In this connection, it bears emphasis that in 1982 when it last addressed the regulation of leverage transactions under section 19 of the Act, Congress reminded the Commission that it retained the "authority to take appropriate action under any other provision of the Commodity Exchange Act against transactions masquerading as 'leverage' contracts." H.R. Rept. No. 964, 97th Cong. 2d Sess. 51 (1982). Of particular relevance in this context is section 4(a) of the Act, 7 U.S.C. 6(a) (1982), which generally prohibits any person to offer or sell, or to conduct a business in the United States for the purpose of dealing in, "a contract for the purchase or sale of a commodity for future delivery," *i.e.*, a futures contract, unless such transaction is conducted on or subject to the rules of an exchange that has been designated by the Commission as a contract market, and is executed or consummated by or through a member of that contract market.[1]

While the terms and conditions of any particular transaction must be examined on a case-by-case basis, the Commission's Office of the General Counsel is of the view that many off-exchange future delivery type transactions, whether or not "masquerading" as leverage contracts, are in fact commodity futures contracts and are *per se* unlawful under section 4(a) of the Commodity Exchange Act. In general, these transactions share some of or all of the following indicia of futures contracts: they involve the purchase or sale of a commodity for delivery in the future at a price or pricing formula that is agreed upon when the transactions are initiated; they are standardized as to terms and conditions other than price; unlike commercial forward contracts or traditional installment agreements, they are undertaken primarily to assume or shift the risk of commodity price changes and are not generally entered into for purposes of obtaining delivery of the commodity, but rather are discharged through offsetting transactions or other buy-back arrangements.[2]

[1] Contracts made on or subject to the rules of exchanges located outside the United States are not included within this prohibition.

[2] Other characteristics of a futures contact may include standardized commodity units, the initial deposit and maintenance of "margin" or like payments and no right or interest in the customer of a particular lot or other commodity unit. For a discussion of the general attributes of a commodity futures contract within the meaning of the Act, *see Commodity Futures Trading Commission v. CoPetro Marketing Group, Inc., et al.*, 680 F.2d 573 (9th Cir. 1982); *In Re Stovall, et al.*, [1977–1980 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 20, 941 (CFTC 1979).

Because the off-exchange marketing of these transactions is unlawful under federal law, it may not be permitted by the states. However, since the 1982 enactment of the "open season" provisions of section 12(e) of the Act, 7 U.S.C. 16(e), the states have been empowered to take legislative or enforcement action to prohibit the offer and sale of these transactions. Section 12(e), among other things, expressly permits the application of any state law to commodities transactions other than those within the Act's exclusive regulatory structure, such as leverage transactions subject to regulation under Section 19.[3] Since transactions that do not meet the Commission's leverage contract definition in Rule 31.4(w) are not subject to regulation under section 19, they are subject to the "open season" provisions of section 12(e).

As indicated above, where Congress, as in section 4(a) of the Act, has prohibited the offer and sale of a particular type of commodity transaction that is also subject to the open season provision, the states may, consistent with that Congressional directive and section 12(e), also enact and enforce legislation prohibiting the marketing of the transaction. State law enforcement actions against off-exchange futures transactions may be prosecuted under any state law or as violations of section 4(a) of the Act.[4] In this regard, the Commission has consistently taken enforcement action, or joined or assisted the states in bringing actions, to curtail the unlawful offer and sale of various off-exchange instruments for future delivery.[5]

[3] In addition, under section 12(e) the states may apply their laws against persons who are engaged in transactions exclusively regulated by the Commission, such as Section 19 leverage transactions, but who have failed to obtain a required registration with the Commission.

[4] In addition to being initiated solely by the Commission, enforcement actions under section 4(a) may be brought or joined in by the states. *See* section 6d of the Act, 7 U.S.C. 13a-2 (1982), pursuant to which the states are generally authorized to enforce the Commodity Exchange Act and the Commission's regulations in the federal courts.

[5] Some of these more recent actions include *Commodity Futures Trading Commission and People of the State of California v. Brazier Corp. Inc., et al.*, Civ. No. 84-2006 ER (C.D. Cal. 1984); *Commodity Futures Trading Commission v. Rose, et al.*, No. 84-6717 (S.D. Fla. 1984); *Commodity Futures Trading Commission v. Thomas, et al.*, No. 85-6066 (S.D. Fla. 1985); *Commodity Futures Trading Commission v. International Silver Bullion Exchange, et al.*, C.A. No. 84 C 10501 (N.D. Ill. 1984); and *Commodity Futures Trading Commission v. FITC, Inc., et al.*, C.A. No. 85-1553 EFL (N.D. Cal. 1985).

The Office of the General Counsel also wishes to make clear that certain commodity-related transactions not covered by section 19, section 4(a), or any other provision of the Act may be permitted and regulated by the states or other government agencies. For example, whether and how to permit the sale of commodities on a cash basis are generally matters of state concern, as are installment sales of commodities where the purchaser takes delivery upon entry into the transaction. The Office of the General Counsel is aware of several laws and legislative proposals that the states have developed to implement their authority under section 12(e). Of these the most comprehensive proposal appears to be the Model State Commodity Code being developed by the North American Securities Administrators Association ("NASAA").

The proposed Model Code would, among other things, prohibit under state law the offer and sale of off-exchange futures contracts (including transactions not subject to Commission regulation under section 19) and would permit certain types of sales to the public of precious metals where delivery of the commodity, or of appropriate documents of title or similar documentation, occurs within a limited period. The Office of the General Counsel is of the view that the NASAA proposal is fully consistent with the principles set forth in this notice.

Issued in Washington, D.C., on March 18, 1985, by the General Counsel.

Kenneth M. Raisler,

General Counsel.

[FR Doc. 85-6863 Filed 3-22-85; 8:45 am]

BILLING CODE 6351-01-M

SECURITIES AND EXCHANGE COMMISSION

17 CFR Part 211

[Release No. SAB-58]

Staff Accounting Bulletin No. 58

AGENCY: Securities and Exchange Commission.

ACTION: Publication of Staff Accounting Bulletin.

SUMMARY: This staff accounting bulletin expresses the staff's views regarding last-in, first-out (LIFO) inventory accounting practices for financial statement purposes.

DATE: March 19, 1985.

FOR FURTHER INFORMATION CONTACT: Leland E. Graul, Office of the Chief Accountant (202-272-2130), or Howard

P. Hodges, Jr., Division of Corporation Finance (202-272-2553), Securities and Exchange Commission, 450 Fifth Street NW., Washington, D.C. 20549.

SUPPLEMENTARY INFORMATION: The statements in Staff Accounting Bulletins are not rules or interpretations of the Commission nor are they published as bearing the Commission's official approval. They represent interpretations and practices followed by the Division of Corporation Finance and the Office of the Chief Accountant in administering the disclosure requirements of the Federal securities laws.

John Wheeler,
Secretary.
March 19, 1985.

PART 211—[AMENDED]

Accordingly, Part 211 of Title 17 of the Code of Federal Regulations is amended by adding Staff Accounting Bulletin No. 58 to the table found in Subpart B.

Staff Accounting Bulletin No. 58

The staff hereby adds Section L to Topic 5 of the staff accounting bulletin series. Section L discusses the staff's views regarding last-in, first-out (LIFO) inventory accounting practices for financial reporting purposes.

Topic 5: Miscellaneous Accounting

* * * * *

L. LIFO Inventory Practices

Facts: On November 30, 1984, the American Institute of Certified Public Accountants' Accounting Standards Executive Committee (AcSEC) and its Task Force on LIFO Inventory Problems (task force) issued a paper, "Identification and Discussion of Certain Financial Accounting and Reporting Issues Concerning LIFO Inventories." This paper identifies and discusses certain financial accounting and reporting issues related to the last-in, first-out (LIFO) inventory method for which authoritative accounting literature presently provides no definitive guidance. For some issues, the task force's advisory conclusions recommend changes in current practice to narrow the diversity which the task force believes exists. For other issues, the task force's advisory conclusions recommend that current practice should be continued for financial reporting purposes and that additional accounting guidance is unnecessary. Except as otherwise noted in the paper, AcSEC generally supports the task force's advisory conclusions. As stated in the issues paper, "Issues papers of the AICPA's accounting standards division are developed primarily to identify financial accounting and reporting issues the division believes need to be addressed or clarified by the Financial Accounting Standards Board." On February 6, 1985, the Financial Accounting Standards Board decided not to add to its agenda a narrow project on the subject of LIFO inventory practices.

Question 1: What is the SEC staff's position on the recently released issues paper?

Interpretive Response: In the absence of existing authoritative literature on LIFO accounting, the staff believes that registrants and their independent accountants should look to the paper for guidance in determining what constitutes acceptable LIFO accounting practice.[1] In this connection the staff considers the paper to be an accumulation of existing acceptable LIFO accounting practices which does not establish any new standards and does not diverge from generally accepted accounting principles.

The staff also believes that the advisory conclusions recommended in the issues paper are generally consistent with conclusions previously expressed by the Commission, such as:

1. Pooling—paragraph 4-6 of the paper discusses LIFO inventory pooling and concludes "establishing separate pools with the principal objective of facilitating inventory liquidations is unacceptable." In Accounting and Auditing Enforcement Release No. 35, August 13, 1984, the Commission stated that it believes that the Company improperly realigned its LIFO pools in such a way as to maximize the likelihood and magnitude of LIFO liquidations and thus, overstated net income.

2. New Items—paragraph 4-27 of the paper discusses determination of the cost of new items and concludes "if the double extension or an index technique is used, the objective of LIFO is achieved by reconstructing the base year cost of new items added to existing pools." In Accounting Series Release No. 293, the Commission stated that when the effects of inflation on the cost of new products are measured by making a comparison with current cost as the base-year cost, rather than a reconstructed base-year cost, income is improperly increased.

Question 2: If a registrant utilizes a LIFO practice other than one recommended by an advisory conclusion in the issues paper, must the registrant change its practice to one specified in the paper?

Interpretive Response: Now that the issues paper is available, the staff believes that a registrant and its independent accountants should re-examine previously adopted LIFO practices and compare them to the recommendations in the paper. In the event that the registrant and its independent accountants conclude that the registrant's LIFO practices are preferable in the circumstances, they should be prepared to justify their position in the event that a question is raised by the staff.

Question 3: If a registrant elects to change its LIFO practices to be consistent with the guidance in the issues paper and discloses such changes in accordance with Accounting Principles Board Opinion No. 20, "Accounting Changes," will the registrant be requested by the staff to explain its past practices and its justification for those practices?

Interpretive Response: The staff does not expect to routinely raise questions about changes in LIFO practices which are made to make a company's accounting consistent with the recommendations in the issues paper.

* * * * *

[FR Doc. 85-6976 Filed 3-22-85; 8:45 am]

BILLING CODE 8010-01-M

[1] In Accounting Series Release No. 293 (July 2, 1981) see Financial Reporting Codification section 205, the Commission expressed its concerns about the inappropriate use of Internal Revenue Service (IRS) LIFO practices for financial statement preparation. Because the IRS amended its regulations concerning the LIFO conformity rule on January 13, 1981, allowing companies to apply LIFO differently for financial reporting purposes than for tax purposes, the Commission strongly encouraged registrants and their independent accountants to examine their financial reporting LIFO practices. In that release, the Commission acknowledged the "task force which has been established by AcSEC to accumulate information about [LIFO] application problems" and noted that "This type of effort, in addition to self-examination [of LIFO practices] by individual registrants, is appropriate. . . ."

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

18 CFR Part 4

[Docket No. RM83-56-000; Order No. 413]

Application for License, Permit, and Exemption From Licensing for Water Power Projects

Issued: March 20, 1985.

AGENCY: Federal Energy Regulatory Commission, DOE.

ACTION: Final rule.

SUMMARY: The Federal Energy Regulatory Commission (Commission) is amending its regulations governing

applications for license, preliminary permit, and exemption from licensing for hydroelectric projects. This rulemaking: (1) Clarifies and revises many of the Commission's regulations that govern hydroelectric applications; (2) amends 18 CFR Part 4 to incorporate Commission decisions into these regulations; and (3) reorganizes several sections of 18 CFR Part 4 to integrate the regulations governing exemption applications into Subpart D of 18 CFR Part 4.

DATE: The effective date of this final rule is June 10, 1985, subject to OMB approval under the Paperwork Reduction Act.

FOR FURTHER INFORMATION CONTACT: Joseph H. Long, Office of the General Counsel, Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington, D.C. 20426, (202) 357-8528.

SUPPLEMENTARY INFORMATION: .

Before Commissioner: Raymond J. O'Connor, Chairman; A.G. Sousa, Oliver G. Richard III and Charles G. Stalon.

I. Introduction

The Federal Energy Regulatory Commission (Commission) is amending its regulations under the Federal Power Act (FPA)[1] governing applications for licenses, preliminary permits, and exemptions from licensing for hydroelectric projects. This rulemaking accomplishes three major objectives. First, it clarifies and revises many of the Commission's regulations that govern hydroelectric applications, which are set forth in 18 CFR Part 4. Second, it amends Part 4 to incorporate Commission decisions into the regulations. Third, it reorganizes several sections of Part 4 to integrate the regulations governing exemption applications into Subpart D of Part 4. Subpart D[2] prescribes the general procedural rules for filing applications, the rules of competition, and the rules for selection among competing applications.[3]

The rule will be effective June 10, 1985 as discussed below under "Effective Date and Paperwork Reduction Act." In general, application of the rule to pending proceedings should not cause any hardship or unfairness, since the rule primarily codifies Commission decisions and clarifies the old regulations. However, there may be instances in which applicants that have relied on the old regulations would be put at an unfair disadvantage by application of the new regulations. The Commission will consider petitions by such applicants requesting it to apply all or part of the old rules in these instances and will grant the petitions to avoid any unfairness.

II. Background

On February 24, 1984, the Commission issued a Notice of Proposed Rulemaking (NOPR) in which it proposed to revise several sections of Part 4 of its regulations.[4] These proposed revisions were intended: (1) to clarify numerous rules promulgated over the last few years; (2) to reflect more clearly Commission interpretations of specific regulations; and (3) to reorganize several sections concerning exemption applications.[5]

The Commission received 65 public comments in response to this NOPR. Commenters include Federal and state fish and wildlife agencies, state and municipal governments, associations representing states, municipalities, public utilities, landowners, private hydroelectric developers, and environmental groups, and several individual public utilities, landowners, and private hydroelectric developers. The final rule discusses and responds to the major comments on the NOPR. Commenters also raise several issues not discussed in the NOPR which will not be addressed here. The Commission is reviewing these comments and will determine whether they should be addressed in subsequent rulemaking dockets.

III. Reorganization of Subpart D

Commenters support the proposed reorganization of Subpart D. The Commission continues to believe that these changes will reduce cross-referencing from Subparts J[6] and K[7] to Subpart D and will clarify both the procedural rules for filing exemption applications and the rules governing competing applications for authority to develop and operate mutually exclusive projects.[8] Therefore, the Commission is reorganizing Subpart D, as follows:

Section 4.30 states that Subpart D applies to applications for a permit, a license, and an exemption. Section 4.30 also contains definitions for Part 4.

Section 4.31 states who may file an initial or a competing application for a permit, a license, or an exemption.

Section 4.32 states the conditions under which the Commission will accept an initial or competing application for a permit, a license, or an exemption.

Section 4.33 states certain circumstances under which the Commission will not accept an application for a permit, a license, or an exemption.

Section 4.34 states the conditions under which an applicant can petition the Commission for a hearing concerning an application, or under which the Commission will order such a hearing on its own accord.

Section 4.35 states the rules for assigning a new "acceptance for filing" date to an application for a permit, a license, or an exemption, when certain types of amendments are made to these applications.

Section 4.36 states the special filing requirements and deadlines for filing competing applications, and states the requirements governing the comparisons of plans of development that applicants for licenses or exemptions must make.

Section 4.37 states the rules that the Commission uses to select one application from among those competing for the same or mutually exclusive projects.

Section 4.38 states the requirements for pre-filing consultation with other agencies.

Section 4.39 states the requirements for preparing and submitting maps and plans.

Appendix A of this rule contains derivation and distribution tables. The derivation table indicates how the new regulations are derived from the old regulations. The distribution table

[1] 16 U.S.C. 791a-825r (1982).

[2] Sections 4.30-4.35. The Commission's current regulations are cited with no preface. Regulations that were proposed in the Notice of Proposed Rulemaking are prefaced with the designation "proposed." New regulations that are being implemented by this final rule are prefaced with the designation "new." All sections cited herein are to 18 CFR Part 4.

[3] The rule revises §§ 4.30-4.35, 4.40, 4.41, 4.50, 4.51, 4.60, 4.61, 4.70, 4.71, 4.80-4.83, 4.90-4.93, 4.101-4.107, and 4.201. It adds new §§ 4.36, 4.37, 4.38, 4.64, 4.95, and 4.96.

[4] Application for License, Permit, or Exemption from Licensing for Water Power Projects: 49 FR 8009 (Mar. 5, 1984).

[5] To afford the Commission an opportunity to reconsider the categorical exemption rules, on June 15, 1983, the Commission stayed §§ 4.109-4.113, 48 FR 29474 (June 27, 1983) (Order No. 202-C). Because of the stay, the Commission does not propose, at this time, to address regulations governing categorical exemptions. That will be done in a separate rulemaking docket.

[6] Subpart J governs exemptions of small conduit hydroelectric facilities. §§ 4.90-4.94.

[7] Subpart K governs exemptions of small hydroelectric power projects of five megawatts or less. §§ 4.101-4.113.

[8] In a recent decision, Tulalip Tribes of Washington v. FERC, 732 F.2d 1451 (9th Cir. 1984), the U.S. Court of Appeals for the Ninth Circuit found certain provisions of § 4.102 to be invalid. Section 4.102 defines requirements for application for exemption from licensing for small hydroelectric power projects. As part of the reorganization, the final rule redesignates these provisions. However, by redesignating these provisions, the Commission is *not* reaffirming their validity. The Commission will respond to the court's findings in a separate proceeding.

indicates where the old regulations are located in the new regulations.

IV. Filing of Competing Applications

A. Notices of Intent to File Competing Applications

Competing applications for a site must be filed within approximately 60 days [9] after issuance of the first public notice of acceptance for filing of an initial application for that site.[10] Generally, if a prospective applicant needs additional time to prepare and submit its application, it can file a notice of intent to submit a competing application.[11] A notice of intent informs the Commission that the prospective applicant requires additional time to prepare and file a competing application, and that an additional application can be expected, before the Commission examines, compares, and acts on all the applications competing for the same site. On submitting an acceptable notice of intent, a competing permit applicant is allowed an additional 60 days [12] and a competing development (i.e., license or exemption) applicant is allowed an additional 120 days [13] beyond the last date for filing protests and motions to intervene prescribed in the public notice of acceptance for filing of the initial application.

The provisions allowing additional time to file a competing application pursuant to a notice of intent were promulgated to balance two countervailing objectives: The need to expedite the processing of initial applications after giving public notice of their acceptance for filing, and the need to allow a reasonable opportunity for prospective competitors to file competing applications. Under the Commission's notice of intent provisions, the Commission delays consideration of the initial application only when, within the deadline prescribed in the public notice of acceptance for filing of the initial application, a prospective competing applicant informs the Commission that it intends to file an application for the same site.

The NOPR explained that these provisions had resulted in numerous disputes [14] and misuse [15] and it proposed to eliminate entirely the provisions allowing notices of intent on the ground that they did not expedite or simplify the processing of applications. Under the proposed rule, a prospective competitor would have been required to file its application not later than the last date for filing protests and motions to intervene, as prescribed in the public notice of acceptance for filing of the initial application (i.e., approximately 60 days after the first publication of the notice of acceptance for filing).[16] The NOPR suggested that this approach would simplify the regulations and reduce the number of disputes arising concerning the appropriate deadline for filing a competing application. However, the NOPR specifically invited public comment on the time to be allowed for the filing of competing applications, and the strengths and weaknesses of the notice of intent mechanism.

Almost all commenters that discuss this issue strongly oppose elimination of notices of intent. The opposing commenters include municipalities, public utilities, private landowners, environmental protection agencies, environmental protection groups, and national associations representing municipalities, public utilities and private developers. Commenters oppose the proposal to eliminate notices of intent for the following reasons. First, several commenters argue that elimination of notices of intent would harm public entities. A public entity, if it can submit an application only after approval by a city council, utility governing board, state agency, or other political entity, allegedly often cannot prepare and submit a competing hydroelectric application within the Commission's current prescribed deadlines for filing competing applications. States and municipalities allegedly would have insufficient time to prepare and submit competing applications and would be unable to avail themselves of the special preferences granted them under section 7 of the FPA, in competition against private entities for hydroelectric permits or licenses.[17]

Second, commenters argue that elimination of notices of intent would result in the licensing of projects that are not "best adapted" in the public interest, as required by section 10(a) of the EPA.[18] They argue that competition results in the authorization of better adapted projects and that the proposal would greatly reduce competition.

Third, a commenter argues that, because the consultation process alone can require over 60 days,[19] the proposal would make it impossible for anyone not already consulting with other agencies to file a competing development application.

Fourth, a commenter argues that, by reducing competition, the proposal would hurt the environment, because competition often revolves around environmental considerations.

In support of the NOPR's proposal, a state agency argues that competing applications are generally incomplete and of poor quality. It supports what it characterizes as the Commission's move to reduce the number of applicants competing for a particular site.

The Commission finds commenters' arguments in favor of retaining notices of intent to be persuasive. Notices of intent provide municipalities with more reasonable deadlines in which to obtain approval to file competing applications. By providing a greater opportunity to file competing applications, notices of intent enhance the possibility that competitors will propose plans that are better adapted in the public interests with regard to environmental and other considerations. Notices of intent also allow a more reasonable time to consult with other agencies prior to filing a competing application with the Commission. The Commission disagrees with one commenter's characterization that the Commission proposed to eliminate notices of intent to reduce the number of competing applicants for a site. The Commission proposed eliminating notices of intent to provide reasonable deadlines in which to file competing applications, while not unduly delaying the consideration of applications. Therefore, for the above reasons, the Commission finds that the advantages of retaining notices of intent outweigh the disadvantages and is

[9] The prescribed deadline for filing protests and motions to intervene is published in the public notice of Commission acceptance for filing of an initial application. In determining the precise date to be prescribed in this notice, the Commission estimates the date of the first newspaper publication of the notice (usually about 7 to 10 days after the notice is issued). It then determines the date that would be 51 days later (i.e., it allows for 4 once-a-week publications of the notice, plus 30 additional days). This date is prescribed in the notice as the deadline for filing protests and motions to intervene. Throughout this rule, for convenience, it is assumed that this date is "approximately 60 days" after issuance of the notice of acceptance for filing of the initial application.

