Sunshine Act Meetings

Federal Register
Vol. 56, No. 97
Monday, May 20, 1991

This section of the FEDERAL REGISTER contains notices of meetings published under the "Government in the Sunshine Act" (Pub. L. 94-409) 5 U.S.C. 552b(e)(3).

COMMODITY FUTURES TRADING COMMISSION

"FEDERAL REGISTER" CITATION OF PREVIOUS ANNOUNCEMENT: 56 F.R. 20643.

PREVIOUSLY ANNOUNCED TIME AND DATE OF MEETING: 11:30 a.m., Friday, May 24, 1991.

CHANGE IN THE MEETING: The Commodity Futures Trading Commission has cancelled the closed surveillance review meeting.

CONTACT PERSON FOR MORE INFORMATION: Jean A. Webb, Secretary of the Commission.

Jean A. Webb,
Secretary of the Commission.
[FR Doc. 91-12049 Filed 5-16-91; 2:51 p.m.]
BILLING CODE 6351-01-M

COMMODITY FUTURES TRADING COMMISSION

"FEDERAL REGISTER" CITATION OF PREVIOUS ANNOUNCEMENT: 56 F.R. 20643.

PREVIOUSLY ANNOUNCED TIME AND DATE OF MEETING: 10:00 a.m., Thursday, May 30, 1991.

CHANGE IN THE MEETING: The Commodity Futures Trading Commission has postponed the open meeting to discuss the Registration of Broker Associations/final rules. This discussion will be rescheduled for the June calendar.

CONTACT PERSON FOR MORE INFORMATION: Jean A. Webb, Secretary of the Commission.

Jean A. Webb,
Secretary of the Commission.
[FR Doc. 91-12050 Filed 5-16-91; 2:51 pm]
BILLING CODE 6351-01-M

COMMODITY FUTURES TRADING COMMISSION

TIME AND DATE: 11 am, Friday, June 7, 1991.

PLACE: 2033 K St., NW., Washington, DC, 8th Floor Hearing Room.

STATUS: Closed.

MATTERS TO BE CONSIDERED: Surveillance Matters.

CONTACT PERSON FOR MORE INFORMATION: Jean A. Webb, 254-6314.

Jean A. Webb,
Secretary of the Commission.
[FR Doc. 91-12051 Filed 5-16-91; 2:51 pm]
BILLING CODE 6351-01-M

COMMODITY FUTURES TRADING COMMISSION

TIME AND DATE: 11:00 a.m., Friday, June 14, 1991.

PLACE: 2033 K St., N.W., Washington, D.C., 8th Floor Hearing Room.

STATUS: Closed.

MATTERS TO BE CONSIDERED: Surveillance Matters.

CONTACT PERSON FOR MORE INFORMATION: Jean A. Webb, 254-6314.

Jean A. Webb,
Secretary of the Commission.
[FR Doc. 91-12052 Filed 5-16-91; 2:51 pm]
BILLING CODE 6351-01-M

COMMODITY FUTURES TRADING COMMISSION

TIME AND DATE: 11:00 a.m., Friday, June 21, 1991.

PLACE: 2033 K St., N.W., Washington, D.C., 8th Floor Hearing Room.

STATUS: Closed.

MATTERS TO BE CONSIDERED: Surveillance Matters.

CONTACT PERSON FOR MORE INFORMATION: Jean A. Webb, 254-6314.

Jean A. Webb,
Secretary of the Commission.
[FR Doc. 91-12053 Filed 5-16-91; 2:51 pm]
BILLING CODE 6351-01-M

COMMODITY FUTURES TRADING COMMISSION

TIME AND DATE: 11:00 a.m., Friday, June 28, 1991.

PLACE: 2033 K St., N.W., Washington, D.C., 8th Floor Hearing Room.

STATUS: Closed.

MATTERS TO BE CONSIDERED: Surveillance Matters.

CONTACT PERSON FOR MORE INFORMATION: Jean A. Webb, 254-6314.

Jean A. Webb,
Secretary of the Commission.
[FR Doc. 91-12054 Filed 5-16-91; 2:51 pm]
BILLING CODE 6351-01-M

NEIGHBORHOOD REINVESTMENT CORPORATION

Thirteenth Annual Meeting of the Board of Directors

TIME AND DATE: 10:00 a.m., Wednesday, May 22, 1991.

PLACE: Neighborhood Reinvestment Corporation, 1325 G Street, N.W.-8th Floor Board Room, Washington, D.C. 20005.

STATUS: Open.

CONTACT PERSON FOR MORE INFORMATION: Martha A. Diaz-Ortiz, Acting Secretary (202) 376-2421.

Agenda

I. Call to Order
II. Approval of Minutes
  a. January 10, 1991, Regular Meeting
  b. February 21, 1991, Special Meeting
III. Election of Chairperson
  Election of Vice Chairperson
IV. Committee Appointments
  a. Personnel Committee
  b. Budget Committee
  c. Audit Committee
V. Election of Officers
VI. Executive Director's Quarterly Management Report
VII. Budget Financial Reports
VIII. Adjourn

Martha A. Diaz-Ortiz,
Acting Secretary.
[FR Doc. 91-12014 Filed 5-16-91; 1:27 p.m.]
BILLING CODE 7570-09-M

NATIONAL CREDIT UNION ADMINISTRATION

Notice of Previously Held Emergency Meeting

TIME AND DATE: 2:35 p.m., Tuesday, May 14, 1991.

PLACE: Chairman's Office, 6th Floor, 1776 G Street, NW., Washington, DC 20456.

STATUS: Closed.

MATTER CONSIDERED:

1. Administrative Action under Section 206 of the Federal Credit Union Act. Closed pursuant to exemptions (5), (7), (8), (9)(A)(ii), and (9)(B).

The Board voted unanimously to hold a closed meeting, under the exemptions listed above, to clarify an action taken at an earlier closed meeting on the same date. General Counsel Robert Fenner certified that the meeting could be closed under those exemptions.

FOR FURTHER INFORMATION CONTACT: Becky Baker, Secretary of the Board, telephone (202) 682-9600.

Becky Baker,

Secretary of the Board.

[FR Doc. 91-12000 Filed 5-16-91; 12:12 pm]

BILLING CODE 7535-01-M

RESOLUTION TRUST CORPORATION

Notice of Agency Meeting

Pursuant to the provisions of the "Government in the Sunshine Act" (5 U.S.C. 552b), notice is hereby given that the Board of Directors of the Resolution Trust Corporation will meet in open session following the adjournment of the FDIC open meeting beginning at 2:00 p.m. on Tuesday, May 21, 1991 to consider the following matters:

Summary Agenda: None.

Discussion Agenda:

A. *Memorandum re:* Proposed policy regarding the sale of RTC properties through negotiated purchase offers.

B. *Memorandum re:* Proposed policy regarding the payment of real estate taxes on RTC properties.

The meeting will be held in the Board Room on the sixth floor of the FDIC Building located at 550—17th Street, NW., Washington, DC.

Requests for further information concerning the meeting may be directed to Mr. John M. Buckley, Jr., Executive Secretary of the Resolution Trust Corporation, at (202) 416-7282.

Dated: May 15, 1991.

Resolution Trust Corporation.

William J. Tricarico,

Assistant Executive Secretary.

[FR Doc. 91-11952 Filed 5-16-91; 9:41 am]

BILLING CODE 6714-01-M

FEDERAL DEPOSIT INSURANCE CORPORATION

Notice of Agency Meeting

Pursuant to the provisions of the "Government in the Sunshine Act" (5 U.S.C. 552b), notice is hereby given that at 2:02 p.m. on Tuesday, May 14, 1991, the Board of Directors of the Federal Deposit Insurance Corporation met in closed session to consider the following:

Matters relating to the probable failure of certain insured banks.

