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Vol. 52, No 242
Thursday, December 17, 1987

Presidential Documents

Title 3—

The President

Notice of December 15, 1987

Continuation of Libyan Emergency

On January 7, 1986, by Executive Order No. 12543, I declared a national emergency to deal with the unusual and extraordinary threat to the national security and foreign policy of the United States constituted by the actions and policies of the Government of Libya. On January 8, 1986, by Executive Order No. 12544, I took additional measures to block Libyan assets in the United States. I transmitted a notice continuing this emergency to the Congress and the **Federal Register** on December 23, 1986. Because the Government of Libya has continued its actions and policies in support of international terrorism, the national emergency declared on January 7, 1986, and the measures adopted on January 7 and January 8, 1986, to deal with that emergency, must continue in effect beyond January 7, 1988. Therefore, in accordance with Section 202(d) of the National Emergencies Act (50 U.S.C. 1622(d)), I am continuing the national emergency with respect to Libya. This notice shall be published in the **Federal Register** and transmitted to the Congress.

Ronald Reagan

THE WHITE HOUSE,
December 15, 1987.

[FR Doc. 87-29101
Filed 12-15-87; 3:52 pm]
Billing code 3195-01-M

Rules and Regulations

Federal Register

Vol. 52, No. 242

Thursday, December 17, 1987

OFFICE OF PERSONNEL MANAGEMENT

5 CFR Part 831

Retirement; Law Enforcement Officers and Firefighters

AGENCY: Office of Personnel Management.

ACTION: Final rule.

SUMMARY: The Office of Personnel Management (OPM) is issuing final regulations for the special retirement provisions for law enforcement officers and firefighters employed under the civil service retirement law. The regulations revise the current regulations in order to improve administration of the program by clarifying the methods and criteria for obtaining coverage under the special provisions.

EFFECTIVE DATE: Regulations effective January 19, 1988.

FOR FURTHER INFORMATION CONTACT: Raymond J. Kirk, (202) 632-4682.

SUPPLEMENTARY INFORMATION: Section 8336(c) of title 5, United States Code, authorizes immediate retirement benefits at age 50 for Federal employees who have completed 20 years of Federal civilian service as a law enforcement officer or firefighter. Employees who are eligible to retire under this provision are mandatorily separated at age 55, or, under limited circumstances which warrant an extension of service, at age 60. Employees and their agencies each contribute an extra half percent of pay for this benefit. Section 8331 *et seq.* and these regulations promulgated at Subpart I of Part 831 of Title 5, Code of Federal Regulations, are applicable to the Civil Service Retirement System (CSRS) *only*. This section of law and these regulations do *not* apply to employees covered by the "new" retirement system—The Federal Employees' Retirement System (FERS)—established by Pub. L. 99-335.

On December 19, 1986, OPM published proposed regulations in the Federal Register (51 FR 45471) on this subject. During the comment period, OPM received 65 comments. The comments are addressed below.

Many comments addressed the proposed definition of administrative secondary positions. The proposed definition requires that experience in a primary position must be a mandatory prerequisite for a secondary position. Thus, Federal law enforcement or firefighting experience is required. Many of the comments pointed out that for some positions there are dual career tracks. For example, primary firefighters are often hired as fire inspectors, but some people become fire inspectors without first being a firefighter. They argue that it is unfair to deny early retirement coverage to those that fail to meet the transfer requirement because the agency has a dual career track.

We believe that the issue is primarily an agency staffing decision. If the position is truly one that does not require experience as a firefighter or law enforcement officer, then it should not be a secondary position. However, if there are some duties that do require the experience, the agency should establish two positions—one which contains those duties and requires the experience and a different position which does not contain those duties.

Other commenters pointed out that it is often to the government's advantage to recruit for administrative positions outside the government and that the proposed definition would effectively prevent that. We agree; therefore, we have revised the "mandatory prerequisite" definition from requiring "experience in a primary position" to "experience in a primary law enforcement or firefighting position, or equivalent experience outside the Federal government." Persons with non-Federal experience could qualify and be selected for the job, but would not qualify for early retirement coverage. Non-Federal experience would allow a position to meet the definition of a secondary position. An individual would still have to transfer from a primary position in the Federal service to retain coverage in a secondary position.

Since the revised definition of administrative positions would affect the coverage of many employees, the regulations now provide "grandfather" coverage for those employees who are in a presently covered secondary position on the effective date of these regulations. Employees will retain coverage as long as the employee remains in that position without a voluntary break in service and OPM does not revoke coverage under § 831.909(c).

Some commenters stated that the proposed requirement that an employee in a secondary position who has a voluntary break in service must meet the transfer requirement anew would create a recruiting problem and would be a hardship for employees who leave Federal service and later reenter. The final rule contains the same provision as the proposed rule. The law provides for continued coverage when an employee transfers directly from a primary position to a secondary position. The existing regulations go beyond the statute by permitting an employee who has met the transfer requirement once to be covered in a secondary position even following a subsequent voluntary break in service. The proposed regulations follow the statutory requirement stated above. Further, the purpose of the early retirement provisions is to ensure a young and vigorous workforce. We believe that this purpose is best served by encouraging employees to have a continuous career in the law enforcement and firefighting fields. This requirement refers to all voluntary breaks in service after the effective date of these regulations.

Several commenters stated that the list of evidence that is required from individuals requesting a coverage determination was too detailed. We believe that the information is required so OPM can make an informed decision. Another commenter objected to using the number of arrests made as a criterion. The commenter pointed out that the number of arrests made is not the only measure of a law enforcement officer. We agree; however, arrests are one valid criterion among many and we have retained the requirement to include that information.

Many comments indicated that the December 31, 1987, deadline for requesting a determination for past service was too short. We agree and have changed the deadline in the final regulations to September 30, 1989.

Several commenters objected to the retroactive withdrawal of coverage after an OPM review finds the position no longer warrants coverage. The final regulations change the effective date of the withdrawal to 30 days after the date of OPM's determination.

An Inspector General commented on the requirement that agency requests must be submitted by the agency head or his or her representative and that in no instance may a person below the level of the agency personnel director be designated as the agency head's representative. The Inspector General pointed out that the proposed regulations could result in potential interference with the independence of the Inspectors General. The final regulations still require statutory Inspectors General to submit requests for coverage through the agency head. However, the head of the agency must forward the requests to OPM.

One commenter asked for clarification of an individual's rights after OPM has made a final decision denying an agency request to cover a position. If an agency request has been denied and an individual believes that his or her individual service merits credit, the employee may still make an individual request under § 831.908.

The proposed regulations clarified that the 7½ percent withholding would not be made by the agency in the case of an employee who is not a primary or secondary law enforcement officer or firefighter but is detailed to a primary or secondary position. Several commenters asked if the converse is also true. The final regulations make clear that the position of record determines the coverage. Therefore, an employee who has been detailed or temporarily promoted from a covered position to a noncovered position continues to be covered. Conversely, an employee detailed or temporarily promoted to a covered position is not covered by the early retirement provisions.

E.O. 12291, Federal Regulation

I have determined that this is not a major rule as defined under section 1(b) of E.O. 12291, Federal Regulation.

Regulatory Flexibility Act

I certify that within the scope of the Regulatory Flexibility Act, these regulations will not have a significant economic impact on a substantial number of small entities because they affect Federal employees and retirees only.

List of Subjects in 5 CFR Part 831

Government employees, Administrative practice and procedure, Claims, Firefighter, Law enforcement officers, Pensions, Retirement.

Office of Personnel Management.

Constance Horner,

Director.

Accordingly, OPM is amending Part 831 of Title 5 of the Code of Federal Regulations as follows:

PART 831—RETIREMENT

1. The authority citation for Subpart I of Part 831 is revised to read as follows:

Authority: 5 U.S.C. 8347.

2. Subpart I is revised to read as follows:

Subpart I—Law Enforcement Officers and Firefighters

§ 831.901 Applicability and purpose.

(a) This subpart contains regulations of the Office of Personnel Management (OPM) to supplement 5 U.S.C. 8336(c), which establishes special retirement eligibility for law enforcement officers and firefighters employed under the Civil Service Retirement System; 5 U.S.C. 8331(3) (C) and (D), pertaining to basic pay; 5 U.S.C. 8334(a) (1) and (c), pertaining to deductions, contributions, and deposits; 5 U.S.C. 8335(b), pertaining to mandatory retirement; and 5 U.S.C. 8339(d), pertaining to computation of annuity.

(b) The regulations in this subpart are issued pursuant to the authority given to OPM in 5 U.S.C. 8347 to administer and prescribe regulations to carry out subchapter III of chapter 83, United States Code.

§ 831.902 Definitions.

In this subpart—

"Detention duties" means duties that require frequent direct contact in the detention, direction, supervision, inspection, training, employment, care, transportation, or rehabilitation of individuals suspected or convicted of offenses against the criminal laws of the United States or the District of Columbia or offenses against the punitive articles of the Uniform Code of Military Justice (chapter 47 of title 10, United States Code). (See 5 U.S.C. 8331(20).)

"Firefighter" means an employee, whose duties are *primarily* to perform work directly connected with the control and extinguishment of fires or the maintenance and use of firefighting apparatus and equipment. Also included in this definition is an employee engaged in this activity who is transferred to a supervisory or administrative position. (See 5 U.S.C. 8331(21).) An employee whose primary duties are the performance of routine fire prevention inspection is excluded from this definition.

"Frequent direct contact" means personal, immediate, and regularly-assigned contact with detainees while performing detention duties, which is repeated and continual over a typical work cycle.

"Law enforcement officer" means an employee, the duties of whose position are *primarily* the investigation, apprehension, or detention of individuals suspected or convicted of offenses against the criminal laws of the United States, including an employee engaged in this activity who is transferred to a supervisory or administrative position. (See 5 U.S.C. 8331(20).) The definition does not include an employee whose primary duties involve maintaining law and order, protecting life and property, guarding against or inspecting for violations of law, or investigating persons other than persons who are suspected or convicted of offenses against the criminal laws of the United States.

"Primary duties" are those duties of a position which—

(a) Are paramount in influence or weight; that is, constitute the basic reasons for the existence of the position;

(b) Occupy a substantial portion of the individual's working time over a typical work cycle; and

(c) Are assigned on a regular and recurring basis. Duties that are of an emergency, incidental, or temporary nature cannot be considered "primary" even if they meet the substantial portion of time criterion.

"Primary position" means a position whose primary duties are (a) to perform work directly connected with controlling and extinguishing fires or maintaining and using firefighter apparatus and equipment; or (b) investigating, apprehending, or detaining individuals suspected or convicted of offenses against the criminal laws of the United States.

"Secondary position" means a position that (a) is clearly in the law enforcement or firefighting field; (b) is in an organization having a law enforcement or firefighting mission; and (c) is either—

(1) Supervisory; i.e., a position whose primary duties are as a first-level supervisor of law enforcement officers or firefighters in primary positions; or

(2) Administrative; i.e., an executive, managerial, technical, semiprofessional, or professional position for which experience in a primary law enforcement or fire-fighting position, or equivalent experience outside the Federal government, is a mandatory prerequisite.

§ 831.903 Conditions for coverage in primary positions.

An employee's service in a position that has been approved as a primary position by OPM or its predecessor, the U.S. Civil Service Commission, is automatically covered under the provisions of 5 U.S.C. 8336(c). An employee who is not in a primary or secondary position and is detailed to a primary position is not covered under the provisions of 5 U.S.C. 8336(c).

§ 831.904 Conditions for coverage in secondary positions.

(a) An employee's service in a secondary position is covered under the provisions of 5 U.S.C. 8336(c) if the employee meets the following criteria:

(1) Employee is transferred directly (i.e., without a break in service exceeding 3 days) from a primary position to a secondary position; and

(2) If applicable, the employee has been continuously employed in secondary positions since transferring from a primary position without a break in service exceeding 3 days, except that a break in employment in secondary positions which begins with an involuntary separation (not for cause), within the meaning of section 8336(d)(1) of title 5, United States Code, is not considered in determining whether the service in secondary positions is continuous for this purpose.

(b) This requirement for continuous employment in a secondary position applies only to voluntary breaks in service beginning after January 19, 1988.

(c) An employee who is not in a primary or secondary position and is detailed to a secondary position is not covered under the provisions of 5 U.S.C. 8336(c).

(d) The service of an employee who is in a position on January 19, 1988 that has been approved as a secondary position by OPM or its predecessor, the U.S. Civil Service Commission, will continue to be covered under the provisions of 5 U.S.C. 8336(c) as long as the employee remains in that position without a voluntary break in service and coverage is not revoked by OPM under § 831.909(c).

§ 831.905 Agency requests for OPM determination of primary positions.

(a) After its analysis of the evidence required under § 831.907(a) (1) though (7) for a current position, an agency will submit a request to OPM for a determination that the duties of the position qualify the position as a primary position. The request for OPM approval must include the required evidence and a detailed statement of the agency's reasons why it believes the position meets the statutory and regulatory requirements.

(b) If the agency request is based on a finding that the primary duties of the position are detention duties which require the incumbent to have frequent direct contact with detainees, the agency will submit the information listed in § 831.907(a) (1) through (6) and (b) (1) through (5) and also a statement supporting its initial determination of "frequent direct contact" for OPM's concurrence in the determination of "frequent direct contact" and for OPM's determination that the position otherwise meets the criteria for a primary position.

§ 831.906 Agency requests for OPM determination of secondary positions.

After its analysis of the evidence listed under § 831.907(c) (1) through (3) for a current position, an agency will submit a request to OPM for a determination that the position meets the criteria for a secondary position. The request for OPM approval must include the required evidence and a detailed statement of the agency's reason why it believes the position meets the statutory and regulatory requirements.

§ 831.907 Evidence.

(a) When an agency makes a request to OPM for a determination that a position is a primary position, the request must be signed by the agency head or his or her representative. In no instance, however, may a person below the level of the agency personnel director be designated as the agency head's representative. A request from a statutory Inspector General must go through the agency head but must be submitted to OPM by the agency. The following documentation must be included in the request:

(1) The official position description annotated to show the percentage of time spent performing the various duties; or, if a position description is not required for the position or the position description is not current, a detailed narrative description of the duties and responsibilities including the knowledges, skills, and abilities required to perform the duties, and all other current agency documents describing the official duties of the position. In addition, if the position description is not current, an explanation as to why the position description has not been revised as well as a timetable for the proposed revision;

(2) The functional statement for the organization where the position is located and the organizational chart showing at least two levels above and below the level of the position;

(3) The critical and non-critical elements and performance standards for the position established by the agency under Part 430 of this chapter (or, if the position is not subject to Part 430, a statement of the effect);

(4) The evaluation statement, if any, explaining the classification of the position;

(5) The agency qualification and medical standards for entry and retention, or a statement that the standards are the same as the X–118 handbook standards;

(6) A statement concerning the current or proposed maximum entry age, if any; and

(7) For law enforcement officers, a list of the provisions of Federal criminal laws the incumbent is responsible for enforcing.

(b) If the agency request for an OPM determination as to whether a position is a primary position is based on an agency finding that the primary duties of the position are detention duties, the agency will include a statement supporting its initial determination of "frequent direct contact" and request OPM concurrence with its determination. This statement must include—

(1) The incumbent's worksite and official duty station, with a description of where contact with Federal detainees occurs;

(2) The frequency of contact with Federal detainees over a daily, weekly, monthly, or quarterly work cycle;

(3) The average duration of these contacts;

(4) The nature of the assigned duties which require the contacts (training, care, rehabilitation, etc.); and

(5) Any other pertinent information.

