaska's regulatory program for water-power development to determine whether it complies with the requirements of subsection (a).  
(2) The Commission's review required by paragraph (1) shall be completed within 1 year of initiation, and the Commission shall within 30 days thereafter issue a final order determining whether or not the State of Alaska's regulatory program for water-power development complies with the requirements of subsection (a).  
(3) If the Commission fails to issue a final order in accordance with paragraph (2) the State of Alaska's regulatory program for water-power development shall be deemed to be in compliance with subsection (a).

**APPENDIX B**

**OTHER FEDERAL STATUTES**



In addition to the powers and responsibilities granted to the Federal Energy Regulatory Commission (FERC) by the Federal Power Act (FPA), several other laws and executive orders affect the licensing process. Seven federal laws are particularly prominent in their influence. What follows are brief summaries of these laws, which do not substitute for examination of the actual statutory language.

## NATIONAL ENVIRONMENTAL POLICY ACT

The National Environmental Policy Act of 1969 (NEPA) identified environmental protection as a major national policy objective. The NEPA requires all federal agencies involved in the permitting of activities affecting the environment to evaluate environmental impacts and the significance of these impacts. The NEPA process is to be used to identify and assess the reasonable alternatives to proposed actions, and federal agencies are to use all practical means to restore and enhance the quality of the human environment and to avoid or minimize any possible adverse effects of their actions upon the quality of the human environment. FERC is bound by the statutory requirements of the NEPA and maintains a policy adhering to the objectives of the NEPA.

## FISH AND WILDLIFE COORDINATION ACT

The Fish and Wildlife Coordination Act (FWCA) requires federal agencies granting a license or permit for the control, impoundment, or modification of streams and water bodies to first consult with the U.S. Department of the Interior, Fish and Wildlife Service (FWS) and the appropriate state fish agencies regarding conservation of these resources.

A federal agency licensing a water-resource development project is required under the FWCA to give full consideration to the recommendations of FWS and the state fish and wildlife agency ~~on~~ the wildlife aspects of such projects. FERC is now directed to not only consult with FWS and the state agencies but also to include in each license conditions for the protection, mitigation, and enhancement of fish and wildlife. Those conditions are to be based on recommendations received pursuant to the FWCA from the National Marine Fisheries (NOAA FISHERIES), FWS, and state fish and wildlife agencies.

As a result of the work of the ITF, the Commission and the Secretaries of the Interior, Agriculture, and Commerce signed an agreement to improve and accelerate hydropower licensing. The agreement includes commitments by the resource agencies to seek public input on mandatory conditions and to participate in the alternative licensing process.

## **NATIONAL HISTORIC PRESERVATION ACT**

The National Historic Preservation Act (NHPA) was enacted and amended to require the federal government to accelerate its historic preservation programs and to encourage such efforts on state, local, and private levels. Compliance with the NHPA may be coupled with FERC's NEPA compliance where a federal action such as licensing affects a historical or cultural resource. In licensing, FERC is bound by the provisions of the NHPA, which requires it to take into account the effect of the action on any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register of Historic Places, and to give the Advisory Council on Historic Preservation (ACHP) a reasonable opportunity to comment on a proposed action. ACHP promulgated revised regulations at 36 CFR 800 on May 18, 1999 and again on January 11, 2001.

## **ENDANGERED SPECIES ACT**

The purpose of the Endangered Species Act (ESA) is to provide a system for protecting and conserving endangered and threatened species and protecting the ecosystems upon which they depend. Under the ESA, based on the best scientific and commercial data available, various species are categorized by regulation as endangered or threatened species. In addition, the critical habitat

for endangered and threatened species is also designated based on best available scientific data and consideration of the economic impact of such a designation.

In hydropower project licensing, FERC must consult with FWS or NOAA FISHERIES to determine whether the agency action is likely to jeopardize the continued existence of any endangered or threatened species or result in critical habitat destruction. Where endangered or threatened species may be present in the area of a hydroelectric project proposed for licensing, FERC may be required to prepare a biological assessment for the purpose of identifying any endangered or threatened species likely to be affected by licensing. This biological assessment may be undertaken as an integral part of NEPA compliance.

## **CLEAN WATER ACT**

Under Section 401 of the Clean Water Act (CWA), a license applicant must obtain certification from the state or interstate pollution control agency verifying compliance with the CWA. FERC's licensing process requires an applicant for a hydropower project to consult with the ~~A~~certifying agency@under Section 401 of the CWA. Evidence of a request for water quality certification must be filed with the Commission no later than 60 days after the Commission issues its ready for environmental analysis notice.

## **WILD AND SCENIC RIVERS ACT**

The Wild and Scenic Rivers Act provides for the protection and preservation of certain rivers and their immediate environments by instituting a national wild and scenic rivers system. Rivers may be included in this system either by an act of Congress or by the Secretary of the Interior, upon application by a governor.