[10] Section 4.33(a)(1).

[11] Section 4.33(a)(1) and (b).

[12] Section 4.33(c).

[13] Section 4.33(c) and 4.104(d).

[14] *See* Energenics Systems, Inc., 17 FERC ¶ 61,110 (1981) (The Commission interpreted its regulations to allow a rejected competing permit application to be treated as a notice of intent); Long Lake Energy Corp., 20 FERC ¶ 61,130 (1982) (The Commission determined that a notice of intent to file a license or an exemption from licensing application could be used to file either type of application).

[15] Some notices of intent apparently are filed only to delay the initial applicant or as bargaining leverage against the initial applicant. Other notices of intent are filed without any realistic expectation of filing a competing application.

[16] Proposed § 4.36.

[17] 16 U.S.C 800 (1982).

[18] 16 U.S.C 803(a) (1982).

[19] *See* proposed § 4.38(b).

retaining notices of intent to file development applications in competition with either an initial permit application or an initial development application.

The Commission, however, continues to believe that prospective competing permit applicants do not require the additional 60 days now allowed under a notice of intent to file a competing permit application. Permit applications do not require extensive studies and plans, nor do they require pre-filing consultation with other agencies. Therefore, the Commission is reducing from 60 days to 30 days the time allowed under a notice of intent to file a competing permit application. This will ensure that prospective competing applicants, including those municipalities that must seek prior approval to file, will have a reasonable amount of time to prepare and file competing permit applications. It will allow a maximum of approximately 90 days after the first publication of acceptance for filing of an initial permit application to prepare and file a competing permit application.

B. Deadlines for Filing a Competing Application for License or Exemption From Licensing

The NOPR proposed to extend to exemption applications the rule that allows license applications to be filed any time before the Commission issues a preliminary permit for the same site. Rather than expanding this rule, the final rule eliminates it. Development applications filed in competition with an initial permit application will be required to be filed within prescribed deadlines. The Commission's proposal, comments thereto, and reasons for revising the rule are as follows.

As stated above, the Commission's regulations require competing permit and license applications to be filed not later than the deadline for filing protests and motions to intervene prescribed in the public notice of acceptance for filing of an "initial application." [20] In the *Georgia Pacific Corporation* decision, [21] the Commission determined that the term "initial application," as used in § 4.33(a)(1), encompasses two initial applications, one for a permit and one for a license, for any one project. The Commission reasoned that competition at the license level constitutes a phase of the competitive proceeding that is distinct from competition at the permit level. Thus, when an applicant files a license application in a preliminary permit proceeding, it starts a new round of competition at the license level.

The NOPR proposed to incorporate more clearly in the regulations the Commission's decision in *Georgia Pacific* that a license application may be filed in competition with a preliminary permit application at any time before the permit is actually issued. [22] In addition, the NOPR proposed to clarify that this opportunity ends if an initial development application is accepted for filing. After an initial development application is accepted for filing, any competing development application would have be be filed not later than the deadline for filing protests and motions to intervene prescribed in the public notice of acceptance for filing of the initial development application. [23]

The proposal extended beyond the precise Commission holding in *Georgia Pacific* because, to date, the Commission's rules and decisions have not fully addressed how exemption applications fit into this two-phase process. When the Commission promulgated its regulations governing exemption applications for small hydroelectric power projects, [24] it declined to allow an exemption application, or a notice of intent to submit such an application, to be filed after the last date for filing protests and motions to intervene prescribed in the public notice of an already pending permit application. [25]

The NOPR stated that, since deciding *Georgia Pacific*, the Commission believed that acceptance for filing of a license application to develop projects during the pendency of a permit application proceeding had not unduly burdened the Commission, any of the interested entities, or the process itself. Because an application for exemption is similar to an application for a license in that applicants for either are ready to build, the Commission believed that allowing an initial exemption application, and competing applications, to be accepted for filing up until a pending permit application is granted would also cause no undue burden. Rather, the Commission believed that allowing exemption applications to be filed in these circumstances would expedite development of hydroelectric sites because an exemption applicant, unlike a permit applicant, is prepared to proceed with construction immediately.

The NOPR therefore proposed to treat exemption applications the same as license applications [26] Under the proposed rule, an application for exemption from licensing would have been accepted in competition with a pending permit application at any time before the Commission granted a permit, or not later than the last date for filing protests and motions to intervene prescribed in the public notice of acceptance for filing of the initial development application for the site, whichever occurred first. [27]

Several commenters argue that the Commission should not expand the *Georgia Pacific* rule to cover exemptions, but, rather, should reverse it. They argue that the *Georgia Pacific* rule introduces too much uncertainty into an already complex system and that permit applicants need a deadline after which they know they will not be subject to competition from development applicants. They request the Commission to set a definite deadline for the filing of an initial development application filed in competition with an initial permit application.

The Commission has considered and balanced the countervailing objectives involved in setting deadlines for the filing of competing applications: favoring actual development over studies, reducing unnecessary uncertainty, assuring fair treatment of prospective competing applicants, and promoting efficient use of the Commission's resources. While the Commission does favor development over studies, it has found that applicants sometimes file development applications merely as a tactic. Frequently, they file competing license or exemption applications rather than competing permit applications when they have not completed the necessary studies and therefore are not prepared to file an acceptable development application. They do this knowing that they would be unable to file competing permit applications that would be better adapted than the initial permit application to develop a region's resources in the public interest and that the initial permit application would therefore be granted under the Commission's "first to file" rule, assuming that municipal preference did not apply. [28]

[20] Section 4.33(a)(1).

[21] Georgia Pacific Corp., 17 FERC ¶ 61,174 (1981).

[22] Proposed § 4.36(a)(2)(i).

[23] Proposed § 4.36(b)(a).

[24] Exemption from All or Part of Part I of the Federal Power Act of Small Hydroelectric Projects with an Installed Capacity of Five Megawatts or Less, 45 FR 76115 (Nov. 18, 1980) (Order No. 106).

[25] Section 4.104(a)(2)(i).

[26] Proposed § 4.36(a)(2)(i).

[27] *Cf.* Milton and Morris Zack, 23 FERC ¶ 61,121 (1983) (noting that the current regulations prescribe different deadlines for filing license and exemption applications in competition with a permit application).

[28] *See* § 4.33.

The Commission does not object to shifting competition from the studies phase to the development phase. In fact, the Commission encourages it. However, where competing applicants in their rush to prepare and file development applications have not performed the necessary studies and have not adequately developed their plans, the Commission's staff wastes time and effort reviewing and ultimately rejecting poorly-prepared competing development applications, and the development of hydropower is delayed rather than enhanced.

In order to discourage the submission of prematurely-filed, poorly-prepared development applications and to introduce greater certainty into the process for all prospective competing applicants and the Commission, the Commission is reversing the *Georgia Pacific* rule. The final rule requires an initial development applicant to file its application within a prescribed deadline, approximately 60 days after the first publication of notice of acceptance for filing of the initial permit application. However, to allow prospective competing development applicants that have already completed, or very quickly can complete, all necessary studies and pre-filing consultations, a short additional time to complete their applications, they will be allowed to file notices of intent and obtain an additional 120 days to file their competing development applications.

Under these new filing deadlines, all interested parties will know the identity of all actual and prospective competing applicants within approximately 60 days of the first newspaper publication of notice of acceptance for filing of an initial permit application. Permit applicants will know whether they should be preparing development applications to compete with a competing development applicant rather than waiting for the Commission to act on their permit applications.

The Commission believes these new deadlines will make the permit competition process more certain, while allowing applicants that are truly prepared to proceed with development to file competing applications.

C. Exemptions

1. Competing Exemption Applications

There are circumstances in which more than one potential applicant could qualify for an exemption.[29] The NOPR proposed to clarify that the Commission does allow competition for an exemption.[30]

Until now, the Commission's regulations have been silent on how it selects from among two or more competing exemption applications for the same project. In comparing competing permit or competing license applications, when either both applicants have municipal preference or neither applicant has municipal preference, the Commission favors the applicant with plans of development that are better adapted to develop, conserve, and utilize in the public interest the water resources of the region.[31] If the plans of development of the competing applicants are equally well adapted, neither applicant has municipal preference (or both do) and neither applicant is the permittee, the Commission favors the applicant with the earliest application acceptance date.[32]

In the NOPR, the Commission proposed to provide expressly that the "better adapted" and "first-in-time" rules of preference apply to competing applications for exemption from licensing of a small hydroelectric power project or a small conduit hydroelectric facility. The NOPR proposed to amend the Commission's regulations [33] to expressly state that the Commission would apply these rules of preference in selecting among competing exemption applications.[34]

The American Public Power Association (APPA) argues that, where competition for a site exists, an exemption is unnecessary; the exemption process is intended to encourage development of previously ignored sites, not necessarily or primarily to expedite development of known and usable sites. The APPA made these same arguments in the rulemaking establishing regulations governing application for exemption.[35] The Commission continues to reject these arguments for the reasons set forth at length in that rulemaking. The Commission is adopting the regulation as proposed.

2. Permit Applications Submitted After an Exemption Application

The Commission's regulation state that, with certain exceptions, the Commission will not accept for filing an application for a permit for a small hydroelectric power project if the Commission has accepted a previously filed exemption application for that project and has not yet granted or denied that exemption application.[36] The NOPR proposed to clarify the Commission's implementation of this restriction. If an initial application for a project is for a permit, and an exemption application is then filed that is the initial development application, the Commission only accepts subsequent permit applications filed not later than the last date for filing applications in competition against the initial permit application (as would be determined by proposed § 4.36(a)).[37] The Commission received no comments opposing this proposal. Accordingly, the Commission is adopting it.

3. Competing Exemption and License Applications

The Commission's regulations state that if an application for a license and an application for exemption from licensing are both accepted for filing and each proposes to develop the same site, the Commission will favor the first filed application unless the Commission determines that the plans of the subsequent applicant would better develop the water power potential of the affected resources.[38] The regulations do not state expressly that the Commission will make this comparison. The NOPR proposed to clarify that the Commission will make the comparison, will favor the applicant with the better adapted plans, and that if the plans of the competing applicants are equally well adapted, the Commission will favor the applicant that filed first.[39]

A commenter argues that applying the "first in time" rule to competition between a license applicant and an exemption applicant creates problems because the regulations impose different reporting, consultation, and other requirements for the two types of applicants. The Commission finds that the differences in filing requirements between the two types of applications do not create an unfair advantage for either type of applicant. The

[29] For example, this can occur where only Federal lands would be used or occupied (*see* Douglas Pegar, 23 FERC ¶ 61,110 (1983)) or where more than one potential applicant has all the necessary property interests.

[30] Proposed § 4.36(b).

[31] Section 4.33(g)(1). *See also* section 10(a) of the Federal Power Act, 16 U.S.C. 803(a) (1982).

[32] Section 4.33(g)(2).

[33] Proposed § 4.37(d)(2).

[34] Municipal preference does not apply in selecting among competing exemption applications.

[35] 45 FR 76115 (Nov. 18, 1980) (Order No. 106).

[36] Section 4.104(c)(1).

[37] Proposed § 4.33(a)(3).

[38] Section 4.104(e)(2). Municipal preference does not apply in competition between a public entity license applicant and an exemption applicant.

[39] Proposed § 4.37(d)(2).

Commission's experience has been that it can compare projects on their merits and select the project that best utilizes a region's resources in the public interest, whether the applicant is seeking an exemption or a license. If the Commission requires additional information from any applicant, it can acquire it under § 4.31(f). Therefore, the Commmission is adopting the proposal.

4. Competing Exemption and Permit Applications

The Commission's regulations state that the Commission will favor an application for exemption from licensing over an application for a permit.[40] This reflects the rebuttable presumption that preliminary permit applications are less concrete in nature and do not offer substantiated information and result in study rather than immediate development, whereas accepted exemption applications are fully developed proposals that are to be put into effect soon after approval. However, if the permit applicant's plans are both better adapted to develop the region's water resources and are substantiated in the application, the Commission will favor the permit applicant.[41] Where the permit applicant's plans are not substantiated, or, if substantiated, are not better adapted, the Commission will favor the exemption applicant. The NOPR proposed to codify this Commission policy.[42]

Commenters generally favor codifying the Commission's current practice of comparing substantiated plans of a permit applicant with those of exemption applicants. However, a commenter questions the fairness of requiring a permit applicant to have substantiated its plans in its originally filed application. The commenter argues that when a permit applicant files its application it does not know that it will be competing with a later filed development application. Therefore, even though able to substantiate its plans, it might not do so because it is not aware of the need to do so until after the competing development application is filed.

The Commission will allow a permit applicant to substantiate its plans within the deadlines prescribed for filing competing development applications in competition with the initial development application. This will allow the permit applicant to substantiate its application while not delaying the review process.

[40] Section 4.104(e)(1).

[41] *See* Western Power, Inc., 23 FERC ¶ 61.343 (1983).

[42] Proposed § 4.37(d)(1).

The same commenter requests the Commission to detail what it will accept as adequate substantiation. The Commission advises permit applicants that want their applications to be considered in competition with development applications to demonstrate that their plans of development are feasible in all aspects, such as engineering feasibility, environmental consequences, and economic soundness. The Commission notes, however, that it expects it to be the unusual case where a permit applicant can substantiate a superior proposal. As the Commission has frequently noted,[43] and as is reflected in its regulation's rebuttable presumption, a permit application is usually sketchy and unsupported. Generally, if an applicant has studied a project to a degree sufficient to substantiate its proposal, it will apply for a license or exemption. Thus, those rare cases where a permit application has substantiated superiority over another application have generally involved a showing of superior flexibility to maximize development of the site.[44]

5. Threshold Capacity Required To Compete Against an Exemption Application for a Small Hydroelectric Power Project

The Commission's regulations require that a prospective competing license applicant propose to develop a project with an installed capacity of at least 7.5 MW to compete with an initial application for exemption of a small hydroelectric power project.[45] This threshold capacity requirement encourages prospective exemption applicants to develop small hydroelectric power projects. It buffers them from the full force of competition by allowing competition from a prospective license applicant only if that applicant can prove that it can develop a project with at least 50 percent more capacity than the largest project (5 MW) eligible for this type of exemption.

The NOPR proposed to eliminate this threshold capacity requirement.[46] Under the proposed rule, prospective license applicants would not have to propose projects with greater installed capacities to compete against an initial exemption application. The Commission suggested that prospective exemption applicants do not need this favored treatment. The

[43] *See, e.g.*, Fluid Energy Systems, Inc. 20 FERC ¶ 61,017 (1982).

[44] *See* Marsh Island Hydro Assocs., 16 FERC ¶ 61,236 (1981); and City of Ukiah, 18 FERC ¶ 61,108 (1982) (both involve competing permit applications).

[45] Section 4.104(c)(2)(i).

[46] Compare § 4.104(c) and proposed § 4.33(c).

favored treatment is given only if the exemption applicant files the initial development application. If such an exemption applicant's plans of development are at least as well adapted as the plans of other applicants to develop the region's water resources, the Commission will favor its application under the Commission's "first the file" rule.[47] However, if a license applicant's plans are better adapted to develop the region's water resources, the Commission suggested that it would be in the public interest to favor the license applicant.

While most commenters on this proposal favor it on the ground that it will eliminate the underdevelopment of sites, other commenters argue that, rather than discarding the 7.5 MW capacity threshold requirement, the Commission can encourage development of sites by requiring license applicants to propose projects with installed capacities of at least 1½ or 2½ times the size of the proposed exemption project. The Commission believes that a variable threshold capacity requirement would not be in the public interest because it would continue to give protection from competition to exemption applicants whose plans fail to develop the region's resources as fully as they can be developed by another applicant. Thus, the final rule adopts the approach discussed in the NOPR.

6. Competition Against a Small Conduit Hydroelectric Facility Exemption Application

The Commission's regulations do not address competition against an application for exemption of a small conduit hydroelectric facility. The NOPR proposed to extend the Commission's general rules for competition against an application for exemption of a small hydroelectric power project to competition against an application for exemption of a small conduit hydroelectric facility.[48] The NOPR also proposed to codify the Commission's current practice [49] of allowing more than one application for a small conduit hydroelectric facility to be filed in competition for the same site and allowing conduit exemption applications and small hydroelectric power project exemption applications to be filed in competition with each other.[50] No

[47] Section 4.104(e)(2).

[48] Proposed §§ 4.33, 4.36 and 4.37.

[49] *See* City of Gridley, 22 FERC ¶ 61,256 (1983).

[50] Proposed § 4.36(b)(2).

commenter opposes the proposal, and the Commission is adopting it.

V. Evaluation of Competing Applications

A. Applicant's Comparisons of Plans of Development

The Commission grants a preliminary permit to the applicant with the plans best adapted to develop, conserve, and utilize in the public interest the water resources of the region, or, if the plans are equally well adapted, to the first applicant to file an acceptable application.[51] At this early stage of planning, comparisons made by competing applicants of their plans of development to those of the initial applicant and rebuttals of these comparisons by the initial applicant have not usually helped the Commission in determining whether one set of plans is better adapted than another set of plans. Plans are too rudimentary at this stage of the process. In most cases, to the extent that plans could be compared, the Commission could do so without referring to the applicants' comparisons. The NOPR therefore proposed to eliminate the generic requirement that a competing applicant for a preliminary permit compare its plans to those of the initial applicant. In the unusual case where the Commission does need permit applicants' comparisons of plans, the Commission can request that they be submitted.[52]

In the phase of competing for a license or an exemption from licensing, competitors' plans are much more fully developed and can be compared more readily. At this stage of competition, the Commission can use the assistance of the applicants in comparing the various plans of development to determine which plans are best adapted in the public interest. The NOPR stated the Commission's belief that these comparisons would be more useful if, after all applications have been submitted, applicants compared their plans to those of *all* the other applicants. Under the regulations, competing applicants must compare their plans only with those of the initial applicant.[53]

The NOPR therefore proposed to require that all license and exemption applicants competing for the same site compare their plans of development to the plans of development of all other applicants to show the Commission how their own plans are better adapted to develop, conserve, and utilize in the public interest the water resources of the region.[54] The NOPR also proposed to change the Commission's practice of automatically finding patently deficient an application that at the time of filing failed to include comparisons of plans of development.[55] Under the proposed rule, license and exemption applicants would be required to compare their plans with those of other applicants, but failure by an applicant to do so would not automatically cause an application to be rejected as patently deficient.[56]

Commenters generally support this proposal, but with reservations. Two commenters believe the Commission should continue to require comparisons of plans for permit applications. One commenter believes that comparisons of plans in permit applications should be voluntary, except when the permit applicant is competing against development applicants. The commenter argues that, in such cases, the permit applicant should be required to compare its plans with those of development applicants.

The Commission continues to believe that comparisons of plans by permit applicants are unnecessary in most cases. However, it agrees that comparisons by permit applicants whose applications are being compared with development applications would be useful to the Commission in those rare situations when the Commission is comparing substantiated permit applications with development applications. When this occurs, the Commission intends to require those permit applicants to make comparisons of their plans with those of the other competitors and to require the development applicants to compare their plans with those permit applicants.

Commenters argue that they will need more than the 40 days proposed in which to compare plans of development. The final rule therefore allows 60 days after the Commission notifies an applicant of the identity of each competing applicant for the submission of comparisons.

A fish and wildlife agency argues that applicants should be specifically required to compare treatment of fish and wildlife resources. This is only one of the many areas that must be treated by applicants in making their comparisons. Applicants must compare all factors relevant to deciding which plans are best adapted in the public interest. The Commission will not specify in its regulations each area that must be compared and therefore it is not expressly listing this one type of comparison.

B. Special Limitations on Submission of Applications

The NOPR proposed to add a new provision to specifically delineate the Commission's authority to refuse to accept all applications for a project, or to accept applications but not treat any one as the first to be filed.[57] The NOPR explained that the Commission intends to use this power only rarely to handle certain extraordinary situations where the normal rules governing acceptance of applications and competition among applicants have not resulted in a single development plan for the water resource that fully satisfies the public interest in responsible hydropower development.

Commenters argue that the proposed regulation is poorly conceived, contains vague criteria, opens the door to charges of arbitrary action and could be applied capriciously. The NOPR was not intended either to expand or to limit the Commission's power to act in certain extraordinary situations. Rather, it was intended to apprise applicants that the Commission has this authority, has acted in extraordinary situations in the past, and will do so again when the situation warrants it. The Commission cannot foresee all such situations or the actions that it will be required to take. Therefore, it is not practical to promulgate a regulation that prescribes the exact circumstances and actions that the Commission will take. However, the Commission has reconsidered this proposal and is not adopting it because it is unnecessary.

VI. Consultation With Other Agencies

In Order No. 255,[58] the Commission clarified in great detail the different steps that a prospective exemption applicant must take during consultation with Federal and state fish and wildlife agencies before filing an exemption application with the Commission. However, developers too often submit exemption applications to the Commission without having consulted adequately with the appropriate fish and wildlife agencies.[59] The Commission has

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[51] This assumes that the municipal preference under section 7(a) of the FPA does not apply.

[52] *See* § 4.31(f).

[53] Section 4.33(d).

[54] Proposed § 4.36(c)(2).

[55] Sections 4.31(d)(2)(i) and 4.33(d)(2).

[56] Proposed § 4.32(d)(2)(i).

[57] Proposed § 4.33(f).

[58] Amendments to Regulations Governing Case-by-Case Exemption From All or Part of Part I of the Federal Power Act for Small Hydroelectric Power Projects With an Installed Capacity of 5 Megawatts or Less, 47 FR 38506 (Sept. 1, 1982) (Order No. 255).

[59] *See, e.g.*, Eastern Sierra Energy Development, 20 FERC ¶ 61.348 (1982); Potter Instrument Co., 19 FERC ¶ 61.299 (1982).

had to reject many of these applications as patently deficient. The applicants have then had to consult further with the fish and wildlife agencies and resubmit their applications.