(c) When an agency makes a request for a determination that a position is a secondary position, the request must be signed by the agency head or his or her representative. In no instance, however, may a person below the level of the agency personnel director be designated as the agency head's representative. A request from a statutory Inspector General must go through the agency head but must be submitted to OPM by the agency. The following documentation must be included in the request:

(1) The documentation required under paragraphs (a) (1) through (7) of this section; and

(2) For an administrative position, certification that the position requires experience equivalent to that of a primary law enforcement or firefighting position; and

(3) For supervisory positions, certification that the position meets the requirements for a first-level supervisor.

(d) When OPM notifies the agency that official documentation is lacking or insufficient to meet the requirements under paragraphs (a), (b), and (c) of this section, agencies will submit the requested information and may submit any other material deemed appropriate (e.g., awards certificates, job applications, affidavits, job announcements, etc.). If the information requested is not received by OPM in a timely manner, OPM will make a decision based on the information contained in the file.

§ 831.908 Requests from individuals.

(a) The employee bears the burden of proof with respect to credit under 5 U.S.C. 8336(c). The employee must provide the agency, or OPM, with all pertinent information regarding duties performed to include, for law enforcement officers, a list of the provisions of Federal criminal law the incumbent is responsible for enforcing and arrests made; and, for firefighters, number of fires fought, names of fires fought, dates of fires, and position occupied while on firefighting duty.

(b) An employee who is currently serving in a position that has not been approved by OPM as a primary or secondary position, but who believes that his or her service is creditable as service in a primary or secondary position and that he or she satisfies the conditions for credit set forth above must be submitted to OPM through the current employing agency and the employing agency must submit an advisory opinion as to whether the position qualifies as a primary or secondary position. A request for a determination made directly to OPM by an employee, however, will not be accepted. The request will be returned by OPM to the employee for submission to the employee's agency for action. After its analysis of the evidence provided by the employee, the agency will submit a request to OPM for a determination and must include an advisory opinion to OPM as to whether it believes the individual's service in the position should or should not be credited and, if it qualifies, whether it should be a primary or secondary position. The agency's submission must include all evidence required under § 831.907 for a determination of primary and secondary positions.

(c) A current or former employee (or the survivor of a former employee) who believes that a period of past service in an unapproved position qualifies as service in a primary or secondary position and meets the conditions for credit must follow the procedures in paragraph (b) of this section. The request must be made to the agency where the claimed service was performed except as provided in paragraph (d) of this section. Based upon its analysis of official records and the individual's submissions, the agency will submit a request for a determination to OPM along with an advisory opinion as to whether the service should or should not be credited and, if credited, whether it qualifies as service in a primary or secondary position. The agency's submission must include all evidence required under § 831.907 for a determination of primary and secondary positions.

(d) For a current or former employee who performed service at an agency which is no longer in existence and for which there is no successor agency, OPM will accept, directly from the current or former employee (or the survivor of a former employee), a request for a determination as to whether a period of past service qualifies as service in a primary or secondary position and meets the conditions for credit.

(e) Requests received by the employing agency, the agency where past service as performed, or OPM, not later than September 30, 1989, may include any periods of previous service. After September 30, 1989, coverage in a position or credit for service will not be granted for a period greater than 1 year prior to the date that the request from an individual is received by the employing agency, the agency where past service was performed, or OPM. OPM may extend the time limits for filing when, in its judgment, the individual shows that he or she was prevented by circumstances beyond his or her control from making the request within the time limit.

§ 831.909 OPM decisions.

(a) OPM's decision on an agency request for a determination under §§ 831.905 and 831.906 will be issued in writing to the agency following submission of all evidence required by § 831.907 and any other evidence requested by OPM. If OPM approves the position, it will be designated as a primary position or as a secondary position.

(b) OPM's decision on the request from an individual submitted under §§ 831.908 (b) or (c) will be issued in writing to the individual, the current employing agency and/or the agency in which the past service was performed following submission of all evidence requested by OPM.

(c) OPM may revoke approval of a position under paragraph (a) of this section if it determines, through an on-site evaluation, classification review, information provided by the agency, or from any other source, that the formerly approved position no longer meets the requisite definition.

(d) An adverse OPM decision will include an explanation of the basis for the decision and a statement of the applicable reconsideration rights. When OPM's decision is directed to the agency, the agency must inform each employee whose rights or interests under Subchapter III of chapter 83, United States Code, are affected, that the decision of OPM may be individually reconsidered by OPM in accordance with § 831.109. A request for reconsideration must follow the procedures in § 831.908. The notice to each affected employee must include a copy of OPM's written decision, must be duly dated, and a copy must be entered as a permanent record in the employee's official personnel file. If OPM's decision is later reversed, the copy in the official personnel file must be removed.

(e) Agencies may not represent in any way (e.g. position descriptions, vacancy announcements, etc.) that a position is a primary or secondary position if OPM has not so determined with respect to that position.

§ 831.910 Review of approved positions and certification to OPM.

(a) An agency must review a currently approved primary or secondary position wherever there is a significant change that may affect its designation to assess whether, in its opinion, the position continues to warrant approval. The agency must provide certification of the results of the review to OPM.

(b) If an agency finds that a currently approved primary or secondary position no longer warrants coverage, it must request that OPM revoke the approval. The request must fully explain the material change(s) in the position and state the date the change(s) occurred. The withdrawal of approval is effective 30 days after the date of OPM's notice to the agency. Beginning with the effective date of the revocation of approval, the agency must stop withholding the additional deductions and must inform each affected employee of OPM's action. The notice to the employee(s) must include a full explanation of the basis for OPM's determination, and state the right to request reconsideration of the determination and the time limits for requesting reconsideration in accordance with § 831.109. A request for reconsideration must follow the procedures in § 831.908. Any excess deductions must be refunded to the employee after the expiration of the time limits for requesting reconsideration or exhaustion of the administrative remedies, and upon proper application to OPM.

(c) If the agency abolishes a primary or secondary position, the agency must notify OPM.

§ 831.911 Withholdings and contributions.

(a) Prior to the receipt of OPM's decision that a position is a primary or secondary position, the additional employee withholding for the incumbent of such a position and the agency contribution required by 5 U.S.C. 8334(a)(1) must not be made. Upon receipt of OPM approval of the position, the effective date of the additional withholding and agency contribution is retroactive to the beginning date of covered service in the primary or secondary position.

(b) Whenever it is finally determined that past service of a current or former employee was creditable under the provisions of 5 U.S.C. 8336(c), retroactive employee deductions and matching agency contributions due for such service must be made. The underwithholding of civil service retirement contributions from the employee's pay results in an overpayment of pay. The employing agency must pursue collection under appropriate procedures. The agency is responsible for submitting to OPM the employee's share as well as the agency's share of the additional contributions to the Civil Service Retirement and Disability Fund. This payment must be made within 30 days of the final decision that past service was creditable.

(c) The additional employee withholding and agency contribution for covered or creditable service properly made as required under 5 U.S.C. 8334(a)(1) or deposited under 5 U.S.C. 8334(c) are not separately refundable, even in the event that the employee or his or her survivor does not qualify for a special annuity computation under 5 U.S.C. 8339.

(d) An employee, upon proper application to the agency, or a former employee or eligible survivor, upon proper application to OPM, will be paid a refund, without interest, of erroneous additional withholdings or deposits for service which was not covered service.

(e) While an employee who does not hold a primary or secondary position is detailed or temporarily promoted to a primary or secondary position, the additional withholdings and agency contributions will not be made. While an employee who does hold a primary or secondary position is detailed or temporarily promoted to a position which is not a primary or secondary position, the additional withholdings and agency contributions will continue to be made.

§ 831.912 Mandatory separation.

(a) The mandatory separation provisions of 5 U.S.C. 8335(b) apply to all law enforcement officers and firefighters in primary and secondary positions. A mandatory separation under section 8335(b) is not an appealable action. Section 831.503 provides the procedures for requesting an exemption from mandatory separation.

(b) In the event an employee is separated mandatorily under 5 U.S.C. 8335(b), or is separated for optional retirement under 5 U.S.C. 8336(c), and OPM finds that all or part of the minimum service required for entitlement to immediate annuity was in a position which did not meet the requirements of a primary or secondary position and the conditions set forth in this subpart, such separation will be considered erroneous.

§ 831.913 Reemployment.

An employee who has been mandatorily separated under 5 U.S.C. 8335(b) is not barred from reemployment in any position except a primary position after age 60. Service by a reemployed annuitant is not covered by the provisions of 5 U.S.C. 8336(c).

§ 831.914 Review of decisions.

(a) An initial OPM decision under this subpart issued to an agency as to whether an encumbered position is a primary or secondary position or whether the service of a current or former employee meets the conditions for credit is subject to reconsideration under § 831.109, upon timely request for reconsideration. The 30-day time limit for requesting reconsideration begins on the date of the agency's notification to the affected individual in accordance with § 831.909(d).

(b) An initial OPM decision issued to an employee, former employee, or survivor as to whether a period of service met the requirements of this subpart as service of a law enforcement officer or firefighter during any period of service is subject to reconsideration under § 831.109.

[FR Doc. 87-28752 Filed 12-16-87; 8:45 am]
BILLING CODE 6325-01-M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

18 CFR Parts 2, 157, and 380

[Docket No. RM87-15-000; Order No. 486]

Regulations Implementing National Environmental Policy Act of 1969

Issued: December 10, 1987.

AGENCY: Federal Energy Regulatory Commission, DOE.

ACTION: Final rule.

SUMMARY: The Federal Energy Regulatory Commission (Commission) is issuing a final rule implementing the National Environmental Policy Act of 1969. The Commission's final rule states that the Commission will abide by the regulations of the Council on Environmental Quality (CEQ), 40 CFR Parts 1500–1508 (1987), unless those regulations are inconsistent with the Commission's statutory responsibilities. The final rule also promulgates regulations which supplement the regulations of the CEQ.

EFFECTIVE DATE: This rule is effective January 19, 1988.

FOR FURTHER INFORMATION CONTACT: Thomas J. Lane, Office of the General Counsel, Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington, DC 20426, (202) 357-8530.

SUPPLEMENTARY INFORMATION:

Before Commissioners: Martha O. Hesse, Chairman; Anthony G. Sousa, Charles G. Stalon, Charles A. Trabandt and C. M. Naeve.

I. Introduction

The Federal Energy Regulatory Commission (Commission) is issuing a final rule to revise its regulations implementing the regulations of the Council on Environmental Quality

(CEQ) and the National Environmental Policy Act of 1969 (NEPA).[1] The regulations replace and elaborate on existing Commission regulations and procedures under NEPA.[2]

II. Background

Section 102(2)(C) of NEPA provides in part that all Federal agencies must include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement on (i) the environmental impact of the proposed action; (ii) any adverse environmental affects which cannot be avoided if the proposal is implemented; (iii) any reasonable alternative to the proposed action; (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity; and (v) any irreversible and irretrievable commitment of resources which would be involved if the proposed action were implemented. This detailed statement is generally referred to as an Environmental Impact Statement (EIS).

Section 102 also requires that, if agency planning and decisionmaking may have an impact on the human environment, an agency should use a systematic, interdisciplinary approach which will ensure the integrated use of the natural and social sciences and the environmental design arts to protect unquantified environmental amenities. NEPA also requires that an agency consult with other Federal agencies with jurisdiction by law or special expertise when preparing a EIS.

CEQ published its regulations implementing section 102 of the NEPA on November 29, 1978, in the **Federal Register.**[3] The CEQ regulations state goals and procedures for researching and solving environmental problems.[4]

On May 14, 1987, the Commission issued a notice of proposed rulemaking (NOPR).[5] This NOPR proposed to adopt by reference many of the CEQ regulations and elaborated on policies and procedures of the CEQ. In response, the Commission received 31 comments.[6]

[1] 42 U.S.C. 4321–4370a (1982).

[2] The Commission's current NEPA procedures for hydroelectric and gas projects are combined in the regulations and appendices contained in 18 CFR Part 2.

[3] See 40 CFR Parts 1500–1508 (1987).

[4] The Commission issued a Notice of Proposed Rulemaking (NOPR) in RM79-69-000 on August 20, 1979, 44 FR 50052 (Aug. 27, 1979). The Commission terminated this docket and incorporated the record in RM87-15-000.

[5] 52 FR 20314 (May 29, 1987).

[6] See Appendix A.

III. Discussion

As a Federal regulatory agency, the Commission does not initiate projects. The Commission's mission is to evaluate applications filed for natural gas, hydroelectric and electric projects. One of the Commission's responsibilities under NEPA is to determine whether an environmental impact statement should be prepared on a project. NEPA requires the preparation of environmental impact statements for major Federal actions that may have a significant impact on the human environment. To make this determination, the Commission (1) is requiring specific information from the applicant on the environmental impacts of the project and (2) has developed specific procedures for evaluating project applications.

All regulatory actions by the Commission are classified in one of three categories for purposes of environmental review: Those projects which normally require an EIS, those projects which normally do not have a significant environmental impact, and are therefore categorically excluded, and those projects for which no generic determination can be made. The latter projects will require an environmental assessment to determine whether they may have a significant impact, and therefore need an EIS, or will not have such an impact, and therefore require no further NEPA review.

These classifications give an applicant guidance on the environmental review that will normally be done on a particular type of project. For projects categorically excluded, the Commission will normally not prepare an EA or an EIS. For projects listed in the EIS category, the Commission will proceed directly to prepare an EIS, or in some situations, will prepare an EA to see if an EIS should be done. For projects listed in the EA category, the Commission will utilize the environmental report filed by the applicant and other information and prepare an environmental assessment. The result of this assessment may be either a finding that the project will not have a significant impact on the environment, followed by Commission issuance of a Finding of No Significant Impact (FONSI), or a decision that the project may have such an impact followed by preparation of an EIS.

Some commenters claim that the Commission did not properly consult with the CEQ in reissuing the NOPR.[7]

[7] See, e.g., Panhandle Eastern Pipe Line Company and Trunkline Gas Company (Panhandle and Trunkline), the Interstate Natural Gas Association of America (INGAA), and American Rivers, Inc., *et al.*

The Commission disagrees. In addition to incorporating the comments of CEQ in the NOPR, various meetings and discussions were held between the Commission staff and CEQ staff. One outcome of these meetings was the decision by the Commission to issue a new NOPR rather than an immediate final rule, a decision applauded by one commenter, the American Rivers, Inc., Friends of the Earth, American Whitewater Affiliation, and the Izaak Walton League of America (American Rivers, Inc., *et al.*).

This final rule complies with and supplements the CEQ regulations. Since the Commission is voluntarily complying with CEQ regulations, there is no need to address a number of comments that raise the question whether those regulations are binding on the Commission as a matter of law.[8] The CEQ regulations by their terms are not binding on the Commission to the extent they are inconsistent with the Commission's statutory obligations.[9]

The final rule also changes the format of the NOPR, as proposed in the CEQ's comments. In the NOPR, the Commission actually incorporated the CEQ regulations into its own proposed rules, except for some CEQ language that it proposed to modify and a few provisions that it decided not to adopt. In its comments, CEQ points out that specific agency NEPA rules are supposed to supplement CEQ regulations by focusing on the requirements that are particular to each agency, rather than repeat or paraphrase CEQ's general regulations that speak to all Federal agencies.[10] In view of the CEQ's comments, the format of the final rule has been changed to focus on the Commission's particular requirements as a supplement to CEQ regulations, thereby avoiding the unnecessary repetition of general provisions in the CEQ regulations.