Administrative enforcement proceedings.

Matters relating to the Corporation's corporate activities.

In calling the meeting, the Board determined, on motion of Director C.C. Hope, Jr. (Appointive), seconded by Vice Chairman Andrew C. Hove, Jr., concurred in by Director T. Timothy Ryan, Jr. (Office of Thrift Supervision), and Chairman L. William Seidman, that Corporation business required its consideration of the matters on less than seven days' notice to the public; that no earlier notice of the meeting was practicable; that the public interest did not require consideration of the matters in a meeting open to public observation; and that the matters could be considered in a closed meeting by authority of subsections (c)(2), (c)(4), (c)(6), (c)(8), (c)(9)(A)(i), (c)(9)(A)(ii), and (c)(9)(B) of the "Government in the Sunshine Act" (5 U.S.C. 552b(c)(2), (c)(4), (c)(6), (c)(8), (c)(9)(A)(i), (c)(9)(A)(ii), and (c)(9)(B).

The meeting was held in the Board Room of the FDIC Building located at 550-17th Street, NW., Washington, DC.

Dated: May 15, 1991.

Federal Deposit Insurance Corporation.

Robert E. Feldman,

Deputy Executive Secretary.

[FR Doc. 91-11947 Filed 5-15-91; 5:06 pm]

BILLING CODE 6714-01-M

Corrections

Federal Register
Vol. 56, No. 97
Monday, May 20, 1991

This section of the FEDERAL REGISTER contains editorial corrections of previously published Presidential, Rule, Proposed Rule, and Notice documents. These corrections are prepared by the Office of the Federal Register. Agency prepared corrections are issued as signed documents and appear in the appropriate document categories elsewhere in the issue.

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 1205

[CN-91-004]

Amendment to the Procedure for the Conduct of Referenda in Connection With Cotton Research and Promotion Orders

Correction

In proposed rule document 91-10213 beginning on page 20378 in the issue of Friday, May 3, 1991, make the following corrections:

1. On page 20379:

a. In the first column, in the first full paragraph, in the second line, insert the following after "proposed":

"rule. A 15 day comment period is considered appropriate".

b. In the same column, in the same paragraph, in the fourth line from the bottom, insert the following after "prevent":

"unnecessary delays in implementing any order that may result".

§ 1205.200 [Corrected]

c. In the second column, in § 1205.200, in the third line, the first "of" should read "or".

§ 1205.201 [Corrected]

d. In the same column, in § 1205.201(r), in the fifth line from the bottom, insert "de" after "the".

§ 1205.202 [Corrected]

e. In the same column, in § 1205.202(a)(2), in the second line, insert "advance" after "reasonable".

§ 1205.205 [Corrected]

2. On page 20380, in the third column, in § 1205.205(c), in the third line from the bottom, the first "of" should read "or".

BILLING CODE 1505-01-D

DEPARTMENT OF AGRICULTURE

Agricultural Stabilization and Conservation Service

7 CFR Parts 735, 736, 737, 738, 739, 740, 741, 742

Liquidation and Informal Hearing Procedures Under the U.S. Warehouse Act

Correction

In proposed rule document 91-10647 beginning on page 21452 in the issue of Thursday, May 9, 1991, make the following corrections:

1. On page 21452, in the third column, in the third paragraph, in the seventh line, "warehouse" should read "warehouses".

§ § 735.89, 736.99, 737.78, 738.72, 739.80, 740.81, 741.73, 742.84 [Corrected]

2. On page 21453, in the third column, in § § 735.89, 736.99, 737.78, 738.72, 739.80, 740.81, 741.73, 742.84, in paragraph (e), in the sixth line remove the "(" before "If".

3. On the same page, in the same column, in amendatory instruction 3, in the second line, "hearing" should read "heading".

§ 736.87 [Corrected]

4. On page 21454:

a. In the first column, in § 736.87(b), in the fifth line, "gains" should read "grains".

b. In the same column, in § 736.87(d)(1), in the second line, the first "of" should read "to".

c. In the 2d column, in § 736.87(d)(8), in the 12th line, "bases" should read "basis"; and in the 21st line, "office's" should read "officer's".

BILLING CODE 1505-01-D

COMMITTEE FOR PURCHASE FROM THE BLIND AND OTHER SEVERELY HANDICAPPED

Procurement List; Proposed Additions

Correction

In notice document 91-10542 appearing on page 20414, in the issue of Friday, May 3, 1991, in the second column, in the fifth line from the bottom, after "8410-01-277-3610" insert "thru".

BILLING CODE 1505-01-D

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 81

[AD-FRL-3923-5]

Preparation, Adoption, and Submittal of State Implementation Plans; PM-10, Sulfur Dioxide, and Lead Nonattainment and Unclassifiable Area Designations

Correction

In rule document 91-9369 beginning on page 16274, in the issue of Monday, April 22, 1991, make the following correction:

On page 16276, in the second column, under **Table II**, in the second column of the table, after "Harris Co." in the first column of the table, insert "X" in the second column.

BILLING CODE 1505-01-D

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 558

New Animal Drugs for Use in Animal Feeds; Decoquinate

Correction

In rule document 91-9026 beginning on page 15498, in the issue of Wednesday, April 17, 1991, in the second column, under **FOR FURTHER INFORMATION CONTACT**, in the second line "(HFC-135)" should read "(HFV-135)".

BILLING CODE 1505-01-D

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. 91-0143]

Optical Radiation Corp.; Premarket Approval of OrcolonU, Intraocular Fluid for Use as a Surgical Aid in Anterior Segment Procedures

Correction

In notice document 91-9815, beginning on page 19118, in the issue of Thursday, April 25, 1991, in the third column, in the first full paragraph, in the second line insert "data" after "effectiveness".

BILLING CODE 1505-01-D

SECURITIES AND EXCHANGE COMMISSION

17 CFR Part 270

[Rel. Nos. 33-6882; IC-18005; S7-13-90]

RIN 3235-AD91

Revisions to Rules Regulating Money Market Funds

Correction

In rule document 91-4438 beginning on page 8113 in the issue of Wednesday, February 27, 1991, make the following corrections:

§ 270.2a-7 [Corrected]

On page 8126:

1In the first column, in § 270.2a-7 (a)(20)(ii)(A), in the first line "with" should read "was".

2In the same column, in § 270.2a-7 (a)(21)(a), delete "(a)" after "(21)".

3In the third column, in § 270.2a-7 (c)(3) in the second line "NRSRO and" should read "NRSRO) *and*".

BILLING CODE 1505-01-D

federal register

Monday
May 20, 1991

Part II

Department of Energy

Federal Energy Regulatory Commission

18 CFR Parts 4, 16, 375, and 380

Regulations Governing Submittal of Proposed Hydropower License Conditions and Other Matters; Final Rule

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

18 CFR Parts 4, 16, 375, and 380

[Docket No. RM89-7-000; Order No. 533]

Regulations Governing Submittal of Proposed Hydropower License Conditions and Other Matters

Issued: May 8, 1991.

AGENCY: Federal Energy Regulatory Commission, DOE.

ACTION: Final Rule.

SUMMARY: The Federal Energy Regulatory Commission (Commission) is adopting a final rule to codify many existing practices of the Commission in the hydropower area, such as procedures for conducting hearings by notice and comment. The final rule establishes deadlines for participation by resource agencies, Indian tribes and other parties. The final rule clarifies Commission practices in a number of areas, such as when the prefiling consultation applies to amendments of license, when water quality certifications are deemed waived or must be renewed, and when and how the Commission will commence its review of applications.

The final rule establishes a dispute resolution mechanism, by which the Commission may resolve disputes over necessary scientific studies that arise during the pre-filing consultation process. The final rule incorporates into the regulations procedures for the Federal Power Act section 10(j) consultation process. The final rule also provides for greater notice and opportunity for involvement by the public and by Indian tribes in the hydropower licensing process.