Section 7(a) of the Wild and Scenic Rivers Act provides that the Commission shall not license the construction of project works on or directly affecting any river which is designated as a component of the Wild and Scenic River system. Moreover, all departments and agencies of the United States are precluded from assisting (by loan, grant, license, or other method) the construction of any water resources project that would have a direct and adverse effect on the values for which a component of the wild and scenic rivers system was established. Section 7(a) further provides that the foregoing provisions do not preclude the licensing of, or assistance to, "developments below or above a wild, scenic, or recreational river area or on any tributary thereto which will not invade the area or unreasonably diminish the scenic, recreational, and fish and wildlife values present in the area on the date of designation of a river as a component of the National Wild and Scenic Rivers System."

Section 7(b) provides the same protection for rivers being studied for inclusion in the wild and scenic rivers system (for limited

periods while the rivers are being studied), except that the word "unreasonably" does not appear before "diminish."

## **AMERICANS WITH DISABILITIES ACT (ADA)**

The Americans with Disabilities Act was created to protect the civil rights of persons with disabilities. Titles II and III of the ADA apply to licensee's recreation facilities. This law required public and private entities which have ~~A~~public accommodations@ to be accessible to persons with disabilities. Although FERC does not specifically require ADA-compliant facilities, licensees must consider the disabled when planning recreational facilities, and new recreational facilities and access areas at hydropower projects must comply with the requirements of the ADA.

## **PACIFIC NORTHWEST POWER PLANNING AND CONSERVATION ACT**

Under Section 4(h) of the Pacific Northwest Power Planning and Conservation Act (Act), the Pacific Northwest Planning Council (Council) developed the Columbia River Basin Fish and Wildlife Program (Program) to protect, mitigate, and enhance the fish and wildlife resources associated with development and operation of hydroelectric projects within the Columbia River Basin. Section 4(h) of the Act states that responsible federal and state agencies should provide equitable treatment for fish and wildlife resources,

## APPENDIX B

in addition to other purposes for which hydropower is developed, and that these agencies shall take into account, to the fullest extent practicable, the Program adopted under the Act.

The program directs agencies to consult with federal and state fish and wildlife agencies, appropriate Indian tribes, and the Council during the study, design, construction, and operation of any hydroelectric development in the basin. Section 12.1A of the Program outlines conditions that should be provided for in any original or new license. The program also designates certain river reaches as protected from development. If the project is not within the Columbia River Basin, this section would not be included.

## **APPENDIX C**

### **DEFINITIONS AND ACRONYMS**



<b>Adequate License Application:</b>	a determination by the FERC that a license application conforms to the requirements for the particular project type as specified in 18 CFR Part 4 and 16.
<b>APEA:</b>	Applicant Prepared Environmental Assessment.
<b>CEA:</b>	Cumulative Effects Analysis
<b>Competing development application:</b>	any application for a license or exemption from licensing for a proposed water power project that would develop, conserve, and utilize, in whole or in part, the same or mutually exclusive water resources that would be developed, conserved, and utilized by a proposed water power project for which an initial preliminary permit or initial development application has been filed and is pending before the Commission.
<b>Comprehensive plan:</b>	those comprehensive plans referenced in Section 10(a)(2)(A) of the Federal Power Act, as defined by FERC regulations (18 CFR 2.19).
<b>Conduit:</b>	any tunnel, canal, pipeline, aqueduct, flume, ditch, or similar constructed water conveyance that is operated for the distribution of water for agricultural, municipal, or industrial consumption and not primarily for the generation of electricity. The term <i>Anot primarily for the generation of electricity@</i> includes but is not limited to a conduit: -which was built for the distribution of water for agricultural, municipal, or industrial consumption and is operated for such a purpose; and -to which a hydroelectric facility has been or is proposed to be added.
<b>Cumulative impacts:</b>	the effect on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions. Cumulative impacts can result from individually minor, but collectively significant actions taking place over a period of time.
<b>CWA:</b>	Clean Water Act  for the purposes of provisions governing application for license of a major project existing dam,

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<b>Dam:</b>	means any structure for impounding or diverting water.
	for the purposes of provisions governing application for exemption of a small conduit hydroelectric facility, means any structure that impounds water.
	for the purposes of provisions governing application for exemption of a small hydroelectric power project, means any structure for impounding water, including any diversion structure that is designed to obstruct all or substantially all of the flow of a natural body of water.
<b>Deficient: License Application:</b>	a determination by the Director, OEP that an application does not fully conform to the requirements for the particular project type as specified in 18 CFR Parts 4 and 16. An applicant having a deficient application is afforded additional time to correct the deficiencies.
<b>Development application:</b>	any application for either a license or exemption from licensing for a proposed water power project.
<b>Dismissal:</b>	the termination of license application processing resulting from a determination by FERC that an applicant has failed to provide timely additional information or documents that the Commission requires as being relevant for an informed decision.
<b>EA:</b>	environmental assessment
<b>EIS:</b>	environmental impact statement
<b>EPA:</b>	United States Environmental Protection Agency
<b>EPAct:</b>	Energy Policy Act of 1992
<b>ESA:</b>	Endangered Species Act
<b>Existing dam:</b>	for the purposes of provisions governing application for license of a major project, existing dam, means any dam that has already been constructed and which does not require any construction or enlargement of impoundment structures other than repairs or reconstruction.