[8] See, e.g., CEQ, California Save Our Streams Council (S.O.S.), American Rivers, Inc., *et al.*, and the U.S. Department of the Interior, Office of Environmental Project Review (Interior). In support of this, these commenters cite Executive Orders 11514 and 11991, the CEQ regulations and court decisions in The Steamboaters v. F.E.R.C., 759 F. 2d 1385 (9th Cir. 1985) and People Against Nuclear Energy v. U.S. Nuclear Regulatory Commission, 678 F.2d 222 (D.C. Cir. 1982), rev'd on other grounds, 103 S.Ct. 1556 (1983). The commenters add that the Commission must adopt all of the CEQ regulations and supplement those regulations with its own NEPA regulations.

[9] 40 CFR 1507.3(b) (1987).

[10] 40 CFR 1507.3 (1987).

A. Projects Categorically Excluded, Subject to an EA, and Subject to an EIS

1. Categorical Exclusion

The CEQ regulations at § 1508.4 define the term "categorical exclusion" to mean a category of actions which do not individually or cumulatively have a significant effect on the human environment. The CEQ regulations allow the Commission to make a finding that certain actions have no such significant effect. If a project is categorically excluded neither an EA or EIS is then required. In the NOPR the Commission listed 31 projects in the categorical exclusion (CE) category. Commenters focused on:

(i) Whether the possibility of an EA was foreclosed because a project was listed in the CE category,

(ii) Suggested projects that should be added to or deleted from the list of projects, or

(iii) Requested clarification of terms describing projects in the list.

As a general response to these comments, environmental review is not foreclosed merely because a project is in the CE category. In addition, in the final rule the Commission is modifying several categorical exclusions, is not adding to the list of projects proposed for categorical exclusion in the NOPR, but is deleting one project from the list.

(a) *Possibility of an EA on a Project Categorically Excluded.* The CEQ is concerned that the nature of the Commission's environmental review of particular projects might be rigidly predetermined by the general classification of such projects. This is a misunderstanding of the Commission's intent. The general classification of a project indicates only how such a project will normally be treated. The classification of a project as categorically excluded, for example, does not automatically foreclose further environmental review in particular unusual circumstances. The existence of unusual circumstances may be manifest from the application itself, or derived from comments by interested persons in response to the application itself (after notice in the **Federal Register**) or from additional information sought by the staff.

The Commission is adopting one commenter's [11] suggestion that the Commission specify the circumstances when an EA or EIS will be prepared for a project normally categorically excluded. The commenter suggests the following exceptions: If the project may have an impact on Indian lands, units of the National Park System, National Wildlife Refuges, National Fish Hatcheries and other fish facilities, anadromous fish, endangered species, wilderness areas, wild and scenic rivers, wetlands, and other ecologically significant or critical areas, or if the environmental effects are uncertain. The situations described by this commenter are examples of projects that may have a significant environmental impact. However, there may be others and, thus, in making this determination, the Commission will not limit itself to only these.

(b) *Proposed Deletions from the CE Category.* Several commenters [12] asked the Commission to remove a number of projects from the list of categorical exclusions in the NOPR. These projects are: (1) Preliminary permits, (2) small conduit hydroelectric projects, (3) actions concerning reservation of lands and classification of United States lands as water power project sites under section 24 of the FPA, (4) annual charges (5) electric rate filings submitted by public utilities under section 205 and 206 of the Federal Power Act, (6) review of natural gas rate filings, including curtailment plans that do not have a major effect on an entire pipeline system, (7) surrender and amendment of water power licenses, preliminary permits and exemptions, (8) proposals to use water power project lands or waters for a variety of activities including piers, boat docks, and landings, and (9) actions which involve solely socio-economic impacts.

The Commission is only deleting one of these projects from the list. The Commission recognizes that any particular project included in the list could, in unusual circumstances, have an adverse effect on the environment. As discussed, the possibility of an EA is not foreclosed merely because a project is listed as a categorical exclusion.

(i) *Preliminary Permits.* Four commenters [13] said that preliminary permits should be removed because feasibility studies done under preliminary permits often involve significant ground distrubance activity. It has been the Commission's experience that preliminary permits rarely involve significant ground disturbance activity and the commenters provide no support for a contrary conclusion. Rather, activities under a preliminary permit generally involve merely field work to gather data on stream flows, resources, and other characteristics of the area. These activities would not have a significant impact on the human environment.

(ii) *Small Conduit Hydroelectric Projects.* Some commenters [14] recommend that the CE for small conduit hydroelectric projects be removed or limited substantially [15] since these projects often involve significant stream flows or major construction activity and the mandatory terms and conditions of fish and wildlife agencies do not constitute adequate environmental review.

By its very nature a small conduit hydroelectric project will not have an impact on stream flows since the water used to generate power is water previously removed from the stream for other purposes, such as irrigation and drinking. After the power is generated, the water is then used for the original purposes for which is was drawn. In addition, small conduit hydroelectric projects use water in existing conduits and are located at previously developed sites. For these reasons the typical project has little or no potential to affect historic sites, aquatic resources, terrestrial resources, or other environmental resources.

(iii) *FPA, Section 24.* Some commenters [16] argue that the CE for the reservation and classification of water power sites under section 24 of the FPA should be removed because the reverse process of rescinding power site reservations can open previously reserved public lands to various types of development. Under section 24, lands

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[11] See e.g., U.S. Department of the Interior, Office of Environmental Project Review (Interior).

[12] See generally, the National Marine Fisheries Service (NMFS), American Rivers, Inc., *et al.*, the CEQ, Wisconsin Department of Natural Resources, (State of Wisconsin), Natural Resources Defense Council (NRDC), Washington Department of Ecology, and the Environmental Protection Agency.

[13] See *e.g.*, the NMFS, American Rivers, Inc. *et al.* S.O.S., State of Washington.

[14] *See, e.g.*, NMFS and American Rivers, Inc., *et al.*

[15] Save Our Streams, (S.O.S.) suggested that a categorical exclusion for small conduit hydroelectric proejcts be limited to those which:

a. Will not change the flow regime in the affected stream, canal or pipeline including but not limited to:

1. Rate and volume of flow;

2. Temperature;

3. Amounts of dissolved oxygen and nitrogen to a degree which would adversely affect aquatic life;

4. Timing of release;

b. New power lines not to exceed one mile in length nor located adjacent to a wild or scenic river;

c. No modifications in the existing surface elevation of the existing diversion;

d. No upstream or downstream passage of fish affected by the project.

e. Discharge from powerhouse not more than 300 feet from the toe of the diversion structure;

f. No violation of Federal or state water quality standard.

g. No impact on any site eligible for inclusion in the National Register of Historic Places;

h. No construction in the vicinity of any rare or endangered species.

[16] See, *e.g.*, American Rivers, Inc., *et al.*

owned by the United States can be reserved as water power sites. Once the lands are so reserved, persons who wish to use them for other purposes may apply to the Commission for a determination that these other proposed uses would not damage or destroy the value of the lands as water power sites. The Commission may set restrictions on other uses of these lands to protect their water power value. However, except for determining compatibility with water power uses, the Commission does not approve or disapprove these nonpower developments. They are subject to the jurisdiction of other Federal agencies (such as the Bureau of Land Management which would have to approve any mining project on a reserved site), and it is these other agencies, not the Commission, that would be responsible for NEPA review.

(iv) *Annual Charges.* The Commission finds no support for the argument by S.O.S. that the CE for annual charges payments under section 10(e) of the FPA should be removed. The S.O.S. argues that low annual charges result in the subsidized transfers of Federal land and water resources to developers below market value.

The purpose of section 10(e) is to reimburse the United States Government for the cost of administering Part I of the Federal Power Act and recompensing the Federal government for the use, occupancy and enjoyment of its lands or other property. The Commission's rule governing land use charges has recently been revised to adopt a more accurate measure of the fair market value of the land.[17] As for the Commission's general annual charges, their assessment below a level S.O.S. would like to see hardly represents a transfer of Federal lands to private developers, any more than the Commission's failure to collect fees and charges from S.O.S. for the government's costs of considering its pleadings represents a Federal subsidy to that organization. The assessment of annual charges is purely an administrative function mandated by Congress to recover the Commission's costs. As such, it is appropriately categorically excluded.

(v) *Electric Rate Filings under Section 205 and 206 of the FPA.* The Natural Resources Defense Council (NRDC) argues that approval of electric rate filings under sections 205 and 206 of the FPA should not be in the CE category because they constitute Federal actions subject to NEPA, even though no facilities are being constructed.

It is true that the approval of rate filings constitutes a Federal action. However, the Commission has determined *In the Matter of Monongahela Power Co. et al.*, Docket No. ER87-330-000,[18] that the approval of wholesale electric rates is not a major Federal action significantly affecting the environment and therefore does not necessitate an EIS. This rule merely codifies the *Monongahela* decision.

(vi) *Curtailment.* The NOPR categorically excluded gas curtailment plans that do not have a major effect on an entire pipeline system. The State of Wisconsin argues that the Commission should categorically exclude only those gas curtailment plans that do not cause industries to switch fuels. The Commission recognizes that any curtailment of gas service could cause an industrial customer to switch fuels. The Commission also recognizes that fuel switching can have an impact on air quality. That is why the Commission limited the categorical exclusion for curtailment plans to interim or short-term plans, which do not have a major effect on a pipeline system. Such plans are normally unlikely to result in fuel switching and are thus not likely to have a long-term or widespread impact on air quality. As with all categorically exempted actions staff may seek additional information and perform an EA if circumstances warrant.

(vii) *Surrender and Amendment.* The Washington Department of Ecology and EPA claim that the categorical exclusion for surrender and amendments of water power licenses and preliminary permits should be limited to surrender and amendment of preliminary permits only. These commenters cite the work that must be done to remove hydroelectric facilities and restore the project site to its undeveloped condition. The Commission agrees. In the final rule the Commission is clarifying this CE to limit it to (1) the surrender and amendment of preliminary permits, (2) the surrender of water power project licenses and exemptions where no project works exist or no ground disturbing activity has occurred, and (3) amendments to water power licenses and exemptions that do not require ground disturbing activity or changes to project works or operation. These changes will ensure the potential environmental effects from any construction activity due to the surrender or amendment of a license or exemption will be considered.

(viii) *Proposals for Water Power Project Lands.* EPA and NMFS recommend that the categorical exclusion for the use of water power project lands or waters for a variety of activities including utility lines, piers, landings, and boat docks be eliminated, citing the need to study the potential effects on water quality and fisheries.

The Commission disagrees. It has been the Commission's experience that such projects normally do not have a significant effect on the environment. These projects are small and, before filing with the Commission, applicants are required to consult with the appropriate state and local environmental agencies to mitigate any impact.

(ix) *Socio-Economic Impact.* The CEQ objects to the categorical exclusion for projects having solely socio-economic impacts. While it agrees that an EIS is not required for such projects, once they are determined to have only socio-economic impacts, it points out that this standard is not self-defining.

The Commission recognizes that in accordance with the regulations of the CEQ and court decisions,[19] no EIS is required for a project that involves solely socio-economic impacts. However, the Commission agrees with CEQ that apart from specific types of projects that the Commission has already found to have solely socio-economic impacts, it is not self-evident which projects fall into this category. Thus, the Commission is eliminating this specific categorical exclusion in the final rule. In the future, when the Commission finds that a particular activity, not presently included in the CE category, generally involves solely socio-economic impacts, it will amend the CE category to include this particular activity. This will avoid unnecessary environmental review.

(c) *Suggestions for Addition to the CE Category.* Several commenters requested a number of projects be added to the categorical exclusion category or be clarified. In response, the

[17] The Commission recently issued a final rule revising its methodology for assessing Federal land use charges. Order No. 469. Revision of the Billing Procedures for Annual Charges for Administering Part I of the Federal Power Act and to the Methodology for Assessing Federal Land Use Charges, 52 FR 18201 (May 14, 1987). The purpose of this revision was to establish a rate for use of government lands based on fair market value.

[18] In the Matter of Monongahela Power Co., *et al.*, Order Accepting Rates for Filing Without Suspension, Denying Motion to Reject, Granting Waivers, Noting and Granting Interventions, Consolidated Proceedings, Denying Motion for an Evidentiary Hearing, Denying Motion for a Declaratory Order and Granting Exemptions, 39 FERC ¶ 61,350 (June 25, 1987); Order Denying Reh'g, 40 FERC ¶ 61,256 (Sept. 17, 1987).

[19] *See* Como-Falcon Community Coalition, Inc. v. U.S. Dept. of Labor, 609 F.2d 342 (8th Cir. 1979); Image of Greater San Antonio, Texas v. Brown, 570 F.2d 517 (5th Cir. 1978) and Breckinridge v. Rumsfeld, 537 F.2d 864 (6th Cir. 1976).

Commission is clarifying and modifying several categories. In addition, the final rule modifies three categorical exclusions since the Commission is not requiring applicants to file additional information to qualify for the categorical exclusion.[20]

(i) *Uses of Water Power Projects Lands and Waters.* The Edison Electric Institute (EEI) proposed to modify the categorical exclusion for uses of water power project lands or waters, *i.e.*, the lands and waters which encompass the area surrounding the dam, (1) to add radial sub-transmission lines, communication lines and cables and (2) to broaden the structures and activities that could use water power project lands or waters, rather than limiting it to those specifically mentioned in the NOPR. EEI argues that the additions reflect current or anticipated advances in technology and will have no significant environmental impact.

The Commission agrees that radial sub-transmission lines and communications lines and cables should be added to this categorical exclusion. This is because these two additions are similar to electric utility distribution lines, which were included in the CE proposed in the NOPR.

The Commission is not adopting, however, the suggestion that any types of structures and activities that could use water project lands or waters should be categorically excluded. In proposing this CE, the Commission only included the specific types of activities that it believed would not normally have a significant effect on the environment. Any other proposed uses must be studied individually to determine the proper level of environmental review.

(ii) *Abandonment.* Some commenters[21] argue that the categorical exclusion for abandonment in place of minor natural gas pipelines would be of little use since the Commission defined a minor natural gas pipeline as one having short segments of buried pipe with an outside diameter of six inches or less. The commenters state that most six inch pipe has an outside diameter greater than six inches.

The Commission agrees. Therefore, the final rule clarifies that a minor natural gas pipeline is one having short segments of buried pipe with an inside, rather than an outside, diameter of six inches or less.[22]

(iii) *Removal of Minor Surface Facilities.* The Commission disagrees with suggestions that the categorical exclusion for the removal of surface facilities should be expanded to include all surface facilities, not just minor ones, such as taps, valves and metering stations.[23] For example, Texas Gas argues that the removal of a facility as large as a compressor station causes no more harm to the environment than the original construction and that once the facility is removed the land can revert to its former use.