EFFECTIVE DATE: June 19, 1991.

FOR FURTHER LEGAL INFORMATION CONTACT: Merrill Hathaway, Office of the General Counsel, Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington, DC 20426, (202) 208–0825.

FOR FURTHER TECHNICAL INFORMATION CONTACT: William Wakefield, Office of Hydropower Licensing, Federal Energy Regulatory Commission, 810 First Street, NE., Washington, DC 20426, (202) 219–2784.

SUPPLEMENTARY INFORMATION: In addition to publishing the full text of this document in the **Federal Register**, the Commission also provides all interested persons an opportunity to inspect or copy the contents of this document during normal business hours in, room 3308 at the Commission's headquarters, 941 North Capitol Street, NE., Washington, DC 20426.

The Commission's Issuance Posting System (CIPS), an electronic bulletin board service, provides access to the texts of formal documents issued by the Commission. CIPS is available at no charge to the user and may be accessed using a personal computer with a modem by dialing (202) 208–1397. To access CIPS, set your communications software to use 300, 1200, or 2400 baud, full duplex, no parity, 8 data bits, and 1 stop bit. The full text of this final rule will be available on CIPS for 30 days from the date of issuance. The complete text on diskette in WordPerfect format may also be purchased from the Commission's copy contractor, La Dorn Systems Corporation, also located in room 3308, 941 North Capitol Street, NE., Washington, DC 20426.

Table of Contents

I. Introduction

On March 6, 1990, the Federal Energy Regulatory Commission (Commission) issued a Notice of Proposed Rulemaking (NOPR) proposing to revise its regulations governing submittal of proposed hydropower license conditions and other matters.[1] In response to the comments received,[2] the Commission has decided to adopt a final rule in this proceeding. The regulations adopted implement, in part, provisions added to the Federal Power Act (FPA) [3] by the Electric Consumers Protection Act of 1986 (ECPA).[4]

The Commission is adopting this final rule in order to streamline the hydropower licensing process by making it more efficient, fairer and more understandable for all participants. The final rule codifies many existing practices of the Commission in the hydropower area, such as procedures for conducting hearings by notice and comment. The final rule expedites the preparation and processing of hydropower applications by establishing deadlines for participation by resource agencies, Indian tribes, and other parties. The final rule also clarifies Commission practices in a number of important areas, such as when the pre-filing consultation applies to amendments of license, when water quality certifications are deemed waived or must be renewed, and when and how the Commission will commence its review of applications.

The final rule establishes a dispute resolution mechanism, by which the Commission may assist in resolving disputes over necessary scientific studies that arise during the pre-filing consultation process. The final rule incorporates into the regulations procedures for the FPA section 10(j) consultation process, pursuant to ECPA. The final rule also provides for greater notice and opportunity for public involvement in the hydropower licensing process, by requiring applicants for an original license to maintain public files, conduct a public meeting prior to filing, and provide public notice of the filing of their applications. These requirements are similar to those already in effect for applicants for a new license.

The final rule also explains the relationship of the administrative processes under FPA section 10(j), the Fish and Wildlife Coordination Act (FWCA),[5] and the National

[1] 50 FERC ¶ 61,270, 55 FR 9894 (March 16, 1990).
[2] The commenters are listed in appendix A.
[3] 16 U.S.C. 791a *et seq.* (1988).
[4] Pub. L. No. 99–495, 100 Stat. 1243 (Oct. 16, 1986) (codified at 16 U.S.C. 791a *et seq.*).
[5] 16 U.S.C. 661 *et seq.* (1988).

Environmental Policy Act (NEPA),[6] clarifies the application of the Commission's *ex parte* rules to consultation with governmental agencies on license and exemption conditions, and clarifies the role of other governmental agencies, Indian tribes, citizens' groups and members of the public in the hydropower licensing and exemption processes.

II. Reporting Burden

The public reporting burden for this collection of information is estimated to average 832 hours per response for water power projects having more than five megawatt (MW) capacity and 178 hours per response for water power projects having five MW capacity or less, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding these burden estimates or any other aspect of this collection of information, including suggestions for reducing this burden, to the Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington, DC 20426 (Attention: Michael Miller, Office of Information Policy and Standards, (202) 208–1415); and to the Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, DC 20503 (Attention: Desk Officer for the Federal Energy Regulatory Commission).

III. Summary of the Final Rule

The final rule defines a number of terms used in the procedural regulations governing hydropower proceedings. Fish and wildlife agencies are those agencies, state or federal, with responsibility for managing fish and wildlife resources. There may be more than one fish and wildlife agency in a particular state. Fish and wildlife recommendations are those filed by fish and wildlife agencies pursuant to the FWCA to be considered for inclusion in licenses and to be included in exemptions, but do not include recommendations by other parties or recommendations that a proposed hydropower project not be built or for prelicensing scientific studies.

Indian tribes are defined in reference to the list published annually by the U.S. Department of the Interior. To have a right to be consulted fully in the pre-filing consultation process for a particular hydropower proposal, an Indian tribe's legal rights must be affected by the proposal, as where the project would be located on Indian lands or could interfere with the tribe's statutory or treaty rights.

A fishway is defined as a structure that is part of a hydropower facility's project works that is used for the upstream passage of fish around or through a hydropower project. An application is deemed ready for environmental analysis when all of the significant additional information requested by the Commission is filed.

The pre-filing consultation process adopted in the regulations for applicants for original licenses or exemptions parallels that previously adopted for applicants for new licenses, and specifies time limits for various actions during the pre-filing process. The process requires applicants to inform the public, resource agencies and Indian tribes of their plans; to conduct necessary scientific studies on the impact of the proposed project on resources; to submit a draft application to the resource agencies and Indian tribes; and to attempt to resolve differences with these parties and to consider all significant resource impacts prior to filing an application with the Commission. The potential applicant must keep the Commission informed of its progress, and the applicant or interested resource agencies or affected Indian tribes would have a right to request that the Commission resolve any disputes between the applicant and the resource agencies or tribes concerning necessary scientific studies that the applicant must conduct or information that it must furnish as part of its application. The final stage of the pre-filing consultation process is the filing of a complete application with the Commission, with service of copies on the parties consulted.

The Commission may waive the requirements of the pre-filing consultation process when appropriate, and the regulations make clear which applications for amendment of license are subject to the pre-filing consultation requirements. These provisions are designed to encourage licensees to improve the efficiency of their hydropower facilities and to allow for expedited submission of applications when called for by emergencies or other special circumstances.

The Commission has decided not to codify in the regulations at this time any specific standards for determining when a particular scientific study must be conducted by an applicant, but the preamble discusses the standards that the Commission will consider in making these determinations, both during the pre-filing dispute resolution process and after an application is filed. The Commission's regulations also do not generally distinguish between different types of applications in terms of the procedural requirements applied during the pre-filing consultation and hearing stages, but any difference in the complexity and number of issues raised by an application may be used as a basis for the Commission's granting waivers or extensions of time to comply with the deadlines set forth in the regulations, when appropriate.

The new regulations clarify that hearings on hydropower applications are typically conducted by notice and comment, with all interested parties having an opportunity to participate in writing. Parties, resource agencies, and Indian tribes must submit their comments, recommendations, and any terms and conditions or prescriptions within specific time limits after an application is deemed ready for environmental analysis. These time limits may be extended by the Commission only for good cause shown.