This process of inadequate initial consultation, rejection, reconsultation, and resubmittal of an application is a waste of the time and resources of the applicants, the fish and wildlife agencies, and the Commission. Therefore, the NOPR proposed to add a new section to the regulations to consolidate the Commission's consultation requirements for applicants for licenses and exemptions[60] and to clarify the minimum steps that must be taken to consult adequately with appropriate agencies, including the fish and wildlife agencies. The Commission reminded applicants that those that persist in failing to consult adequately with these agencies would continue to have their applications rejected by the Commission as deficient.[61]

Under the proposed rule, applicants would be required to contact all the appropriate agencies and provide them with details with respect to their planned projects.[62] During this initial phase, applicants would not merely provide information to agencies. An effort would be required to determine the types of studies agencies consider necessary, the information they have in hand, their concerns about the environmental consequences of the proposed project, and their ideas about mitigation of adverse impacts or enhancement of resources. Areas of disagreement between applicants and agencies would be isolated, and an attempt to resolve conflicts would be made. The NOPR noted that if applicants and the agencies could not resolve their conflicts the Commission would give great weight to the agencies' expertise in deciding whether the applicants had performed all the studies necessary to consult properly.

Commenters generally approve the proposed regulation. Most, however, recommend that the Commission revise it in specific ways. The major recommended changes, and the Commission's response to them, are as follows.

1. Commenters recommend that additional entities be placed on the list of agencies that applicants must consult before filing an application. The entities suggested are: natural resource agencies; environmental protection agencies; state land management agencies; state recreational agencies; state water agencies; and Indian tribes. Also, commenters recommend that the list be published in § 4.38.

The Commission periodically updates its list of known entities that must be consulted to include additional entities that become known to the Commission. The Commission will periodically review this list and will add to it additional entities that it believes should normally be consulted. However, prospective applicants are advised that the list is only a partial one. They must seek out and consult with all appropriate entities, whether or not those entities are specifically included in the Commission's list. Because of the length of the list and the fact that the Commission periodically updates it, publication in the Code of Federal Regulations would be impractical. The list is included as part of the Commission's Blue Book, which is readily available to prospective applicants.

2. Commenters argue either that the proposed three-stage consultation process is too complicated and should be simplified, or that it is too short and should be expanded. Some commenters argue that the proposed three-stage process should be reduced to a two-stage process. One commenter argues that, for already-constructed projects, the three-stage process is unnecessarily formal and complicated. That commenter recommends that, in cases involving constructed projects, a simpler two-stage process be substituted for the proposed three-stage process and that § 4.38 be amended to allow a more flexible consultation process geared to the size and complexity of individual projects.

The proposed rule already provides for a simpler consultation process for less complicated projects. The type, difficulty, and number of studies required for pre-filing consultation vary with the complexity of the proposed project. If the consulted agencies decide that it is unnecessary for the prospective applicant to undertake any particular step of the consultation process, the agencies may expressly waive, and the prospective applicant may then omit, that step of the pre-filing consultation process. The final rule explicitly allows omission of requirements of § 4.38 when all the appropriate agencies waive those requirements. If a dispute arises later as to the adequacy of an applicant's consultation, the applicant must prove that the agencies waived the omitted steps of its consultation. Prospective applicants therefore are advised to obtain written waivers from each appropriate agency if they omit any step of the prescribed consultation process.

3. The proposal would require prospective applicants to provide consulted agencies either 30 days or 60 days, depending on the type of project, in which to analyze and respond to the applicants' plans of development. Commenters argue that the proposed rule would allow insufficient time for such analysis and comment. One commenter recommends that applicants should be required to start the consultation process at least 18 months before filing application with the Commission. The Commission believes that the time allowed agencies to review draft applications and comment on them is adequate. These time periods begin only after the applicant has already informed the agencies of its general plans and submitted all the necessary studies required by the agencies.

4. Some commenters object to the proposed requirement that studies be completed before an application may be filed with the Commission. They argue that this requirement is a change from current Commission practice and that certain studies take several months or even years to complete. Commenters describe instream flow studies as an example of the type of studies that are routinely performed after submission of an application. They request the Commission to revise proposed § 4.38 to allow studies to be completed after pre-filing consultation and after filing an application with the Commission.

The Commission believes that certain major studies must be completed prior to submission of an application. The results of these studies are necessary for consulted agencies to analyze and respond to applicants' proposed plans of development. These include studies that concern the economic or technical feasibility of the project, that are necessary to determine the design or location of project features, that measure the impact of the project on important natural or cultural resources, or that analyze mitigative measures, or that are necessary to minimize the impact on a significant resource. However, the Commission agrees that there are other studies, the results of which are not required for pre-filing consultation or for consideration by the Commission in its review of an application. These include studies that can be conducted only after a project is operating, that determine the success of mitigative measures, that deal with refinements to the project's operation, or

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[60] Proposed § 4.38. Because the same problems with respect to inadequate pre-filing consultation occur in license applications, and to consolidate the Commission's regulations governing consultation, this section also applies to license applicants.

[61] Proposed § 4.32(d)(2).

[62] Proposed § 4.38(a).

modifications to the project's facilities. The final rule allows these studies to be completed after pre-filing consultation.

5. Commenters discuss the problem that arises when applicants and agencies disagree over which studies applicants must do before the agencies are able to review proposed plans. As to license applications, and to exemption applications to the extent they involve matters other than impact on fish and wildlife resources, the Commission makes the final decision on whether particular studies are necessary but will give great weight to a consulted agency's determination that a particular study is necessary. However, if an applicant strongly believes that particular studies are unnecessary, it can refuse to perform those studies and file its application. The applicant will then bear the burden of proving to the Commission that the omitted studies were indeed unnecessary. If the Commission finds that the omitted studies were necessary, the application will be rejected because the applicant will have failed to consult adequately. The applicant will then be required to do the studies and reconsult before refiling.

In the recent *Olympus Energy Corporation* decision, [63] the Commission determined that, in case-specific exemption applications, Congress gave specified fish and wildlife agencies the exclusive authority and responsibility for protecting fish and wildlife resources. Therefore, these agencies must determine which studies concerning fish and wildlife resources must be completed before they can review such applications.

6. Commenters object that the proposed rule fails to consider the proprietary rights of prospective applicants. They claim that the rule would require them to expose their plans for development to public scrutiny and that this would leave them open to, as one commenter expresses it, "a marauding municipality's xerox machine." The Commission does not require prospective applicants to reveal their plans to the public. It does require them to provide their plans to consulted agencies for the agencies' analysis and response. The Commission cannot control whether the consulted agencies reveal to the public plans filed with them. Prospective applicants should address their concerns regarding confidentiality of plans to the individual agencies.

7. Commenters object to the proposed requirement that an applicant give consulted agencies a preliminary schedule of the dates the applicant expects to file its application, to begin and complete construction, and to initiate operations. Commenters claim that disclosure of these dates will give potential competitors an unfair competitive advantage. The Commission proposed requiring submission of schedules of dates to help the consulted agencies schedule their staff resources. However, the information is not necessary and, in response to the commenter's objections, the Commission is deleting this requirement from the final rule.

8. A commenter argues that the Commission should not allow consulted agencies to raise new issues after an applicant has adequately completed its pre-filing consultation process. The Commission disagrees. It is in the public interest to allow agencies to raise new issues throughout the authorization process, before the granting of a license or an exemption. The Commission will continue to review recommendations by agencies for additional terms and conditions submitted after pre-filing consultation and determine whether it is in the public interest to impose them.

9. Commenters suggest that the Commission require prospective applicants to jointly undertake certain studies. While it might well be more economical for prospective applicants to share the costs of these studies, the Commission will not force them to cooperate.

VII. Other Aspects of the Exemption Process

A. Real Property Interests for Exempt Projects

When the Commission adopted Subpart J of Part 4, governing applications for exemption of small conduit hydroelectric facilities, it anticipated that only property owners having all the real property interests necessary to develop and operate such a facility would apply for such an exemption. However, the Commission has received applications for these exemptions from entities that did not own all the real property interests necessary to develop and operate their proposed projects.[64] Unlike a licensee, an exemption holder cannot acquire property rights through the power of eminent domain provided under section 21 of the FPA. If the exemption holder does not possess all the necessary real property interests, it cannot immediately develop and operate the project. The NOPR therefore proposed to require an applicant for such an exemption to have either all the real property interests in the lands necessary to develop and operate its project or an option to obtain those interests.[65] The NOPR also reminded these exemption applicants that their applications will be rejected as patently deficient if adequate documentary evidence of ownership is not submitted with their applications.

Commenters argue that a public entity should not be required to obtain necessary real property interests before filing an application for an exemption. They argue that, because a public entity has the right of eminent domain under its state law, ownership of real property is not a prerequisite for it to proceed expeditiously with its project. The Commission disagrees. As the Commission stated in Order No. 106, possession of state power of eminent domain is not an adequate substitute for ownership of non-Federal lands.[66] The possibilities of bitter and lengthy condemnation litigation before development could go ahead and the time limit on commencing construction portend too great a risk that exemptions in such circumstances would be wasted. An entity with state power of eminent domain may, of course, take the necessary property interests and than apply for exemption.[67]

A western state water resources control board requests the Commission to require that applicants apply for all necessary water rights before filing exemption applications, claiming that such a requirement would expedite the exemption process. The Commission intends to review whether its regulations should require exemption applicants to obtain all possible necessary water rights prior to filing exemption applications. If it finds such a requirement appropriate, it will propose it in a subsequent rulemaking docket. The Commission is not considering adopting this proposal in this final rule because it would impose a substantial new requirement and was not proposed in the NOPR.

B. Automatic Suspension of the 90- and 120-Day Periods for Commission Action on Exemption Applications

The Commission must act within 90 days on applications for small conduit hydroelectric facilities and within 120 days on applications for small hydroelectric power projects.[68] In the

[63] Olympus Energy Corp., 26 FERC ¶ 61,407 (1984) *(reh. pending)*.

[64] *See, e.g.*, City of Gridley, 22 FERC ¶61,256 (1983).

[65] Proposed § 4.31(b).

[66] 45 FR 76115 (Nov. 18, 1980) (Order No. 106).

[67] *Id. See also* City of Ogdenburg, 22 FERC ¶61,313 (1983).

[68] *See* §§ 4.93(e) and 4.105(b)(5).

absence of action within those deadlines, exemption applications are automatically granted. However, the Commission may take affirmative action within the deadlines to suspend the running of the time periods. When an acceptable competing application is filed within these time periods, the Commission compares competing applications and grants the exemption, license, or permit to the applicant with the best adapted plans of development, or, if the plans are equally well adapted, to the applicant that filed first. To afford meaningful comparative consideration to competing applicants, the Commission must usually suspend the running of the time periods. However, if the Commission inadvertently fails to suspend, an exemption could be automatically granted to the initial exemption applicant.[69] To avoid such occurrences, the NOPR proposed that, upon the filing of a competing application, the mandatory time periods for Commission action on exemption applications would automatically cease to run. The Commission would then consider all the competing applications.[70]

The NOPR also proposed to automatically suspend the running of the mandatory time period if an application for exemption of a small hydroelectric power project is accompanied or supplemented by a petition for waiver.[71] The Commission's regulations allow a qualified applicant for such an exemption to petition for a waiver of any specific provision of §§ 4.102 through 4.107.[72]

Some commenters recommend that the proposed automatic suspension provision apply also in cases where protests, adverse motions to intervene, or other timely filings are made. One commenter, however, argues that the automatic exemption provisions might produce "more mischief than good, and should be eliminated altogether."

The Commission initially promulgated the deadlines on its handling of exemption applications to express its commitment to act expeditiously on those applications. The short time limits were prescribed because the Commission expected that exemption projects generally would be uncomplicated, environmentally non-controversial, and uncontested. It expected almost always to be able to grant or deny exemption applications by written order before the 90- or 120-day periods expired. However, the Commission has found exemption applications often to be complicated, environmentally controversial, and contested. Exemptions have sometimes been automatically granted inadvertently, to the dismay of the Commission and to the financial harm of competing applicants. The proposed amendments were intended to resolve the problems that the Commission has experienced with these provisions.

However, after further consideration, the Commission concludes that the proposed regulations would be unnecessarily complicated. Applicants seldom rely on the automatic granting provisions as proof that their exemptions have been authorized. They request written confirmation from the Commission anyway. Under the proposed changes to the regulations, applicants would have had even less reason to rely on the automatic granting provisions because the time periods would have been suspended automatically as soon as any competing applications were filed. In order to simplify the regulations, the final rule is eliminating the provisions providing for automatic granting of exemptions. All exemptions will now be granted only by written order of the Commission or its delegate. The Commission will continue to act as expeditiously as possible on exemption applications. Applications for projects that are uncomplicated, environmentally noncontroversial, and uncontested will be acted on quickly—normally within a few months from Commission acceptance for filing.

C. Waiver of Conduit Exemption Regulation

Under the Commission's regulations, an applicant for exemption of a small conduit hydroelectric facility can request a waiver of discharge requirements [73] for that type of exemption when it files its application.[74] The Commission must rule on the waiver request before accepting the application.[75] The NOPR stated that the Commission should have the flexibility to rule on the waiver request either when it considers the application on its merits or at any other appropriate time. Therefore, the NOPR proposed to allow the Commission this flexibility and to clarify that the acceptance, by itself, of a conduit exemption application does not constitute a ruling on any request for waiver of the discharge requirements.[76] There were no comments on this proposal. The Commission is adopting it.

D. Revocation of an Exemption to Allow More Substantial Development

The Commission is responsible for regulating non-Federal development of water resources to provide for the most comprehensive development of hydroelectric power.[77] If, in order to fulfill this mandate, exempted projects must be altered, or are determined to be obsolete, the Commission, using its inherent authority, may revoke an exemption even after the project has been authorized and is fully operational.[78] This is in part a necessary consequence of the indefinite term for an exemption as opposed to the finite term for a license. The Commission recognizes that exemption holders must be assured of the continuing validity of their exemptions to the maximum extent permitted by law.

To clarify the Commission's responsibilities, the NOPR proposed to add a new article to the standard terms and conditions of exemptions of small conduit hydroelectric facilities and exemptions of small hydroelectric power projects. This standard article [79] would expressly reserve the Commission's right (1) to require modifications in the structure or operation of an exempted project, or (2) to revoke an exemption if the most comprehensive development of a region's water resources so requires. If in deciding upon a particular license application the Commission determines it should revoke an already issued exemption and instead issue a license for a given site, the licensee would be required either to purchase the exemption holder's property or to acquire the property by eminent domain and pay compensation to the exemption holder pursuant to section 21 of the FPA.

Commenters argue that the Commission should delineate the precise procedures for determining the amount of "fair compensation" that licensees will be required to pay in such a case if the property is acquired by eminent domain under section 21. Section 21 precludes the Commission from prescribing specific procedures by providing that the "practice and procedure in any action or proceedings for (the purpose of exercising rights of eminent domain) in the district court of the United States shall conform as nearly as may be with the practice and

[69] *See* Hirshey v. FERC, 701 F.2d 215 (D.C. Cir. 1983).

[70] Proposed §§ 4.93(c)(2) and 4.105(b)(2).

[71] Proposed § 4.105(b)(2)(iii).

[72] Section 4.103(d)(1).

[73] Section 4.91(f)(5) and proposed § 4.30(b)(26)(v).

[74] Section 4.92(c)(1)(i).

[75] Section 4.93(a)(2).

[76] Proposed § 4.93(a).

[77] Section 10(a) of the FPA, 16 U.S.C. 803(a) (1982).

[78] *See* 45 FR 76115 (Nov. 18, 1980) (Order No. 106); Metro. Dist. of Hartford, 16 FERC ¶ 61,254 (1981); Wells River Hydro Assocs., 18 FERC ¶ 61,157 (1982).

[79] Proposed §§ 4.94(d) and 4.106(f).

procedure in similar action or proceeding in the courts of the State where the property is situated. . . ." [80]

Fish and wildlife agencies argue that the Commission cannot require modifications or revocations when such actions would affect fish and wildlife resources without first providing for consultation with the appropriate fish and wildlife agencies and allowing them to impose mandatory mitigative terms and conditions. Since the Commission has found that specified fish and wildlife agencies have the exclusive authority and responsibility to set terms and conditions affecting these resources when an exemption is issued, the Commission agrees with the commenters that these agencies must also be allowed to impose new terms and conditions to protect these resources before an exemption, for which construction has begun, is revoked or modified.[81] Before the Commission revokes or requires modification to such an exemption, it will allow these fish and wildlife agencies to impose new mitigative terms and conditions.

Commenters urge the Commission to delineate precisely all circumstances in which it would require modifications or revocations. The Commission cannot prescribe all such circumstances because it cannot foresee all circumstances in which the public interest might require modifications or revocations of exempted projects.

Commenters express concern that this new article might heighten the risk of investing in exempted projects, therefore making it more difficult to secure financing to construct them and casting a significant doubt on the ability of a project to be considered as a dependable source of energy. The Commission reemphasizes that it expects to require modifications or revocations only in rare circumstances. Therefore, decisions to construct, operate, or rely on an exempted project for power should not be unduly affected by this provision.

E. Amendments to an Issued Exemption

The Commission expects an exempted project to be constructed and operated as described in the exemption application that was approved by the Commission. The NOPR proposed to establish a procedure through which an exemption holder that desired to change the design, location, or method of construction or operation of its project could obtain from the Commission a determination as to whether its proposed changes would be allowed under its issued exemption.[82] The Commission would then review the proposed changes and determine whether they would be consistent with the exemption or whether they would constitute a material change and therefore not be allowed. Under the proposed rule, within 45 days of receipt of the exemption holder's request for a determination, the Commission would have notified the exemption holder whether its proposed changes were consistent with its issued exemption. If the Commission did not respond within 45 days, the exemption holder would automatically be allowed to proceed with its proposed changes. If the Commission determined that the proposed changes were material, the exemption holder would be required to apply for an amendment to its exemption or apply for a license.

An application for an amendment to an exemption would be prepared, filed, and processed in the same way as an application for exemption from licensing, with one difference. The Commission would not accept applications in competition against an application for an amendment of an exemption.

Several agencies, including the National Marine Fisheries Service (NMFS) and the Department of the Interior (DOI), argue that the Commission must allow the same fish and wildlife agencies that have been authorized by Congress to impose mandatory conditions to protect fish and wildlife resources to impose terms and conditions on amendments to exempted projects.[83] DOI also recommends providing for a delay in the 45-day automatic approval if an appropriate Federal or state agency notifies the Commission within the same 45-day period that the proposed amendment would materially affect fish and wildlife resources. One commenter, however, raises the possibility that "rights will be established by the Commission's inadvertent failure to act, which is causing the Commission to propose an automatic suspension of the deadline for Commission action on the exemption application itself when a competing application is filed."

The Commission has reconsidered the advisability of these proposed new regulations and has decided not to adopt them. The proposed regulations would have been too cumbersome to apply. Moreover, they are unnecessary. The Commission advises an exemption holder that wants to change the design, location, or method of construction or operation of its project to consult with the fish and wildlife agencies to ascertain whether the agencies believe that the proposed changes would violate the exemption's fish and wildlife mitigation terms and conditions. If all the agencies advise the exemption holder that the proposed changes would not violate these terms and conditions, and if the changes are not material, the exemption holder may implement the changes without seeking prior Commission authorization. If, on the other hand, any of the agencies advises that the proposed changes would violate fish and wildlife mitigative terms and conditions, or if the changes are material, the exemption holder must, before making the changes, apply to the Commission for an amendment to its exemption or must obtain a license.

The final rule allows exemption holders to apply for authorization to amend their exemptions. The Commission normally will not accept competing applications, unless it finds it to be in the public interest to do so (*e.g.*, if it finds that the proposed changes, had they been proposed in an exemption holder's original application, might have materially affected the decision to grant the exemption to the exemption holder). If the Commission makes such a finding, it will either reject the application for an amendment to the exemption, accept it but allow for competition for the project, or take other appropriate actions.

F. Additional Standard Terms and Conditions for Exemptions

1. Deadline to Begin Construction

To prevent an exemption holder from owning a project site for an unreasonable time without developing it, the NOPR proposed to add a new article to the standard terms and conditions for exemptions of small conduit hydroelectric facilities. That article would reserve to the Commission the right to revoke an exemption if actual construction of any proposed generating facility has not begun within two years, or if construction has not been completed within four years of the effective date of the exemption.[84] the article also would provide that, if an exemption is revoked under these conditions, the Commission would not accept any subsequent application for exemption from licensing, or a notice of

[80] 16 U.S.C. 814 (1982). *See generally* Georgia Power Co. v. Sanders, 617 F.2d 1112 (1980), *cert. denied*, 450 U.S. 936 (1980).

[81] *See* Olympus Energy Corp., 26 FERC ¶ 61.407 (1984) (*reh. pending*).

[82] Proposed §§ 4.96 and 4.104.

[83] *See* Olympus Energy Corp., 26 FERC ¶ 61.407 (1984) (*reh. pending*).

[84] Proposed § 4.94(c).

exemption from licensing, from the prior exemption holder within two years of the revocation.[85] Commenters support this proposal. The Commission is adopting it.

2. Dam Safety

Exempting a project from licensing does not relieve the Commission of its responsibilities over dam safety. The NOPR therefore proposed to add a new article[86] to the standard terms and conditions of all exemptions of small hydroelectric power projects. The article would require that, if a dam is more than 33 feet in height above streambed, impounds more than 2.5 million cubic feet of water, or is determined to have a significant or high hazard potential, the project must have periodic safety inspections by an independent consultant, and is subject to safety inspections, remedial measures, and other requirements that may be imposed by the Commission's Regional Engineer or other authorized representative under the Commission's safety regulations.[87]

A state agency argues that this new article would be an unnecessary duplication of existing state programs. It claims that for many decades western states have operated effective programs for dam safety and that this new requirement would merely create frustration and extra expense for dam operators by duplicating programs under which they already safely operate. It suggests that consistency can be obtained by revising the rule to recognize as adequate a safety certification of any state having a dam safety program, leaving the proposed rule affecting only dams in states without dam safety programs.