	for the purposes of provisions governing application for exemption of a small hydroelectric power project, means any dam, the construction of which was completed on or before April 20, 1977, and which does not require any construction or enlargement of impoundment structures (other than repairs or reconstruction) in connection with the installation of any small hydroelectric power project.
<b>Existing impoundment:</b>	for the purposes of provisions governing application for license of a major project <b>C</b> existing dam, means any body of water that an existing dam impounds.
<b>Federal lands:</b>	for the purposes of provisions governing application for exemption of a small hydroelectric power project, means any lands to which the United States holds fee title. [18 CFR 4.30(8)].
<b>FERC:</b>	Federal Energy Regulatory Commission
<b>Fish and wildlife agencies:</b>	the United States Fish and Wildlife Service, the National Marine Fisheries Service, and the state agency in charge of administrative management over fish and wildlife resources of the state in which a proposed hydropower project is located.
<b>Fish and wildlife recommendation:</b>	any recommendation designed to protect, mitigate damages to, or enhance any wild member of the animal kingdom, including any migratory or nonmigratory mammal, fish, bird, amphibian, reptile, mollusk, crustacean, or other invertebrate, whether or not bred, hatched, or born in captivity, and includes any egg or offspring thereof, related breeding or spawning grounds, and habitat. A <b>fish and wildlife recommendation</b> includes a request for a study which cannot be completed prior to licensing, but does not include a request that the proposed project not be constructed or operated, a request for additional pre-licensing studies or analysis or, as the term is used in Sections 4.34(e)(2) and 4.34(f)(3) of the Commission's regulations, a recommendation for facilities, programs, or other measures to benefit recreation or tourism. [18 CFR 4.30(9)]
<b>Fishway:</b>	The items which may constitute a 'fishway' under section 18 for the safe and timely upstream and downstream passage of fish shall be limited to physical structures, facilities, or devices necessary

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	to maintain all life stages of such fish, and project operations and measures related to such structures, facilities, or devices which are necessary to ensure the effectiveness of such structures, facilities, or devices for such fish.(Pub. L. No. 102-486 [Oct. 24, 1992], 106 Stat. 3096.)
<b>FLMA:</b>	Federal Land Management Agency
<b>FPA:</b>	Federal Power Act
<b>FWCA:</b>	Fish and Wildlife Coordination Act
<b>IFIM:</b>	Instream Flow Incremental Methodology
<b>Indian tribe:</b>	in reference to a proposal to apply for a license or exemption for a hydropower project, an Indian tribe which is recognized by treaty with the United States, by federal statute, or by the U.S. Department of the Interior in its periodic listing of tribal governments in the Federal Register in accordance with 25 CFR 83.6(b), and whose legal rights as a tribe may be affected by the development and operation of the hydropower project proposed (as where the operation of the proposed project could interfere with the management and harvest of anadromous fish or where the project works would be located within the tribe's reservation).
<b>Initial development application:</b>	any acceptable application for either a license or exemption from licensing for a proposed water power project that would develop, conserve, and utilize, in whole or in part, water resources for which no other acceptable application for a license or exemption from licensing has been submitted for filing and is pending before the Commission.
<b>Install or increase:</b>	means to add new generating capacity at a site that has no existing generating units, to replace or rehabilitate an abandoned or unused existing generating unit, or to increase the generating capacity of any existing power plant by installing an additional generating unit or by rehabilitating an operable generating unit in a way that increases its rated electric power output.
<b>Interagency Task Force (ITF):</b>	work group formed to improve relations with federal and state agencies.

**Licensed water power project:** a project, as defined in Section 3(11) of the Federal Power Act, that is licensed under Part I of the Federal Power Act.

**Major modified project:** any major project (existing dam) that would include:  
-any repair, modification or reconstruction of an existing dam that would result in a significant change in the normal maximum surface area or the normal maximum surface elevation of an existing impoundment; or  
-any change in existing project works or operations resulting in a significant environmental impact.

**Major unconstructed project:** any unlicensed water power project that would:  
-have a total installed generating capacity of more than 1.5 MW; and  
-use the water power potential of a dam and impoundment which, at the time application is filed, have not been constructed.

**Major project existing dam:** a licensed or unlicensed, existing or proposed water power project that would:  
-have a total installed generating capacity or more than 2,000 horsepower (1.5 MW); and  
-not use the water power potential provided by any dam except an existing dam.

**Major project 5 MW or less:** any major project/existing dam or any major unconstructed project or major modified project that has a total installed capacity of 5 MW or less.

**Minor water power project:** any licensed or unlicensed, existing or proposed water power project that would have a total installed generation capacity of 2,000 horsepower (1.5 MW), or less.

**Mitigation:** the act of making a potential impact from a major modification, new project, or nonpower project less severe.