The final rule addresses the Commission's responsibilities to consult with state and federal agencies. Under FPA section 4(e), the Commission may issue a license for a hydropower project located within a federal reservation only after it finds that the license will not interfere or be inconsistent with the purpose for which the reservation was created or acquired, and the license is subject to conditions set by the agency (such as the Forest Service) supervising the reservation. Under section 18, the Commission requires fishways at licensed projects as prescribed by the Secretary of the Interior or Commerce. Under section 10(j), the Commission is required to include in licenses conditions for the protection, mitigation, and enhancement of fish and wildlife, based on recommendations made by fish and wildlife agencies. If the Commission believes that such a recommendation may be inconsistent with applicable law, the Commission must attempt to resolve such inconsistency, and the Commission may reject such recommendation only if it finds that it is inconsistent with the law.

The Commission has not revised its *ex parte* or NEPA regulations, but the preamble discusses the relationship of these regulations to hydropower hearings and the FWCA and FPA 10(j) process. In specified respects the final rule grants to parties participation rights beyond those required by the *ex parte* rule. The Commission intends to consider generic revisions to its *ex parte* rule in a separate proceeding; the

[6] 42 U.S.C. 4321 *et seq* (1983).

regulations adopted herein, therefore, are subject to modification in that proceeding. The Commission may also consider proposals for alternative NEPA procedures in a future proceeding.

The new regulations codify the Commission's section 10(j) procedures and set forth in detail the rights of parties, resource agencies, and Indian tribes to participate in the process. The Commission will consult with fish and wildlife agencies, make preliminary determinations of inconsistency of section 10(j) recommendations with applicable law, and attempt to resolve any differences with fish and wildlife agencies. Notice of all such determinations will be given to all parties and to affected resource agencies and Indian tribes, which will have an opportunity to submit comments in response to the Commission. All of these entities will have advance notice of and an opportunity to participate in any meetings held to discuss section 10(j) recommendations with fish and wildlife agencies.

The Commission has decided to limit intervention rights of all persons, resource agencies, and Indian tribes to those specified in the regulations. As at present, those entities will be able to intervene in any hydropower proceeding after the application is filed, and motions to intervene will be invited after the application is accepted for filing as well as in response to a draft environmental impact statement if one is prepared in the proceeding. Order No. 511, allowing fish and wildlife agencies to intervene after a Commission decision on a hydropower application is issued, is rescinded.

These new regulations significantly expand the rights of participation in hydropower proceedings for Indian tribes and the public. Applicants are required to consult affected tribes in the pre-filing consultation process. Applicants must hold public meetings at the beginning of this process and must maintain a public file of their application materials and make copies of these materials available to the public on request and at reasonable cost. Applicants must give public notice when they file their applications with the Commission. As under current practice, members of the public and Indian tribes may intervene as parties in any hydropower proceeding and may file protests of any hydropower application. Anyone may file recommendations and comments on the application with the Commission. All parties may request rehearing of a Commission decision on a hydropower application and thereafter seek judicial review under the FPA.

The final rule contains transition provisions that generally do not require the repetition of steps previously taken under the Commission's procedural regulations as they existed prior to this revision. All applicants, however, must conduct a public meeting prior to the filing of any application with the Commission after the effective date of the final rule. The rule changes the authority delegated to the Director of the Office of Hydropower Licensing (OHL), to clarify his authority to issue waivers of the pre-filing consultation requirements and to conduct section 10(j) consultations. The Commission rejects the suggestion made in the comments that it declare that FPA section 4(e) mandatory conditions of a federal land management agency do not apply to applications for new licenses.

In order to assist in the processing of the large number of applications for new licenses due to be filed this year, this order also changes the filing requirements for all applicants for a new license whose application is due between June 19, 1991 and January 1, 1992. All such applicants must serve copies of their applications on the Commission Regional Office, the U.S. Bureau of Land Management District Office, and U.S. Corps of Engineers District Office for the area in which the project is to be located, as well as the U.S. Department of the Interior in Washington, DC. Applicants hand-delivering their applications to the Commission must deliver five copies to the Director, Division of Project Review, Office of Hydropower Licensing. The number of copies required to be filed with the Secretary is reduced by the number of copies mailed or served under this new requirement.

IV. Discussion

A. Definitions

1. *Fish and Wildlife Agencies.* We proposed to include in the definition of "fish and wildlife agencies" the United States Fish and Wildlife Service, the National Marine Fisheries Service, and the state agency in charge of administrative management over fish and wildlife resources of the state in which a proposed hydropower project is located.[7]

In the NOPR, we stated that we would not include Indian tribes in the definition because they are not fish and wildlife agencies. We noted that Congress used these terms distinctly in ECPA section 3 and decided not to extend the procedural requirements of FPA section 10(j) to apply to other parties and resource agencies. Thus, the recommendations of Indian tribes would not be subjected to the specific requirements of FPA section 10(j). However, we also stated that it might be appropriate to give Indian tribes that might be affected by a particular hydropower project a role in the pre-filing consultation process that parallels the role of fish and wildlife agencies in other respects. Thus, we stated that, pursuant to FPA section 10(a)(2) and (3),[8] the Commission would solicit recommendations (including fish and wildlife recommendations) from Indian tribes and consider those recommendations in its final decision on a hydropower application. Furthermore, we included Indian tribes among the parties to be consulted in the applicant's pre-filing consultations, and proposed appropriate revisions to the regulations to make this obligation clear.

The Indian tribes [9] suggest that the Commission is limiting their role to pre-filing consultation, and therefore is relegating them to the same category as the general public and citizen's groups. They maintain that by doing this the Commission ignores the fact that the Indians' rights are significant, distinct, and often different from those of the state, which therefore cannot represent them. The Indian tribes also argue that tribes should be accorded a consultation role parallelling that of federal and state fish and wildlife agencies because pursuant to tribal law they operate their own fish and wildlife agencies, which they assert are equivalent to their state and federal counterparts and have the expertise to provide the most accurate information of fish and wildlife resources in a particular area.

The participation of Indian tribes in pre-filing consultation is not a limitation of their role but an expansion of it beyond the consideration of their recommendations which the FPA requires. Indeed, they are not treated like the public, which does not have a consultation role prior to filing, but are given treatment parallel to that of the resource agencies.[10] However, it is clear that they are not fish and wildlife agencies within the meaning of the FPA, but that they have a special status of their own under the FPA. The FPA does not refer to Indian tribes as fish and

[7] Proposed § 4.30(b)(9)(i).

[8] 16 U.S.C. 803(a) (1988) (this section was added by ECPA).

[9] Nez Perce, Pueblo de Cochiti, Klamath, the Native American Rights Fund, and California Indian Legal Services.

[10] See the discussion of participation of Indian tribes, section IV.D.1., *infra*.

wildlife agencies, but where the Indian tribes are to be consulted, the statute refers to them in addition to and separately from the agencies.[11] There is no reference to Indian tribes in section 10(j).[12]

Some commenters [13] suggest technical corrections to the proposed regulation. They note that the proposed regulation's reference to "the state agency" implies that each state has a single agency in charge of administrative management over fish and wildlife. They suggest that the reference to states be made plural, since some states may have more than one agency with such responsibility.[14] They also suggest that the reference to "the state in which a proposed hydroelectric power project is located" be revised to read "the state or states in which * * *," since a project may be located in more than one state. These changes are unnecessary, because our regulations state that the singular includes the plural.[15]

2. *Fish and Wildlife Recommendation.* We proposed to add a definition for "fish and wildlife recommendation." [16] This term is important because under ECPA only fish and wildlife recommendations of a fish and wildlife agency are subject to the procedures set forth in FPA section 10(j). As used in the proposed rule, this term means any recommendation designed to protect, mitigate potential damages to, or enhance any wild member of the animal kingdom.[17] We stated that the term does not include a request that the proposed project not be constructed or operated, a request for additional studies that can be completed prior to licensing, or, as the term is used in those sections of the proposed rules that implement FPA section 10(j), a recommendation for facilities, programs or other measures to benefit recreation or tourism.[18]

Energy and EEI support the rule's exclusion from the definition of recommendations that projects not be constructed and recommendations for additional pre-licensing studies or for facilities, programs, or other measures to benefit recreation or tourism. However, EEI suggests additional language be added to exclude from the definition other non-fish and wildlife related recommendations from the definition. We believe that the definition is clear that only fish and wildlife recommendations are within the definition, and that no additional language is necessary.