This argument is not persuasive. The removal of a compressor station can involve effects as sedimentation, erosion, and the presence of contaminated hydrocarbons. Consideration may also have to be given to the methods being used to restore the site. For this reason, the Commission is limiting the CE to minor surface facilities.[24] In addition, this categorical exclusion has been modified, since the Commission is not requiring applicants to file additional information to qualify for this categorical exclusion. Specifically, this categorical exclusion is available in those instances where appropriate erosion control and site restoration will occur.[25]

(iv) *CE For Replacement of Essentially Equivalent Design Capacity.* Similarly, some commenters[26] advocate a categorical exclusion for replacement of pipelines of essentially equivalent designed delivery capacity. These commenters argue that such replacement pipelines place no additional burden on the environment because the trench area was already disturbed at the time of the original installation.

The Commission disagrees with this argument. Merely because land was disturbed when the trench was originally dug does not mean that replacing the old pipe with a new pipe will not disturb the environment. Such an action must be assessed in light of current land use and concerns about erosion, sediment control, impact on streams and soils threatened and endangered species and potential PCB contamination.

(v) *Conditions on CE for the Approval of Taps, Meters, and Regulating Facilities.* The Commission proposed a categorical exclusion for the approval of taps, meters and regulating facilities located on a right-of-way where there is an existing natural gas pipeline but only where (1) the land use of the vicinity has not changed since the original facilities were installed and (2) no significant non-jurisdictional facilities would be constructed in association with these facilities. Some commenters argue that these two conditions should be removed.

The Commission is not persuaded by these arguments. First, these commenters claim that the environmental impact of these facilities is insignificant regardless of whether these two conditions exist. The Commissioner disagrees. For instance, if a residential development is now present along the pipeline or if the area has been designated as a park or historic district, then the Commission must determine whether there might be a significant environmental impact to the area resulting from construction of the new facilities. This is also true if significant nonjurisdictional facilities such as cogeneration or other electrical power plants or industrial facilities were being built along with the jurisdictional facilities as an integral part of the same overall project.[27]

Second, the commenters make the arguments that these two conditions should be deleted just as the Commission has categorically excluded certain electric interconnections and wheeling projects that do not entail: (i) Construction of a new substation or expansion of the boundaries of an existing subsection; (ii) Construction of any transmission line that operates at more than 115 kilovolts and occupies more than ten miles of an existing right-of-way; or (iii) Construction of any transmission line more than one mile long if located on a new right-of-way.

This argument is puzzling since there is no inconsistency between the conditions attached to the CE for taps, meters and regulating facilities and

[20] For a further discussion of this issue, see Section C, Subsection 4, on Submission of Environmental Reports.

[21] *See, e.g.*, the American Gas Association (AGA), Tennessee, Transco, Consolidated and INGAA.

[22] One commenter, the Wisconsin Department of Natural Resources, supports the categorical exclusion for abandonment in place of piplelines only if various local utilities, state public commissions and environmental agencies are notified. The Commission notes that whether a particular person is notified of a project has no relevance to its environmental impact. The Commission reiterates that all project applications reviewed by it are noticed in the **Federal Register**. State agencies can then review the abandonment to determine the potential for groundwater contamination or whether the pipeline could act as a conductor for induced electric current.

[23] In response to a comment, the Commission clarifies that other minor surface facilities, other than taps, metering stations and valves, includes items such as minor surface pipe.

[24] The text of this CE is being modified slightly in the final rule to remove references to tap-related facilities, as an example of a minor surface facility. This in no way changes the CE. It is still available for minor surface facilities, which includes tap-related facilities, and has been done for purposes of clarity.

[25] For further discussion of this issue, see Section C, Subsection 4, on Submission of Environmental Reports.

[26] See, *e.g.*, Enron and INGAA.

[27] See Alice Henry v. F.P.C., 513 F.2d 395 (D.C. Cir. 1975).

those attached to the CE for interconnections and wheeling projects. While the two types of projects are different, the limitations on each CE have the same general purpose—to assure that only those projects that normally have no significant environmental impact are excluded from the requirement for individual environmental assessments. The actual limitations are different in the two cases because the projects themselves are different.

Finally, the commenters state that the taps, meters and regulating facilities located on an existing pipeline's right-of-way can be constructed under a blanket certificate even if the land use in the vicinity has changed since the original facilities were installed or significant non-jurisdictional facilities are constructed in conjunction with the jurisdictional facilities. They argue that the same type of environmental review should apply for these projects whether or not they are constructed under the blanket certificate program. The Commission disagrees. The Commission established the blanket certificate program to provide for expedited construction of routine pipeline projects without prior Commission approval. The procedures used to protect the environment under the blanket certificate program include (i) limiting the types of projects that can be constructed, (ii) requiring applicants to follow the conditions of § 157.206(d), which include guidelines for clearing rights-of-way and constructing facilities above ground and compliance with a wide range of Federal statutes, such as the National Historic Preservation Act of 1966, 16 U.S.C. 470 *et seq.* (1982). The environmental review applicable to blanket certificates is specifically geared to the needs of that program and recognizes that new construction under the program is limited to routine pipeline projects. The same approach to environmental review is not necessarily suitable in other contexts.[28]

[28] However, the Commission is adopting two minor revisions to this CE. First, the Commission is requiring that the tap, meter or regulating facility be located completely within the natural gas pipeline's right-of-way. This is being done to assure that no adjacent right-of-way is impacted by the project. Second, this CE is available not only if these three facilities are located completely within a natural gas pipeline's land, but also if they are located completely within a compressor station. The Commission sees no reason to differentiate between where these three facilities could be located for purposes of this CE. The Commission believes that the impact on the environment is insignificant, assuming these two conditions are met, if these facilities are located within a compressor station or a natural gas pipeline's right-of-way.

(d) *Miscellaneous Projects Proposed For Addition.* The Commission is not persuaded by the comment of Transco that the list of CEs should be expanded to include looping on existing pipelines and making additions to existing pipeline facilities adjacent to or within current rights-of-way, and abandonments or removals of compression facilities where there is no increase in net emissions.

Generally, in the Commission's experience, looping may have significant environmental impacts even when adjacent to an existing right-of-way. These impacts are similar to those described for replacement of existing pipe—namely, possible concerns over land use, erosion and sediment control, the impact on streams, soils, and threatened and endangered species, and the potential for PCB contamination.[29] In addition, in these instances additional right-of-way is being taken and the environmental impacts of that taking must be studied.

One commenter, Texas Gas, asks if looping an existing pipeline on adjacent right-of-way owned by Texas Gas or others, would require an EIS. The ownership of a right-of-way is of little relevance to a project's potential environmental impact. The Commission will generally prepare an EA on these projects to determine whether an EIS is necessary.

Additionally, the Commission cannot generally assume that there is no need to conduct an environmental review of abandonments/removals of compression facilities simply because there is no net increase in emissions. As noted earlier, these actions can have the possible negative effects from erosion, sedimentation, methods used to restore the site and the potential for PCB contamination and therefore will require the Commission to perform an EA.

2. Projects Requiring an EIS

The final rule lists four types of projects for which it normally would prepare an EIS. Comments focused on only two types, *i.e.*, an EIS for major pipeline construction under NGA section 7 where there is no existing natural gas pipeline right-of-way and an EIS for projects at new dams with a total installed capacity of 20 MW or more.

(a) *Major Pipeline Construction.* First, the Commission is not opposed to the suggestion that a Commission EIS should be waived on a major pipeline construction project where the Mineral Management Service (MMS) or other Federal agency has already prepared an EIS in conjunction with the offshore leasing program. However, the Commission can adopt a draft or final EIS prepared by other Federal agencies only if the action previously reviewed and the proposed action are substantially the same, *i.e.*, the same project at the same site.[30] It has been the Commission's experience that EISs prepared by MMS on the offshore leasing program are not geared toward this required site-specific analysis. The Commission notes, however, that it is prepared to act as a cooperating agency, under § 1501.6 of the CEQ regulations, when the MMS is preparing an EIS. Thus, when the Commission is later asked to review a specific project, it would be more familiar with that project, thereby avoiding unnecessary delay.

[29] PCBs (polychlorinated biphenyls) are chemical compounds which have been shown to cause cancer.

Second, some commenters urge the Commission to provide a specific definition of a "major pipeline" basing it on the diameter and length of the pipe [31] or the cost of the facilities constructed.[32] Some commenters also suggest that the Commission should initially require an EA rather than an EIS when a major pipeline is constructed in any existing right-of-way.[33]

The Commission does not believe it should define a major pipeline by using specific criteria such as the diameter or length of pipe, or cost of the facilities constructed. These factors are not determinative of the potential impact on the human environment from the project. The Commission must determine whether a project involves major pipeline construction on a case-by-case basis.

The Commission also rejects suggestions to include major pipeline construction in the EA category when it is built in any existing right-of-way, such as railroad, highway or other utility rather than only when it is built in an existing natural gas pipeline right-of-way. The environmental impact of a pipeline project within an existing natural gas pipeline right-of-way can by substantially different and potentially less severe than environmental impact of the same kind of project within the

[30] *See* CEQ and 40 CFR 1506.3, which state that if the actions covered by the original EIS and the proposed action are substantially the same, the Commission can adopt that statement. In addition, the Commission may, where appropriate, incorporate by reverence state findings and conclusions into Commission NEPA documents. See § 1502.21 of the CEQ regulations.

[31] See Columbia.

[32] See Texas Gas and Enron.

[33] See, *e.g.*, AGA and Columbia.

right-of-way of another utility. For example, an electric utility transmission line may be built in terrain which is inappropriate for a pipeline. Thus, use of that right-of-way would not reduce, and might increase, the environmental effects of a pipeline project constructed within the right-of-way of that transmission line.

(b) *Construction of Dams.* In the NOPR, the Commission provided generally that the construction of new dams would be in the EIS category unless the dams had a total installed capacity of 20 MW or less, in which case an EA would normally be performed to determine whether an EIS was necessary. The rationale for treating dams of less than 20 MWs differently was the Commission's experience that only a small portion of dam projects requiring an EIS involved dams of less than 20 MWs.

Several commenters [34] oppose different treatment for the smaller dams, questioning the significance of the past experience cited in the NOPR. They argue that the electrical capacity of a dam is only one factor among many that could affect its environmental impact.

The final rule eliminates the artificial distinction between new dams with a capacity of more than 20 MW and those with a capacity of less than 20 MW. It recognizes that projects involving proposed new dam construction will normally require an EIS, but that the Commission may sometimes perform an EA to decide whether an EIS is necessary. The dam's electrical capacity will be one factor, among others, that the Commission will consider in specific circumstances to decide whether to do an EA first.

3. Projects Subject to an Environmental Assessment

The NOPR listed 13 actions that would normally require an environmental assessment. Generally, commenters argue that particular projects should be removed from the list or clarified. With the removal from the EA category of hydroelectric projects at new dams with a total installed capacity or 20 MW or less, the final rule lists 12 actions that would normally require an environmental assessment.

(a) *Processing Facilities.* In the final rule, the Commission is clarifying that only processing facilities (i) that are subject to the Commission's jurisdiction or (ii) are an integral part of a project under the jurisdiction of the Commission will be analyzed for their environmental effects. Some commenters [35] had apparently believed that the Commission would analyze all processing facilities.

(b) *Relicense Applications Under FPA Section 15.* The Commission classified relicense applications under section 15 of the FPA in the EA category. The Commission agrees with a commenter [36] maintaining that this classification is consistent with *Confederated Tribes and Bands of the Yakima Indian Nation v. FERC.* [37] Although the court in *Yakima* held that the Commission had in that particular case unreasonably failed to prepare an EIS, it did not hold that an EIS must first be prepared for every relicensing project, notwithstanding the contrary view of the American Rivers, Inc., *et al.* The Commission continues to believe that an EA will normally be necessary to determine whether relicensing applications will require an EIS or will require no further environmental review.

(c) *Blanket Certificates.* Several commenters [38] ask the Commission to stop its practice of preparing an EA on projects constructed under a blanket certificate that cost more than $5.2 million but less that $14.7 million.[39] They argue that eliminating an EA will expedite action. Requiring an EA for construction under a blanket certificate costing between $5.2 and $14.7 million is current Commission policy. In maintaining this practice, the rule imposes no new obligation. Projects costing less than $5.2 million are categorically excluded. The procedures used to protect the environment under the blanket certificate program include (i) limiting the types of projects that can be constructed, (ii) requiring applicants to follow the conditions of § 157.206(d), which include guidelines for clearing rights-of-way and (iii) constructing facilities above ground and compliance with a wide range of Federal statutes, such as the National Historic Preservation Act of 1966, 16 U.S.C. 470 *et seq.* (1982). The environmental review applicable to blanket certificates is specifically geared to the needs of that program and recognizes that new construction under the program is limited to routine pipeline projects. The same approach to environmental review is not necessarily suitable in other contexts. In contrast, the Commission believes an EA is necessary because projects costing between $5.2 million and $14.7 million can have a significant environmental effect and therefore cannot be categorically excluded.

B. Environmental Decisionmaking

1. Preparation of an EA or an EIS by Third Parties

Unless a project is categorically excluded under the Commission's regulations, or classified as a project that will require an EIS, the Commission will prepare an EA to determine the environmental effects of the project. If the Commission concludes after preparing an EA that the project may have a significant effect on the human environment, the Commission will prepare an EIS. One commenter argues that third party contractors should be allowed to prepare an EA. It points out that CEQ regulations allow Federal agencies to permit an applicant to prepare an EA if the agency makes an independent evaluation of the information and takes responsibility for the scope and content of the EA. Similarly, CEQ regulations also permit contractors selected by a lead agency to prepare an EIS in some circumstances.

While the Commission expects to rely on its staff to prepare EAs and EISs in most situations, there may be occasions when it may rely on contractors to play a role in the process of environmental review. To the extent the Commission decides in individual situations to rely on contractors, it will develop procedures to assure independent evaluation by the staff and ultimate Commission responsibility for the scope and content of environmental documents.

2. Reliance on Other Agencies

Some commenters [40] argue that the Commission should sometimes defer its decisionmaking responsibilities to other agencies, which these commenters believe possess more technical expertise. This would mean, for example, that the Commission would rely on the determinations of various fish and wildlife and water quality agencies when evaluating the impacts of a proposed project on these resources. The Commission has not adopted this suggestion, since it has the responsibility to analyze the environmental impacts of a proposed pipeline, hydroelectric or electric project under the jurisdiction of the Commission. Moreover, the Commission

[34] See, *e.g.*, S.O.S., Friends of the River, and American Rivers, Inc., *et al*

[35] *See, e.g.*, Panhandle Eastern and Trunkline.

[36] *See,* the Edison Electric Institute.

[37] 746 F.2d 466 (9th Cir. 1984).

[38] *See,* Enron and AGA.

[39] The projects constructed are defined in §§ 157.202(b) (2), (3) and (6) of the Commission's regulations. Projects exceeding $14.7 million in costs cannot be constructed under a blanket certificate. Projects below $5.2 million constructed under a blanket certificate are categorically excluded.

[40] *See, e.g.*, Enron, Panhandle and Trunkline.

has the expertise and staff resources to satisfy this responsibility and court decisions such as *The Steamboaters v. FERC*[41] have clarified that the Commission cannot evade its NEPA responsibility by relying on another agency's environmental judgment. Certainly, the Commission will consider the comments and studies of other agencies in making those determinations. However, the Commission remains ultimately responsible for the environmental review mandated by NEPA for actions under its jurisdiction.