This issue was first raised, and answered by the Federal Power Commission (FPC), in connection with the FPC rulemaking that promulgated the Commission's dam safety provisions for licensed projects. This Commission believes it equally apt with respect to exempted projects to note that

> while some of the existing state safety inspection programs are undoubtedly of the highest calibre, it would not be conducive to the carrying out of our own responsibilities in this area to attempt to evaluate the relative effectiveness of particular state inspectoral systems, or to authorize them to be substituted for the requirements imposed upon the licensees and independent consultants by our new regulations.[88]

A state agency recommends that the rulemaking point out that state laws apply to those dams that the Commission has, by regulation, chosen not to make subject to its safety rules. Non-inclusion of the dam safety article reflects the Commission's judgment in the exercise of its responsibilities that the dam in question poses no safety hazard. The exemption holder may of course consult with any state agency with respect to any concerns that might arise on matters of safety.

3. Additional Standard Terms and Conditions Recommended By Commenters

Commenters suggest that several new standard terms and conditions be added to exemptions. The major recommendations and the Commission's response thereto are as follows:

a. Article 2 requires an exemption holder to comply with terms and conditions imposed by Federal and state fish and wildlife agencies to prevent loss of, or damage to, fish and wildlife resources or to otherwise carry out the purposes of the Fish and Wildlife Coordination Act.[89] DOI suggests that Article 2 discuss the Energy Security Act.[90] Article 2 requires exemption holders to comply with all fish and wildlife mitigative terms and conditions. Inclusion of a discussion of the Energy Security Act, which authorizes the Commission to exempt certain projects, would in no way expand this requirement. The Commission therefore is not adopting DOI's recommendation.

b. Commenters make the following suggestions with respect to the Northwest Power Planning Council's Columbia Basin Fish and Wildlife Program and Northwest Conservation and Electric Power Plan (the Regional Energy Plan),[91] other comprehensive state and regional resource plans, and environmental impacts of multiple proposed projects in a river basin. First, commenters recommend that the Commission provide in its regulations that, in reviewing hydropower applications, it will consider, act consistently with, or adopt these plans and programs. Second, commenters recommend that the Commission provide in its regulations that it will consider the environmental impacts of multiple hydropower applications. Third, commenters recommend that the Commission require that applicants demonstrate in their applications whether their plans of development comply with these plans, and assess how any environmental impacts of their projects might interact with the impacts of other projects clustered in the same area.

Section 10(a) of the FPA requires that, in licensing hydropower projects, the Commission ensure that projects are best adapted to a comprehensive plan for improving or developing a waterway, for commerce, for water power development and for other beneficial public uses. The Commission considers and weighs all relevant available information when it reviews a license application. Whenever the Commission reviews any application, it considers the Columbia Basin Fish and Wildlife Program, the Regional Energy Plan, and state and other regional resource plans, if relevant. The Commission requires applicants to comply with the provisions of the plans and programs, unless the Commission determines that compliance is not in the best public interest.[92] Therefore, it is not necessary for the Commission's regulations to require it to do so. Where a number of proposed projects are clustered in one geographical area, the Commission intends to take a hard look at the

[85] A parallel article conditions exemptions for small hydroelectric power projects. *See* § 4.106(c). The rule amends this standard article to lengthen the time period in which to begin construction from 18 months to 2 years. This change is in response to several requests received by the Commission seeking an extension of the current time period. The rule also amends this standard article to restrict only the prior exemption holder that lost its exemption under this article from reapplying within two years of the exemption being revoked. The article currently restricts *anyone* from applying for an exemption for that site within two years. The Commission sees no reason to restrict persons other than the prior exemption holder from applying for an exemption for the site since the primary purpose of this restriction is to prevent persons from obtaining exemptions for the purpose of excluding others from developing the site (e.g., a property owner that does not want to develop its site, but does not want others developing it either).

[86] Proposed § 4.106(h).

[87] This article already is a standard term in all categorical exemptions. *See* § 4.111(a)(6).

[88] 35 F.P.C. 274 (1966) (FPC Docket No. R-268).

[89] 16 U.S.C. 662 (1982).

[90] Energy Security Act of 1980 section 408, 16 U.S.C. 2705(d) (1982).

[91] The Northwest Power Planning Council is an interstate compact agency created to encourage conservation and the development of renewable resources in the Pacific Northwest. The Council adopted the Columbia Basin Fish and Wildlife Program in 1982 and the Regional Energy Plan in 1983. The Commission is required to take the Columbia Basin Fish and Wildlife Program into account in its decisions "to the fullest extent practicable." 16 U.S.C. 839 (1982).

[92] With respect to the Columbia Basin Fish and Wildlife Program in particular, the Commission's decisions take the Program into account to the fullest extent practicable. Licenses issued in the Columbia River Basin include a condition reserving to the Commission the authority to impose further requirements to make the license consistent with the Columbia Basin Fish and Wildlife Program. *See, e.g.*, Yakima-Tieton Irrigation Dist., 28 FERC ¶ 61,033 (1984). Permits issued in the Basin include a condition requiring the permittee to take the program into account in preparing its fish and wildlife report in any subsequent license or exemption application. *See, e.g.*, Beaver Creek Hydro, Inc., 29 FERC ¶ 62,060 (1984).

environmental impacts of these multiple projects.[93]

In exercising this responsibility, the Commission will continue to consider all relevant plans and studies when it reviews hydropower applications.

Requiring all applicants to assess their project's contribution to the environmental impacts of clustered projects would, however, impose a substantial and often unnecessary burden on developers. In cases in which this information is needed, the Commission can acquire it under § 4.31(f).

c. Fish and wildlife agencies suggest inclusion of a new standard article expressly reserving the rights of fish and wildlife agencies to modify the fish and wildlife mitigative terms and conditions that they impose and a new standard article requiring installation of flow gauges to ascertain compliance with minimum flow requirements. As stated above, the Commission determined in the *Olympus* decision that Congress gave these agencies exclusive responsibility to impose fish and wildlife mitigative terms and conditions in exemptions. Therefore, the Commission is not including these articles in its standard articles. Rather, if the agencies believe that such articles are warranted, they may impose them when they set their mandatory terms and conditions.

e. DOI recommends adoption of a new standard article that would require exemption holders, if they later transfer ownership or operation of exempted projects, to require in the transfer documents that the transferees comply with the fish and wildlife protection terms and conditions of the exemptions. Transferees of exempted projects must comply with the terms and conditions of the exemptions. Thus, a transferee's agreement to this requirement is unnecessary. However, the Commission concurs with the basic thrust of DOI's concern—that additional provisions should ensure that transferees of exempted facilities are aware of, and comply with, an exemption's terms and conditions. The Commission is therefore adding a new standard article that requires an exemption holder: (1) To inform the Commission of a transfer of any property interests in an exempted project within 30 days of the transfer; (2) to provide the Commission with the names and addresses of the transferees; and (3) to inform the transferees of the exemption's terms and conditions.[94]

[93] *See* City of Seattle, 26 FERC ¶ 61,406, at 61,909 n.4 (1984).

[94] New §§ 4.94(f) and 4.106(i).

e. A commenter recommends adoption of a new standard article requiring compliance with terms and conditions of Indian tribes. The Commission is not adopting this recommendation because the law does not provide for Indian tribes to impose mandatory terms and conditions in exemptions. Indian tribes may submit recommended fish and wildlife mitigative terms and conditions to the specified fish and wildlile agencies. These agencies have the responsibility and authority to determine which articles to include in an exemption.[95] Indian tribes may submit all other recommended terms and conditions to the Commission. The Commission will consider them and will include those that it deems to be in the public interest.

G. Surrender of an Exemption

Until now, the Commission has had no rules governing the surrender of an exemption. The NOPR proposed to require an exemption holder to file a petition with the Commission requesting surrender of its exemption. Public notice of the petition would be given at least 30 days before the Commission acted.[96] These proposed regulations are similar to the Commission's existing regulations governing surrender of a license.[97]

Under the proposed regulations, an exemption holder would be required to state in its petition for surrender its plans for disposition of the project works and restoration of project lands. The exemption holder would also be required to notify interested Federal and state fish and wildlife agencies of its surrender plans.

If a project occupies Federal lands under a permit from a Federal agency having supervision over such lands, the exemption holder would also be required to concurrently notify that agency of the surrender plans. The NOPR explained that the Commission expects these agencies to take appropriate action to require an exemption holder to restore affected Federal lands. In approving a petition for surrender, the Commission would prescribe any necessary terms and conditions concerning disposition of the project works and restoration of the affected environment.

Commenters argue that, before the Commission authorizes the surrender of an exemption, Federal and state fish and wildlife agencies must be consulted and allowed to impose terms and conditions with respect to fish and wildlife resources. The Commission agrees.[98] Accordingly, the final rule requires that, if construction has begun, exemption holders that want to surrender their exemptions must first notify the appropriate Federal and state fish and wildlife agencies, inform them in writing of their surrender plans, and allow the agencies adequate time to review the surrender plans and to stipulate any necessary mandatory terms or conditions.

[95] *See* Olympus Energy Corp., 26 FERC ¶ 61,407 (1984) (*reh. pending*).

[96] Proposed §§ 4.95 and 4.102 would govern surrender of an exemption of a small conduit hydroelectric facility and a small hydroelectric power project, respectively.

[97] *See* §§ 6.1 and 6.2.

H. National Marine Fisheries Service Exemption Conditioning Authority

The Commission's regulations authorize NMFS, the United States Fish and Wildlife Service (USFWS), and appropriate state fish and wildlife agencies to impose conditions on all conduit and case-specific small power project exemptions.[99] However, the Commission has since determined that Congress did not authorize NMFS to impose such conditions.[100] Therefore, the NOPR proposed to amend the Commission's regulations to reflect this decision.[101]

Commenters argue that the Commission has misinterpreted Congressional intent and therefore should consider as mandatory NMFS's fish and wildlife mitigative terms and conditions. This issue is currently in litigation in the Court of Appeals for the Ninth Circuit.[102] However, unless the court determines that the Commission has misinterpreted Congressional intent, or Congress enacts new legislation providing for a different treatment of terms and conditions set by NMFS, the Commission will continue to act in a manner consistent with its prior interpretation of Congressional intent.[103]

[98] *See* Olympus Energy Corp., 26 FERC ¶ 61,407 (1984) (*reh. pending*).

[99] *See* §§ 4.94(b) and 4.106(b).

[100] *See* Winchester Water Control Dist., 24 FERC ¶ 61,080 at 61,207–08 (1983); Public Utility Regulatory Policies Act of 1978 section 218, 16 U.S.C. 823a (1982); Energy Security Act of 1980 section 408, 16 U.S.C. 2705(d) (1982).

[101] *See* proposed §§ 4.94(b) and 4.106(b).

[102] Steamboaters Inc., v. FERC, No. 83–7444 (9th Cir. June 20, 1983).

[103] The Commission determined in *Winchester* that it would review any fish and wildlife conditions proposed by NMFS and impose those that it decided were in the public interest. Subsequently, in *Olympus*, the Commission held that the USFWS and the comparable state fish and wildlife agencies have exclusive responsibility for, and authority over, fish and wildlife matters. The Commission therefore no longer reviews or imposes fish and wildlife conditions. Any agency may however request either the USFWS or the

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I. Stream Flow Guidelines

As a guideline for determining whether a small hydroelectric power project would adequately use the available stream flow, the Commission's staff determines whether the instantaneous flow that a proposed project would be capable of using would be exceeded less than 25 percent of the time (i.e., the 25 percent exceedance point on the flow duration curve). If, in using this guideline, it appears to staff that the proposed project would not adequately develop the site, the applicant must demonstrate why a lesser use is nevertheless appropriate in light of relevant environmental, economic, or other constraints. Otherwise, the Commission will conclude that the exemption is not in the public interest and should not be granted.[104] The NOPR proposed to reflect this Commission practice by requiring an applicant for a case-specific exemption of a small hydroelectric power project to submit a flow duration curve.[105] The principal comments, and the Commission's response to them, are as follows:

1. Fish and wildlife agencies object that the 25 percent exceedance test does not consider instream fishery flow requirements and argue that the Commission should state clearly that the guideline is in no way related to fishery flow needs. The Commission agrees, and the final rule states that the 25 percent exceedance test is intended to consider only stream flows above required minimum streams flows.

2. DOI argues that flow duration curves should be provided for each month of the year. It argues that, if the project is to be operated in a mode other than run-of-the-river, simulated monthly flow duration curves must be provided and their derivation described. It argues that this link between the engineering and environmental sections of the application is vitally important. The Commission is not implementing this recommendation, because it is not necessary in most cases, and the Commission will request this information on a case-specific basis when it is needed.

3. DOI recommends that "justification for the instream flow selected in any bypassed reach be developed in consultation with the state and Federal fish and wildlife agencies and documentation of that consultation be provided in the Exhibit E." The Commission's consultation regulations do provide for such consultation.

4. Commenters argue that, by subjecting only exemption projects to this test, the Commission promotes the development of manmade dams and impoundments rather than natural water features and provides an incentive to build larger projects to avoid closer scrutiny during review of the application. The Commission considers and balances other uses of a region's resources against hydroelectric use, and determines the balance that it believes best uses the resources in the public interest. Commenters assume that the Commission considers efficiency in using the available stream flow only when it reviews exemption applications. The Commission considers this factor in all license and exemption applications. Commenters therefore are incorrect when they claim that requiring exemption applicants to submit flow duration curves would create an incentive to develop larger projects.

VIII. Other Changes Regarding Permits

A. Prior Notice to Cancel Permit

The NOPR proposed that the Commission would give a permittee prior notice of the Commission's intention to cancel a permit for failure to comply with the specific terms and conditions of the permit. The proposed rule acknowledges that a permittee will have an opportunity to petition for a hearing before the Commission to contest the proposed cancellation order.[106] Commenters support this proposal. The Commission is adopting it.

B. Surrender of Permit

The NOPR proposed to formalize the procedure by which a permittee surrenders an unexpired permit.[107] Under the proposed rule, a permittee would be required to file a petition to surrender its permit. Unless the Commission issued an order to the contrary, the permit would remain in effect through the thirtieth day after the Commission issued a public notice approving the surrender. The 30-day period was included to minimize unfair competitive advantages that could be obtained by orchestration of a surrender petition filed by one entity and an immediate subsequent application filed by another entity for the surrendered site. Applications for the surrendered site that are filed before the effective date of the surrender would be rejected.

A commenter argues that there could be legitimate reasons for a permittee to surrender a permit and then file an exemption or license application and that the Commission should not open up a 30-day window for competition between the surrender and the filing of the subsequent application. The commenter gives no examples. Even if there were good reasons for these actions, they are outweighed by the public interest in preserving the fairness of the competitive process. Therefore, the Commission is adopting the proposal discussed in the NOPR.

IX. Truthfulness of Applications

The Commission relies on the accuracy and truthfulness of the statements and information contained in hydroelectric permit, license, or exemption applications. Based in large part on these statements and information, the Commission grants permits, licenses, and exemptions. Therefore, the NOPR stated that the Commission needs written assurance that persons submitting applications and making statements therein have knowledge of the contents of the applications and can vouch for their accuracy. The NOPR proposed to require applicants to subscribe and verify all applications[108] and to add a new article to the standard terms and conditions of all exemptions[109] and a special article to all permits and licenses[110] that would explicitly recite the Commission's right to revoke any of these authorizations if any inaccurate material information was presented during the application process.

While commenters generally favor adoption of this proposal, they make the following comments. First, a commenter questions whether the rule would apply to exhibits and drawings that are a part of an application, and whether the rule would apply to additional information requested at a later time by Commission staff. All submissions of relevant information, whenever filed, must be subscribed and verified.

Second, a commenter recommends that, because applicants do not always have a copy of the Commission's Rules of Practice and Procedure, the form for subscription and verification be set forth in some general section, such as § 4.32. The final rule includes the form in § 4.32.

Third, a commenter recommends that the Commission automatically revoke

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comparable state agencies to adopt its recommendations as part of their mandatory terms and conditions.

[104] *See* Pacific Hydro, Inc., 28 FERC ¶ 61,014 (1984).

[105] Proposed § 4.107(c)(5).

[106] Proposed § 4.83(a).

[107] Proposed § 4.84.

[108] Proposed § 4.32(a)(3).

[109] Proposed §§ 4.94(e) and 4.106(g).

[110] Standard terms and conditions for permits and licenses are not published in the Code of Federal Regulations.

any authorization if the applicant knowingly submits inaccurate data. Because revocation of any authorization is a drastic step, usually having serious economic effects, the Commission will decide whether to take such action on a case-specific basis.

X. Amendment to Applications and New Filing Dates

The NOPR proposed to amend § 4.35 in the following three ways. First, a new filing date would be assigned to a permit, exemption, or license application (or an application to amend a license when the amendment would increase installed capacity) when such an application is materially amended. This is the general rule of § 4.35. However, it has previously been applied only to license and permit applications. The NOPR proposed to define a material amendment to be: (1) A change in generating units that would significantly modify the flow regime associated with the project; (2) a change in design or location of project works that would increase or decrease the reach of the stream affected by the project or would cause additional adverse environmental impacts; or (3) a change in the number of discrete units of development of the project. Under the proposed rule, if an application were materially amended, the staff would review it to determine whether the application, as revised, complied with applicable regulations as to content of the application. Acceptance, deficiency, or rejection letters would be prepared pursuant to the Commission's normal practice in reviewing applications. The Commission would consider any acceptance letter that may have been issued for the original application to be automatically rescinded upon acceptance of the amendment to the application.

Second, the NOPR proposed to define a change in "status," one of the material changes to an application that triggers § 4.35, to mean a change that causes a preliminary permit or license applicant to gain or lose municipal preference under section 7(a) of the FPA or that cause a permittee to lose its priority status under section 5 of the FPA. Prospective applicants should know at the time another applicant files whether that applicant has municipal preference or priority status as a permittee. This knowledge could affect a prospective applicant's decision whether to compete and may help the Commission to streamline its processing of applications.[111]

Third, the NOPR proposed to define a change in "identity," another of the material changes to an application that triggers § 4.35, to be a change that substitutes new applicants for *all* the original applicants.[112] This total substitution can be made in one or more amendments to an application. The amendment that substitutes the last remaining original applicant would trigger § 4.35, resulting in the assignment of a new date of "acceptance for filing." Future total substitutions of the new set of applicants could again trigger § 4.35. Again, prospective and competing applicants should know against whom they are competing. The rule bars transfers of applications both out of fairness to competing applicants and to allow orderly administration of the licensing program.

Recommended changes to § 4.35 and the Commission responses to them are as as follows:

1. With respect to changes in "identity," commenters generally favor the rule that allows changes in some, but not all, of the original co-applicants, without triggering § 4.35. However, other commenters believe that any addition or deletion of an original co-applicant should trigger § 4.35. The Commission believes that its proposed rule, which allows some, but not all, original co-applicants to be substituted without triggering § 4.35, to be proper. It prevents applicants from transferring their applications by totally substituting all the original co-applicants. It allows partial substitution of partners because this does not normally affect competition.

2. With respect to material amendments to application with regard to environmental issues, one commenter argues that the Commission should extend to license applications the proposed new provision that would allow exemption applicants to change their plans as part of a settlement agreement with fish and wildlife agencies without triggering § 4.35. The Commission agrees, and the final rule allows both exemption and license applicants to change their plans to satisfy requests of fish and wildlife agencies, without triggering § 4.35.

3. One commenter recommends that, if there are other material changes besides those delineated in the proposed regulation, they all be specified in § 4.35. The examples given in § 4.35 are intended only to demonstrate the types of changes that the Commission considers "material." The Commission cannot foresee and therefore cannot prescribe in § 4.35 every "material" change.

4. One commenter argues that § 4.35 should apply to only situations that involve actual competition, and that "material" amendments should be limited to amendments that totally alter the project concept or that cause great environmental impact. The Commission disagrees. A material change in an application can encourage competition by persons that previously did not want to compete or that could not successfully compete.

5. One commenter argues that applicants who materially amend their proposed plans of development should be required to serve the Federal and state fish and wildlife agencies with such a proposed amendment and to reconsult to mitigate for any expected impact on fish and wildlife resources. The Commission agrees. If an amendment to an applicant's proposed plans could affect fish and wildlife resources, applicants must serve copies of the amendment on the agencies and reconsult.

6. One commenter requests that the Commission implement retroactively the new rule allowing a partial substitution of partners, without triggering § 4.35. Regulations are generally applied prospectively, not retroactively. All parties should know the rules under which they are operating. The Commission does not find any compelling reason to apply this new rule retroactively.

7. One commenter recommends that the Commission provide that, where a permit is held by more than one party, a license or an exemption application filed during the permit period by any of the applicants is entitled to priority over all competing non-permit holders. The Commission is precluded by law from doing this. The FPA provides that a permit "shall be for the sole purpose of maintaining priority of application for a license application," and that permits are not transferable.[113] A permit is issued to a person or a particular group of persons. Only that person or particular group of persons is entitled to priority.

XI. Municipal Preference

Section 7(a) of the FPA directs the Commission "[i]n issuing preliminary permits hereunder or licenses where no preliminary permit has been issued" to give preference to applications by states and municipalities. In the *City of*

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[111] Because municipal status is irrelevant to an exemption application under the applicable statutes, a change in "status" would not be a material change to an exemption application and therefore would not trigger § 4.35.

[112] *See* Noah Corp., 19 FERC ¶ 61,276 and 20 FERC ¶ 61,156 (1982).

[113] Section 5 of the FPA, 16 U.S.C. 798 (1982).

Fayetteville decision,[114] the Commission concluded that the legislative design of the FPA precludes giving municipal preference to "hybrid" applications filed jointly by private developers and municipalities. In that case, the Commission expressed its concern that a municipality's participation in power development should represent more than tokenism to receive this statutory preference. In *Fayetteville*, the Commission stated that, in order to retain its entitlement to municipal preference as the party who intends to be the licensee, a municipality must retain control over the operation of a project in its contractual relationships with private entities and it must not relinquish any property or other rights necessary for project purposes. However, at the same time, the Commission emphasized that municipal preference need not be jeopardized by contractual arrangements that a municipality may make with private entities for assistance in financing, studying, or constructing or operating a project, provided that such arrangements are consistent with license ownership and control requirements.

The NOPR said that the Commission was considering promulgating guidelines to help prospective applicants determine the range of contractual relationships between a private entity and a municipality that would be allowed without jeopardizing the right to municipal preference. The Commission specifically invited public comment and suggestions with respect to guidelines to distinguish between (a) those types of contractual relations between private entities and municipalities that should not disqualify an applicant from receiving municipal preference under section 7(a) of the FPA and (b) those contractual relationships that should preclude municipal preference.