Conversely, other commenters [19] object to the exclusion of recommendations that projects not be constructed, recommendations for additional pre-licensing studies, and recommendations for measures to benefit recreation or tourism. They state first that, if no other measures are available to adequately protect or mitigate fish and wildlife resources and/or the project is in direct conflict with state water management plans, a recommendation against licensing constitutes a recommendation designed to protect, mitigate damages to, or enhance fish and wildlife.[20] Some add that, whether or not the Commission adopts such a recommendation, it cannot by rule limit the bounds of the required section 10(j) recommendations, and that such a recommendation is consistent with the intent of NEPA that federal agencies identify and assess reasonable alternatives that will avoid or minimize adverse effects on the environment. In addition, South Carolina states that under the proposed regulation it is unclear what appropriate comments should be submitted under section 10(j) if the agency is requesting denial of the license under section 10(a) or section 4(e).

These commenters [21] also argue that, since the Commission imposes strict evidentiary burdens and time limits on the agencies, requests for additional pre-licensing studies should be permitted under section 10(j) where agencies have identified fish and wildlife information needs early and repeatedly in the consultation process, but the Commission has deferred resolution of information needs, or the applicant has refused to conduct studies in a manner that provides adequate results.

In addition, Wildlife Federation argues that providing the information on which section 10(j) recommendations are based is the responsibility of the applicant, subject to the Commission's control, that requests for additional information are a part of the process of preparing section 10(j) recommendations, and that the agency expertise to which the Commission is required to defer under section 10(j) is the expertise to assess what studies are necessary for formulating fish and wildlife recommendations. Washington Fisheries adds that fish and wildlife agencies have neither sufficient staff nor budget to do their own studies, or to be, in short, biological consultants for applicants.

These commenters argue that the fish and wildlife agencies have a duty under the FWCA to make recommendations for public uses of fish and wildlife, and that nothing in the statutory language supports the idea that some FWCA recommendations relating to fish and wildlife are to be excluded from consideration under section 10(j) because they address recreational uses of fish and wildlife. The commenters also argue that a recommendation for fish and wildlife protection, mitigation, or enhancement should not be precluded simply because it might also benefit recreation or tourism. Finally, Washington Fisheries adds that it is not always possible or desirable to provide in-place, in-kind mitigation and that the form or content of a mitigation package should be up to the discretion of the resource agency.

The commenters' objections to the regulation are inapposite. Section 10(j) of the FPA requires that licenses issued under the FPA include conditions based on the recommendations of the state and federal fish and wildlife agencies for the protection, mitigation, and enhancement of fish and wildlife. It is inherent in this requirement that the recommendations

[11] See, for example, section 10(a)(2)(A), which refers to "the recommendations of Federal and State agencies * * * and the recommendations (including fish and wildlife recommendations) of Indian tribes affected by the project." See also section 10(a)(3), which states that the Commission shall solicit recommendations "from the agencies and Indian tribes."

[12] Section 10(j) only states that section 10(j) license conditions shall be based on recommendations received from the National Marine Fisheries Service, the U.S. Fish and Wildlife Service, and state fish and wildlife agencies.

[13] Washington Wildlife, American Rivers, and Wildlife Federation.

[14] Oklahoma Water argues that state agencies that implement water quality standards should be treated as fish and wildlife agencies for purposes of section 10(j), since such standards relate to fish and wildlife use, among other things. Clearly, many different kinds of resource agencies may administer programs that have an effect on fish and wildlife. However, we believe that section 10(j) is intended to include only those agencies exercising direct administrative management over fish and wildlife.

[15] See 18 CFR 1.102(a).

[16] Proposed § 4.30(b)(9)(ii). This definition is based on those definitions used in federal statutes cited by the legislative history of ECPA. H.R. Rep. No. 99–507, 99th Cong., 2nd Sess. 31 (1986) (citing 16 U.S.C. 1532(8) and 3371(a)).

[17] The term includes a recommendation to protect fish, birds and reptiles, whether or not hatched or born in captivity, and their eggs or offspring (including juveniles), related breeding or spawning grounds and habitat. See NOPR, IV FERC Stats. & Regs. ¶ 32,470 at 32,382 (March 6, 1990).

[18] Proposed § 4.34(e)(2) and 4.34(f)(3).

[19] Interior, Commerce, Oklahoma, Oklahoma Wildlife, Oklahoma Water, Michigan, California Fish and Game, Montana DFWP, West Virginia, South Carolina, Washington Fisheries, Washington Wildlife, American Rivers, and National Wildlife.

[20] Interior quotes, without citation, a statement of the Conference Report on ECPA that, "if nonpower values cannot be adequately protected, FERC should exercise its authority to restrict or * * * even deny a license * * *."

[21] Interior, Washington Fisheries, Washington Wildlife, and wildlife Federation.

be for conditions that will be included in a license. A recommendation that a project not be licensed simply is not such a recommendation. Clearly, if an agency believes that a project's effects cannot be mitigated, it is free in its comments on the application [22] to recommend that a project not be licensed, but such a recommendation is not a section 10(j) recommendation and is not subject to section 10(j) procedures.

Likewise, while requests for studies that can be completed prior to licensing may be very important in forming the data base necessary to formulate fish and wildlife recommendations, such requests are not themselves recommendations as the term is used in section 10(j). Section 10(j)(1) states, in pertinent part, that "each license issued under this part shall include conditions * * * (which) shall be based on recommendations received pursuant to the Fish and Wildlife Coordination Act * * *." Thus, the plain meaning of this provision excludes from "section 10(j) recommendations" agency requests for pre-licensing studies, because such studies are not conditions imposed on "issued licenses," as specified in the section.

Furthermore, what pre-licensing studies should be conducted is not an issue that should be resolved late in the administrative process as part of the FPA section 10(j) negotiations. Those negotiations must focus, as the law requires, on the fish and wildlife recommendations on which terms and conditions for license can be based. However, as stated in the preamble to the NOPR,[23], the Commission has established a procedural system, to be enhanced by the rule, that addresses, at the outset of the Commission's review of an application tendered for filing, issues concerning necessary pre-licensing studies.[24]

Finally, we recognize that the FWCA encompasses recommendations by fish and wildlife agencies that promote recreation, which has long been a waterway use included in the hydropower program.[25] But ECPA section 3 uses the term in a narrower sense, and clearly distinguishes between recommendations dealing with fish and wildlife and those dealing with other concerns such as recreation. ECPA directs only that the former recommendations, and not the latter, be subject to the provisions in FPA section 10(j) (requiring determinations, negotiations, and findings). As stated in the preamble to the NOPR,[26] Congress mandated that the Commission go through extra procedural steps to protect, mitigate damages to, and enhance members of the wild animal kingdom, but did not require such special measures on the issues of constructing access roads or picnic areas, etc., to facilitate recreation.