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Mitigation includes but is not limited to:	
-avoiding the impact altogether by not taking a certain action or parts of an action;	
-minimizing impacts by limiting the degree or magnitude of the action and its implementation;	
-rectifying the impact by repairing, rehabilitating, or restoring the affected environment;	
-reducing or eliminating the impact over time by preservation and maintenance operations during the life of the action; and	
-compensating for the impact by replacing or providing substitute resources or environments.	
<b>MW:</b>	megawatts
<b>MOA:</b>	Memorandum of Agreement
<b>NEPA:</b>	National Environmental Policy Act
<b>New development:</b>	for the purposes of provisions governing application for license of a major project-existing dam, means any construction installation, repair, reconstruction, or other change in the existing state of project works or appurtenant facilities, including any dredging and filling in project waters.
<b>NGO:</b>	Non Governmental Organization
<b>NHPA:</b>	National Historic Preservation Act of 1966 as amended
<b>NOI:</b>	Notice of Intent to file a license application
<b>Non-Federal lands:</b>	for the purposes of provisions governing application for exemption of a small conduit hydroelectric facility, any lands except lands to which the United States holds fee title.
	for the purposes of provisions governing application for exemption of a small hydroelectric power project, any lands other than federal lands defined in paragraph (b)(8) of Commission regulations.
<b>Nonpower license:</b>	a temporary license for a project that is in transition from power generation to termination of Commission regulation there over.

<b>NOPR:</b>	Notice of Proposed Rulemaking
<b>NPS:</b>	National Park Service
<b>OEP:</b>	Office of Energy Projects
<b>Original license:</b>	the first license issued for an existing or proposed hydroelectric project.
<b>PAD</b>	Pre-Application Document , which contains existing, relevant and reasonably available information to enable issue identification, information needs, and study request and plan preparation.
<b>Patently deficient:</b>	a determination by the Commission staff that an application substantially fails to comply with the requirements specified in 18 CFR Parts 4 and 16, or that the application is for a project that is precluded by law.  An application determined to be patently deficient may be denied.
<b>Person:</b>	any individual and, as defined in Section 3(4) of the Federal Power Act, any corporation, municipality, or state.
<b>Project:</b>	for the purposes of provisions governing application for exemption of a small hydroelectric power project, means: (i) The impoundment and any associated dam, intake, water conveyance facility, power plant, primary transmission line, and other appurtenant facility if a lake or similar natural impoundment or a constructed impoundment is used for power generation; or (ii) Any diversion structure other than a dam and any associated water conveyance facility, power plant, primary transmission line, and other appurtenant facility if a natural water feature other than a lake or similar natural impoundment is used for power generation. [18 CFR 4.30(22)]
<b>PURPA benefits:</b>	means benefits under section 210 of the Public Utility Regulatory Policies Act of 1978 (PURPA). Section 210(a) of PURPA requires electric utilities to purchase electricity from, and to sell electricity to, qualifying facilities, which may include hydroelectric projects.

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<b>Qualified exemption applicant:</b>	any person who meets the requirements specified in Section 4.31(c)(2) of the Commission's regulations with respect to a small hydroelectric power project for which exemption from licensing is sought.
<b>Qualified license applicant:</b>	any person to whom the Commission may issue a license, as specified in section 4(e) of the Federal Power Act.
<b>Ready for environmental analysis (REA):</b>	the point in the processing of an application for an original or new license or exemption from licensing which has been accepted for filing, where substantially all additional information requested by the Commission has been filed and found adequate.
<b>Rejection:</b>	the response of the FERC to an application determined by the Commission to be patently deficient. An application that is rejected may be resubmitted, but the date the rejected application is resubmitted is considered the filing date.
<b>Resource agency:</b>	a federal, state, or interstate agency exercising administration over the areas of flood control, navigation, irrigation, recreation, fish and wildlife, water resource management (including water rights), or cultural or other relevant resources of the state or states in which a project is or will be located.
<b>SCORP:</b>	State Comprehensive Outdoor Recreation Plan
<b>SD</b>	Scoping Document
<b>Section 106:</b>	refers to Section 106 of the National Historic Preservation Act
<b>SHPO:</b>	State Historic Preservation Officer
<b>Small hydroelectric project:</b>	any project in which capacity will be installed or increased after the date of notice of exemption or application under Subpart K of 18 CFR Parts 4and 16, which will have a total installed capacity of not more than 5 MW and which meets the specific criteria of 18 CFR 4.30(b)(27).

**SMP:** Shoreline Management Plan

**Subsequent license:** A license for a hydroelectric project issued under Part I of the Federal Power Act after a minor or minor part license that is not subject to sections 14 and 15 of the Federal Power Act expires.

**WQC:** Water Quality Certification (401 Certification)



**APPENDIX D**

**GUIDELINES FOR PREPARING EXHIBIT E**



## GUIDELINES FOR PREPARING EXHIBIT E

*Environmental issues are typically the most complex aspects of relicensing. Appropriate consideration of the types of information contained in this appendix will assist in the development of focused studies, issue identification, and a complete application.*

The exact form and content of the environmental report (Exhibit E) will depend on the licensing process followed (ILP, ALP, TLP 2), and the size and type of project (i.e. major or minor, constructed or un-constructed, etc.)(See Chapter 2). Nonetheless, certain information is commonly needed by the Commission to evaluate a project. Inclusion of this information will expedite licensing decisions and decrease the potential for deficient applications. For applicants using the integrated licensing process, the contents of the Exhibit E build upon the information contained in the pre-application document. See **18 CFR 5.6** for detailed information that should be included in the pre-application document.