In reviewing the comments filed, the Commission has concluded that any regulations specifically describing financing arrangements that would not jeopardize a municipality's entitlement to preference would be confusing and counter-productive. The variety of such financing arrangements makes detailed regulations impractical. Furthermore, the basic principles to be applied in determining whether a municipality would create an impermissible hybrid joint venture in its financing arrangements were clearly set forth in *Fayetteville:* "the municipality must retain in such contractual relationships requisite control over the operation of the project and may not relinquish any property or other rights necessary for project purposes."[115] To the extent that partial private ownership of project property is required, the municipality must pursue its application as a hybrid with no recourse to municipal preference under section 7(a).[116]

The comments reveal neither significant confusion about what the current requirements are nor any need for clarification of how they are to be applied. Rather, those comments that set forth proposals to increase financing flexibility for municipal licensees essentially request that the Commission reconsider fundamental issues raised and resolved in the Fayetteville decision. The Commission continues to believe that the ruling in *Fayetteville* represents a reasonable interpretation of the availability of municipal preference under section 7(a). Joint municipal/non-municipal ownership and development of a project is perfectly appropriate, but, as the Commission decided in *Fayetteville*, it must proceed without the benefit of statutory municipal preference.

XII. Other Amendments

A. Sites Authorized for Only Federal Development

The NOPR proposed to clarify that, although an applicant may not apply for a preliminary permit or license for project works that are authorized for Federal development exclusively, an applicant may submit a preliminary permit or license application for project works authorized for both Federal and private development.[117] The final rule simply precludes filing an application for any project that is precluded by law.[118] Filing an application for a project that would develop a site reserved exclusively for Federal development is now clearly proscribed under § 4.32(d)(2). Thus, there is no need for the specific provision proscribing application for a project that would use a site authorized exclusively for Federal development.[119]

B. Rejection of Conditional Applications

The NOPR proposed to codify the Commission's practice of rejecting any application as patently deficient if its effectiveness is conditioned upon the occurrence of some future event or circumstance.[120]

A commenter argues that the Commission should accept an application to amend an original license to accelerate a license's termination date that is filed on the condition that the Commission grant an application for a new license filed by the original licensee. The commenter argues that, near the end of a license period, no licensee would invest in costly improvements to its project if it were not assured that it would be granted a new license for the improved project. Otherwise, by improving its project, it would be investing capital that it could not recover during the remaining life of the original license.

The processing and consideration of such conditional applications would obstruct the Commission's statutory responsibility to ensure that the relicensing process is open to competition by any qualified applicant. It is not in the public interest to institute a relicensing proceeding where no meaningful competition can exist and where the expenditure of staff resources to analyze the relicense application would be for naught if the conditional application were withdrawn.[121]

C. Absence of Proof of Service

The NOPR proposed to reflect the Commission's practice of not finding a competing application to be patently deficient merely because it does not include proof of service on other applicants.[122] When a competing application fails to include proof of service, the Commission allows the competing applicant to correct this deficiency, provided other deficiencies in the application do not make the application patently deficient.[123] This treatment assures adequate notice to competitors while not unduly penalizing applicants that fail to make timely notifications. Commenters support this proposal. The Commission is adopting it.

D. Motions To Intervene

Rule 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.214) governs the processing of motions to

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[114] City of Fayetteville Public Works Comm., 16 FERC ¶ 61,209 (1981).

[115] *Id.*

[116] A number of recent Commission decisions have addressed the question of rights necessary for project purposes and who must be made a licensee. *See e.g.*, Little Falls Hydroelectric Assocs., 28 FERC ¶ 61,214 (1984), 29 FERC ¶ 61,001 (1984); City of Vidalia, 28 FERC ¶ 61,328 (1984); Boott Mills, 25 FERC ¶ 61,386 (1983).

[117] Proposed § 4.33(a)(1) and (b)(1).

[118] Section 4.32(d)(2).

[119] Proposed § 4.33(a) and (b).

[120] Proposed § 4.32(i)

[121] *See* Niagara Mohawk Power Corp., 20 FERC ¶ 61, 454 (1982).

[122] Sections 4.31(d)(2)(i) and 4.33(d)(2).

[123] Proposed § 4.32(d)(2).

intervene in all Commission proceedings, including hydroelectric matters. Therefore, the NOPR proposed to remove the redundant part of § 4.32(h) that describes the intervention procedure.[124] No commenters discuss this proposal. The Commission is adopting it for the reasons set out in the NOPR.

E. Deadlines for Submitting Additional Information

The Commission can require any applicant to submit additional copies of an application or any additional information or documents that the Commission considers relevant.[125] The regulations do not provide a time limit for compliance with such a request. The NOPR proposed to codify the Commission's current requirement that, when an applicant is required to submit additional copies, it must do so within the time specified in the Commission's request. This rule would apply to information that the Commission seeks for itself or that the Commission orders to be furnished to other persons, agencies or entities.[126] No commenters discuss this proposal. The Commission is adopting it for the reasons discussed in the NOPR.

F. Notice to Municipalities

Under section 4(f) of the FPA, the Commission must give written notice to any municipality that is likely to be interested in, or affected by, a pending preliminary permit or license application.[127] The Commission gathers information about political subdivisions in the project area and determines which of them should be given written notice.[128]

The Commission could better implement section 4(f) of the FPA if permit and license applicants were to provide the Commission with lists of local political subdivisions in their areas. Therefore, the NOPR proposed to require permit and license applicants to identify those political subdivisions that meet certain criteria related to whether those local political subdivisions would likely be interested in their applications. Applicants also would be required to identify any other political subdivisions that they believe would be interested in their applications. Consistent with the Commission's policy in issuing section 4(f) notices, a political subdivision's ability to "engage in the business of developing, transmitting, utilizing, or distributing power," which determines whether it qualifies as a "municipality" under section 3(7) of the FPA,[129] would have no bearing on whether it should be identified by an applicant under proposed § 4.32(b).[130] The Commission would meet its section 4(f) obligations by notifying the political subdivisions identified in an applicant's list.

Commenters that oppose the proposal argue that: (1) It would be overly burdensome to prospective applicants; (2) the proposed rule, which would require applicants to identify all political subdivisions that they believe are likely to be interested in, or affected by, their applications, is extremely vague; and (3) the proposed rule would result in legal challenges by municipalities that were omitted from an applicant's list and therefore never notified of Commission acceptance of its application. Also, one commenter questions whether the Commission has the authority under section 4(f) to delegate to applicants the responsibility for identifying all interested or affected government entities.

Identifying municipalities that must be sent written notice is one of the steps that must be taken to process a permit or license application. The Commission can reasonably require applicants to prepare such lists. Furthermore, based on their familiarity with project areas, applicants should be more able than the Commission's staff to quickly identify the municipalities.

The Commission believes that it may lawfully require applicants to prepare the lists because the Commission may require applicants to submit all information necessary to the processing and consideration of an application. While the obligation to comply with the statute remains with the Commission, the Commission clearly can require applicants to provide information necessary for it to do so.[131]

For the most part, the proposed regulation is specific about which entities applicants must include on their lists. While the requirement that applicants identify political entities that they believe are likely to be interested in, or affected by, an application is less precise, applicants should have no difficulty complying with it. Most, if not all, such political subdivisions will already have been identified by applicants under proposed § 4.32(b)(2)(i)–(iii).

The final rule now clarifies the reporting requirements in the following ways. First, the terms "borough" and "township" are being deleted from § 4.32(b)(2)(ii) to clarify that this requirement refers to general purpose local governments and not to entities such as land survey townships (the reference to "borough," which is akin to a city or town, is superfluous).[132] Second, political subdivisions of exactly 5,000 people are being included in § 4.32(b)(2)(ii)(B), to conform to current practice.[133] Third, to clarify the regulation, the geographical limitation in § 4.32(b)(2)(ii)(B) is measured from the project dam (or diversion).

G. Timely Submission of Amendments to Applications

The NOPR proposed to remind applicants that amendments to cure deficient applications must be timely submitted. Also, the NOPR proposed to provide that the Director of the Office of Electric Power (the Director of the Office of Hydropower Licensing in the final rule), under delegated authority, would reject applications as patently deficient only within 45 days of filing.[134] Thereafter, such applications could be treated as deficient under § 4.32(d)(1), which allows the applicant an opportunity to cure the deficiencies. The Commission (but not the Director) could reject such applications as patently deficient after the 45-day period.[135]

Commenters suggest that proposed § 4.32(d) inadequately explains the differences between treatment of applications that are "deficient" and those that are "patently deficient." The Commission notifies applicants that have filed "deficient" applications of the specific deficiencies and specifies times within which to cure the deficiencies. Applications that are cured within the times allowed retain their "acceptance for filing" dates and are reviewed by the

[124] Proposed § 4.32(h).

[125] Section 4.31(f).

[126] Proposed § 4.32(f).

[127] 16 U.S.C. 797(f) (1982).

[128] *See* City of Idaho Falls, 29 FERC ¶ 61.066 (1982).

[129] 16 U.S.C. 796(7) (1982).

[130] *See* Allegheny Electric Coop., Inc., 29 FERC ¶ 61.208 (1984).

[131] Shortly after the notice of the proposed rule was issued, the District of Columbia Circuit Court of Appeals issued its Northern Colorado Water Conservancy Dist. v. FERC decision. 730 F.2d 1509 (D.C. Cir. 1984). The court rejected the Commission's contention that special purpose political subdivisions, such as drainage districts and irrigation districts, were not entitled to written notice of applications under Section 4(f) of the FPA. The rule amends Commission practice and implements this decision.

[132] Townships such as Potter Township, Pennsylvania (*see* Allegheny Electric Coop., 29 FERC § 61.208 (1984)) will be included as local political subdivisions similar to towns and cities.

[133] *See* city of Idaho Falls, 20 FERC § 61.066 (1982).

[134] The final rule provides the Director of the Office of Hydropower Licensing with 60 days rather than 45 days in which to reject applications under delegated authority. Sixty days more closely approximates the average time necessary for staff to review and analyze an application.

[135] Proposed § 4.32(d)(2).

Commission. The Commission rejects "patently deficient" applications. These applicants must cure the deficiencies and refile their applications. The refiled applications are assigned new "acceptance for filing dates."

Commenters request the Commission to explain the standards used to make the distinction between "deficient" and "patently deficient" and to give examples of the different types of deficiencies that cause applications to be classified as one or the other. The Commission rejects as "patently deficient" any application that fails in any material respect either to comply with the Commission's substantive requirements or to supply the required information necessary to consider the application on its merits. Applications are most often rejected for failing to meet substantive requirements because they fail to include all required exhibits or results of studies.

The Commission also rejects as "patently deficient" applications for projects which the Commission is precluded by law from licensing or exempting from licensing. Examples of applications that are rejected for this reason are projects for which the waterways proposed to be developed are located in national parks and therefore proscribed from hydroelectric development [136] or because the project site is reserved exclusively for Federal development. [137]

Some applications basically provide the Commission with all the necessary information but are deficient in some minor respect that can be cured in a short time. Rather than reject these applications, the Commission notifies the applicants of the specific deficiencies and affords them specified times within which to cure the deficiencies.

The final rule clarifies the Commission's current rules for rejecting applications that fail to meet the Commission's substantive requirements or that propose to develop projects that by law cannot be licensed or exempted from licensing.

H. Conforming Project Boundary Requirements

The NOPR proposed to conform the requirements for describing project boundaries in an application for license for either a major unconstructed project or major modified project or a major project—existing dam. [138]

[136] 16 U.S.C. 796(2), 797(e) (1982).

[137] *See* Chapman v. FPC, 191 F.2d 796 (4th Cir. 1951), *aff'd*, 345 U.S. 153 (1953).

[138] Proposed §§ 4.41 and 4.51. No commenters discuss this proposal. It is being adopted, with one change related to the use of tentative boundaries in cases in which accurate survey information is unavailable. This language currently appears in § 4.41(h)(2).

DOI's Bureau of Land Management (BLM), which manages U.S. lands, submitted comments concerning the withdrawal of U.S. lands pursuant to section 24 of the FPA once an application is accepted for filing. Section 24 provides, in part, that any

> lands of the United States included in any proposed project under the provisions of [Part I of the FPA] 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. [139]

BLM has submitted the following requests for technical changes to the Commission's regulations with respect to section 24.

1. BLM requests that proposed § 4.32(c)(1) and the public notice of acceptance for filing of a permit or a license application state that, upon the filing of an application, all affected U.S. lands are reserved under section 24. Because section 24 specifically provides this, the Commission does not believe it necessary to state it in the regulations.

2. Section 4.81 of the Commission's regulations prescribes the reporting requirements for a permit application. BLM argues that § 4.81 is too flexible in its requirements for providing in the application a list of affected U.S. lands and an adequate map from which these lands can be identified. BLM asserts that, as a result of this flexibility, BLM is provided with inadequate information to reserve the affected U.S. lands. The Commission believes that its regulations are sufficiently precise. However, the Commission's staff will thoroughly review permit applications to ensure that they provide sufficient information for BLM's purposes.

3. Section 4.35 assigns new "acceptance for filing" dates to applications when they are materially amended. BLM suggests that § 4.35 should indicate that a newly assigned "acceptance for filing" date will also be considered the effective date for the withdrawal of U.S. lands, if that is the Commission's intention. That is not the Commission's intention. Section 4.35 assigns new "acceptance for filing" dates for the purposes of filing deadlines and competition. It is not intended to change the date on which U.S. lands are reserved under section 24 of the FPA. However, § 4.35 can affect the date on which U.S. lands are withdrawn when an amendment to an application would cause the proposed project to affect additional U.S. lands. The filing date of such an amendment is the date on which these additional affected U.S. lands are reserved.

4. Proposed § 4.41(h)(2) requires applicants for a license for a major unconstructed project or a major modified project to include in their applications the "project boundary enclosing the project works and other features." In states covered by a public land survey, § 4.41(h)(2) requires that ties be shown at sufficient points to permit accurate plotting of the position of the boundary relative to the lines of the public land survey. In states not covered by public land surveys, it requires the best available legal description of the position of boundaries, including distances and directions from fixed monuments or physical features.

BLM requests the Commission to require applicants in states not covered by public land surveys to use only an acceptable land survey approved by BLM. The Commission believes that proposed § 4.41(h) prescribes adequate requirements. However, the Commission's staff will review applicants' land descriptions and maps to ensure that they are sufficient for BLM's purposes.

5. The Commission has reviewed its other regulations to determine whether they require applicants to submit descriptions of U.S. lands adequate for BLM to withdraw affected U.S. lands. The Commission finds that § 4.61, which prescribes the requirements for application for minor water power projects and major water power projects of five megawatts or less should be clarified to ensure that applicants proposing projects that would affect U.S. lands identify in Exhibit G of their applications the affected U.S. lands so that BLM may withdraw these lands pursuant to section 24. Therefore, the final rule clarifies these requirements. [140]

[139] 16 U.S.C 818 (1982).

XIII. Regulatory Flexibility Act Certification

The Regulatory Flexibility Act of 1980 (RFA), 5 U.S.C. 601–612 (1982), requires certain analyses of proposed agency rules that will have a "significant economic impact on a substantial number of small entities." Pursuant to section 605(b) of the RFA, the Commission certified in the NOPR that

[140] New § 4.61(f)(4)(iii).

this rulemaking will not have a significant economic impact on a substantial number of small entities.

The primary purposes of this rule are to: (1) Clarify procedures already established for filing applications for a preliminary permit, a license, and an exemption from licensing for hydroelectric projects; (2) codify recent decisions of the Commission affecting these types of applications; and (3) reorganize certain sections of the regulations governing hydroelectric applications. The codification of Commission decisions and the reorganization of certain sections have no economic impact because they do not significantly change the substance of existing regulations and case law requirements. Other rules are mostly procedural and, in any case, are minor in effect on any potential applicants. Thus, the Commission stated in the NOPR that the proposed rule would cause no substantial economic impact on any entity, large or small.

Commenters argue that the rulemaking will have such an effect by affecting commercial fishing dependent on fish habitat, by expanding the "maximum levels of competition," and by expanding pre-filing consultation requirements.

The Commission continues to believe that the rulemaking will not have a significant economic effect on a substantial number of small entities. First, fish habitat will not be affected by promulgation of this rulemaking. The rulemaking does not authorize the construction or operation of any projects. Only issuance of a license or an exemption does. Second, the rulemaking does not expand competition. It merely codifies or revises some of the procedural rules governing competition. Finally, the rulemaking does not expand pre-filing consultation requirements. It merely formalizes the existing requirements.

XIV. Finding of No Significant Impact

The NOPR stated that the Commission had determined that the codification of Commission decisions, clarification, and reorganization of the regulations would not be a major Federal action significantly affecting the quality of the human environment. Therefore, under the National Environmental Policy Act of 1969,[141] neither an environmental assessment nor an environmental impact statement was necessary.

Commenters argue that the rulemaking will have such an effect. However, the rulemaking does not authorize the construction or operation of any projects and therefore will not affect the environment nor will it encourage or discourage further applications. The Commission has determined that it can best meet the requirements of the National Environmental Policy Act by considering environmental impacts when it and the fish and wildlife agencies review each license and exemption application.

[141] 42 U.S.C. 4321–4347 (1982).

XV. Effective Date and Paperwork Reduction Act Statement

The information collection provisions in this proposed rule are being submitted to the Office of Management and Budget (OMB) for its approval under the Paperwork Reduction Act, 44 U.S.C. 3501–3520 (1982), and OMB's regulations, 5 CFR 1320.13 (1984). Interested persons can obtain information on the proposed information collection provisions by contacting the Federal Energy Regulatory Commission, 825 N. Capitol Street, NE., Washington, D.C. 20426 (Attention: Joseph H. Long, (202) 357–8526). Comments on the information collection provisions can be sent to the Office of Information and Regulatory Affairs of OMB (Attention: Desk Officer for the Federal Energy Regulatory Commission).

This rule will become effective June 10, 1985. If OMB's approval and control number have not been received by this effective date, the Commission will issue a notice temporarily suspending the effective date.

List of Subjects in 18 CFR Part 4

Electric power.

In consideration of the foregoing, the Commission amends Part 4, Subchapter B, Chapter I, Title 18, Code of Federal Regulations, as set forth below.

By the Commission.

Kenneth F. Plumb,

Secretary.

PART 4—[AMENDED]

1. The authority citation for Part 4 is revised to read as follows:

Authority: Federal Power Act, 16 U.S.C. 791a–825r (1982); Public Utility Regulatory Policies Act of 1978, 16 U.S.C. 2601–2645 (1982); Department of Energy Organization Act, 42 U.S.C. 7101–7352 (1982); Exec. Order No. 12,009, 3 CFR 142 (1978), unless otherwise noted.

2. The heading for Subpart D of Part 4 is revised to read as follows:

Subpart D—Application for Preliminary Permit, License or Exemption: General Provisions

3. Section 4.30 is revised to read as follows:

§ 4.30 Applicability and definitions.

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

(b) For the purposes of this Part—

(1)(i) "Competing development application" means 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.

(ii) "Competing preliminary permit application" means any application for a preliminary permit 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.

(2) "Conduit" means any tunnel, canal, pipeline, aqueduct, flume, ditch, or similar manmade 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 "not primarily for the generation of electricity" includes but is not limited to a conduit:

(i) Which was built for the distribution of water for agricultural, municipal, or industrial consumption and is operated for such a purpose; and

(ii) To which a hydroelectric facility has been or is proposed to be added.

(3) "Construction of a dam," for the purposes of provisions governing application for exemption of a small conduit hydroelectric facility, means any construction, repair, reconstruction, or modification of a dam that creates a new impoundment or increases the normal maximum surface elevation or the normal maximum surface area of an existing impoundment.

(4)(i) "Dam," for the purposes of provisions governing application for license of a major project—existing dam, means any structure for impounding or diverting water.

(ii) "Dam," for the purposes of provisions governing application for exemption of a small conduit hydroelectric facility, means any structure that impounds water.

(iii) "Dam," for the purposes of provisions governing application for exemption of a small hydroelectric power project, means any structure for impounding water which is usable for electric power generation if the impoundment supplies all, or the substantial part of, the total hydroelectric pressure (head) developed for such generation.

(5) "Development application" means any application for either a license or exemption from licensing for a proposed water power project.

(6)(i) "Existing dam," for the purposes of provisions governing application for license of a major project—existing dam, means any dam (as defined in paragraph (b)(4)(i) of this section) that has already been constructed and which does not require any construction or enlargement of impoundment structures other than repairs or reconstruction.

(ii) "Existing dam," 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.

(7) "Existing impoundment," for the purposes of provisions governing application for license of a major project—existing dam, means any body of water that an existing dam impounds.

(8) "Federal lands," 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.

(9) "Fish and wildlife agencies" means the U.S. Fish and Wildlife Service and any state agency with administrative management over fish or wildlife resources of the state or states in which the small conduit hydroelectric facility or small hydroelectric power project is or will be located.

(10)(i) "Initial development application" means 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.

(ii) "Initial preliminary permit application" means any acceptable application for a preliminary permit for a proposed water power project that would develop, conserve, and utilize, in whole or in part, water resources for which no other acceptable preliminary permit application has been submitted for filing and is pending before the Commission.

(11) "Initial license" means the first license issued for a water power project under either the Federal Water Power Act of 1920 or the Federal Power Act.

(12) "Install or increase," for the purposes of provisions governing application for exemption of a small hydroelectric power project, 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.

(13) "Licensed water power project" means a project, as defined in section 3(11) of the Federal Power Act, that is licensed under Part I of the Federal Power Act.

(14) "Major modified project" means any major project—existing dam, as defined in paragraph (b)(16) of this section, that would include:

(i) 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 existng impoundment; or

(ii) Any change in existing project works or operations that would result in a significant environmental impact.

(15) "Major unconstructed project" means any unlicensed water power project that would:

(i) Have a total installed generating capacity of more than 1.5 MW; and

(ii) Use the water power potential of a dam and impoundment which, at the time application is filed, have not been constructed.

(16) "Major project—existing dam" means a licensed or unlicensed, existing or proposed water power project that would:

(i) Have a total installed generating capacity or more than 2,000 horsepower (1.5 MW); and

(ii) Not use the water power potential provided by any dam except an existing dam.

(17) "Minor water power project" means 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.

(18) "New development," 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.

(19) "New license" means any license, except an annual license issued under section 15 of the Federal Power Act, for a water power project that is issued under the Federal Power Act after the initial license for that project.