3. Finding of No Significant Impact

At the conclusion of the environmental assessment (EA) stage, the Commission will make one of two determinations. The Commission will either make a Finding of No Significant Impact (FONSI) or determine that the project may be a major Federal action having a significant effect on the human environment and thus proceed to prepare an EIS. The Commission will generally issue a FONSI on a project if proposed mitigation measures will render a project's environmental impacts insignificant. The Environmental Protection Agency (EPA), American Rivers, Inc., *et al.* and the National Marine Fisheries Service (NMFS) argue that where mitigation measures are cited to support a FONSI, the Commission should provide a review procedure before issuing the FONSI, during which agencies and the public may comment on the effectiveness of the proposed mitigation measures. The Commission sees no need to provide a comment period before deciding on the effectiveness of the mitigation measures used. Neither the CEQ regulations nor court decisions mandate such a comment period.[42] In addition, parties to the Commission's licensing or certificate proceedings have available other procedures, such as a petition for rehearing under Rule 713 of the Commission's Rules of Practice and Procedure, for presenting their views to the Commission also on the adequacy of mitigation measures.

The Commission describes in an EA how the mitigation measures proposed will render the environmental impact of a project insignificant. The Commission agrees with commenters that mitigation measures must consist of more than vague statements of good intentions. Mitigation measures must provide concrete solutions to negate potential environmental impacts. The other issued for the license or certificate will state mitigation measures adopted by the Commission.

4. Issues Involved in Preparing an EA

(a) *Consideration of the Environmental Effects of Non-Jurisdictional Facilities.* When the Commission considers the environmental impact of a project subject to its jurisdiction, it also considers the environmental impact of nonjurisdictional facilities which are to be constructed with, or are an integral part of, the project involving jurisdictional facilities. The Commission does this because Commission precedent, case law,[43] and the CEQ regulations require the Commission to consider the environmental impact of an entire project when considering whether to approve the portion of the project under the jurisdiction of the Commission. Some commenters[44] are concerned the Commission would use the EA process to exercise jurisdiction over non-jurisdictional facilities.

Although the Commission understands the commenters' concern, it believes they are unfounded. The Commission does not intend to exercise jurisdiction over nonjurisdictional facilities and is not using this process to exercise such jurisdiction. However, to ignore the environmental impact of these facilities when they are an integral part of an entire project that includes jurisdictional facilities would be to take too narrow a view of the Commission's NEPA responsibilities.

(b) *Cumulative Impacts.* The final rule states that the Commission will comply with the definition to the term "cumulative impact" in the CEQ regulations. Under this definition, "cumulative impact" is the effect on the environment which results from the incremental impact of the action when added to past, present and reasonably foreseeable effects of future actions regardless of the agency or person undertaking such actions. This definition is consistent with current Commission practice of assessing cumulative impacts.

Several commenters state that the Commission's interpretation and procedures in the hydroelectric area were contrary to the definition of cumulative impact in that two or more pending applications for hydroelectric projects were not a prerequisite for cumulative analysis.[45] The Commission has not said that it would do a cumulative impact analysis only when two or more projects are pending at a given river basin or waterway. The commenters correctly point out that, under the CEQ regulations, the cumulative impact of all "past, present and reasonably foreseeable future actions" must be assessed in determining the significance of the action.

(c) *Denial of an application based on an EA.* The final rule permits the Commission to deny an application on the merits either because the project is not viable or because the project will have significant adverse environmental impacts and mitigation measures to avoid these impacts are either nonexistent or impractical. Several commenters[46] agree with the Commission that an EIS is not necessary when a project is denied at the EA stage.

The rule does not adopt the suggestion of Tennessee Gas Pipeline to prepare an EIS in these situations if the applicant requests that one be prepared. An EIS is required only if a Commission action may have a significant effect on the environment. Where the project has been denied on the merits at the EA state, there is no longer a proposed Federal action that may have a significant environmental effect.

The rule adopts the suggestions of several commenters, *e.g.*, Enron, that where the Commission denies an application at the EA stage for environmental grounds, the Commission will provide an applicant with an explanation of the denial and continue to make the environmental review part of the applicant's record.

5. Preparation of an EIS

(a) *Format.* The final rule adds to the essential[47] elements required for an EIS under the CEQ regulations,[48] to include a staff conclusion section and a bibliography section, citing the literature reference in the EIS.[49] Some

[41] 759 F.2d 1383 (9th Cir. 1985).

[42] For a more detailed discussion on the suggestion for a 30-day comment period prior to Commission action on an EA or FONSI, see the section on Public Participation.

[43] Alice Henry v. F.P.C., 513 F.2d 395 (D.C. Cir. 1975), as later discussed in Silentman v. Federal Power Commission, 566 F.2d 237 (D.C. Cir. 1977).

[44] See, *e.g.*, INGAA and AGA.

[45] See, *e.g.*, CEQ, NMFS, and Wisconsin Department of Natural Resources.

[46] See, *e.g.*, CEQ and S.O.S.

[47] The CEQ regulations require a cover sheet, summary, table of contents, list of preparers, list of agencies, organizations and persons to whom copies of the statement are sent and an index. The CEQ regulations also required the substance of the sections on purpose and need for the action, alternatives, affected environment, environmental consequences and the appendices, if any.

[48] 40 CFR 1502.10 (1987).

[49] In response to a comment the Commission clarifies that the page limits on an EIS, *i.e.* normally less than 150 pages and less than 300 pages for proposals of unusual scope or complexity, does not include material incorporated by reference.

commenters [50] questioned whether the Commission should add these sections to the CEQ regulations and more specifically questioned why the Commission was adding a staff conclusion section since the CEQ regulations do not differentiate between the staff of an agency and the agency itself.

The Commission believes that these additions are necessary. First, the CEQ regulations encourage an agency to supplement the prescribed CEQ format to meet specific agency needs, as long as the format complies with the CEQ.[51] Second, these additions are made to conform the regulations to the Commission's current practice and to clarify that an environmental statement made by staff is not a statement of the Commission until it is accepted by the Commission.

(b) *Purpose and Need and Consideration of Alternatives.* An EIS contains a purpose and need statement and a consideration of alternatives. Several commenters [52] are concerned that if the applicant submits a statement of purpose and need, the statement will control and limit the number of alternatives considered by the Commission in evaluating the project. The Commission emphasizes that it will evaluate the purpose and need for a project on an individual project basis. It does not intend to be bound by and will not accept without further evaluation the purpose and need statement supplied by the applicant.[53]

The final rule includes provisions, supported by many commenters,[54] that the Commission will consider all reasonable alternatives, including the no-action alternative and alternatives outside of the jurisdiction of the Commission, when evaluating a project.[55] Some commenters [56] argue that this will cause undue delay and would result in undue costs. The Commission disagrees. It has been the Commission's experience that the consideration of all reasonable alternatives, as is the Commission's present practice and as required by CEQ regulations, does not unduly delay the issuance of environmental documents or add substantially to the cost of preparing those documents.

S.O.S. suggests that the Commission list the minimum number of alternatives that would be considered on each project. It argues that the Commission, in addition to considering the alternative of disapproval of a project, should also consider a location alternative, a size alternative, a source alternative, a fuel alternative, and a delay alternative for each project.[57] The Commission does not believe that it should require these alternatives to be considered on every project. Generally, depending on whether the project considered is a natural gas, electric or hyroelectric project, the Commission has considered the alternatives suggested by S.O.S. However, these alternatives may not be appropriate for every project. Thus, in the final rule, the Commission recognizes the alternatives mentioned by S.O.S. as illustrative of the alternatives that the Commission may consider on each project.

The Commission considers these alternatives in the context of whether to approve or dispprove the project application. Some commenters, *e.g.* the P.C.L., objected to this. However, this practice simply reflects the Commission's regulatory mission. The Commission does not initiate projects. It merely approves projects, with or without modifications, or disapproves projects.

C. General Procedures

1. Commission Personnel Responsible For Implementing NEPA

In general, the preparation of NEPA documents on natural gas projects is done by the Office of Pipeline and Producer Regulation. The preparation of NEPA documents on hydroelectric projects is done by the Office of Hydropower Licensing.

The Department of the Interior asked the Commission to designated one person responsible for the Commission's NEPA compliance. The Commission's General Counsel or his or her designee, on behalf of the Commission, will be responsible for the overall review of the Commission's compliance with NEPA, except for issues in formal proceedings pending before an administrative law judge or the Commission acting as a collegial body.

2. Pre-filing Consultation

The final rule continues present Commission practice by requiring an applicant to consult, prior to filing, with appropriate Federal, regional, state and local entities.[58] During the consultation process, an applicant generally submits the application to the appropriate Federal, state or local agency and supplies the agency with information requested on the project. In addition, the Commission is complying with §§ 1501.2(d)(2) and 1502.5(b) of the CEQ regulations. Implementing these regulations does not change the Commission's current pre-filing consultation procedures.

Some commenters [59] argue that pre-filing consultation may be appropriate for larger, more complex projects requiring an EA or EIS, but that prefiling consultation is unproductive and could cause delay of routine projects. In contrast, the Commission agrees with other commenters [60] who point out that identifying environmental problems, through pre-filing consultation, facilitates the consultation with various environmental bodies required of the Commission under section 102(2) of NEPA, the Federal Power Act, and other statutes. Applicants also benefit from this process. The more work done before an application is filed, the less time the Commission is likely to need to process the application.[61]

The pre-filing consultation provision, however, does not require an applicant to wait indefinitely for an environmental agency to complete its review before submitting its application to the Commission. The rule requires the applicant to make a good faith effort to consult. In some circumstances, Congress has imposed time deadlines on

[50] See *e.g.*, American Rivers, Inc. *et al.*

[51] 40 CFR 1502.10 (1987).

[52] See *e.g.*, S.O.S., Department of the Interior, CEQ and American Rivers, Inc., *et al.*

[53] The Washington Department of Ecology had questioned whether the Commission considers the effect of the project on current electric rates when evaluating the need for licensing a hydroelectric project, in an area where a regional power surplus exists. This is current Commission policy. The Commission considers the effect on electric rates over the life of the project when it evaluates the economic feasibility of the project. This evaluation involves comparing the cost of the hydroelectric project to the least expensive reasonable alternative power source.

[54] See *e.g.*, S.O.S., Planning and Conservation League (PCL).

[55] In response to one commenter, when a reasonable alternative arises from the hearing process, the Commission's practice is to supplement the EIS, thereby ensuring that all alternatives considered by the Commission are included in environmental documents.

[56] See *e.g.*, Colorado Interstate.

[57] S.O.S. did not specify the context it was using the terms "source alternative" or "fuel alternative", thus making it difficult for the Commission to respond.

[58] *See, e.g.*, the current Appendix B of Part 2, for the consultation required for natural gas projects and § 4.38 of the Commission's regulations for the consultation required of hydropower applicants.

[59] *See, e.g.*, Texas Eastern Transmission Corporation (Texas Eastern) and AGA.

[60] *See* The Washington Department of Ecology (State of Washington).

[61] In addition, as discussed in § 380.3(b) (4) and (5), an applicant must continue to make a good faith effort to:

(1) Submit applications for all Federal and state approvals as early as possible in the planning process; and

(2) Notify the Commission staff of all other Federal actions required for completion of the proposed action so that the staff may coordinate with other interested Federal agencies.

such consultations.[62] Even where no explicit deadlines exist, applicants will be permitted to file with the Commission if they can demonstrate their own good faith efforts to consult an undue and unjustified delay by the appropriate environmental agency.

One commenter, the American Rivers, Inc., *et al*, suggests more involvement by the Commission staff in pre-filing consultation and the preparation of environmental documents prior to an application being filed. The Commission has not adopted these suggestions. First, the Commission's implementation of the statutory provisions of NEPA and the FPA and the requirements under § 4.38 of the Commission's regulations meet the letter and spirit of the CEQ provisions. Second, the CEQ consultation regulations do not require the Commission to prepare environmental documents before an application has been filed.[63]

3. Preparation of Studies

Under the final rule, an applicant must also conduct those studies that Commission staff considers necessary or relevant to determine the impact of the proposal on the human environment and natural resources. The rule continues current Commission practice. Several commenters,[64] primarily representing regulated natural gas entities, argue that guidelines are needed to ensure that staff requests only information which is necessary and relevant, and studies that are justified, and avoid delays. For example, they suggest that the Commission specifically explain what studies or data could be requested; who could request the studies—the Commission or staff; what procedures would be established for protesting studies as too burdensome or costly; and when studies could be requested. The Commission is sympathetic to the concerns of these commenters and agrees that the staff should request only such information and studies as are necessary for a full environmental review. However, since the types of data and studies needed vary widely with the resources affected, it is unlikely that generic guidelines, that would be useful and applicable to the various jurisdictional activities regulated by the Commission, could be developed. If a person believes that a study or data request by the staff is unduly burdensome or otherwise inappropriate, it may ask the Commission for relief by filing a petition under the provisions of Rule 207 of the Commission's Rules of Practice and Procedure, 18 CFR 385.207.[65]

4. Submission of Environmental Reports

As proposed in the NOPR, the final rule continues the current practice of requiring an applicant to submit an environmental report (ER) for actions that require an EA or an EIS. The ER provides basic environmental information on the project.

The ER for hydroelectric projects must contain the information in 18 CFR Part 4.[66] The information in this ER varies depending on the type of project, but generally includes a description of the project area, and reports on water use and water quality, fish and wildlife resources, historic and archaeological resources, and recreational resources.

The environmental report for any natural gas project requiring an EA or EIS, except for prior notice filings under § 157.208,[67] must contain the information specified in Appendix A of Part 380.[68] This ER includes: (1) A description of the proposed action and the existing environment; (2) the environmental impact of the proposed action; (3) the measures proposed to enhance the environment or to guard against or mitigate adverse environmental effects; (4) any unavoidable adverse environmental effects; (5) the relationship between the short and long-term uses of the environment; (6) any irreversible and irretrievable commitment of resources; (7) the alternatives to the proposed action; and (8) any permits or other compliance required with Federal, State, or local regulations or statutes.

Normally projects placed in the categorical exclusion (CE) category are not required to be accompanied by an ER. However, the Commission proposed that for three actions in the CE category an applicant should provide certain additional information.[69] These three projects were (i) the approval of taps, meters, and regulating facilities located within a right-of-way where there is an existing natural gas pipeline, (ii) the abandonment in place of a minor natural gas pipeline, and (iii) the abandonment by removal of minor surface facilities.

For these three types of projects, applicants were asked to provide a brief explanation of why the application qualified for a CE and to provide environmental information sought by the Commission or its staff.

Some commenters[70] object to requiring this information. They argue that this requirement will increase costs and delays.

The Commission included these projects in the CE category on the basis of experience indicating they normally do not have a significant environmental impact. However, the Commission proposed requiring ER's for these projects because some individual projects within these categories could pose environmental concerns. In the final rule, the Commission has decided to condition the CE covering minor surface facilities to require appropriate erosion control and site restoration. While the final rule no longer requires an ER with all applications for these types of projects at issue, thereby treating them like other projects in the CE category, applicants have a continuing responsibility to provide sufficient information to show appropriate erosion control and site restoration at minor surface facilities, and to meet requests by the staff for environmental information in specific circumstances.