*The Exhibit E that is prepared following the integrated licensing process must address the resources listed in the pre-application document, and meet certain format and content requirements.*

The Exhibit E should clearly explain the applicant's overall assessment of the resource needs in the project area and how the applicant proposes to satisfy those needs in a balanced way through the proposed set of project modifications, protection, mitigation, and enhancement measures, including:

- the view of agencies, affected Indian tribes, and the public with respect to resource needs in the project vicinity and region;
- the applicant's position with respect to resource needs and the applicant's proposal for addressing project-related effects on the resources. The applicant should address the relative importance of the various resources to the nation, region, and immediate locale and the basis for agreement or disagreement with agencies and tribes; and
- detailed protection, mitigation, and enhancement plans for each affect resource area, as appropriate, including a full discussion of any differences between the applicant's proposals and recommendations of the agencies, tribes, and the public.

The level of treatment of each resource should be commensurate with the area's resource needs, the sensitivity of the resource issues, and the nature, scope, and size of the project.

The Commission recommends that applicants rely on six principal guides in deciding on content and extent of Exhibit E:

1. the applicable sections of 18 CFR Part 5; Part 4 and as identified in 16 for the minimum information items necessary for license application acceptance;
  2. dialogue with resource agencies, Indian tribes, and the public, through the consultation process and possibly public meetings, to determine the relative importance and sensitivity of the area's environmental resources and management objectives for those resources;
  3. recognition that the Commission process is subject to NEPA and therefore an EA or EIS will need to be prepared. The Commission's NEPA documents are detailed and must include staff-developed recommendations based on a thorough evaluation of the project effects, the applicant's proposal, and agency protection, mitigation, and enhancement recommendations and conditions as well as other factors;
  4. recognition that the Commission considers the applicant responsible to provide information necessary for the Commission to determine license conditions;
  5. the Commission's March 2001, **Preparing Environmental Assessments: Guidelines for Applicants, Contractors, and Staff**(see the Commission web page), as applicable; and
  6. the Commission staff suggestions compiled for this handbook.
- In deciding on the adequacy of Exhibit E, the applicant should ask: "Will the Commission be able to prepare an EA or EIS on the basis of Exhibit E information being submitted?"*
- Exhibit E should be characterized as an open-minded attempt to identify the existing environment, the potential effects of the project, resource needs, and the project's ability to satisfy those needs relative to project effects.***

The items are organized according to the topics addressed by the Commission staff in an EA or EIS, beginning with a general description of the river basin.

#### **General Description of the River Basin**

The Exhibit E should begin with a description of the river system, including its tributaries, the basin and length of river (identify river mile markers), general topography and climate, major land and water uses, proximity to cities, and economic activity within the basin. The information should promote an understanding of the

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environmental setting of the project. The most important environmental matters you discuss here will be treated more extensively in subsequent resource sections.

### Cumulative Effects

Applicants should identify resources that may be cumulatively affected by the proposed action. Applicants should structure their discussion on cumulative effects around a logical geographic and temporal scope of analysis for those resources and describe how resources are cumulatively affected. The discussion should identify past, present and future actions and their effects on resources based on the new license term (30-50) years. (See Commission's publication: *Guidelines for Preparing Environmental Assessments* for more detail).

### Applicable Laws

The Exhibit E should include a discussion of the status of compliance with or consultation under the following laws:

- *Section 401 of the Clean Water Act.* Applicants must file no later than 60 days from the REA notice, a request for water quality certification (WQC), as required by section 401 of the Clean Water Act.
- *Endangered Species Act (ESA).* Applicants must briefly describe the process used to address project effects on Federally listed or proposed species in the project vicinity and summarize any anticipated environmental effects on these species while providing the status of the consultation process.
- *Magnuson-Stevens Fishery Conservation and Management Act.* The applicant must document any essential fish habitat (EFH) that may be affected by the project. Within the context of this discussion, the applicant must address each managed species and life stage for which EFH was designated.
- *Coastal Zone Management Act (CZMA).* If the project is located within a designated coastal zone or if a project affects a resource located in the designated coastal zone, the applicant must certify that the project is consistent with the state Coastal Zone Management Program, and receive the state's concurrence in the consistency certification.
- *National Historic Preservation Act (NHPA).* The applicant must document its efforts to identify historic properties eligible for listing on National Register of Historic Places (NRHP), potential effects, and mitigation measures to minimize those effects. If there would be an adverse effect on historic properties, the applicant may include a Historic Properties Management Plan (HPMP) to avoid or mitigate the effects. The applicant must include documentation of consultation with the Advisory Council, the State Historic Preservation Officer, Tribal Historic Preservation Officer,

National Park Service, members of the public, and affected Indian tribes, where applicable.