(20)(i) "Non-Federal lands," for the purposes of provisions governing application for exemption of a small conduit hydroelectric facility, means any lands except lands to which the United States holds fee title.

(ii) "Non-Federal lands," for the purposes of provisions governing application for exemption of a small hydroelectric power project, mean any lands other than Federal lands defined in paragraph (b)(8) of this section.

(21) "Person" means any individual and, as defined in section 3 of the Federal Power Act, any corporation, municipality, or state.

(22) "Project," 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 manmade 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.

(23) "Qualified exemption applicant" means any person who meets the requirements specified in § 4.31(c)(2) with respect to a small hydroelectric power project for which exemption from licensing is sought.

(24) "Qualified license applicant" means any person to whom the Commission may issue a license, as specified in section 4(e) of the Federal Power Act.

(25) "Real property interests," for the purposes of provisions governing application for exemption of a small conduit hydroelectric facility or a small

hydroelectric power project, includes ownership in fee, rights-of-way, easements, or leaseholds.

(26) "Small conduit hydroelectric facility" means an existing or proposed hydroelectric facility that is constructed, operated, or maintained for the generation of electric power, and includes all structures, fixtures, equipment, and lands used and useful in the operation or maintenance of the hydroelectric facility, but excludes the conduit on which the hydroelectric facility is located or the transmission lines associated with the hydroelectric facility and which:

(i) Utilizes for electric power generation the hydroelectric potential of a conduit;

(ii) Is located entirely on non-Federal lands, as defined in paragraph (b)(20)(i) of this section;

(iii) Has an installed generating capacity of 15 MW or less;

(iv) Is not an integral part of a dam;

(v) Discharges the water it uses for power generation either:

(A) Into a conduit;

(B) Directly to a point of agricultural, municipal, or industrial consumption; or

(C) Into a natural water body if a quantity of water equal to or greater than the quantity discharged from the hydroelectric facility is withdrawn from that water body downstream into a conduit that is part of the same water supply system as the conduit on which the hydroelectric facility is located; and

(vi) Does not rely upon construction of a dam, which construction will create any portion of the hydrostatic head that the facility uses for power generation unless that construction would occur for agricultural, municipal, or industrial consumptive purposes even if hydroelectric generating facilities were not installed.

(27) "Small hydroelectric power project" means any project in which capacity will be installed or increased after the date of notice of exemption or application under Subpart K, which will have a total installed capacity of not more than 5 MW, and which:

(i) Would utilize for electric power generation the water power potential of an existing dam that is not owned or operated by the United States or by an instrumentality of the Federal Government, including the Tennessee Valley Authority; or

(ii)(A) Would utilize for the generation of electricity a natural water feature, such as a natural lake, waterfall, or the gradient of a natural stream, without the need for a dam and man-made impoundment;

(B) Would not retain water behind any struture for the purpose of a storage and release operation; and

(C) Except as otherwise permitted under § 4.103(c)(2), would contain a diversion or intake structure that:

(*1*) Is not higher than two times the diameter of the penstock or intake pipeline, not to exceed ten feet in total height, as measured from the lowest point of the natural streambed at the downstream toe of the structure to the normal water surface level retained by the structure assuming a no-spill condition;

(*2*) Does not retain more than two acre-feet (2,467 cubic meters) of water behind the diversion or intake structure; and

(*3*) Does not increase the existing, naturally occurring hydraulic head of the natural water feature more than five (5) percent.

4. Section 4.31 is revised to read as follows:

§ 4.31 Initial or competing application: who may file.

(a) *Application for a preliminary permit or a license.* Any citizen, association of citizens, domestic corporation, municipality, or state may submit for filing an initial application or a competing application for a preliminary permit or a license for a water power project under Part I of the Federal Power Act.

(b) *Application for exemption of a small conduit hydroelectric facility.*—(1) *Exemption from provisions other than licensing.* Any citizen, association of citizens, domestic corporation, municipality, or state that has all of the real property interests in the lands necessary to develop and operate that project, or an option to obtain those interests, may apply for exemption of a small conduit hydroelectric facility from provisions of Part I of the Federal Power Act, other than licensing provisions.

(2) *Exemption from licensing.* Any person having all the real property interests in the lands necessary to develop and operate the small conduit hydroelectric facility, or an option to obtain those interests, may apply for exemption of that facility from licensing under Part I of the Federal Power Act.

(c) *Application for case-specific exemption of a small hydroelectric power project.*—(1) *Exemption from provisions other than licensing.* Any qualified license applicant or licensee seeking amendment of its license may apply for exemption of the related project from provisions of Part I of the Federal Power Act other than licensing provisions.

(2) *Exemption from licensing.*—(i) *Only Federal lands involved.* If only rights to use or occupy Federal lands would be necessary to develop and operate the proposed small hydroelectric power project, any person may apply for exemption of that project from licensing.

(ii) *Some non-Federal lands involved.* If real property interests in any non-Federal lands would be necessary to develop and operate the proposed small hydroelectric power project, any person who has all of the real property interests in non-Federal lands necessary to develop and operate that project, or an option to obtain those interests, may apply for exemption of that project from licensing.

§ 4.32 [Redesignate as § 4.39]

5. Section 4.32 is redesignated as § 4.39.

6. A new § 4.32 is added to read as follows:

§ 4.32 Acceptance for filing or rejection.

(a) Each application must:

(1) For a preliminary permit or license, identify every person, citizen, association of citizens, domestic corporation, municipality, or state that has or intends to obtain and will maintain any proprietary right necessary to construct, operate, or maintain the project;

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

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

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

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

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

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

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

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

(iv) Every other political subdivision in the general area of the project that the applicant believes may be likely to be interested in, or affected by, the application.

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

(ii) This (application, etc.) is executed in the

State of ——————

County of ——————

by: ——————

(Name) —————— ——————

(Address) ——————

being duly sworn, depose(s) and say(s) that the contents of this (application, etc.) are true to the best of (his or her) knowledge or belief. The undersigned applicant(s) has (have) signed the (application, etc.) this —— day of ——, 19——.

——————

(Applicant(s))

By: ——————

Subscribed and sworn to before me, a [Notary Public, or title of other official authorized by the state to notarize documents, as appropriate] of the State of —— this day of ——, 19——.

/SEAL/ [if any]

——————

(Notary Public, or other authorized official)

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

(i) Preliminary permit: § 4.81;

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

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

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

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

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

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

(viii) Case-specific exemption of a small hydroelectric power project: § 4.107.

(b)(1) Each applicant for a preliminary permit or a license must submit to the Commission's Secretary for filing an original and fourteen copies of the application and five sets of full-sized prints. The applicant must serve one copy of the application on the Commission's Regional Engineer for the appropriate region and on each consulted agency. The application may also include reduced prints of maps and drawings conforming to § 4.39(d). The originals (microfilm) of maps and drawings included in a license application under § 4.39(a) are not to be filed initially, but will be requested pursuant to paragraph (c) of this section.

(2) Each applicant for exemption must submit to the Commission's Secretary for filing an original and fourteen copies of the application and five sets of full-sized prints. An applicant must serve one copy of the application on the Commission's Regional Engineer for the appropriate region and on each consulted agency. Maps and drawings need not conform to the requirements of § 4.39, but must be of sufficient size, scale, and quality to permit easy reading and understanding. The original (microfilm) of maps and drawings are not to be filed initially, but will be requested pursuant to paragraph (c) of this section.

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

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

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

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

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

(d) In order for an application to conform adequately to the requirements of paragraphs (a) and (b) of this section and of § 4.38, an application must be completed fully. No blanks should be left in the application. No material or information required in the application should be omitted. If an applicant believes that its application conforms adequately without containing certain required material or information, it must explain in detail why the material or information is not being submitted and what steps were taken by the applicant to provide the material or information. If the Commission finds that an application does not adequately conform to the requirements of paragraphs (a) and (b) of this section and of § 4.38, the Commission or its delegate will consider the application either deficient or patently deficient.

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

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

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

(2) *Patently deficient applications.* (i) If, within 60 days of its filing date, the Director of the Office of Hydropower Licensing determines that an application patently fails to substantially comply with the requirements of paragraphs (a) and (b) of this section and of § 4.38, or is for a project that is precluded by law, the application will be rejected as patently deficient with the specification of the deficiencies that render the application patently deficient.

(ii) If, after 60 days of its filing date, the Director of the Office of Hydropower Licensing determines that an application patently fails to substantially comply with the requirements of paragraphs (a) and (b) of this section and of § 4.38, or is for a project that is precluded by law:

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

(B) The application will be considered deficient under subparagraph (d)(1), if the Commission determines it is not patently deficient.

(iii) Any application that is rejected may be resubmitted if the deficiencies are corrected and if, in the case of a competing application, the resubmittal is timely. The date the rejected application is resubmitted will be considered the new filing date for purposes of determining its timeliness under § 4.36 and the disposition of competing applications under § 4.37.

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

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

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

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

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

7. Section 4.33 is revised to read as follows:

§ 4.33 Limitations on submitting applications.

(a) *Limitations on submission and acceptance of a preliminary permit application.* The Commission will not accept an application for a preliminary permit for project works that:

(1) Would develop, conserve, and utilize, in whole or in part, the same water resources that would be developed, conserved, and utilized by a project for which there is an unexpired preliminary permit.

(2) Would develop, conserve, and utilize, in whole or in part, the same water resources that would be developed, conserved, and utilized by a project for which an initial development application has been filed unless the preliminary permit application is filed not later than the time allowed under § 4.36(a) for the filing of applications in competition against an initial application for a preliminary permit that would develop, conserve, and utilize, in whole or in part, the same resources.

(b) *Limitations on submission and acceptance of a license application.* The Commission will not accept an application for a license for project works that would develop, conserve, and utilize, in whole or in part, the same water resources that would be developed, conserved, and utilized by a project for which there is an unexpired preliminary permit, unless the permittee has submitted an application for license.

(c) *Limitations on submission and acceptance of an application for a license that would affect an exempted project.* (1) Except as permitted under § 4.33(c)(2), § 4.94(d), or § 4.106 (c), (e) or (f), the Commission will not accept an application for a license for project works that are already exempted from licensing under this Part.

(2) If a project is exempted from licensing pursuant to § 4.103 or § 4.109 and real property interests in any non-Federal lands would be necessary to develop or operate the project, any person who is both a qualified license applicant and has any of those real property interests in non-Federal lands may submit a license application for that project. If a license application is submitted under this clause, any other qualified license applicant may submit a competing license application in accordance with § 4.36.

(d) *Limitations on submission and acceptance of exemption applications.*— (1) *Unexpired permit or license.* (i) If there is an unexpired permit in effect for a project, the Commission will accept an application for exemption of that project from licensing only if the exemption applicant is the permittee. Upon acceptance for filing of the permittee's application, the permit will be considered to have expired.

(ii) If there is an unexpired license in effect for a project, the Commission will accept an application for exemption of that project from licensing only if the exemption applicant is the licensee.

(2) *Pending license applications.* If an accepted license application for a project was submitted by a permittee before the preliminary permit expired, the Commission will not accept an application for exemption of that project from licensing submitted by a person other than the former permittee.

(3) *Submitted by qualified exemption applicant.* If the first accepted license application for a project was filed by a qualified exemption applicant, the applicant may request that its license application be treated initially as an application for exemption from licensing by so notifying the Commission in writing and, unless only rights to use or occupy Federal lands would be necessary to develop and operate the project, by submitting documentary evidence showing that the applicant holds the real property interests required under § 4.31. Such notice and documentation must be submitted not later than the last date for filing protests or motions to intervene prescribed in the public notice issued for its license application under § 4.32(c)(2).

(e) *Priority of exemption applicant's earlier permit or license application.* Any accepted preliminary permit or license application submitted by a person who later applies for exemption of the project from licensing will retain its validity and priority under this subpart until the preliminary permit or license application is withdrawn or the project is exempted from licensing.

8. Section 4.34 is revised to read as follows:

§ 4.34 Hearings on applications.

The Commission may order a hearing on an application for a preliminary permit, a license, or an exemption from licensing upon either its own motion or the motion of any interested party of record. Any hearings will be limited to the issues prescribed by order of the Commission.

9. Section 4.35 is revised to read as follows:

§ 4.35 Amendment of application; change of date of acceptance.

(a) *General rule.* (1) Except as provided in paragraph (a)(2), if an applicant amends its filed license or preliminary permit application in order to change the status or identity of the applicant or to materially amend the proposed plans of development, or if an applicant amends its filed application for exemption from licensing in order to materially amend the proposed plans of development, the Commission, in determining the date of acceptance of the application under § 4.32(e), will consider the date on which the amendment to the application was filed to be the date on which the application was filed with the Commission. The Commission will also consider the amended application as a new filing for the purposes of determining its timeliness under § 4.36, for disposing of competing applications under § 4.37, and for reissuing public notice of the application under § 4.32(c)(2). The Commission also will rescind any acceptance letter already issued for the application.

(2) *Exceptions.* This section does not apply to:

(i) Any corrections of deficiencies made pursuant to § 4.32(d)(1);

(ii) Any amendments made pursuant to § 4.37(b)(4) by a state or a municipality to amend its proposed plans of development to make them as well adapted as the proposed plans of an applicant that is not a state or a municipality;

(iii) Any amendments made pursuant to § 4.37(c)(2) by a priority applicant to amend its proposed plans of development to make them as well adapted as the proposed plans of an applicant that is not a priority applicant; and

(iv) Any amendments made by a license or an exemption applicant to amend its proposed plans of development to satisfy requests of fish and wildlife agencies submitted after an applicant has consulted adequately under § 4.38.

(b) *Definitions.* (1) For the purposes of this section, a material amendment to plans of development proposed in an application for a license or exemption from licensing means any fundamental and significant change, including but not limited to:

(i) A change in the installed capacity, or the number or location of any generating units of the proposed project if the change would significantly modify the flow regime associated with the project;

(ii) A material change in the location, size, or composition of the dam, the location of the powerhouse, or the size and elevation of the reservoir if the change would:

(A) Enlarge, reduce, or relocate the area of the body of water that would lie between the farthest reach of the proposed impoundment and the point of discharge from the powerhouse; or

(B) Cause adverse environmental impacts not previously discussed in the original application; or

(iii) A change in the number of discrete units or development to be included within the project boundary.

(2) For purposes of this section, a material amendment to plans of development proposed in an application for a preliminary permit means a material change in the location of the powerhouse or the size and elevation of the reservoir if the change would enlarge, reduce, or relocate the area of the body of water that would lie between the farthest reach of the proposed impoundment and the point of discharge from the powerhouse.

(3) For purposes of this section, a change in the status of an applicant means:

(i) The acquisition or loss of preference as a state or a municipality under section 7(a) of the Federal Power Act; or

(ii) The loss of priority as a permittee under section 5 of the Federal Power Act.

(4) For purposes of this section, a change in the identity of an applicant means a change that either singly, or together with previous amendments, causes a total substitution of all the original applicants in a permit or a license application.

10. A new § 4.36 is added to read as follows:

§ 4.36 Competing applications: deadlines for filing; notices of intent; comparisons of plans of development.

The public notice of an initial preliminary permit application or an initial development application shall prescribe the deadline for filing protests and motions to intervene in that proceeding (the "prescribed intervention deadline").

(a) *Deadlines for filing applications in competition with an initial preliminary permit application.* (1) Any preliminary permit application or any development application not filed pursuant to a notice of intent must be submitted for filing in competition with an initial preliminary permit application not later than the prescribed intervention deadline.

(2) Any preliminary permit application filed pursuant to a notice of intent must be submitted for filing in competition with an initial preliminary permit application not later than 30 days after the prescribed intervention deadline.

(3) Any development application filed pursuant to a notice of intent must be submitted for filing in competition with an initial preliminary permit application not later than 120 days after the prescribed intervention deadline.

(b) *Deadlines for filing applications in competition with an initial development application.* (1) Any development application not filed pursuant to a notice of intent must be submitted for filing in competition with an initial development application not later than the prescribed intervention deadline.

(2) Any development application filed pursuant to a notice of intent must be submitted for filing in competition with an initial development application not later than 120 days after the prescribed intervention deadline.

(3) If the Commission has accepted an application for exemption of a project from licensing and the application has not yet been granted or denied, the applicant for exemption may submit a license application for the project if it is a qualified license applicant. The pending application for exemption from licensing will be considered withdrawn as of the date the Commission accepts the license application for filing. If a license application is accepted for filing under this provision, any qualified license applicant may submit a competing license application not later than the prescribed intervention deadline set for the license application.

(4) Any preliminary permit application must be submitted for filing in competition with an initial development application not later than the deadlines prescribed in subparagraphs (a)(1) and (a)(2) for the submission of preliminary permit applications filed in competition with an initial preliminary permit application.

(d) *Notices of intent.* (1) Any notice of intent to file an application in competition with an initial preliminary permit or an initial development application must be submitted for filing not later than the prescribed intervention deadline for the initial application.

(2) A notice of intent must include:

(i) The exact name, business address, and telephone number of the prospective applicant; and

(ii) An unequivocal statement of intent to submit a preliminary permit application or a development application (specify which type of application).

(e) *Requirements for competing applications.* (1) Any competing application must:

(i) Conform to all requirements for filing an initial application; and

(ii) Include proof of service of a copy of the competing application on the person(s) designated in the public notice of the initial application for service of pleadings, documents, or communications concerning the initial application.

(2) *Comparisons of plans of development.* (i) After the deadline for filing applications in competition against an initial development application has expired, the Commission will notify each license and exemption applicant of the identity of the other applicants.

(ii) Not later than 14 days after the Commission serves the notification described in paragraph (c)(2)(i), if a license or exemption applicant has not already done so, it must serve a copy of its application on each of the other license and exemption applicants.

(iii) Not later than 60 days after the Commission serves the notification described in paragraph (c)(2)(i), each license and exemption applicant must file with the Commission a detailed and complete statement of how its plans are as well or better adapted than are the plans of each of the other license and exemption applicants to develop, conserve, and utilize in the public interest the water resources of the region. These statements should be supported by any technical analyses that the applicant deems appropriate to support its proposed plans of development.

11. A new § 4.37 is added to read as follows:

§ 4.37 Rules of preference among competing applications.

Except as provided in § 4.33(f), the Commission will select among competing applications on the following bases:

(a) If an accepted application for a preliminary permit and an accepted application for a license propose project works that would develop, conserve, and utilize, in whole or in part, the same water resources, and the applicant for a license has demonstrated its ability to carry out its plans, the Commission will favor the license applicant unless the permit applicant substantiates in its filed application that its plans are better adapted to develop, conserve, and utilize in the public interest the water resources of the region.

(b) If two or more applications for preliminary permits or two or more applications for licenses (not including applications for a new license under section 15 of the Federal Power Act) are filed by applicants for project works that would develop, conserve, and utilize, in whole or in part, the same water resources, and if none of the applicants is a preliminary permittee whose application for license was accepted for filing within the permit period, the Commission will select between or among the applicants on the following bases:

(1) If both of two applicants are either a municipality or a state, the Commission will favor the applicant whose plans are better adapted to develop, conserve, and utilize in the public interest the water resources of the region, taking into consideration the ability of each applicant to carry out its plans.

(2) If both of two applicants are either a municipality or a state, or neither of them is a municipality or a state, and the plans of the applicants are equally well adapted to develop, conserve, and utilize in the public interest the water resources of the region, taking into consideration the ability of each applicant to carry out its plans, the Commission will favor the applicant with the earliest application acceptance date.

(3) If one of two applicants is a municipality or a state, and the other is not, and the plans of the municipality or a state are at least as well adapted to develop, conserve, and utilize in the public interest the water resources of the region, the Commission will favor the municipality or state.

(4) If one of two applicant is a municipality or a state, and the other is not, and the plans of the applicant who is not a municipality or a state are better adapted to develop, conserve, and utilize in the public interest the water resources of the region, the Commission will inform the municipality or state of the specific reasons why its plans are not as well adapted and afford a reasonable period of time for the municipality or state to render its plans at least as well adapted as the other plans. If the plans of the municipality or state are rendered at least as well adapted within the time allowed, the Commission will favor the municipality or state. If the plans are not rendered at least as well adapted within the time allowed, the Commission will favor the other applicant.

(c) If two or more applications for licenses are filed for project works which would develop, conserve, and utilize, in whole or in part, the same water resources, and one of the applicants was a preliminary permittee whose application was accepted for filing within the permit period ("priority applicant"), the Commission will select between or among the applicants on the following bases:

(1) If the plans of the priority applicant are at least as well adapted as the plans of each other applicant to develop, conserve, and utilize in the public interest the water resources of the region, taking into consideration the ability of each applicant to carry out its plans, the Commission will favor the priority applicant.

(2) If the plans of an applicant who is not a priority applicant are better adapted than the plans of the priority applicant to develop, conserve, and utilize in the public interest the water resources of the region, taking into consideration the ability of each applicant to carry out its plans, the Commission will inform the priority applicant of the specific reasons why its plans are not as well adapted and afford a reasonable period of time for the priority applicant to render its plans at least as well adapted as the other plans. If the plans of the priority applicant are rendered at least as well adapted within the time allowed, then the Commission will favor the priority applicant. If the plans of the priority applicant are not rendered as well adapted within the time allowed, the criteria specified in paragraph (b) will govern.

(3) The criteria specified in paragraph (b) will govern selection among applicants other than the priority applicant.

(d) With respect to a project for which an application for an exemption from licensing has been accepted for filing, the Commission will select among competing applications on the following bases:

(1) If an accepted application for a preliminary permit and an accepted application for exemption from licensing propose to develop mutually exclusive small hydroelectric power projects, the Commission will favor the applicant whose substantiated plans in the application received by the Commission are better adapted to develop, conserve, and utilize in the public interest the water resources of the region. If the substantiated plans are equally well adapted, the Commission will favor the application for exemption from licensing.

(2) If an application for a license and an application for exemption from licensing, or two or more applications for exemption from licensing are each accepted for filing and each proposes to develop a mutually exclusive project, the Commission will favor the applicant whose plans are better adapted to develop, conserve, and utilize in the public interest the water resources of the region. If the plans are equally well adapted, the Commission will favor the applicant with the earliest application acceptance date.

(e) A municipal applicant must provide evidence that the municipality is competent under applicable state and local laws to engage in the business of developing, transmitting, utilizing, or distributing power, or such applicant will be considered a non-municipal applicant for the purpose of determining the disposition of competing applications.