5. Abbreviated Report

The final rule adopts the proposal to eliminate the provisions in current Commission guidelines that allow an applicant to file an "abbreviated report" (AR) to support the conclusion that a natural gas proposal would not be a major Federal action significantly affecting the quality of the human environment. Commenters argue that the Commission should continue to allow

[62] For example, see section 401 of the Clean Water Act, 33 U.S.C. 1341 (1982).

[63] Section 1501.2(d)(2) provides generally that Federal agencies should consult early with appropriate state and local agencies, Indian tribes and with interested private persons and organizations when the agency's own involvement is reasonably foreseeable. The second sentence of § 1502.5(b) states that Federal agencies are encouraged to begin preparation of environmental assessments or environmental impact statements prior to an application being filed preferably jointly with applicable state and local agencies.

[64] See, *e.g.*, Tennessee Gas (Tennessee), Lone Star, Pacific Gas Transmission (PGT), Enron, Consumers Power (Consumers) and Columbia Gas.

[65] The Commission is not aware of any such petitions being filed.

[66] The Commission is eliminating the current Appendix A of Part 2 of the Commission's regulations because the requirements for an environmental report for specific hydropower projects can be found in Part 4 of the Commission's regulations.

[67] The environmental report requirement for prior notice filings is contained in § 157.208(c)(11) of the Commission's regulations.

[68] Appendix A of Part 380 is currently Appendix B of Part 2 of the Commission's regulations.

[69] An abandonment in place of a minor natural gas pipeline involves Commission approval to discontinue the use of the pipeline to transport gas and to leave the pipeline in the ground. The Department of Transportation, Office of Pipeline Safety, has regulations on procedures for abandonment of pipelines. An abandonment by removal, involves physically removing the facility from the site.

[70] *See, e.g.*, Panhandle Eastern and Trunkline, Texas Gas, Columbia and INGAA.

the abbreviated report.[71] They reason that the report allows the Commission to concentrate on significant issues without spending time compiling data which will not change the final determination.

The commenters misinterpret the effect of the elimination of the AR on the amount of environmental documentation an applicant must file. Under the AR provision, an applicant was still required to file information on the items currently described in Appendix B of Part 2. However, some applicants attempted to use the AR provisions to file brief conclusory statements, that their projects would not have a significant effect on the environment. Such statements were of little use to the Commission staff. Staff then had to request the appropriate information in Appendix B. So, the elimination of the AR will not require applicants to file any more information than in the past and will avoid the confusion that occasionally arises under existing regulations. As in the past, applicants are expected to tailor the amount and character of the environmental information they provide to the possible environmental effects of the project.

6. Time Limits On Preparation of Environmental Review

Several commenters[72] argue that the Commission's NEPA processes would be improved if the Commission set fixed time limits on the preparation of an EA, the completion of an EIS and the entire NEPA process. The time limits suggested ranged from 30 days to nine months to prepare an EA, to 18 months after an application is filed to prepare an EIS.

The Commission has reviewed these various suggestions and has concluded that general time limits for completion of the NEPA process are simply not feasible. The time required to prepare an individual EA may vary considerably depending on the sufficiency of the initial application or the complexity of the project proposed.

The Commission believes that a more reasonable approach is one suggested by five commenters,[73] and now followed as a normal part of the Commission's environmental review procedure—namely, the approach of telling an applicant who asks in specific circumstances, the approximate timeframe in which NEPA documents needed to evaluate the action will be completed. The Commission also notes that § 1500.5 of the CEQ regulations encourages steps to reduce delay in the NEPA process and that the Commission will be guided by that objective.

7. CEQ Referral

The NOPR proposed not to accept Part 1504 of the CEQ's regulations, which provides a mechanism for referring disputes to the CEQ concerning major Federal actions that might cause unsatisfactory environmental effects. Several commenters [74] disagree with the Commission's proposal and argue that the referral process could be helpful to the Commission and is not a threat to the Commission's autonomy.

The Commission wishes to cooperate as much as possible with other Federal agencies that may have a legitimate interest in significant environmental issues within the Commission's jurisdiction.[75] However, the purpose of these regulations is to set out the Commission's procedures implementing NEPA. The regulations do not purport to deal with the authority of other agencies to refer to the CEQ disputes involving major Federal actions within the Commission's jurisdiction or the authority of the CEQ to accept such referrals. In its comments, the CEQ notes that any recommendations it would make as a result of such a referral would not be binding on the Commission. Moreover, no trial-type proceeding has ever been referred to the CEQ by other agencies. Under the circumstances, the Commission cannot conclude that the referral provision would necessarily conflict with the Commission's obligation to provide a fair hearing to the parties in trial-type cases and to make its decision on the basis of the evidentiary record. The Commission reserves the right not to participate in a CEQ referral in circumstances where doing so would conflict with its adjudicatory responsibilities. The CEQ recognizes that its regulations are not binding to the extent they are inconsistent with an agency's statutory obligations.

8. Monitoring and Enforcement

Despite the existence of the Commission's present monitoring and enforcement program, several commenters [76] interpret the NOPR to claim that the Commission's responsibility to monitor and enforce mitigation measures, where applicable, is discretionary. This was not the Commission intent. The Commission recognizes it has an obligation to adopt a monitoring and enforcement program where applicable for any mitigation.

D. Public Participation

Commenters raised several issues concerning public participation at the EA or EIS stage. The issues raised included who would publish the notice of availability of an EIS, the Commission or the EPA; the availability or an EA or FONSI for public comment prior to Commission action; whether the Commission's regulations should provide for a minimum of 30 days to consider a final EIS before Commission action; the possibility of making an EA or EIS available at regional offices; the Commission's present intervention procedures in trial-type proceedings; and the use of NEPA documents in administrative proceedings.

1. Publication of the Notice of Availability of an EIS

In the NOPR, the Commission proposed to publish a notice of an EIS if the Environmental Protection Agency (EPA) fails to publish this notice, in accordance with § 1506.10 of the CEQ regulations, within 15 days after filing with EPA This CEQ section requires the EPA to publish in the **Federal Register** each week a notice of the environmental impact statements filed by Federal agencies in the preceding week.

The Commission proposed these provisions in the unlikely event that EPA, because of unforeseen problems, failed to meet time frames. The EPA and other commenters, such as CEQ, object to this proposal. First, the commenters state EPA has the obligation to publish the notice of availability of an EIS under CEQ regulations.[77] Second, the commenters state that the Commission's fears are unfounded because the maximum number of calendar days which normally expire between the official filing of an EIS and publication by EPA of the official notice, is twelve. In light of the comments, the Commission no longer sees the need for the proposed provisions providing for a

[71] *See, e.g.,* exas Eastern, Panhandle Eastern and Trunkline, and INGAA.

[72] See *e.g.,* Lone Star; Transcontinental Gas Pipeline Corporation (Transco); Texas Eastern; INGAA; Pacific Gas and Electric Company (PG&E); AGA; Enron; Consumers Power; and Panhandle Eastern and Trunkline.

[73] See, *e.g.,* Panhandle Eastern and Trunkline.

[74] See, e.g., American Rivers, Inc., *et al.,* CEQ and Friends of the River.

[75] In addition, section 10(j)(2) of the Federal Power Act, 16 U.S.C. 803(j)(2), requires the Commission and fish and wildlife agencies to coordinate in an attempt to resolve any inconsistencies between the recommendations of the fish and wildlife agencies and the purposes and requirements of Part I of the Federal Power Act or other applicable law.

[76] See, *e.g.* American Rivers, Inc., *et al.,* CEQ and the State of Wisconsin.

[77] Under the CEQ regulations the time frame for actions on a draft or final EIS in § 1506.10, *i.e.,* 90 days on a draft EIS and 30 days on a final EIS, begins upon publication by EPA of the notice of availability of the EIS.

back-up notice in case EPA fails to provide it.

2. Public Comments on EA's and FONSI's

In the NOPR, the Commission proposed to continue its current practice of giving notice of availability of an EA and of a FONSI in the order it issues on the project application. In addition the Commission will publish in the **Federal Register** some notices of the availability of EA's and FONSI's beyond those dealing with matters of national concern which are required to be published under the CEQ regulations. Some commenters [78] request the Commission make an EA or FONSI available for public review and comment in every case at least 30 days prior to Commission action. The commenters argue that the current Commission practice does not adequately foster NEPA goals of encouraging and facilitating public involvement in decisions which affect the quality of the human environment. The commenters add that meaningful public participation cannot be accomplished through agency rules which allow for decision to be made without notice to the public of the basis for the decisions.

The Commission has not adopted a strict 30-day period of notice and comment on an EA or FONSI on every project prior to Commission action. Neither the CEQ regulations nor court decisions interpreting NEPA specifically require the Commission to provide such a comment period.[79] However, on individual projects the Commission may adopt this suggestion. In addition, the Commission is implementing § 1501.4(e)(2) of the CEQ regulations and thus will make a FONSI available for 30 days prior to taking any action on a proposal that normally requires the preparation of an EIS or where the proposed action is without precedent.

Some commenters [80] state that the Commission is not implementing the CEQ provisions in 40 CFR 1506.10 requiring, in most circumstances, a minimum 30-day period between notice of the final EIS and Commission action. The commenters argue that without this notice public participation is denied and the potential for project delay is created through appeals to Commission orders. The commenters misinterpret the Commission's proposal. The Commission is complying with this section of the CEQ regulations. However, the CEQ regulations permit the Commission to issue the final EIS concurrently with a Commission order if a person has an opportunity to alter that decision by an appeal to the Commission.[81] That opportunity exists in the Commission's rehearing procedures in Rule 713 of the Commission's Rules of Practice and Procedure.[82] Parties in a Commission proceeding may petition for rehearing as a matter of right. In fact, a rehearing request must be filed before seeking judicial review of a Commission decision.[83] In general, the Commission considers and responds to the points made in a rehearing petition. In that response, the Commission will either agree or disagree, based on the merits of the petition and the relief sought, or clarify the final order.

3. Availability of an EA or an EIS at Regional Offices

The final rule adopts the proposal to make EAs and EISs available at regional offices on a case-by-case basis. Two commenters, the P.C.L. and Friends of the River, argue that every EA or EIS should be available at regional offices. The Commission recognizes it would be convenient to the public if EAs and EISs were routinely made available at regional offices. However, the costs and administrative burden of such a practice would be prohibitive and disproportionate to the public benefits. For a reasonable fee, environmental documents are available through the Division of Public Affairs and Legal Reference, 825 North Capitol Street NE., Washington, DC 20426, (202) 357-8118.

4. Motion to Intervene

A person may become a party to a proceeding by filing a motion to intervene under Rule 214 of the Commission's Rules of Practice and Procedure.[84]

Some commenters[85] express the concern that the proposed rule would permit unsubstantiated evidence and opinions on environmental issues to be admitted into evidence in trial-type proceedings without the opportunity for cross-examination. Other commenters complain that non-parties who may have an interest in the environmental issues may be excluded from the environmental review process.

Both comments misinterpret the Commission's position. Rule 214 of the Commission's Rules of Practice and Procedure requires a person to file a motion to intervene in order to become a party to a proceeding. Parties to a proceeding can introduce evidence at a formal hearing. This does not mean that only the views of parties are considered by the Commission. All comments received on a draft EIS are reviewed and responded to in a final EIS regardless of whether the commenters are intervenors in the proceeding. The EIS becomes a part of the record of the proceeding.

5. Use of NEPA Documents in Administrative Proceedings

One commenter, the NMFS, wants the Commission to discuss how environmental documents will be included as part of the record in an informal adjudication and formal rulemaking. The commenter wants such documents included in the record of an informal adjudication in the same manner as for informal rulemakings, and the documents included in the record of formal rulemakings in the same manner as for formal adjudications.

In an informal rulemaking the notice of a draft EIS, or EA with a FONSI, will be included in the notice of proposed rulemaking. A final EIS will be published prior to or simultaneously with a decision on the final rule. For adjudicatory proceedings, and EA or an EIS will be included as part of the record of the proceeding. Since the Commission does not use formal rulemaking, it need not establish procedures for formal rulemakings.

An informal adjudication is an adjudicative proceeding where a formal trial-type hearing has not been held.[86] Such proceedings are normally associated with the issuance of a natural gas pipeline certificate or hydroelectric license. In these situations, the Commission will make environmental documents available as discussed in this rule, *i.e.*, notice of an EA or an EA with a FONSI will be published in the Commission order and may be published in the **Federal Register**. A draft and final EIS will be made available as described in the CEQ procedures at § 1506.10.

NMFS states that NEPA requires the Commission to consider an EIS regardless of whether the EIS is introduced into the record of a formal

[78] *See, e.g.*, the Izaak Walton League and NMFS.

[79] National Ass'n of Gov't Employees v. Rumsfeld, 418 F.Supp 1302 (E.D.Pa. 1976); Friends of the Earth, Inc. V. Butz, 406 F.Supp. 742 (D. Mont. 1975); Como Falcon Coalition v. U.S. Dept. of Labor, 465 F.Supp. 850 (D. Minn. 1978).

[80] See, *e.g.*, Izaak Walton League.

[81] 40 CFR 1506.10 (1987).

[82] See Mid-Tex Electric Cooperative, Inc. v. FERC, 773 F.2d 327 (D.C. Cir. 1985).

[83] Section 313(a) of the Federal Power Act, 16 U.S.C. 825*l*(a) (1982) and section 19(a) of the Natural Gas Act, 15 U.S.C. 717r (1982).

[84] 18 CFR 385.214 (1987).

[85] See, *e.g.*, Izaak Walton League and the State of Wisconsin.

[86] Sierra Ass'n for Environment v. FERC, 744 F.2d 661 (9th Cir. 1984).

adjudicatory hearing in making its decision. The Commission agrees. An EIS will be introduced into the record of the adjudication considering the project for which an EIS has been performed. In all situations where an EIS has been prepared, the Commission will consider and review the alternatives included in the EIS in reaching its decision.

E. Miscellaneous Issues

1. National Historic Preservation Act (NHPA)

The Department of the Interior urges the Commission to add regulations to implement the National Historic Preservation Act and the regulations of the Advisory Council on Historic Preservation (Advisory Council). In the NOPR, the Commission stated that insofar as NHPA compliance could be achieved through the NEPA process, the Commission would use that process. The Commission believes that it is unnecessary to add specific regulations for NHPA. The Commission now requires information on historic sites in an ER and consults with and reviews comments of the Advisory Council before it approves a project that may affect a historic or cultural site that is included in or eligible for inclusion in the National Register of Historic Places. Thus, the Commission has incorporated the substance of the NHPA into its procedures.

2. Comprehensive Plans

The State of Wisconsin requests clarification on the relationship between a comprehensive plan under FPA section 10(a) and an EIS or EA when the Commission consider an application for a hydroelectric project.

An EA or EIS conducted pursuant to NEPA considers the environmental effects of a specific hydroelectric project. This EA or EIS is included in the record of decision. The comprehensive plans under section 10(a) of the FPA consist of the entire record of the proceeding before the Commission. This record includes all information before the Commission including the EA or EIS, comments by interested parties, studies, as well as any comprehensive plan of a state.