- *Pacific Northwest Power Planning and Conservation Act.* If the project is located within the Columbia River Basin, applicants should demonstrate that they have consulted with Northwest Power Planning Council and explain how their proposal is consistent with purposes of the Pacific Northwest Power Planning and Conservation Act.
  - *Wild and Scenic River and Wilderness Act.* Include a description of any areas within or in the vicinity of the proposed project boundary that are (1) included in, or have been designated for study for inclusion in, the National Wild and Scenic Rivers System; or (2) that are designated as wilderness area, have been recommended for such designation, or have been designated as a wilderness study area under the Wilderness Act.
- Configuration of any dams, spillways, penstocks, canals, powerhouses, tailraces, and other structures;
  - The normal maximum water surface area and normal maximum water surface elevation (mean sea level), gross storage capacity of any impoundments;
  - Number, type, and minimum and maximum hydraulic capacity and installed capacity of existing and proposed turbines or generators to be included as part of the project;
  - An estimate of the dependable capacity, and average annual energy production in kilowatt hours; and
  - A description of the current and proposed operation of the project, including any daily or seasonal ramping rates, flushing flows, reservoir operations, and flood control operations.

### **Project Facilities and Operation**

In the case of the Exhibit E prepared under the integrated or alternative licensing process, the exhibit should also provide a description of the project that includes:

- Maps showing existing and proposed project facilities, lands, and waters within the project boundary;

### **Proposed Action and Action Alternatives**

Irrespective of the licensing process, the environmental document must contain an explanation of the effects the applicant's proposal would have on resources. This analysis should extend to the effects of any alternatives to the applicant's proposal (i.e., any preliminary terms and conditions filed with the Commission), and any unavoidable adverse impacts.

***Geology and Soils***

- ! a description of the geologic features, including bedrock lithology, stratigraphy, structural features, glacial features, unconsolidated deposits, and mineral resources at the project site. This should include a description of soils in the project area, including soil types, occurrence, erodability, and potential for mass soil movement, and a description of the geology of the project area, including bedrock type, unconsolidated deposits, and active or dormant mass movements;
- ! description of the reservoir shorelines and stream banks, including the steepness, composition and vegetative cover; existing erosion, mass soil movement, slumping, or other forms of instability, including identification of project facilities or operations that are known to or may cause these conditions;
- ! if there are existing areas of continuing erosion or slope instability, include a plan to stabilize these areas. This plan should include a narrative describing the soil types and geologic characteristics which could contribute to future erosion or slope instability, including streambank or reservoir shoreline erosion; the type of control measures to be used; and a topographic map showing the specific locations of the proposed control measures;
- ! discussion of the need for periodic removal of accumulated sediments and associated spoil disposal plans;
- ! discussion of sediment transport and deposition, particularly in the reservoir and bypassed reach, associated with any proposed project modifications;
- ! applicable, discussion of toxic sediments, including plans for testing and proper disposal if necessary; and
- ! for construction activities (including fishways or recreational development), specific plans for disposal of excavated materials and control of erosion and sedimentation. This plan should be self contained and must include the following:
  - ◆ detailed topographic maps showing project features and site conditions;
  - ◆ detailed descriptions of the existing topography, bedrock lithology, groundwater, vegetation, drainage, and soils;
  - ◆ descriptions of the nature and extent of proposed land-disturbing activities;
  - ◆ detailed descriptions of control measures, including the types and locations of control measures;

- ◆ descriptions of how restored disposal sites would be visually compatible with the surrounding landscape characteristics;
- ◆ plan and section drawings of the proposed disposal sites showing existing and post-disposal conditions;
- ◆ a specific implementation schedule;
- ◆ project construction period and during project operation;
- ◆ documentation of consultation with the agencies prior to preparing the plan;
- ◆ copies of agency comments or recommendations on the completed plan after it has been prepared and provided to the agencies; and
- ◆ specific descriptions of how all agency comments and recommendations are accommodated by the plan.

#### ***Water Use and Quality***

Include a description of the quality and quantity of all waters affected by the project including, but not limited to, project reservoir(s), tributaries thereto, bypassed reach, and tailrace. Components include:

- ! Drainage Area;
- ! Monthly minimum, mean, and maximum recorded flows in cubic feet per second of the stream or other body of water at the powerplant intake or point of diversion, specifying any adjustments made for evaporation, leakage, minimum flow releases, or other reductions available flow;
- ! monthly, not just yearly, flow duration curves and data indicating the period of record and the location of gauging station(s), including identification number(s), used in deriving the curve; and a specification of the critical streamflow used to determine the project's dependable capacity;
- ! data on mainstem and tributary inflows to the project reservoir, tailrace area and any bypassed reach, including seasonal quantities, and information of existing water uses and rights and water rights applications potentially affecting or affected by the project; and if quality differs from the mainstream, tributary water quality data;
- ! at least two years of actual gaged flow data to allow verification of any synthetic hydrographs submitted;
- ! description of the local groundwater regime; for example, the hydraulic connection between the reservoir and surrounding area;