12. A new § 4.38 is added to read as follows:

§ 4.38 Pre-filing consultation requirements.

(a) An applicant for a license or exemption from licensing must consult with each appropriate Federal and state agency before submitting its application to the Commission. The Federal agencies to be consulted must include the Federal agency administering any United States lands utilized or occupied by the project as well as other appropriate resource agencies. To assist applicants, the Director of the Office of Hydropower Licensing or the Regional Engineer responsible for the area will provide a list of known appropriate Federal and state agencies upon request.

(b) Consultation consists of the following:

(1) *Initial stage of consultation.* A potential applicant must contact all appropriate agencies and provide each of them with the following information:

(i) Detailed maps with proper land descriptions of the entire project area by township, range and section as well as by state, county, river, river mile, and the closest town. Show the specific location of all proposed project facilities, including roads, transmission lines, and any other appurtenant facilities;

(ii) A general engineering design of the proposed project with a description of any proposed diversion of a stream through a canal or a penstock;

(iii) A summary of the proposed operational mode of the project;

(iv) Identification of the environment to be affected and the significant resources present, and the applicant's environmental protection, mitigation, and enhancement plans to the extent known at that time; and

(v) Streamflow and water regime information, including drainage area, natural flow periodicity, montly flow rates and durations, mean flow figures illustrating the mean daily streamflow curve for each month of the year at the proposed point of diversion or impoundment with location of the stream gauging station, the method used to generate the streamflow data provided, and copies of all records used to derive the flow data used in the applicant's engineering calculations.

(2) *Second stage of consultation.* A potential applicant must perform any reasonable studies that are necessary for the Commission to make an informed decision regarding the merits of the application.

(i) Studies must be conducted prior to filing an application if the results:

(A) Would influence the economic feasibility of the project (e.g., minimum flow study);

(B) Would influence the technical feasibility of the project (e.g., study of potential mass soil movement);

(C) Are needed to determine the design or location of project features;

(D) Are needed to determine the impacts of the project on important natural or cultural resources (e.g., resource surveys);

(E) Are necessary to determine suitable mitigation (e.g., resource surveys); and

(F) Are necessary to minimize impacts to a significant resource (e.g., wild and scenic river, anadromous fish, endangered species, caribou migration routes).

(ii) Studies may be conducted after a license or exemption is issued if the studies:

(A) Can be conducted only after the project is operating (e.g., turbine-related fish mortality studies);

(B) Would determine the success of mitigative measures (e.g., post-construction monitoring studies); and

(C) Would be used to refine project operation or modify project facilities.

(iii) A potential applicant must provide each agency with a copy of its draft application, the results of all studies and a written request for review and comment. The draft application must clearly indicate the type of application the applicant expects to file with the Commission.

(iv) From the date that an agency receives the applicant's draft application, an applicant must allow each agency the following lengths of time to comment on the draft application before filing the application with the Commission:

(A) Thirty days for an application to be filed under §§ 4.60 and 4.61(d)(2), 4.70 and 4.71, 4.90 through 4.94, 4.101 through 4.107, or 4.200 and 4.201(b)(2), (3) and (4); and

(B) Sixty days for an application to be filed under §§ 4.40 and 4.41, 4.50 and 4.51, 4.60 and 4.61(d)(1), or 4.200 and 4.201(b)(1) and (5). A potential applicant must also provide each agency with a copy of reports discussing the results of any studies performed after the initial stage of consultation and, to the extent possible, must respond in the draft application to any comments and recommendations made by agencies during the initial stage of consultation.

(3) *Third stage of consultation.* When an applicant files an application with the Commission for an exemption, minor license, or major license less than 5 MW, it must serve a copy of its application on each of the agencies consulted. An applicant for a major license for 5 MW or more must provide applications to the agencies after receiving notification by the Commission that the application has been accepted. When an applicant revises, supplements, or amends an application on file with the Commission, or corrects deficiencies in its application pursuant to § 4.32(d)(1), the applicant must serve a copy of the revision, supplement, or amendment upon each consulted agency upon which it had served a copy of the original application.

(c) An applicant must document to the Commission in Exhibit E of its application that the requirements of all three stages of the consultation process have been fully satisfied and must include any agency letters containing comments, recommendations, and terms and conditions.

(d) If an agency fails to comment in writing within the prescribed time period or fails to otherwise consult, an applicant made describe *in detail* in Exhibit E of its application all attempts to consult with that agency, the results of any partial consultations that did occur, and any recommendations that the agency did make.

(e) If all the appropriate agencies waive compliance with any requirement of this section, the applicant may omit compliance with that requirement. The application must describe in Exhibit E of its application the circumstances of the waivers.

(f) An applicant must identify and explain in the application how and why the project would, or would not, comply with the relevant comprehensive state and regional water resource development plans and programs (e.g., the Columbia Basin Fish and Wildlife Program and the Northwest Power Planning Council Regional Energy Plan). If the project would not comply, the applicant must explain why the project should be allowed to not comply with these plans and programs.

§ 4.40 [Amended]

13. Section 4.40 is amended as follows:

a. The title is revised to read:

§ 4.40 Applicability.

b. Paragraphs (b) and (d) are removed.

c. Paragraph (c) is redesignated as paragraph (b).

d. Newly redesignated paragraph (b) is amended by removing the word

"§ 4.31(g)" and inserting, in its place, the word "§ 4.32(g)".

14. Section 4.41 is amended as follows:

a. Paragraph (a)(4), the introductory text in paragraph (f) and paragraph (h)(2) are revised to read as follows:

§ 4.41 Contents of application.

(a) * * *

(4) The applicant is a [citizen of the United States, association of citizens of the United States, domestic corporation, municipality, or State, as appropriate] and (is/is not) claiming preference under section 7(a) of the Federal Power Act. *See* 16 U.S.C. 796.

* * * * *

(f) *Exhibit E* is an Environmental Report. Information provided in the report must be organized and referenced according to the itemized subparagraphs below. *See* § 4.38 for consultation requirements. The Environmental Report must contain the following information, *commensurate with the scope of the project*:

* * * * *

(h) * * *

(2) *Project boundary.* The map must show a project boundary enclosing all project works and other features described under paragraph (b) of this section (Exhibit A) that are to be licensed. If accurate survey information is not available at the time the license application is filed, the applicant must so state, and a tentative boundary may be submitted. The boundary must enclose only those lands necessary for operation and maintenance of the project and for other project purposes, such as recreation, shoreline control, or protection of environmental resources (*see* paragraph (f) of this section (Exhibit E)). Existing residential, commercial, or other structures may be included within the boundary only to the extent that underlying lands are needed for project purposes (e.g., for flowage, public recreation, shoreline control, or protection of environmental resources). If the boundary is on land covered by a public survey, ties must be shown on the map at sufficient points to permit accurate platting of the position of the boundary relative to the lines of the public land survey. If the lands are not covered by a public land survey, the best available legal description of the position of the boundary must be provided, including distances and directions from fixed monuments or physical features. The boundary must be described as follows:

(i) *Impoundments.* (A) The boundary around a project impoundment must be described by one of the following:

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

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

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

(*4*) Any combination of the above methods.

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

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

(iii) *Noncontinuous features.* (A) The boundary around noncontinuous project works such as dams, spillways, and powerhouses must be described by one of the following:

(*1*) Contour lines;

(*2*) Specified courses and distances;

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

(*4*) Any combination of the above methods.

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

* * * * *

b. Paragraph (f)(4)(vii) is amended by removing the word "§ 4.31(b)" and inserting, in its place, the word "§ 4.32(b)(1)".

c. Paragraph (f)(8)(iv) is amended by removing the word "§ 4.32" and inserting, in its place, the word "§ 4.39".

d. Paragraph (g) is amended by removing the word "§ 4.32" and inserting, in its place, the word "§ 4.39".

e. Paragraph (h) is amended by removing the word "§ 4.32" and inserting, in its place, the word "§ 4.39".

§ 4.50 [Amended]

15. Section 4.50 is amended as follows:

a. The title is revised to read: **§ 4.50 Applicability.**

b. Paragraph (b) is removed.

c. Paragraph (c) is redesignated as paragraph (b).

d. Newly redesignated paragraph (b) is amended by removing the word "§ 4.31(g)" and inserting, in its place, the word "§ 4.32(g)".

§ 4.51 [Amended]

16. Section 4.51 is amended as follows:

a. Paragraphs (f)(4) and (f)(5) are amended by removing the words "U.S. Heritage Conservation and Recreation Service" and inserting, in their place, the words "National Park Service".

b. Paragraph (a)(4) and the respective introductory text in paragraph (f) and paragraph (h)(2) are revised to read as follows:

§ 4.51 Contents of application.

(a) * * *

(4) The applicant is a [citizen of the United States, association of citizens of the United States, domestic corporation, municipality, or state, as appropriate] and (is/is not) claiming preference under section 7(a) of the Federal Power Act. *See* 16 U.S.C. 796.

* * * * *

(f) *Exhibit E* is an Environmental Report. Information provided in the report must be organized and referenced according to the itemized subparagraphs below. *See* § 4.38 for consultation requirements. The Environmental Report must contain the following information, *commensurate with the scope of the proposed project:*

* * * * *

(h) * * *

(2) *Project boundary.* The map must show a project boundary enclosing all of the principal project works and other features described under paragraph (b) of this section (Exhibit A) that are to be licensed. If accurate survey information is not available at the time the license application is filed, the applicant must so state, and a tentative boundary may be submitted. The boundary must enclose only those lands necessary for operation and maintenance of the project and for other project purposes, such as recreation, shoreline control, or protection of environmental resources (*see* paragraph (f) of this section (Exhibit E)). Existing residential, commercial, or other structures may be included within the boundary only to the extent that underlying lands are needed for project purposes (e.g., for flowage, public recreation, shoreline control, or protection of environmental resources). If the boundary is on land covered by a public land survey, ties must be shown

on the map at sufficient points to permit accurate platting of the position of the boundary relative to the lines of the public land survey. If the lands are not covered by a public land survey, the best available legal description of the position of the boundary must be provided, including distances and directions from fixed monuments or physical features. The boundary must be described as follows:

* * * * *

b. Subparagraphs (f)(3)(v)(A), (3)(v)(E), (5)(v)(D), (6)(vi), and paragraph (h) are each amended by removing the word "§ 4.32" and inserting, in their respective places, the word "§ 4.39".

c. Subparagraph (g)(3) is amended by removing the word "§ 4.31(b)" and inserting, in its place, the word "§ 4.32(b)(1)".

17. Section 4.60 is revised to read as follows:

§ 4.60 Applicability and notice to agencies.

(a) *Applicability.* The provisions of this subpart apply to any application for an initial license or a new license for:

(1) A minor water power project, as defined in § 4.30(b)(17);

(2) Any major project—existing dam, as defined in § 4.30(b)(16), that has a total installed capacity of 5 MW or less; or

(3) Any major unconstructed project or major modified project, as defined in § 4.30 (b) (15) and (14) respectively, that has a total installed capacity of 5 MW or less.

(b) *Notice to agencies.* The Commission will supply interested Federal, state, and local agencies with notice of any application for license for a water power project 5 MW or less and request comment on the application. Copies of the application will be available for inspection at the Commission's Division of Public Information. The applicant shall also furnish copies of the filed application to any Federal, state, or local agency that so requests.

§ 4.61 [Amended]

18. Section 4.61 is amended as follows:

a. Paragraphs (a)(1) and (a)(2)(i) are removed.

b. Paragraphs (a)(2)(ii), (a)(2)(ii)(A), (a)(2)(ii)(B), (a)(3), (a)(4), and (a)(5) are redesignated as paragraphs (a)(1), (a)(1)(i), (a)(1)(ii), (a)(2), (a)(3), and (a)(4), respectively.

c. Paragraph (b)(7)(ii) is amended by removing the word "§ 4.40(b)(3)" and inserting, in its place, the word "§ 4.30(b)(14)".

d. Paragraph (b)(10) is removed.

e. Paragraph (d)(1)(i) is amended by removing the word "§ 4.40(b)(2)" and inserting, in its place, the word "§ 4.30(b)(15)".

f. Paragraph (d)(1)(ii) is amended by removing the word "§ 4.40(b)(3)" and inserting, in its place, the word "§ 4.30(b)(14)".

g. Paragraphs (e) and (f) are each amended by removing the word "§ 4.32" and inserting, in their respective places, the word "§ 4.39".

h. Paragraph (b)(5), the introductory text in paragraph (d)(2), and paragraph (f)(4)(iii) are revised to read as follows:

§ 4.61 Contents of applications.

* * * * *

(b) * * *

(5) The applicant is a ——— [citizen of the United States, association of citizens of the United States, domestic corporation, municipality, or State, as appropriate] and (is/is not) claiming perference under section 7(a) of the Federal Power Act. *See* 16 U.S.C. 796.

(d) * * *

(2) *For minor projects and major projects at existing dams 5 MW or less.* An application for license for either a minor water power project with a total proposed installed generating capacity of 1.5 MW or less or a major project—existing dam with a proposed total installed capacity of 5 MW or less must contain an Exhibit E under this subparagraph. *See* § 4.38 for consultation requirements. The Environmental Report must contain the following information:

* * * * *

(f) * * *

(4) * * *

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

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

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

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

* * * * *

19. In § 4.71, the introductory paragraph and paragraph (a)(5) are revised to read as follows:

§ 4.71 Contents of applications.

An application for license for transmission line only must contain the following information in the form specified.

(a) * * *

(5) The applicant is a [citizen of the United States, association of citizens of the United States, domestic corporation, municipality, or State, as appropriate] and (is/is not) claiming preference under section 7(a) of the Federal Power Act. *See* 16 U.S.C. 796.

* * * * *

§ 4.80 [Amended]

20. Section 4.80 is amended by revising the title to read:

§ 4.80 Applicability.

21. In § 4.81, paragraph (e) is amended by removing the phrase "§ 4.32 (a) and (b)" and inserting, in its place, the phrase "§ 4.39 (a) and (b)".

22. In § 4.81, paragraph (a)(4) is revised to read as follows:

§ 4.81 Contents of application.

* * * * *

(a) * * *

(4) [Name of applicant] is a [citizen, association, citizens, domestic corporation, municipality, or State, as appropriate] and (is/is not) claiming preference under section 7(a) of the Federal Power Act. [If the applicant is a municipality, the applicant must submit copies of applicable state or local laws or a municipal charter or, if such laws or documents are not clear, any other appropriate legal authority, evidencing that the municipality is competent under such laws to engage in the business of development, transmitting, utilizing, or distributing power].

* * * * *

23. Section 4.82 is revised to read as follows:

§ 4.82 Amendments.

(a) Any permittee may file an application for amendment of its permit, including any extension of the term of the permit that would not cause the total term to exceed three years. (Transfer of a permit is prohibited by section 5 of the Federal Power Act.) Each application for amendment of a permit must conform to any relevant requirements of § 4.81 (b), (c), (d), and (e).

(b) If an application for amendment of a preliminary permit requests any material change in the proposed project, public notice of the application will be issued as required in § 4.32(c)(2)(i).

(c) If an application to extend the term of a permit is submitted not less than 30 days prior to the termination of the permit, the permit term will be automatically extended (not to exceed a total term for the permit of three years) until the Commission acts on the application for an extension. The Commission will not accept extension requests that are filed less than 30 days prior to the termination of the permit.

24. Section 4.83 is revised to read as follows:

§ 4.83 Cancellation and loss of priority.

(a) The Commission may cancel a preliminary permit after notice and opportunity for hearing if the permittee fails to comply with the specific terms and conditions of the permit. The Commission may also cancel a permit for other good cause shown after notice and opportunity for hearing. Cancellation of a permit will result in loss of the permittee's priority of application for a license for the proposed project.

(b) Failure of a permittee to file an acceptable application for a license before the permit expires will result in loss of the permittee's priority of application for a license for the proposed project.

25. A new § 4.84 is added to read as follows:

§ 4.84 Surrender of permit.

A permittee must submit a petition to the Commission before the permittee may voluntarily surrender its permit. Unless the Commission issues an order to the contrary, the permit will remain in effect through the thirtieth day after the Commission issues a public notice of receipt of the petition.

§ 4.90 [Amended]

26. Section 4.90 is amended by removing the word "§ 4.91" and inserting, in its place, the word "§ 4.30(b)(26)".

§ 4.91 [Removed]

27. Section 4.91 is removed.

§ 4.92 [Amended]

28. Section 4.92 is amended as follows:

a. Paragraphs (a) and (b) are removed.

b. The following paragraphs are redesignated or removed as shown:

Old	New
Designation "(1)" following "(c) *Contents of Application.*".	Removed.
(c)(1)(i)	(a)(1).
(c)(1)(ii)	(a)(2).
(c)(2)	(b).
The introductory text of (c)(3).	The introductory text of (c).
(c)(3)(i) through the introductory text of (c)(3)(vii).	(c)(1) through the introductory text of (c)(7).
(c)(3)(vii)(A) through (c)(3)(vii)(E).	(c)(7)(i) through (c)(7)(v).
(c)(3)(viii) through (c)(3)(xi)	(c)(8) through (c)(11).
The introductory text of (c)(4).	The introductory text of (d).
(c)(4)(i) through (c)(4)(iii)	(d)(1) through (d)(3).
The introductory text of (c)(5).	The introductory text of (e).
(c)(5)(i) through (c)(5)(iii)	(e)(1) through (e)(3).
(c)(5)(iv)	Removed.
(c)(5)(v)	(e)(4).
(c)(6)	(f).

29. In § 4.92, the reference in newly redesignated paragraph (c)(7)(v) to "clause (D)" is revised to read "paragraph (c)(7)(iv) of this section."

30. Section 4.92 is further amended by revising the section heading and newly redesignated paragraphs (a), (b), (c)(7)(iv), (c)(9), (d)(2), the introductory text of (e), and paragraph (f) to read as follows:

§ 4.92 Contents of exemption application.

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

(1) An introductory statement, including a declaration that the facility for which application is made meets the requirements of § 4.30(b)(26), the facility qualifies but for the discharge requirement of § 4.30(b)(26)(v), the introductory statement must identify that fact and state that the application is accompanied by a petition for waiver of § 4.30(b)(26)(v), filed pursuant to § 385.207 of this chapter);

(2) Exhibits A, B, E, and G; and

(3) An appendix containing documentary evidence showing that the applicant has the real property interests required under § 4.31(b).

(b) *Introductory Statement.* The introductory statement must be set forth in the following format:

Before the Federal Energy Regulatory Commission, Application for Exemption for Small Conduit Hydroelectric Facility

[Name of applicant] applies to the Federal Energy Regulatory Commission for an exemption for the [name of facility], a small conduit hydroelectric facility that meets the requirements of [insert the following language, as appropriate: "§ 4.30(b)(26) of this subpart" or "§ 4.30(b)(26) of this subpart, except paragraph (b)(26)(v)"], from certain provisions of Part I of the Federal Power Act.

The location of the facility is:

State or Territory: ______

County: ______

Township or nearby town: ______

The exact name and business address of each applicant is:

______

The exact name and business address of each person authorized to act as agent for the applicant in this application is:

______

[Name of applicant] is [a citizen of the United States, an association of citizens of the United States, a municipality, State, or a corporation incorporated under the laws of (specify the United States or the state of incorporation, as appropriate), as appropriate].

The provisions of Part I of the Federal Power Act for which exemption is requested are:

[List here all sections or subsections for which exemption is requested.]

[If the facility does not meet the requirement of § 4.30(b)(26)(v), add the following sentence: "This application is accompanied by a petition for waiver of § 4.30(b)(26)(v), submitted pursuant to 18 CFR 385.207."]

(c) * * *

(7) * * *

(iv) The average flow of the conduit at the plant or point of diversion (using best available data and explaining the sources of the data and the method of calculation); and

* * * * *

(9) If the hydroelectric facility discharges directly into a natural body of water and a petition for waiver of § 4.30(b)(26)(v) has not been submitted, evidence that a quantity of water equal to or greater than the quantity discharged from the hydroelectric facility is withdrawn from that water body downstream into a conduit that is part of the same water supply system as the conduit on which the hydroelectric facility is located.

* * * * *

(d) * * *

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

(3) * * *

* * * * *

(e) *Exhibit E.* This exhibit is an Environmental Report. It must be prepared pursuant to § 4.38 and must include the following information, commensurate with the scope and environmental impact of the facility's construction and operation:

* * * * *

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

§ 4.93 [Amended]

31. Section 4.93 is amended as follows:

a. Paragraphs (b), (d) and (e) are removed.

b. Paragraphs (c), (f) and (g) are redesignated as paragraphs (b), (c) and (d) respectively.

c. Newly designated paragraph (b) is amended by removing the word "§ 4.92(c)(5)" and inserting, in its place, the word "§ 4.92(e)".

32. Section 4.93 is amended by revising paragraph (a) to read as follows:

§ 4.93 Action on exemption applications.

(a) An application for exemption that does not meet the eligibility requirements of § 4.30(b)(28)(v) may be accepted, provided the application has been accompanied by a request for waiver under § 4.92(a)(1) and the waiver request has not been denied. Acceptance of an application that has been accompanied by a request for waiver under § 4.92(a)(1) does not constitute a ruling on the waiver request, unless expressly stated in the acceptance.

* * * * *

33. Section 4.94 is amended by revising paragraph (b) and adding new paragraphs (c), (d), (e) and (f) to read as follows:

§ 4.94 Standard terms and conditions of exemption.

* * * * *

(b) *Article 2.* The construction, operation, and maintenance of the exempt project must comply with any terms and conditions that the United States Fish and Wildlife Service and any state fish and wildlife agencies have determined are appropriate to prevent loss of, or damage to, fish or wildlife resources or otherwise to carry out the purposes of the Fish and Wildlife Coordination Act, as specified in Exhibit E of the application for exemption from licensing or in the comments submitted in response to the notice of the exemption application.

(c) *Article 3.* The Commission may revoke this exemption if actual construction of any proposed generating facilities has not begun within two years or has not been completed within four years from the effective date of this exemption. If an exemption is revoked under this article, the Commission will not accept from the prior exemption holder a subsequent application for exemption from licensing or a notice of exemption from licensing for the same project within two years of the revocation.

(d) *Article 4.* In order to best develop, conserve, and utilize in the public interest the water resources of the region, the Commission may require that the exempt facilities be modified in structure or operation or may revoke this exemption.