3. *Indian Tribe.* In the NOPR, we proposed to add a definition for "Indian tribe" which would make clear what entities are entitled to participate in the pre-filing consultation process and to file recommendations (including fish and wildlife recommendations) with the Commission on proposed hydropower projects.[27] The proposed definition included all Indian groups that are united under one governing body, inhabit a particular and distinct territory, and are appropriately recognized as Indian tribes by the United States. A nexus test was also included in the proposed definition, so that consulted Indian tribes would also have to have tribal (as distinct from individual or social) legal rights that could be affected by the proposed project. Thus, where a proposed project could adversely affect the harvest of anadromous fish to which an Indian tribe had treaty rights, or was located within a particular reservation, that tribe would be identified by the applicant and be able to participate in the pre-filing consultation process and to file comments (including fish and wildlife recommendations) on the proposal.[28] If a group of Indians failed to qualify as an Indian tribe in the context of a particular hydropower project, the group could still participate in the administrative proceeding as a member of the public.[29]

The Indian tribes [30] argue that the definition is unnecessarily elaborate, relies upon an improper racially-based classification, and does not adequately reflect the governmental status of tribes. Most of them argue that the key, perhaps only, criterion should be federal recognition.[31] Interior and the Indian tribes note that federally recognized tribal governments are ascertainable through a list compiled annually by the Bureau of Indian Affairs of the United States Department of the Interior,[32] and suggest that since this established method of determining Indian tribes exists, the Commission should refer to it instead of trying to create its own definition. The Pueblo de Cochiti suggests that the Commission use the definition found in the Indian Self-Determination and Education Assistance Act of 1975, as amended.[33] It adds that use of the established criterion would render proposed §§ 4.30(10) (i) and (ii) superfluous.

The Indian tribes and Interior also argue that the nexus test is too restrictive. They argue that the FPA requires the Commission to consider "the recommendations (including fish and wildlife recommendations) of Indian tribes affected by the project," [34] and

[22] These comments may be made pre-filing, in response to the draft application, or post-filing, after the application is declared by the Commission to be ready for environmental analysis.

[23] *See* NOPR, IV FERC Stats. & Regs. ¶ 32.470 at 32,382, n. 157.

[24] *See* §§ 4.38 and 4.32(b)(7).

[25] Section 10(a) of the FPA referred to "recreational purposes" long before enactment of ECPA. See *Udall* v. *Federal Power Commission,* 387 F. 2d 428 (1967).

[26] NOPR, IV FERC Stats. & Regs. ¶ 32,470 at 32,382, n. 158.

[27] Proposed § 4.30(b)(10).

[28] This situation would arise where the proposed project could impede the migration of anadromous fish on a particular river, and the Indian tribe had statutory or treaty rights to manage or harvest some of the fish runs on that river. Another example would be where the proposed project works would be located within an Indian reservation. On the other hand, if a group of Indians objected to the construction of a hydropower project not located on such a river or within their reservation, and the basis of their objection rested on aesthetic, recreational, or other grounds shared by some local residents but not rooted in rights of the tribe, the Indian group (even if it were a recognized Indian tribe for other purposes) would not be treated as an Indian tribe for purposes of that project.

[29] Such participation would entitle the tribe to attend the joint meeting in the first stage of the pre-filing consultation process, to inspect and obtain copies of the complete application filed by the applicant, and to file comments (including fish and wildlife recommendations) that the Commission would consider in reaching a decision on the merits of the application.

[30] National Congress of American Indians, Pueblo de Cochiti, Pueblo Nambe, California Indian Legal Services, Klamath, Native American Rights Fund, Nez Perce, and Choctaw.

[31] The Klamath Tribe, on the other hand, argues that lack of formal federal recognition should not be used as a criterion to exclude tribes from the process, and suggests that § 4.30(b)(10) (i) and (iii) be combined into a single criterion as "and/or" conditions, in order to prevent such a result. It argues that a tribe should not be excluded because it no longer inhabits a particular territory.

[32] See 25 CFR 83.6(b). Under § 83.6(b), the Secretary of the Interior publishes annually, in the **Federal Register**, a list of all Indian tribes which are recognized and receive services from the Bureau of Indian Affairs.

[33] 25 U.S.C. § 450b(e) (1988). This section states:

"Indian tribe" means any Indian tribe, band, nation, or other organized group or community, including any Alaska Native village or regional or village corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act (85 Stat. 688) (43 U.S.C. 1601 *et seq.*), which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.

[34] 16 U.S.C. 803(a)(2)(B) (1988).

that nothing in the statute or its legislative history suggests that Congress intended this provision to be limited to tribes whose "legal rights" may be affected. Interior suggests that the Commission will have difficulty in determining which rights are "tribal" as opposed to "individual" and when an interest is a "legal" right.[35] Some Indian tribes assume that "legal" rights include only treaty rights, and object to the exclusion of rights protected by statute but not by treaty. A number of Indian tribes argue that the limitation of the definition to "legal" rights is too narrow to permit their participation as a tribe when important Indian interests not protected by treaty or statute (such as effects on ancestral lands, or on cultural or religious sites) are affected.

Citing *Three Affiliated Tribes* v. *Wold Engineering, P.C.*, 467 U.S. 138, 149 (1984), the Pueblo de Cochiti argues that statutes that establish or reserve Indian rights are to be construed broadly, while statutes that would abrogate or narrow Indian rights are to be construed narrowly. It maintains that the statutory language of FPA section 10(a)(2) was passed for the benefit of Indians and thus should be liberally construed. It adds that the tribe should determine whether its interests are affected by a particular project, and the Commission should defer to the tribe's determination.[36]

The Pueblo de Cochiti acknowledges that the Commission may authorize a project despite tribal objections, but argues that it is improper to bar the voicing at the consultation stage of the tribes' important non-power interests. It also recognizes that a tribe which is not found to have "legal rights" under the proposed definition might still participate as a member of the public, but notes that this status does not recognize the sovereignty of the entity involved. The Indian tribes also argue that the definition's reference to situations where "the project works would be located within the tribe's reservation" unduly limits the definition. They maintain that, because the definition of reservation in FPA section 3(2) applies only to those tribal lands within Indian reservations, it appears to exclude lands on the reservation which they do not own, but in which they have reserved rights. They also maintain that the definition should include lands which are not reservation lands but which they own in fee, and lands which are no longer reservation lands but in which they have some remaining interest (such as hunting, fishing, gathering, water, sacred sites, burial grounds, etc.). They also argue that the definition appears to exclude tribes threatened with destruction of sites within a reservation from project works located off the reservation unless some treaty specifically recognizes a tribal right in those sites.[37]

After considering all these arguments, as a matter of law and policy we agree that since Interior has a well-established definition and listing of Indian tribes it is appropriate to rely on that definition, and we have revised the regulations accordingly.[38]

We recognize that Indian tribes have a special status, and that with that status come distinct interests. In promulgating the final rule, we are not attempting to confine these interests, but rather, to design a consultation process that is procedurally manageable. While the statute requires that we solicit the recommendations of Indian tribes upon receipt of an application for a license,[39] it does not suggest that tribes must be involved in consultations prior to the filing of a license application. Any tribal participation in the pre-filing consultation process is therefore an expansion of their statutorily prescribed role.

The pre-filing consultation requirement was developed by the Commission to increase the efficiency of the application process. However, in order to keep the pre-filing consultation process manageable, it is reasonable to require that those participating in it have some readily identifiable and tangible interest in the proposed project. Since it is affected Indian tribes, not Indians as individuals, to which the statute refers in section 10(a)(2), it is reasonable for the Commission to refer to affected Indian tribes when granting pre-filing consultation privileges. It is also reasonable to define qualifying Indian tribes as those with rights that may be affected by the development and operation of the hydropower project. Furthermore, for the purpose of pre-filing consultation, it is reasonable to require the rights to be legal rights, so that they are readily ascertainable. As we have stated previously, interests which are not encompassed by the definition can still be raised during the licensing proceeding, if and when a development application is filed with the Commission.

Finally, the references in the definition to interference with the management and harvest of anadromous fish, and the location of the project works within the tribe's reservation, are examples of how tribal legal rights may be affected and are not intended to be exclusive.

4. *Fishway.* The NOPR proposed the following definition of a fishway: [40]

"Fishway" means any structure, facility, or device used for the safe passage, either downstream or upstream, of migratory or nonmigratory fish (including juveniles) through, over or around a hydropower project, and includes fish ladders, fish locks, lifts and elevators, and fish bypass facilities, devices for guiding fish to an upstream or downstream fish passage facility and flow regulation necessary for proper operation of the fishway itself, but does not include screens, barriers or other devices that are not used to guide fish to a fish passage facility, minimum flow releases or other terms and conditions of license.