- ! specific information on the state and federal water quality standards (including seasonal variability) that apply to the project site and a detailed explanation of how the project meets the standards. This should include data on dissolved oxygen, temperature (including seasonal vertical profiles in the reservoir), total dissolved gas, pH, total hardness, specific conductance, chlorophyll a, suspended sediment concentrations, alkalinity, nutrients (total phosphorus and nitrogen), fecal coliform (*E. Coli*) and contaminants as applicable;
- ! where there is a lengthy bypassed reach, water quality data at the dam, near the downstream end of the bypassed reach, and at any intermediate point where water quality changes abruptly;
- ! existing and proposed uses of project waters for irrigation, domestic water supply, industrial and other purposes, including any upstream of downstream requirements or constraints to accommodate those purposes.
- ! results of temperature modeling where necessary to characterize impacts and identify protection, mitigation, and enhancement measures. Any model used should be justified, calibrated, and tested, and supporting documentation should be provided;
- ! results of modeling the project's impact on downstream dissolved oxygen levels, supported by model documentation where necessary to characterize impacts and identify protection, mitigation, and enhancement measures;
- ! surface area, volume, maximum depth, mean depth, flushing rate, shoreline length, substrate composition; gradient for downstream reaches directly affected by the proposed project; and
- ! identification of other water-related facilities in the immediate project area, such as sewage treatment and water withdrawals
- ! environmental measures proposed or recommended to address any water quality effects.

#### ***Fish and Aquatic Resources***

- ! a description of the fisheries management (e.g., stocking) and resource goals of the agencies;
- ! a description of fish and macroinvertebrate assemblages, including invasive species in the project vicinity;
- ! temporal and spatial distribution of fish and aquatic communities, and any associated trends, species and life stage composition, standing crop, age and growth data, spawning run timing, and extent and location of spawning, rearing, feeding, and wintering habitat;

- ! intake velocities, screen or trashrack spacing, and description of any passage information;
- ! plans and functional design drawings of all fish passage and screening facilities, including proposed design criteria; and an assessment of flow needs (e.g., results of flow studies for different life history stages of target species over a full range of candidate flows, not just the applicant's proposed flow, including applicant-developed fish habitat curves, if applicable and where none exist;
- ! environmental measures proposed or recommended to address any effects on fish and aquatic communities.
- ! temporal or spatial distribution of species considered important because of their commercial, recreational, or cultural value;
- ! environmental measures proposed or recommended to address any effects on wildlife and botanical communities.

#### ***Wildlife and Botanical Resources***

- ! detailed information on the existing project-related environment, e.g., cover types and species (plant and animal) including invasive species, habitat extent, and habitat use.
- ! wildlife management plan for enhancement of transmission corridor habitat, including characterization of the wildlife, present management, and proposed changes in management plans; and

#### ***Wetlands, Riparian, and Littoral Habitat***

- ! Description of the floodplain, wetlands, riparian habitats, and littoral resources in the project vicinity;
- ! List the plant and animal species, including invasive species, that use the wetland, riparian and littoral habitat;
- ! A map delineating the wetlands, riparian, and littoral habitat
- ! Estimates of acreage for each type of wetland, riparian, or littoral habitat, including variability in such availability as a function of storage at a project that is not operated in run-of-river mode
- ! environmental measures proposed or recommended to address any effects on wetland and riparian communities.

***Rare, Threatened and Endangered Species***

- ! A list of Federal and state-listed, or proposed to be listed, threatened and endangered species known to be present in the project vicinity;
- ! Identification of habitat requirements;
- ! References to any known biological opinion, status reports, or recovery plan pertaining to a listed species;
- ! Extent and location of any federally-designated critical habitat, or other habitat for listed species in the project area; and temporal and spatial distribution of the listed species within the project vicinity
- ! environmental measures proposed or recommended to address any effects on threatened and endangered species.

***Recreation Resources***

- ! existing and potential recreational uses in the project area, including downstream use, whether or not facilities have been developed to support such uses, capacity, ownership and management;
- ! existing and potential future recreation use data, not merely unsubstantiated estimates;

- ! evaluation of recreation needs identified in current State Comprehensive Outdoor Recreation Plans, other applicable plans on file with the Commission, or other relevant local, state, or regional conservation and recreation plans; and a determination of whether the need can be accommodated by existing facilities or by additional recreational facilities at the project;
- ! adequacy and condition of existing recreation facilities;
- ! Existing shoreline buffer zones within the project boundary;
- ! maps showing the location and nature of existing and proposed recreation facilities, public access areas, undeveloped informal use locations, and areas set aside for future recreational development;
- ! identification of existing and proposed handicapped-accessible recreational facilities;
- ! construction schedule for new or expanded recreation facilities and identification of the entity responsible for construction, operation, and maintenance;
- ! impacts of any proposed project modifications and project operations on downstream or reservoir-based recreation; and

- ! identification of safety features to protect the public engaged in recreation;
- ! discussion of whether the project is located within or adjacent to National Wild and Scenic River systems and/or state protected river segments;
- ! discussion of how proposed or recommended recreational facilities would address any current or future demands of project facilities.