(e) *Article 5.* The Commission may revoke this exemption if, in the application process, material discrepancies, inaccuracies, or falsehoods were made by or on behalf of the applicant.

(f) *Article 6.* Before transferring any property interests in the exempt project, the exemption holder must inform the transferee of the terms and conditions of the exemption. Within 30 days of transferring the property interests, the exemption holder must inform the Commission of the identity and address of the transferee.

34. A new § 4.95 is added to read as follows:

§ 4.95 Surrender of exemption.

(a) To voluntarily surrender its exemption, a holder of an exemption for a small conduit hydroelectric facility must file a petition with the Commission.

(b)(1) If construction has begun, prior to filing a petition with the Commission, the exemption holder must consult with the fish and wildlife agencies in accordance with § 4.38, substituting for the information required under § 4.38(b)(1) information appropriate to the disposition and restoration of the project works and lands. The petition must set forth the exemption holder's plans with respect to disposition and restoration of the project works and lands.

(2) If construction has begun, public notice of the petition will be given, and, at least 30 days thereafter, the Commission will act upon the petition.

(c) If no construction has begun, unless the Commission issues an order to the contrary, the exemption will remain in effect through the thirtieth day after the Commission issues a public notice of receipt of the petition. New applications involving the site of the surrendered exemption may be filed on the next business day.

(d) Exemptions may be surrendered only upon fulfillment by the exemption holder of such obligations under the exemption as the Commission may prescribe and, if construction has begun, upon such conditions with respect to the disposition of such project works and restoration of project lands as may be determined by the Commission and the Federal and state fish and wildlife agencies.

35. A new § 4.96 is added to read as follows:

§ 4.96 Amendment of exemption.

(a) An exemption holder must construct and operate its project as described in the exemption application approved by the Commission or its delegate.

(b) If an exemption holder desires to change the design, location, method of construction or operation of its project, it must first notify the appropriate Federal and state fish and wildlife agencies and inform them in writing of the changes it intends to implement. If these agencies determine that the changes would not cause the project to violate the terms and conditions imposed by the agencies, and if the changes would not materially alter the design, location, method of construction or operation of the project, the exemption holder may implement the changes. If any of these agencies determines that the changes would cause the project to violate the terms and conditions imposed by the agencies, or if the changes would materially alter the design, location, method of construction or the operation of the project works, the exemption holder may not implement the changes without first acquiring authorization from the Commission to amend its exemption, or acquiring a license that authorizes the project, as changed.

(c) An application to amend an exemption may be filed only by the holder of the exemption. An application to amend an exemption will be governed by the Commission's regulations governing applications for exemption. The Commission will not accept applications in competition with an application to amend an exemption, unless the Director of the Office of Hydropower Licensing determines that it is in the public interest to do so.

§ 4.101 [Amended]

36. Section 4.101 is amended by removing the word "§ 4.102" and inserting, in its place, the word "§ 4.30(b)(27)".

37. Section 4.102 is revised to read as follows:

§ 4.102 Surrender of exemption.

(a) To voluntarily surrender its exemption, a holder of an exemption for a small hydroelectric power project must file a petition with the Commission.

(b)(1) If construction has begun, prior to filing a petition with the Commission, the exemption holder must consult with the fish and wildlife agencies in accordance with § 4.38, substituting for the information required under §4.38(b)(1) information appropriate to the disposition and restoration of the project works and lands. The petition must set forth the exemption holder's plans with respect to disposition and restoration of the project works and lands.

(2) If construction has begun, public notice of the petition will be given, and, at least 30 days thereafter, the Commission will act upon the petition. New applications involving the site may be filed on the next business day.

(c) If no construction had begun, unless the Commission issues an order to the contrary, the surrender will take effect at the close of the thirtieth day after the Commission issues a public notice of receipt of the petition. New applications involving the site may be filed on the next business day.

(d) Exemptions may be surrendered only upon fulfillment by the exemption holder of such obligations under the exemption as the Commission may prescribe and, if construction has begun, upon such conditions with respect to the disposition of such project works and restoration of project lands as may be determined by the Commission and the Federal and state fish and wildlife agencies.

(e) Where occupancy of United States lands or reservations has been permitted by a Federal agency having supervision over such lands, the exemption holder must concurrently notify that agency of the petition to surrender and of the steps that will be taken to restore the affected U.S. lands or reservations.

38. Section 4.103 is revised to read as follows:

§ 4.103 General provisions for case-specific exemption.

(a) *Exemptible projects.* Subject to the provisions in paragraph (b) of this section, § 4.31(c), and §§ 4.105 and 4.106, the Commission may exempt on a case-specific basis any small hydroelectric power project from all or part of Part I of the Act, including licensing requirements. Any applications for exemption for a project shall conform to the requirements of §§ 4.107 or 4.108, as applicable.

(b) *Limitation for licensed water power project.* The Commission will not accept for filing an application for exemption from licensing for any project that is only part of a licensed water power project.

(c)(1) *Waiver.* In applying for case-specific exemption from licensing, a qualified exemption applicant may petition under § 385.207 of this chapter for waiver of any specific provision of §§ 4.102 through 4.107. The Commission will grant a waiver only if consistent with Section 408 of the Energy Security Act of 1980.

(2) For any small hydroelectric power project that would utilize a natural water feature, as defined in § 4.30(b)(27)(ii)(A), a qualified exemption applicant may obtain a waiver under this paragraph of the height limitation in § 4.30(b)(27)(ii)(C)(1), the water retention limitation in § 4.30(b)(27)(ii)(C)(2), or both only if that applicant has demonstrated, based on adequate environmental and engineering information in its exemption application and petition for waiver, that it is reasonable to waive these limitations. In no case may a diversion or intake structure for such project exceed ten feet in total height.

39. Section 4.104 is revised to read as follows:

§ 4.104 Amendment of exemption.

(a) An exemption holder must construct and operate its project as described in the exemption application approved by the Commission or its delegate.

(b) If an exemption holder desires to change the design, location, method of construction or operation of its project, it must first notify the appropriate Federal and state fish and wildlife agencies and inform them in writing of the changes it intends to implement. If these agencies determine that the changes would not cause the project to violate the terms and conditions imposed by the agencies, and if the changes would not materially alter the design, location, method of construction or operation of the project, the exemption holder may implement the changes. If any of these agencies determines that the changes would cause the project to violate the terms and conditions imposed by that agency, or if the changes would materially alter the design, location, method of construction or the operation of the project works, the exemption holder may not implement the changes without first acquiring authorization from the Commission to amend its exemption or acquiring a license for the project works that authorizes the project, as changed.

(c) An application to amend an exemption may be filed only by the holder of an exemption. An application to amend an exemption will be governed by the Commission's regulations governing applications for exemption. The Commission will not accept applications in competition with an application to amend an exemption, unless the Director of the Office of Hydropower Licensing determines that it is in the public interest to do so.

§ 4.105 [Amended]

40. Section 4.105 is amended as follows:

a. The heading "*Exemption from licensing. (1) General Procedure.*" following the paragraph designation "(b)" is removed.

b. Paragraphs (b)(1), (b)(2), (b)(4) and (b)(5) are removed.

c. Paragraphs (b)(3) and (b)(6) are redesignated as (b)(1) and (b)(2), respectively.

41. Section 4.106 is amended by revising paragraphs (b) and (c) and adding new paragraphs (f), (g), (h), and (i) to read as follows:

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

* * * * *

(b) *Article 2.* The construction, operation, and maintenance of the exempt project must comply with any terms and conditions that the United States Fish and Wildlife Service and any state fish and wildlife agencies have determined are appropriate to prevent loss of, or damage to, fish or wildlife resources or to otherwise carry out the purposes of the Fish and Wildlife Coordination Act, as specified in Exhibit E of the application for exemption from licensing or in the comments submitted in response to the notice of the exemption application.

(c) *Article 3.* The Commission may revoke this exemption if actual construction of any proposed generating facilities has not begun within two years or has not been completed within four years from the date on which this exemption was granted. If an exemption is revoked under this article, the Commission will not accept from the prior exemption holder a subsequent application for exemption from licensing or a notice of exemption from licensing for the same project within two years of the revocation.

* * * * *

(f) *Article 6.* In order to best develop, conserve, and utilize in the public interest the water resources of the region, the Commission may require that the exempt facilities be modified in structure or operation or may revoke this exemption.

(g) *Article 7.* The Commission may revoke this exemption if, in the application process, material discrepancies, inaccuracies, or falsehoods were made by or on behalf of the applicant.

(h) *Article 8.* Any exempted small hydroelectric power project that utilizes a dam that is more than 33 feet in height above streambed, as defined in 18 CFR 12.31(c) of this chapter, impounds more than 2,000 acre-feet of water, or has a significant or high hazard potential, as defined in 33 CFR Part 222, is subject to the following provisions of 18 CFR Part 12, as it may be amended:

(1) Section 12.4(b)(1) (i) and (ii), (b)(2) (i) and (iii), (b)(iv), and (b)(v);

(2) Section 12.4(c);

(3) Section 12.5;

(4) Subpart C; and

(5) Subpart D.

For the purposes of applying these provisions of 18 CFR Part 12, the exempted project is deemed to be a licensed project development and the owner of the exempted project is deemed to be a licensee.

(i) Before transferring any property interests in the exempt project, the exemption holder must inform the transferee of the terms and conditions of the exemption. Within 30 days of transferring the property interests, the exemption holder must inform the Commission of the identity and address of the transferee.

42. Section 4.107 is amended as follows:

a. In paragraph (a), the designation "(1)" following the heading "*General requirements.*" is removed;

b. Paragraph (a)(2) is removed;

c. Paragraph (e)(3) is removed;

d. Paragraph (e)(4) is redesignated (e)(3); and

e. Paragraph (c)(5) and the introductory text of (e) of § 4.107 are revised and a new paragraph (d)(4) is added to read as follows:

§ 4.107 Contents of application for exemption from licensing.

* * * * *

(c) * * *

(5) A graph showing a flow duration curve for the project. Identify stream gauge(s) and period of record used. If a synthetic record is utilized, provide details concerning its derivation. Furnish justification for selection of installed capacity if the hydraulic capacity of proposed generating unit(s) plus the minimum flow requirements, if not usable for power production, is less than the stream flow that is exceeded 25 percent of the time.

* * * * *

(d) * * *

(4) A proposed project boundary enclosing project works to be exempted from licensing.

* * * * *

(e) *Exhibit E.* This exhibit is an environmental report that must include the following information, commensurate with the scope and environmental impact of the construction and operation of the small hydroelectric power project. *See* § 4.38 for consultation requirements.

(1) * * *

* * * * *

43. The introductory text of § 4.201 and the heading and introductory text of § 4.201(b) are revised respectively to read as follows:

§ 4.201 Contents of application.

An application for amendment of a license for a water power project must contain the following information in the form specified.

* * * * *

(b) *Required exhibits for capacity related amendments.* Any application to amend a license for a water power project that would alter the actual or proposed total installed capacity of the project must be prepared pursuant to § 4.38 and must contain the following exhibits, or revisions or additions to any exhibits on file, *commensurate with the scope of the licensed project:*

(1) * * *

* * * * *

Appendix A

DERIVATION TABLE

New section	Current section
§ 4.30:	
(a)	N/A.
(b)(1)	§ 4.33(s) amended.
(b)(2)	§ 4.91(a).
(b)(3)	§ 4.91(b).
(b)(4)(i)	§ 4.50(b)(1).
(b)(4)(ii)	§ 4.91(c).
(b)(4)(iii)	§ 4.102(a).
(b)(5)	N/A.
(b)(6)(i)	§ 4.50(b)(2).
(b)(6)(ii)	§ 4.102(b).
(b)(7)	§ 4.50(b)(3).
(b)(8)	§ 4.102(d).
(b)(9)	§§ 4.91(d) and 4.102(c).
(b)(10)	§ 4.33(a).
(b)(11)	§ 4.40(b)(1).
	§§ 4.50(b)(4) and 4.60(b)(1).
(b)(12)	§ 4.102(m).
(b)(13)	§ 4.102(g).
(b)(14)	§ 4.40(b)(3).
(b)(15)	§ 4.40(b)(2).
(b)(16)	§ 4.50(b)(5).
(b)(17)	§ 4.60(b)(3).
(b)(18)	§ 4.50(b)(6).
(b)(19)	§§ 4.40(b)(4), 4.50(b)(7) and 4.60(b)(2).
(b)(20)(i)	§ 4.91(e).
(b)(20)(ii)	§ 4.102(e).
(b)(21)	§ 4.102(i).
(b)(22)	§ 4.102(h).
(b)(23)	§ 4.102(j).
(b)(24)	§ 4.102(k).
(b)(25)	§ 4.102(f).
(b)(26)	§ 4.91(f).
(b)(27)	§ 4.102(1).
§ 4.31:	
(a)	§ 4.33(a).
(b))	§ 4.92(a).
(c)	§ 4.103(b).
§ 4.32:	
(a)(1)	§ 4.30(d).
(a)(2)	N/A.
(a)(3)	N/A.
(a)(4)	§ 4.31(a)(2).
(b)(1)	§ 4.31(b).
(b)(2)	§§ 4.92(b)(2) and 4.107(a)(2).
(c)(1)	§ 4.31(c)(1).
(c)(2)(i)	§ 4.31(c)(2).
(c)(2)(ii)	§§ 4.93(a)(1) and 4.105(b)(1).
(c)(3)	§ 4.31(c)(3).
(d)(1)	§§ 4.31(d)(1), 4.93(a)(1) and 4.105(b)(1).
(d)(2)	§ 4.31(d)(2).
(e)	§ 4.31(e).
(f)	§ 4.31(f).
(g)	§ 4.31(g).
(h)	§ 4.31(h).
(i)	N/A.
§ 4.33:	
(a)	§ 4.30(b).
(b)	§ 4.30(c).
(c)	§ 4.104(c).
(d)	§ 4.104(a).
(e)	§ 4.104(b).
(f)	N/A.
§ 4.36:	
(a)	§ 4.33(a).
(b)	§§ 4.33(a), and 4.104(c)(2)(iii) and (iv).
(c)	
§ 4.33(d)	
§ 4.37:	
(a)	§ 4.33(f).
(b)	§ 4.33(g).
(c)	§ 4.33(h).
(d)	§ 4.104(e).
(e)	§ 4.33(i).
§ 4.38	N/A.
§ 4.39	§ 4.32.

DISTRIBUTION TABLE

Current section	New section
§ 4.30:	
(a)	§ 4.31(a).
(b)	§ 4.33(a).
(c)	§ 4.33(b).
(d)	§ 4.32(a).
§ 4.31:	
(a)(1)	N/A.
(a)(2)	§ 4.32(a)(4).
(b)	§ 4.32(b).
(c)	§ 4.32(c).
(d)	§ 4.32(d).
(e)	§ 4.32(e).
(f)	§ 4.32(f).
(g)	§ 4.32(g).
(h)	§ 4.32(h).
§ 4.32	§ 4.39.
§ 4.33:	
(a)	§ 4.30(b) (1) and (9).
(a)(1)–(e)	§ 4.36.
(f)	§ 4.37(a).
(g)	§ 4.37(b).
(h)	§ 4.37(c).
(i)	§ 4.37(e).
§ 4.34	§ 4.34.
§ 4.35	§ 4.35.
§ 4.40:	
(a)	§ 4.40(a).
(b)	§ 4.30(b).
(c)	§ 4.40(b).
(d)	§ 4.38.
§ 4.41	§ 4.41.
§ 4.50:	
(a)	§ 4.50(a).
(b)	§ 4.30(b).
(c)	§ 4.50(b).

DISTRIBUTION TABLE—Continued

Current section	New section
§ 4.51	§ 4.51
§ 4.60:	
(a)	§ 4.60(a).
(b)	§ 4.30(b).
(c)	§ 4.60(b).
§ 4.61:	
(a)(1)	§ 4.38.
(a)(2)(i)	§ 4.32(b).
(b)–(f)	§ 4.61(b)–(f)
§ 4.70	§ 4.70
§ 4.71	§ 4.71
§ 4.80	§ 4.80.
§ 4.81	§ 4.81
§ 4.82	§ 4.82.
§ 4.83	§ 4.83
§ 4.90	§ 4.90.
§ 4.91	§ 4.30(b).
§ 4.92:	
(a)	§ 4.31(b).
(b)	§ 4.432(b)(2).
(c)(1)–(c)(6)	§ 4.492(a)–(f).
§ 4.93:	
(a)(1)	§ 4.32.
(b)(2)	§ 4.93(a).
(b)	§ 4.34.
(c)	§ 4.93(b).
(d)	§ 4.93(c).
(e)	§ 4.93(d).
(f)	§ 4.93(e).
(g)	§ 4.93(f).
§ 4.94	§ 4.94.
§ 4.101	§ 4.101.
§ 4.102	§ 4.30(b).
§ 4.103:	
(a)	§ 4.103(a).
(b)	§ 4.31(c).
(c)	§ 4.103(b).
(d)	§ 4.103(c).
§ 4.104:	
1st paragraph	Deleted.
(a)	§ 4.33(d).
(b)	§ 4.33(e).
(c)	§ 4.33(c) and 4.36(b).
(d)	§ 4.36(d).
(e)	§ 4.37(d).
§ 4.105:	
(a)	Deleted.
(b)(1)	§ 4.32.
(b)(2)	§ 4.34.
(b)(3)	§ 4.105(b)(1).
(b)(4)	§ 4.105(b)(2).
(b)(5)	§ 4.105(b)(3).
(b)(6)	§ 4.105(b)(4).
§ 4.106	§ 4.106.
§ 4.107:	
(a)(1)	§ 4.107(a).
(a)(2)	§ 4.32.
(b)	§ 4.107(b).

[FR Doc. 85-6842 Filed 3-22-85; 8:45 am]

BILLING CODE 6717-01-M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 442

[Docket No. 85N-0011]

Antibiotic Drugs; Sterile Ceftriaxone Sodium

Correction

In FR Doc. 85-5772 beginning on page 9998 in the issue of Wednesday, March 13, 1985, make the following corrections: on page 10000, in the third column, in § 442.55 a(b)(1)(iv)(*b*), in the fourth, twelfth and fifteenth lines, "ceftriazone" should read "ceftriaxone".

BILLING CODE 1505-01-M

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

21 CFR Part 1308

Schedules of Controlled Substances; Temporary Placement of 3-Methylfentanyl into Schedule I

AGENCY: Drug Enforcement Administration, Justice.

ACTION: Final rule.

SUMMARY: The Acting Administrator of the Drug Enforcement Administration (DEA) is issuing this notice to temporarily place 3-methylfentanyl into Schedule I of the Controlled Substances Act (CSA) pursuant to the emergency scheduling provisions of the CSA. This action is based on a finding that the scheduling of 3-methylfentanyl in Schedule I is necessary to avoid an imminent hazard to the public safety. This action will impose the criminal sanctions and regulatory controls of Schedule I on the manufacturing, distribution and possession of 3-methylfentanyl.

EFFECTIVE DATE: On April 25, 1985, 3-methylfentanyl will be subject to Schedule I control.

FOR FURTHER INFORMATION CONTACT: Howard McClain, Jr., Chief, Drug Control Section, Drug Enforcement Administration, Washinton, D.C. 20537, Telephone: (202) 633-1366.

SUPPLEMENTARY INFORMATION: The Comprehensive Crime Control Act of 1984 (Pub. L. 98-473) amended section 201 of the CSA (21 U.S.C. 811) to give the Attorney General the authority to temporarily place a substance into Schedule I of the CSA if he finds that such action is necessary to avoid an imminent hazard to the public safety. Scheduling a substance under this emergency provision may be done without regard to the requirements of section 201(b) of the CSA (21 U.S.C. 811(b)) relating to the Secretary of Health and Human Services. The Attorney General has delegated his authority under 21 U.S.C. 811 to the Administrator of the Drug Enforcement Administration (28 CFR 0.100(b)).

As required by section 201(h)(4) of the CSA (21 U.S.C. 811(h)(4)), the Acting Administrator has notified the Secretary of Health and Human Services of his intention to place this substance in Schedule I pursuant to the emergency scheduling provisions. Such action may not take effect until the expiration of thirty days after notification is transmitted to the Secretary.

In making a finding of an imminent hazard to the public safety, the Attorney General is required to consider only those factors set forth in paragraphs (4) the history and current pattern of abuse, (5) the scope, duration and significance of abuse, and (6) what, if any, risk there is to the public health, of section 201(c) of the CSA (21 U.S.C. 811(c)).

House Report 98-835 which accompanied Pub. L. 98-473 states that "This new procedure [emergency scheduling] is intended by the Committee to apply to what has been called "designer drugs", new chemical analogs or variations of existing controlled substances, or other new substances, which have a psychedelic, stimulant or depressant effect and have a high potential for abuse." The fentanyl analogs, including 3-methylfentanyl, are examples of such designer drugs which Congress clearly intended to subject to the emergency scheduling authority as imminent hazards to the public safety.

Information available to DEA indicates that a series of analogs of the Schedule II narcotic analgesic, fentanyl, have been clandestinely produced, distributed and abused on the West Coast since late 1979. The first of these analogs detected was alpha-methylfentanyl, sold on the street as "China White" or "synthetic heroin." Using the traditional scheduling process pursuant to section 201 (b) and (c) of the CSA (21 U.S.C. 811 (b) and (c)), DEA placed alpha-methylfentanyl into Schedule I of the CSA on September 22, 1981 (46 FR 46799). Since the control of alpha-methylfentanyl, DEA laboratories have identified other fentanyl analogs clandestinely produced and distributed in California. Available information did not indicate that these analogs were causing a serious public safety hazard until 1984. Increased reports of the distribution, abuse and health hazards of the fentanyl analogs coincided with the identification of 3-methylfentanyl by DEA laboratories in submissions from the San Francisco Bay area in late 1983 and 1984.

N-[3-methyl-1-(2-phenylethyl)-4-piperidyl]-N-phenylpropanamide, or 3-methylfentanyl is an extremely potent morphine-like analgesic substance with a rapid onset and short duration of action. 3-methylfentanyl exhibits a pharmacological profile similar to that of fentanyl, morphine and heroin. In tests which determine morphine-like analgesic effects on rats, some forms of 3-methylfentanyl effectively produced analgesia at doses as low as 0.00058 mg/