IV. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) [87] generally requires a description and analysis of final rules that will have a significant economic impact on a substantial number of small entities. Specifically, if an agency promulgates a final rule under the Administrative Procedure Act (APA), a final RFA analysis must contain (1) a statement of the need for and objectives of the rule, (2) a summary of the issues raised by the public comments in response to any initial regulatory flexibility analysis, and the agency response to those comments, and (3) a description of significant alternatives to the rule consistent with the stated objectives of the applicable statute that the agency considered and ultimately rejected. An agency is not required to make an RFA analysis, however, if it certifies that a rule will not have "a significant economic impact on a substantial number of small entities."

In the NOPR, the Commission certified that these regulations would not have a significant economic impact on a substantial number of small entities. No comments addressed this discussion or the Commission's certification. These rules are procedural in nature and, moreover, insofar as they affect members of the public and impose obligations on them, merely reflect and implement requirements of existing statutes and regulations. Thus, pursuant to section 605(b) of the RFA, the Commission certifies that these regulations will not have a significant economic impact on a substantial number of small entities.

V. Paperwork Reduction Act and Effective Date

The Paperwork Reduction Act (PRA) [88] and the Office of Management and Budget's (OMB)[89] regulations require that OMB approve certain information collection requirements imposed by agency rule. The provisions of this final rule have been submitted to OMB for its approval. Interested persons can obtain information on those provisions by contacting the Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington, DC 20426 (Attention: Ellen Brown, (202) 357-5311). Comments on the provisions of this final rule can be sent to the Office of Information and Regulatory Affairs of OMB, New Executive Office Building, Washington, DC 20503 (Attention: Desk Officer for the Federal Energy Regulatory Commission).

This rule will become effective January 19, 1988. However, if OMB has not approved this rule by that date the Commission will issue a notice temporarily suspending the effective date until OMB has approved the requirements.

[87] 5 U.S.C. 601-612 (1982).

[88] 44 U.S.C. 3501-20 (1982).

[89] 5 CFR 1320.12 (1987).

List of Subjects

18 CFR Part 2

Environmental impact statements, Administrative practice and procedure, Electric power.

18 CFR Part 157

Administrative practice and procedure, Natural gas, Reporting and recordkeeping requirements.

18 CFR Part 380

Environment, National Environmental Policy Act, Natural gas, Pipelines, Reporting and recordkeeping requirements.

In consideration of the foregoing, the Commission amends Parts 2, 157 and 380 of Chapter I, Title 18, Code of Federal Regulations, as set forth below.

By the Commission.

Lois D. Cashell,

Acting Secretary.

Appendix A—List of Commenters for RM87-15-000

Note.—This appendix will not be published in the Code of Federal Regulations.

1. Lone Star Gas Company
2. Montana Department of Fish, Wildlife & Parks
3. Pacific Gas and Electric Company
4. Texas Gas Transmission Corporation
5. Pacific Gas Transmission Company
6. Southern California Edison Company
7. Columbia Gas System Service Corporation
8. Izaak Walton League of America Inc.
9. Wisconsin Department of Natural Resources*
10. Independent Petroleum Association of America
11. Council on Environmental Quality
12. Interstate Natural Gas Association of America
13. American Gas Association
14. Edison Electric Institute
15. ANR Pipeline Company and Colorado Interstate Gas Company
16. Tennessee Gas Pipeline Company
17. Panhandle Eastern Pipe Line Company and Trunkline Gas Company
18. Consumers Power Company
19. Natural Resources Defense Council, Inc.
20. Consolidated Gas Transmission Corporation
21. American Rivers Inc., Friends of the Earth, American Whitewater Affiliation, and the Izaak Walton League of America
22. Enron Interstate Pipelines

*These comments were filed after the close of the comment period.

23. Texas Eastern Transmission Corporation
24. Friends of the River
25. Environmental Protection Agency
26. California Save Our Streams Council*
27. Transcontinental Gas Pipeline Corporation*
28. Washington Department of Ecology*
29. U.S. Department of the Interior, Office of Environmental Project Review*
30. National Marine Fisheries Service*
31. Planning and Conservation League*

PART 2—GENERAL POLICY AND INTERPRETATIONS

1. In Part 2, the authority citation is revised to read as follows:

Authority: Department of Energy Organization Act, 42 U.S.C. 7101–7352 (1982); E.O. No. 12009, 3 CFR 1978 Comp., p. 142; Federal Power Act, 16 U.S.C. 792–825r (1982); Natural Gas Act, 16 U.S.C. 717–717w (1982); Natural Gas Policy Act of 1978, 15 U.S.C. 3301–3432 (1982); Public Utility Regulatory Policies Act of 1978, 16 U.S.C. 2601–2645 (1982); National Environmental Policy Act, 16 U.S.C. 4321–4370a (1982).

2. Section 2.80 is revised to read as follows:

§ 2.80 Detailed environmental statement.

(a) It will be the general policy of the Federal Energy Regulatory Commission to adopt and to adhere to the objectives and aims of the National Environmental Policy Act of 1969 (NEPA) in its regulations promulgated for statutes under the jurisdiction of the Commission, including the Federal Power Act, the Natural Gas Act and the Natural Gas Policy Act. The National Environmental Policy Act of 1969 requires, among other things, all Federal agencies to include a detailed environmental statement in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment.

(b) Therefore, in compliance with the National Environmental Policy Act of 1969, the Commission staff will make a detailed environmental statement when the regulatory action taken by the Commission under the statutes under the jurisdiction of the Commission will have a significant environmental impact. The specific regulations implementing NEPA are contained in Part 380 of the Commission's regulations.

§ 2.81 [Removed]

§ 2.82 [Removed]

Appendix A—[Removed]

3. In Part 2, §§ 2.81, 2.82 and Appendix A are removed.

Appendix B—[Redesignated as Appendix A to Part 380]

4. In Part 2, Appendix B is redesignated as Appendix A of Part 380 and its title is revised to read "Appendix A—Guidelines for the Preparation of Environmental Reports for Applications Under the Natural Gas Act, as Specified in § 380.3 of the Commission's Regulations."

PART 157—APPLICATIONS FOR CERTIFICATES OF PUBLIC CONVENIENCE AND NECESSITY AND FOR ORDERS PERMITTING AND APPROVING ABANDONMENT UNDER SECTION 7 OF THE NATURAL GAS ACT

5. In Part 157, the authority citation is revised to read as follows:

Authority: Natural Gas Act, 15 U.S.C. 717–717w (1982); Department of Energy Organization Act, 42 U.S.C. 7101–7352 (1982); E.O. No. 12009, 3 CFR 1978 Comp., p. 142; Natural Gas Policy Act of 1978, 15 U.S.C. 3301–3432 (1982).

6. In § 157.102, paragraph (b)(1)(v) is revised to read as follows:

§ 157.102 Contents of application and other pleadings.

* * * * *

(b) * * *

(1) * * *

(v) An environmental report as specified in Appendix A of Part 380 of this chapter, and

* * * * *

7. In § 157.208, paragraph (c)(11) is revised to read as follows:

§ 157.208 Construction, acquisition, operation, and miscellaneous rearrangement of facilities.

* * * * *

(c) * * *

(11) A concise analysis discussing the relevant issues outlined in Appendix A of Part 380 of this chapter. The analysis must identify the existing environmental conditions and the expected significant impacts that the proposed action, including proposed mitigation measures, will cause to the quality of the human environment, including impact expected to occur to sensitive environmental areas. When compressor facilities are proposed, the analysis must also describe how the proposed action will be made to comply with applicable State Implementation Plans developed under the Clean Air Act. The analysis must also include a description of the contacts made, reports produced, and results of consultations which took place to ensure compliance with the Endangered Species Act, National Historic Preservation Act and the Coastal Zone Management Act.

* * * * *

8. A new Part 380 is added to read as follows:

PART 380—REGULATIONS IMPLEMENTING THE NATIONAL ENVIRONMENTAL POLICY ACT

Authority: National Environmental Policy Act of 1969, 42 U.S.C. 4321–4370a (1982); Department of Energy Organization Act, 42 U.S.C. 7101–7352 (1982); E.O. No. 12009, 3 CFR 1978 Comp., p. 142.

§ 380.1 Purpose.

The regulations in this part implement the Federal Energy Regulatory Commission's procedures under the National Environmental Policy Act of 1969. These regulations supplement the regulations of the Council on Environmental Quality, 40 CFR Parts 1500 through 1508 (1986). The Commission will comply with the regulations of the Council on Environmental Quality except where those regulations are inconsistent with the statutory requirements of the Commission.

§ 380.2 Definitions and terminology.

For purposes of this part—

(a) "Categorical exclusion" means a category of actions described in § 380.4, which do not individually or cumulatively have a significant effect on the human environment and which the Commission has found to have no such effect and for which, therefore, neither an environmental assessment nor an environmental impact statement is required. The Commission may decide to prepare environmental assessments for the reasons stated in § 380.4(b).

(b) "Commission" means the Federal Energy Regulatory Commission.

(c) "Council" means the Council on Environmental Quality.

(d) "Environmental assessment" means a concise public document for which the Commission is responsible that serves to:

(1) Briefly provide sufficient evidence and analysis for determining whether to prepare an environmental impact statement or a finding of no significant impact.

(2) Aid the Commission's compliance with NEPA when no environmental impact statement is necessary.

(3) Facilitate preparation of a statement when one is necessary. Environmental assessments must include brief discussions of the need for the proposal, of alternatives as required by section 102(2)(E) of NEPA, of the environmental impacts of the proposed action and alternatives, and a listing of agencies and persons consulted.

(e) "Environmental impact statement" (EIS) means a detailed written statement as required by section 102(2)(C) of NEPA. DEIS means a draft EIS and FEIS means a final EIS.

(f) "Environmental report" or ER means that part of an application submitted to the Commission by an applicant for authorization of a proposed action which includes information concerning the environment, the applicant's analysis of the environmental impact of the action, or alternatives to the action required by this or other applicable statutes or regulations.

(g) "Finding of no significant impact" (FONSI) means a document by the Commission briefly presenting the reason why an action, not otherwise excluded by § 380.4, will not have a significant effect on the human environment and for which an environmental impact statement therefore will not be prepared. It must include the environmental assessment or a summary of it and must note other environmental documents related to it. If the assessment is included, the FONSI need not repeat any of the discussion in the assessment but may incorporate it by reference.

§ 380.3 Environmental information to be supplied by an applicant.

(a) An applicant must submit information as follows:

(1) For any proposed action identified in §§ 380.5 and 380.6, and environmental report with the proposal as prescribed in paragraph (c) of this section.

(2) For any proposal not identified in paragraph (a)(1) of this section, any environmental information that the Commission may determine is necessary for compliance with these regulations, the regulations of the Council, NEPA and other Federal laws such as the Endangered Species Act, the National Historic Preservation Act or the Coastal Zone Management Act.

(b) An applicant must also:

(1) Provide all necessary or relevant information to the Commission;

(2) Conduct any studies that the Commission staff considers necessary or relevant to determine the impact of the proposal on the human environment and natural resources;

(3) Consult with appropriate Federal, regional, State, and local agencies during the planning stages of the proposed action to ensure that all potential environmental impacts are identified. (The specific requirements for consultation on hydropower projects are contained in § 4.38 of this chapter and in section 4(a) of the Electric Consumers Protection Act, Pub. L. No. 99-495, 100 Stat. 1243, 1246 (1986));

(4) Submit applications for all Federal and State approvals as early as possible in the planning process; and

(5) Notify the Commission staff of all other Federal actions required for completion of the proposed action so that the staff may coordinate with other interested Federal agencies.

(c) *Content of an applicant's environmental report for specific proposals*—(1) *Hydropower projects.* The information required for specific project applications under Part 4 of this chapter.

(2) *Natural gas projects.* (i) For any application filed under the Natural Gas Act for any proposed action identified in §§ 380.5 or 380.6, except for prior notice filings under § 157.208, as described in § 380.5(b), the information identified in Appendix A of this part.

(ii) For prior notice filings under § 157.208, the report described by § 157.208(c)(11) of this chapter.

§ 380.4 Projects or actions categorically excluded.

(a) *General rule.* Except as stated in paragraph (b) of this section, neither an environmental assessment nor an environmental impact statement will be prepared for the following projects or actions:

(1) Procedural, ministerial, or internal administrative and management actions, programs, or decisions, including procurement, contracting, personnel actions, correction or clarification of filings or orders, and acceptance, rejection and dismissal of filings;

(2)(i) Reports or recommendations on legislation not initiated by the Commission, and

(ii) Proposals for legislation and promulgation of rules that are clarifying, corrective, or procedural, or that do not substantially change the effect of legislation or regulations being amended;

(3) Compliance and review actions, including investigations (jurisdictional or otherwise), conferences, hearings, notices of probable violation, show cause orders, and adjustments under section 502(c) of the Natural Gas Policy Act of 1978 (NGPA);

(4) Review of grants or denials by the Department of Energy (DOE) of any adjustment request, and review of contested remedial orders issued by DOE;

(5) Information gathering, analysis, and dissemination;

(6) Conceptual or feasibility studies;

(7) Actions concerning the reservation and classification of United States lands as water power sites and other actions under section 24 of the Federal Power Act;

(8) Transfers of water power project licenses and transfers of exemptions under Part I of the Federal Power Act and Part 9 of this chapter;

(9) Issuance of preliminary permits for water power projects under Part I of the Federal Power Act and Part 4 of this chapter;

(10) Withdrawals of applications for certificates under the Natural Gas Act, or for water power project preliminary permits, exemptions, or licenses under Part I of the Federal Power Act and Part 4 of this chapter;

(11) Actions concerning annual charges or headwater benefits, charges for water power projects under Parts 11 and 13 of this chapter and establishment of fees to be paid by an applicant for a license or exemption required to meet the terms and conditions of section 30(c) of the Federal Power Act;

(12) Approval for water power projects under Part I of the Federal Power Act, of "as built" or revised drawings or exhibits that propose no changes to project works or operations or that reflect changes that have previously been approved or required by the Commission;

(13) Surrender and amendment of preliminary permits, and surrender of water power licenses and exemptions where no project works exist or ground disturbing activity has occurred and amendments to water power licenses and exemptions that do not require ground disturbing activity or changes to project works or operation;

(14) Exemptions for small conduit hydroelectric facilities as defined in § 4.30(b)(26) of this chapter under Part I of the Federal Power Act and Part 4 of this chapter;

(15) Electric rate filings submitted by public utilities, establishment of just and reasonable rates, and confirmation, approval, and disapproval of rate filings submitted by Federal power marketing agencies under sections 205 and 206 of the Federal Power Act;

(16) Approval of actions under sections 4(b), 203, 204, 301, 304, and 305 of the Federal Power Act relating to issuance and purchase of securities, acquisition or disposition of property, merger, interlocking directorates, jurisdictional determinations and accounting orders;

(17) Approval of electrical interconnections and wheeling under sections 202(b), 210, 211, and 212 of the Federal Power Act, that would not entail:

(i) Construction of a new substation or expansion of the boundaries of an existing substation;

(ii) Construction of any transmission line that operates at more than 115 kilovolts (KV) and occupies more than ten miles of an existing right-of-way; or

(iii) Construction of any transmission line more than one mile long if located on a new right-of-way;

(18) Approval of changes in land rights for water power projects under Part I of the Federal Power Act and Part 4 of this chapter, if no construction or change in land use is either proposed or known by the Commission to be contemplated for the land affected;