#### ***Aesthetics***

- ! identification of viewer locations and evaluation of the sensitivity of visual quality to any proposed modifications to project facilities and, if applicable, altered flows in the bypassed reach;
- ! description of the visual compatibility of proposed project modifications with the surrounding landscape, including linear features such as transmission lines, penstocks, and canals;
- ! assessment of the visual impacts of modifications of the project facilities;
- ! as appropriate, narrated color video cassette tape recording and/or color photographs of the exterior of all project facilities and of the range of streamflows in the

bypassed reach. The video and photographs should show the overall land character using both large and small scale views, proposed construction sites, if any, and proposed minimum flow levels compared to seasonal flows from the same vantage point;

- ! discussion of alternative ways to enhance the visual quality of the project facilities and streamflows to minimize the visual contrast of the project with the surrounding landscape; and
- ! estimate of the construction, operation, and maintenance costs of each visual enhancement alternative and the effect of these costs on the economics of the project.

#### ***Cultural Resources***

- ! Identification of any historic or archaeological site in the proposed project vicinity, with particular emphasis on sites or properties either listed in, or recommended by the State Historic Preservation Officer or Tribal Historic Preservation Officer for inclusion in, the National Register of Historic Places;
- ! Existing discovery measures, such as surveys, inventories, and limited subsurface testing work, for the purpose of locating, identifying, and assessing the significance of historic and archaeological resources that

- 
- have been undertaken within or adjacent to the project boundary; and
- ! Identification of Indian tribes that may attach religious and cultural significance to historic properties within the project boundary or in the project vicinity; as well as available information on Indian traditional cultural and religious properties, whether on or off of any Federally-recognized Indian reservation (A potential applicant must delete from any information made available under this section specific site or property locations, the disclosure of which would create a risk of harm, theft, or destruction of archaeological or Native American cultural resources or to the site at which the resources are located, or would violate any Federal law, including the Archaeological Resources Protection Act of 1979, 16 U.S.C. 470w-3, and the National Historic Preservation Act of 1966, 16 U.S.C. 470hh).
  - ! a description of project construction and operation effects on historic properties, including traditional cultural properties;
  - ! a description of any proposed environmental measures (including any cultural resource management plans) to address any environmental effects, or if sites are found during operation.
- Socioeconomics***
- ! For original construction and larger projects where some facility modification is being proposed, a socioeconomic report should be provided that includes a delineation of the socioeconomic area; a description of general land use, employment, population, and personal income trends in the impact area; an evaluation of impact of any substantial in-migration on the impact area's government facilities and services; on-site manpower requirements and payroll during and after project construction; source of project construction personnel and forecasted residence arrangements during construction; housing availability assessment; discussion of residences and businesses displaced, property acquisition procedures and relocation assistance; and a local governmental fiscal impact analysis;
  - ! For smaller projects without major construction, the socioeconomic report can be limited to a discussion of the project's ongoing effects on the local economy and government fiscal position; and
  - ! Estimates should be provided for changes in employment or income associated with any anticipated modifications to recreation use in the project area, such as whitewater rafting, boating, or fishing.

### ***Tribal Resources***

- ! Identification of information on resources specified above to the extent that existing project construction and operation affecting those resources may impact tribal cultural or economic interests; and
- ! Identification of impacts on Indian tribes of existing project construction and operation that may affect tribal interests not necessarily associated with the above resource e.g., tribal fishing practices or agreements between the tribe and other entities other than the potential applicant that have a connection to project construction and operation.

### ***Land Use and Comprehensive Plans***

- ! Identification of all relevant comprehensive plans and land management plans, and a discussion of the project's consistency or lack of consistency with each plan
- ! if not consistent, justification for accepting the lack of consistency;
- ! depiction of uses of land and resources adjacent to the project using maps, air photos, or drawings that clearly delineate the project boundary and boundaries of public lands;

- ! description of shoreline and reservoir management plans and their relation to adjacent uses of land and resources; and
- ! documentation of consultation with agencies having land management or planning/zoning authority in the area.

The Commission encourages potential applicants to develop shoreline management plans (SMPs), in cooperation with resource agencies, adjoining property owners, local governments, and other interested entities. An SMP helps the applicant and the Commission to reach a reasonable balance between developmental and recreational interests and wildlife and fisheries resource values. These plans would be revised periodically after licensing, with Commission approval, to accommodate changes to environmental and economic circumstances.

### **Economic Analysis**

Irrespective of the licensing process, an applicant must provide in the Exhibit E an estimate of the cost of any proposed facilities and for implementing each proposed resource protection, mitigation, or enhancement measure, including any specific measure filed with the Commission by agencies, Indian tribes, or members of the public when the application is filed.

Under the integrated licensing process, these costs must include annualized, current cost-based information. For an applicant

seeking a new or subsequent license using the integrated licensing process, the applicant must include the cost of operating and maintaining the project under the existing license. For an original license, the applicant must estimate the cost of constructing, operating, and maintaining the proposed project. For an existing license, the applicant's economic analysis must estimate the value of developmental resources associated with the project under the current license and the applicant's proposal. For an original license, the applicant must estimate the value of the developmental resources for the proposed project. As applicable, these developmental resources may include power generation, water supply, irrigation, navigation, and flood control. Where possible, the value of developmental resources must be based on market prices. If a protection, mitigation, or enhancement measure reduces the amount or value of the project's developmental resources, the applicant must estimate the reduction.