The comments in response to this definition may be divided between those that consider the proposed definition too broad and those that consider it too narrow.

Among the commenters in the former category,[41] NHA, EEI, and Energy urge us to limit application of the term "fishway" to migratory fish. NHA, in particular, argues that Commission reports and literature contemporary with the enactment of section 18 and its subsequent 1935 amendment indicate that fishways were considered appropriate for anadromous species of fish, and that extending the term to encompass passage of resident fish would go beyond the statute's original intent.

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[35] Citing *Covelo Indian Community* v. *FERC*, 895 F.2d 581 (9th Cir. 1990). Interior suggests that a responsible consultation process can avoid years of litigation, and advises generous tribal consultation.

[36] The Pueblo de Cochiti suggests that the Commission's determination of whether a tribe may be affected should parallel the process established by regulations issued by the Council on Environmental Quality implementing the National Environmental Policy Act (NEPA). In the NEPA process, potentially affected tribes are contacted during scoping and are invited to participate in the process, with the option of becoming co-operating agencies. See 40 CFR 1501.2(d)(2), 1501.7(a)(1), and 1508.5. In addition, regardless of whether they participate in scoping, potentially affected tribes are provided with copies of draft environmental impact statements, and their comments are requested. See 40 CFR 1503.1(a)(2)(ii).

[37] Choctaw requests that § 4.30(b)(10)(iv) be revised to read: "where the project works would be located within the tribe's reservation, adjacent to the tribe's reservation, or upstream from the tribe's reservation on a waterway which flows through or adjacent to the tribe's reservation."

[38] This revision is made to § 4.30(b)(10). The conflicting definition in § 16.2(f) is deleted, as the definition in § 4.30(b)(10) applies to both parts 4 and 16 of the regulations.

[39] FPA section 10(a)(3).

[40] Proposed § 4.30(b)(9)(iii).

[41] NHA, EEI, Energy, Public Generating Pool, and Wisconsin River.

Similarly, NHA and EEI insist that application of the term should be limited to provision of upstream passage. Again referring to literature from the time of the section's passage, these commenters argue that contemporary discussions of the need for and operation of fishways focused on ensuring upstream passage of fish, and that the concept of a fishway as a structure to facilitate upstream passage was well-established at the time.

EEI cites modern authorities that continue to treat a fishway as something devised to address upstream passage problems. It argues that, both earlier in the century and today, authorities have viewed downstream passage problems as solvable by remedies other than fishways, such as screening of intakes, spills, and chutes.

Public Generating Group, conceding that the FPA does not definitively reveal whether fishways might include devices facilitating downstream passage, argues, on a policy basis, that we should not needlessly concede to the Secretaries the authority to prescribe such devices. In the absence of a clear indication that section 18 contemplated downstream passage, Public Generating Group would prefer that we retain the maximum amount of discretion to balance economic and environmental considerations in licensing proceedings by adopting a definition that does not specify upstream and downstream passage and by making determinations on a case-by-case basis. Nevertheless, it points out that downstream passage issues do not really involve providing a *means* of passage but rather involve reducing the mortality associated with that passage.

These commenters also argue that a "fishway" should embrace a more restricted concept of fish passage measures. While approving of the proposed definition's limitation of a fishway to a "structure, facility, or device," they contend that these physical aspects should not include screens and barriers. Although the proposed definition excluded screens and barriers not used to guide fish to a fish passage facility, Public Generating Group would exclude even those screens and barriers that, although having a secondary guiding function, are designed primarily to protect fish from mortality at turbines. Leaving the prescription of such dual-purpose devices to our discretion, Public Generating Group would view a fishway as including only screens and barriers having the sole purpose of guiding fish to a fish passage facility.

The commenters argue that inclusion in the definition of such non-structural elements as flows, temperature regimes, and project operation procedures and scenarios would be unsupported by the legislative history of the section and the customary usage of the term. However, only EEI clearly objects to our inclusion of "flow regulation necessary for proper operation of the fishway itself," and Public Generating Group specifically includes similar language in its own proposed definition.

EEI contends that section 18 authority does not extend to prescription of structures or devices at locations removed from a project's physical structures. It also urges us to make it clear that prescription authority does not entitle agencies to dictate design specifications. Wisconsin Power objects that the proposed definition would codify our position that fishway prescription authority applies to relicensing, contrary to its view of Congressional intent. It urges us to limit this authority to original license proceedings only.

Public Generating Pool [42] and EEI [43] submitted their own proposed definitions, illustrating the disagreements these parties have with our proposed definition, as well as with each other's position.

Conversely, a number of commenters consider the proposed definition too narrow.[44] Interior submitted a recommended definition[45] hich illustrates the concerns of these commenters generally. Interior's definition, like our proposed definition, includes measures to protect resident as well as migratory fish; neither Interior nor other commenters elaborate on a rationale for this inclusion. Similarly, although measures to facilitate or ensure downstream fish passage are included in this definition, and although downstream fish passage is implicitly assumed in several of the comments, few of them mention the issue specifically. Instead, the comments focus primarily on the need for broad inclusion of measures, both structural and non-structural, necessary for fish passage.

The commenters urge that the definition include even screens and barriers not used to guide fish to a fishway. Several point out that, even when screens and barriers are clearly part of a fishway, their purpose is to prevent entrainment and turbine mortality. Therefore the essential criterion for their inclusion in the definition should not be whether these devices are designed to protect fish from turbine mortality but whether they are required to accomplish upstream and downstream fish passage (Interior) or are components of a passage scheme (Michigan and Minnesota).

The commenters object equally to the definition's basic exclusion of non-structural measures facilitating fish passage. Commenters would include such specific non-structural elements as flows and temperature regulation, and more general measures, such as "project operation scenarios designed to promote or enhance fish passage" (Commerce and California Indian Legal Services). Several commenters note that adoption of such non-structural measures as flows can eliminate the construction and maintenance costs of structural measures. Wisconsin argues that changes in project operations are sometimes not only the most cost-effective fish passage measures but are also biologically preferred. In the view of Wisconsin and Wildlife Federation, exclusion of operational changes and other non-structural measures from the definition could cause Commerce and Interior to prescribe expensive and technically complicated systems to

[42] Public Generating Pool proposed the following definition: "Fishway" means any structure, facility, or device that facilitates the passage of fish through, over or around a hydroelectric project. The term includes such structures as fish ladders, fish locks, and elevators, and the minimum flows necessary for operation of the fishway itself. The term does not include screens, barriers or other devices unless their sole purpose is to guide fish to a fish passage facility, and does not include minimum flow releases or other terms and conditions of a license. The precise scope of the term may vary from project to project, and the Commission will make this determination on an individual basis.

[43] EEI proposed the following definition: "Fishway" means any structure, facility, or device used for the safe upstream passage of migratory fish through, over and around the project works of a hydropower project, particularly fish ladders, but does not include screens, barriers or other devices that are used to guide fish to an upstream fish passage facility, screens, barriers or other devices for downstream passage or guidance of fish (including juveniles), structures, facilities, or devices for the upstream or downstream passage of nonmigratory fish, operation and maintenance procedures, minimum flow releases or other terms and conditions of license.

[44] Interior, Commerce, American Rivers, Wildlife Federation, California Indian Legal Services, and several state agencies.