(19) Approval of proposals under Part I of the Federal Power Act and Part 4 of this chapter to authorize use of water power project lands or waters for gas or electric utility distribution lines, radial (sub-transmission) lines, communications lines and cables, storm drains, sewer lines not discharging into project waters, water mains, piers, landings, boat docks, or similar structures and facilities, landscaping or embankments, bulkheads, retaining walls, or similar shoreline erosion control structures;

(20) Action on applications for exemption under section 1(c) of the Natural Gas Act;

(21) Approvals of blanket certificate applications and prior notice filings under § 157.204 and §§ 157.209 through 157.218 of this chapter;

(22) Approvals of blanket certificate applications under §§ 284.221 through 284.224 of this chapter;

(23) Producers' applications for the sale of gas filed under §§ 157.23 through 157.29 of this chapter;

(24) Approval under section 7 of the Natural Gas Act of taps, meters, and regulating facilities located completely within an existing natural gas pipeline right-of-way or compressor station if company records show the land use of the vicinity has not changed since the original facilities were installed, and no significant nonjurisdictional facilities would be constructed in association with construction of the interconnection facilities;

(25) Review of natural gas rate filings, including any curtailment plans other than those specified in § 380.5(b)(5), and establishment of rates for transportation and sale of natural gas under sections 4 and 5 of the Natural Gas Act and sections 311 and 401 through 404 of the Natural Gas Policy Act of 1978;

(26) Review of approval of oil pipeline rate filings under Parts 340 and 341 of this chapter;

(27) Sale, exchange, and transportation of natural gas under sections 4, 5 and 7 of the Natural Gas Act that requires no construction of facilities;

(28) Abandonment in place of a minor natural gas pipeline (short segments of buried pipe of 6-inch inside diameter or less), or abandonment by removal of minor surface facilities such as metering stations, valves, and tops under section 7 of the Natural Gas Act so long as appropriate erosion control and site restoration takes place;

(29) Abandonment of service under any gas supply contract pursuant to section 7 of the Natural Gas Act;

(30) Approval of filing made in compliance with the requirements of a certificate for a natural gas project under section 7 of the Natural Gas Act or a preliminary permit, exemption, license, or license amendment order for a water power project under Part I of the Federal Power Act;

(b) *Exceptions to categorical exclusions.* (1) In accordance with 40 CFR 1508.4, the Commission and its staff will independently evaluate environmental information supplied in an application and in comments by the public. Where circumstances indicate that an action may be a major Federal action signficantly affecting the quality of the human environment, the Commission:

(i) May require an environmental report or other additional environmental information, and

(ii) Will prepare an environmental assessment or an environmental impact statement.

(2) Such circumstances may exist when the action may have an effect on one of the following:

(i) Indian lands;

(ii) Wilderness areas;

(iii) Wild and scenic rivers;

(iv) Wetlands;

(v) Units of the National Park System, National Refuges, or National Fish Hatcheries;

(vi) Anadromous fish or endangered species; or

(vii) Where the environmental effects are uncertain.

However, the existence of one or more of the above will not automatically require the submission of an environmental report or the preparation of an environmental assessment or an environmental impact statement.

§ 380.5 Actions that require an environmental assessment.

(1) An environmental assessment will normally be prepared first for the actions identified in this section. Depending on the outcome of the environmental assessment, the Commission may or may not prepare an environmental impact statement. However, depending on the location or scope of the proposed action, or the resources affected, the Commission may in specific circumstances proceed directly to prepare an environmental impact statement.

(b) The projects subject to an environmental assessment are as follows:

(1) Except as identified in §§ 380.4, 380.6 and 2.55 of this chapter, authorization under section 7 of the Natural Gas Act for the construction, replacement, or abandonment of compression, processing, or interconnecting facilities, onshore and offshore pipleines, metering facilities, LNG peak-shaving facilities, or other facilities necessary for the sale, exchange, storage, or transportation of natural gas;

(2) Prior notice filings under § 157.208 of this chapter for the rearrangement of any facility specified in §§ 157.202 (b)(3) and (6) of this chapter or the acquisition, construction, or operation of any eligible facility as specified in §§ 157.202 (b)(2) and (3) of this chapter;

(3) Abandonment or reduction of natural gas service under section 7 of the Natural Gas Act unless excluded under §§ 380.4 (a)(21), (28) or (29);

(4) Except as identified in § 380.6, conversion of existing depleted oil or natural gas fields to underground storage fields under section 7 of the Natural Gas Act.

(5) New natural gas curtailment plans, or any amendment to an existing curtailment plan under section 4 of the Natural Gas Act and sections 401 through 404 of the Natural Gas Policy

Act of 1978 that has a major effect on an entire pipeline system;

(6) Licenses under Part I of the Federal Power Act and Part 4 of this chapter for construction of any water power project—existing dam;

(7) Exemptions under section 405 of the Public Utility Regulatory Policies Act of 1978, as amended, and §§ 4.30(b)(27) and 4.101–4.106 of this chapter for small hydroelectric power projects of 5 MW or less;

(8) Licenses for additional project works at licensed projects under Part I of the Federal Power Act whether or not these are styled license amendments or original licenses;

(9) Licenses under Part I of the Federal Power Act and Part 4 of this chapter for transmission lines only;

(10) Applications for new licenses under section 15 of the Federal Power Act;

(11) Approval of electric interconnections and wheeling under sections 202(b), 210, 211, and 212 of the Federal Power Act, unless excluded under § 380.4(a)(17); and

(12) Regulations or proposals for legislation not excluded under § 380.4(a)(2).

(13) Surrender of water power licenses and exemptions where project works exist or ground disturbing activity has occurred and amendments to water power licenses and exemptions that require ground disturbing activity or changes to project works or operations.

§ 380.6 Actions that require an environmental impact statement.

(a) Except as provided in paragraph (b) of this section, an environmental impact statement will normally be prepared first for the following projects:

(1) Authorization under section 3 or 7 of the Natural Gas Act for construction and operation of jurisdictional liquefied natural gas import/export facilities used wholly or in part to liquefy, store, or regasify liquefied natural gas transported by water;

(2) Certificate applications under section 7 of the Natural Gas Act to develop an underground natural gas storage facility except where depleted oil or natural gas producing fields are used;

(3) Major pipeline construction projects under section 7 of the Natural Gas Act using right-of-way in which there is no existing natural gas pipeline; and

(4) Licenses under Part I of the Federal Power Act and Part 4 of this chapter for construction of any unconstructed water power project.

(b) If the Commission believes that a proposed action identified in paragraph (a) of this section may not be a major Federal action significantly affecting the quality of the human environment, an environmental assessment, rather than an environmental impact statement, will be prepared first. Depending on the outcome of the environmental assessment, an environmental impact statement may or may not be prepared.

(c) An environmental impact statement will not be required if an environmental assessment indicates that a proposal has adverse environmental affects and the proposal is not approved.

§ 380.7 Format of an environmental impact statement.

In addition to the requirements for an environmental impact statement prescribed in 40 CFR 1502.10 of the regulations of the Council, an environmental impact statement prepared by the Commission will include a section on the literature cited in the environmental impact statement and a staff conclusion section. The staff conclusion section will include summaries of:

(a) The significant environmental impacts of the proposed action;

(b) Any alternative to the proposed action that would have a less severe environmental impact or impacts and the action preferred by the staff;

(c) Any mitigation measures proposed by the applicant, as well as additional mitigation measures that might be more effective;

(d) Any significant environmental impacts of the proposed action that cannot be mitigated; and

(e) References to any pending, completed, or recommended studies that might provide baseline data or additional data on the proposed action.

§ 380.8 Preparation of environmental documents.

The preparation of environmental documents, as defined in § 1508.10 of the regulations of the Council, on hydroelectric projects, is the responsibility of the Commission's Office of Hydropower Licensing, 400 First Street NW., Washington, DC 20426, (202) 376–9171. The preparation of environmental documents on natural gas projects is the responsibility of the Commission's Office of Pipeline and Producer Regulation, (202) 357–8500, 825 North Capitol Street NW., Washington, DC 20426. Persons interested in status reports or information on environmental impact statements or other elements of the NEPA process, including the studies or other information the Commission may require on these projects, can contact these sections.

§ 380.9 Public availability of NEPA documents and public notice of NEPA related hearings and public meetings.

(a)(1) The Commission will comply with the requirements of 40 CFR 1506.6 of the regulations of the Council for public involvement in NEPA.

(2) If an action has effects of primarily local concern, the Commission may give additional notice in a Commission order.

(b) The Commission will make environmental impact statements, environmental assessments, the comments received, and any underlaying documents available to the public pursuant to the provisions of the Freedom of Information Act (5 U.S.C. 552 (1982)). The exclusion in the Freedom of Information Act for interagency memoranda is not applicable where such memoranda transmit comments of Federal agencies on the environmental impact of the proposed action. Such materials will be made available to the public at the Commission's Public Reference Room at 825 North Capitol Street NW., Room 1000, Washington, DC 20426 at a fee and in the manner described in Part 388 of this chapter. A copy of an environmental impact statement or environmental assessment for hydroelectric projects may also be made available for inspection at the Commission's regional office for the region where the proposed action is located.

§ 380.10 Participation in Commission proceedings.

(a) *Intervention proceedings involving a party or parties*—(1) *Motion to intervene.* (i) In addition to submitting comments on the NEPA process and NEPA related documents, any person may file a motion to intervene in a Commission proceeding dealing with environmental issues under the terms of § 385.214 of this chapter. Any person who files a motion to intervene on the basis of a draft environmental impact statement will be deemed to have filed a timely motion, in accordance with § 385.214, as long as the motion is filed within the comment period for the draft environmental impact statement.

(ii) Any person that is granted intervention after petitioning becomes a party to the proceeding and accepts the record as developed by the parties as of the time that intervention is granted.

(2)(i) *Issues not set for trial-type hearing.* An intervenor who takes a position on any environmental issue that has not yet been set for hearing must file a timely motion with the Secretary containing an analysis of its position on such issue and specifying any differences with the position of Commission staff or an applicant upon which the intervenor wishes to be heard at a hearing.

(ii) *Issues set for trial-type hearing.* (A) Any intervenor that takes a position on an environmental issue set for hearing may offer evidence for the record in support of such position and otherwise participate in accordance with the Commission's Rules of Practice and Procedure. Any intervenor must specify any differences from the staff's and the applicant's positions.

(B) To be considered, any facts or opinions on an environmental issue set for hearing must be admitted into evidence and made part of the record of the proceeding.

(b) *Rulemaking proceedings.* Any person may file comments on any environmental issue in a rulemaking proceeding.

§ 380.11 Environmental decisionmaking.

(a) *Decision points.* For the actions which require an environmental assessment or environmental impact statement, environmental considerations will be addressed at appropriate major decision points.

(1) In proceedings involving a party or parties and not set for trial-type hearing, major decision points are the approval or denial of proposals by the Commission or its designees.

(2) In matters set for trial-type hearing, the major decision points are the initial decision of an administrative law judge or the decision of the Commission.

(3) In a rulemaking proceeding, the major decision points are the Notice of Proposed Rulemaking and the Final Rule.

(b) *Environmental documents as part of the record.* The Commission will include environmental assessments, findings of no significant impact, or environmental impact statements, and any supplements in the record of the proceeding.

(c) *Application denials.* Notwithstanding any provision in this Part, the Commission may dismiss or deny an application without performing an environmental impact statement or without undertaking environmental analysis.

9. In newly redesignated Appendix A of Part 380, guidelines (2), (3), and (8) are revised to read as follows:

Appendix A—Guidelines for the Preparation of Environmental Reports for Applications Under the Natural Gas Act, as Specified in § 380.3 of the Commission's Regulations.

* * * * *

(2) Pertain to actions under Part 380, Chapter I, Title 18, Code of Federal Regulations;

(3) Provide the basis for the preparation of environmental reports being prepared pursuant to Part 380 by applicants for the construction of pipeline facilities under the jurisdiction of the Commission; and

* * * * *

(8) These guidelines have been prepared to relate to a wide range of possible actions that could come before the Commission for consideration. The applicant is expected to make the detail of the environmental report commensurate with the complexity of the possible environmental impact of the proposed action. It is important to recognize that there is some duplication in the information requested. Often a section asks for an evaluation from a different viewpoint rather than absolutely new information. Upon review of the applicant's environmental report, staff may request additional informaiton.

[FR Doc. 28894 Filed 12-16-87; 8:45 am]

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18 CFR Parts 2 and 284

[Docket No. RM87-34-053]

Natural Gas Pipelines After Partial Wellhead Decontrol; Rehearing

Issued: December 14, 1987.

AGENCY: Federal Energy Regulatory Commission, DOE.

ACTION: Interim rule; Order granting rehearing solely for purposes of further consideration.

SUMMARY: The Federal Energy Regulatory Commission is granting rehearing of Order No. 500-B and the Order Explaining Crediting Provisions of Order No. 500 solely for the purpose of affording sufficient time to consider the numerous issues raised in the requests for rehearing of those orders. This action does not constitute a grant or denial of rehearing, either in whole or in part.

EFFECTIVE DATE: December 14, 1987.

FOR FURTHER INFORMATION CONTACT: Richard Howe, Jr., Office of General Counsel, Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington, DC 20426, (202) 357-8274.

SUPPLEMENTARY INFORMATION:

Order Granting Rehearing Solely for Purposes of Further Consideration

Before Commissioners: Martha O. Hesse, Chairman; Anthony G. Sousa, Charles G. Stalon, Charles A. Trabandt and C. M. Naeve.

On October 16, 1987, the Commission issued Order No. 500-B [1] denying rehearing in part, granting rehearing in part, and modifying Order No. 500.[2] On the same day, the Commission also issued an order explaining the take-or-pay crediting provisions of Order No. 500.[3] On November 12, 13 and 16, the Commission received eleven requests for rehearing of those orders.

In order to afford sufficient time to consider the issues raised in the rehearing requests, it is necessary to grant rehearing of Order No. 500-B and the explanatory order for the limited purpose of further consideration.

The Commission orders: Rehearing of Order No. 500-B and the Order Explaining Crediting Provisions of Order No. 500 is hereby granted for the limited purpose of further consideration. This action does not constitute a grant or denial of rehearing, either in whole or in part. As provided in § 385.713(d) of the Commission's Rules of Practice and Procedure, no answers to the requests for rehearing will be entertained by the Commission.

By the Commission.

Lois D. Cashell,

Acting Secretary.

[FR Doc. 87-29016 Filed 12-16-87; 8:45 am]

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DEPARTMENT OF HEALTH AND HUMAN SERVICES

Social Security Administration

20 CFR Part 404

Federal Old-Age, Survivors and Disability Insurance; Effect of Pension From Noncovered Employment

AGENCY: Social Security Administration, HHS.

ACTION: Final rules.

SUMMARY: In these regulations, we explain the modified methods of computing the primary insurance amount of a worker who is first eligible after 1985 for both Social Security old-age or disability insurance benefits and a pension based on his or her noncovered work. Section 113 of Pub. L. 98-21 (the Social Security Amendments of 1983) is intended to eliminate the windfall in Social Security benefits that goes to workers who spent many years in work not covered by Social Security but only a few years in covered work.

[1] 52 FR 39630 (Oct. 23, 1987).

[2] 52 FR 30334 (Aug. 14, 1987).

[3] 41 FERC ¶ 61,025 (1987).