[45] Interior proposed the following definition: Any structure, facility, device, or other measures used for safe and timely passage of all life stages of migratory and non-migratory fish, either upstream or downstream, through, over, or around a hydropower project including: (1) Temperature regulation; (2) such structural measures as fish ladders, fish locks, lifts, elevators, and fish bypass facilities and devices such as screens needed for guiding fish unimpeded to an upstream or downstream passage facility, as well as flows sufficient for guiding, attracting, or transporting fish to the fishway and for operation of the fishway itself; and (3) such nonstructural measures as periodic spill flows, gate opening, breaches, notches, or other openings in the dam.

ensure that fishways are provided, even though cheaper alternatives may exist.

The proposed definition's inclusion of "flow regulation necessary for proper operation of the fishway itself" does not satisfy the commenters, who, as Interior's definition indicates, seek a broader inclusion of flows sufficient to guide, attract, or transport fish to the fishway. Various commenters suggest that these would include flow releases over spillways for downstream migrants, flows needed for passage through critical shoals below a project, and minimum flows during spawning season. Oregon points out that often physical fishway structures are not feasible and adequate flow conditions function best. Washington Wildlife argues that a device unaccompanied by a flow release sufficient to attract fish is not a fishway. In a similar vein, Wildlife Federation contends that, without operating and attraction flows, installation of physical fish passage facilities may be useless, and that section 18 would be rendered meaningless if hydroelectric project operators were required to install physical facilities but not to provide flows necessary to convey fish safely through them.

A number of commenters also stress the importance of temperature controls and regimes. Oregon believes temperature controls should be included where data indicate that temperature-related fish passage barriers exist as a result of a hydropower project. Washington Wildlife also points out that temperature can affect upstream and downstream passage.

It is probably safe to state that, taken as a whole, these commenters seek a broad definition of "fishway" that would include any structural or non-structural measures facilitating fish passage. Wildlife Federation argues that the definition should be expanded to include "all license conditions that contribute to the safe passage of fish around a dam or diversion."

Finally, Commerce, Interior, and other commenters take issue with statements in the concurring opinion of Commissioner Trabandt to the NOPR. These include his statements that Interior and Commerce, in prescribing fishways, should formulate requirements in the context of current operations of an existing project, rather than of past fishery resource conditions; should refrain from requiring fishways that do not reflect current fishery resources; should not impose requirements that would materially interrupt the operation of existing projects, disrupt the scheduling of electric power generation, or degrade the amount of electric power generation capacity; and should avoid prescribing fishway facilities not in harmony with the over-all balancing of competing power and non-power resource interests required by ECPA. The commenters argue that fishway prescription is mandatory and not subject to the Commission's balancing requirements; that there is no presumption against fishways that would interfere with power generation; and that, especially in relicensing proceedings, fishway prescription may transcend consideration of current operations and resources at a project site.[46]

Our consideration of the term "fishway" is not undertaken to develop an abstract definition but rather to reflect the meaning of the term as used in section 18. We are not at liberty to formulate a definition from the comments as if we ourselves had originated the term. That is to say, we solicited comments on our proposed definition to determine what a fishway was intended to be, not necessarily what commenters might wish it to be. It is necessary to consider Congress's understanding of the term to the extent that can be determined. Congress, however, failed to define the term at the time either section 18 or its predecessors, section 3 of the General Dam Acts of 1906 and 1910, were enacted; nor did Congress comment on or modify the term in subsequent amendments to section 18. Therefore, it is also relevant to consider what meaning the term generally conveyed during that period. At the same time, we would not want to adopt a definition that ignores present-day conditions or technological developments affecting achievement of the purposes for which section 18 was enacted.

Among the commenters, those supporting a narrow definition of "fishway," especially NHA and EEI, place the greatest reliance on historical and conventional meaning. These sources provide considerable support for the assumption that Congress understood a fishway to apply to upstream passage only. For example, NHA cites reports of the U.S. Commission on Fish and Fisheries of 1872 and 1873 that refer to fishways as facilities to permit passage of fish upstream, over or around an obstruction.

[46] Interior also suggests that we address the definition of fishway and other section 18 issues in a separate rulemaking proceeding and that regulations be drafted jointly by the Fish and Wildlife Service, the National Marine Fisheries Service, and this Commission. We consider the present proceeding sufficient for resolving the issue of defining a fishway, and we reject Interior's suggestion.

EEI cites a 1908 report of the Bureau of Fisheries referring to the authority of the Secretaries of Commerce and Labor to prescribe fishways under the General Dam Act of 1906, discussing the design criteria for fishways, and defining fishways as devices for upstream passage.[47]

Moreover, EEI cites authority to indicate that the common understanding of "fishway" still restricts the term to upstream passage. C.H. Clay, an expert in the field, defined a fishway, in 1961, as a water passage around or through an obstruction "designed to enable fish to ascend without undue stress." [48] The same definition was used by the U.S. Fish and Wildlife Service in a 1982 publication.[49] Another authority, Milo C. Bell, devoted a chapter of a 1986 book to various types of fishways, all of which were structures for upstream passage of fish.[50] Finally, the Columbia River Basin Fish and Wildlife Program adopted by the Northwest Power Planning Council discusses fishways as a means for promoting upstream migration of salmonids and defines fishway, in its glossary, as a device that enables adult fish to migrate up a river past dams.[51] Reference to these authorities indicates that restricting the definition of fishways to upstream passage measures would not constitute rigid adherence to past usage of the term in disregard of contemporary meaning.

This emphasis on upstream passage does not indicate that the need for safe downstream passage has been unrecognized. However, authorities have often regarded downstream passage measures as separate from fishways. Participants in a discussion of fishways in 1892, in an annual meeting of the American Fisheries Society, treated downstream passage of juveniles as either presenting no problem or at least as not being addressed by the use of fishways.[52]

[47] Von Bayer, H., General Principles of Fishway Construction, Bulletin of the Bureau of Fisheries, vol. XXVIII (1908).

[48] Clay, C. H., Design of Fishways and Other Fish Facilities, Queen's Printer, Ottawa, Canada (1961), at p. 12.

[49] Schnick, Rosalie A., *et al.*, Mitigation and Enhancement Techniques for the Upper Mississippi River System and Other Large River Systems, U.S. Fish and Wildlife Service Resource Publication 149 (1982) at p. 270.

[50] Bell, Milo C., Fisheries Handbook of Engineering Requirements and Biological Criteria (1986), chapter 34.

[51] Northwest Power Planning Council, Columbia River Basin Fish and Wildlife Program, Portland, OR (1987), at p. 192.

[52] Rogers, W. H., Fishways, in Transactions of the American Fisheries Society, Twenty-First Annual Meeting, New York (1892).

Bell, cited above, states that adult fish at dams are protected by the requirement of construction and operation of fishways, while downstream migrants are protected from diversion from a stream by requirements for screening of intakes.

Those commenters favoring inclusion of downstream passage in the definition do not advance authority in conflict with those authorities cited above. American Rivers argues only that the term "fishway" is broad enough to encompass downstream passage facilities and that a limitation would undermine Interior's authority to protect and enhance anadromous fisheries, contrary to section 18. Most of the other commenters barely argue the point. Nevertheless, we acknowledge that a fishway has not been understood, unanimously and at all times, as solving only upstream passage problems. For example, the Department of Commerce, in 1917, referred to the function of a fishway as "to permit fish to pass over a dam from the stream below to the stream or pool above the dam, and also to permit the same or other fish to pass in the reverse direction without injury."[53] Baker and Gilroy, in 1933, refer to fish ladders as a means by which fish can pass over obstructions in traveling up and down stream. They also describe the design of a mechanical device, which they refer to as a fishway, for the handling of upstream and downstream migrating fish.[54] During House debates in 1918 on the proposed section 18, Representative Graham of Illinois, in supporting fishway prescription authority, complained that the absence of a fishway in the Keokuk Dam had been preventing fish from passing "up and down" the Mississippi River.[55]

We note that, in orders issued in the last several years, we have not limited the concept of "fishway" to only upstream passage. In *Lynchburg Hydro Associates*, 39 FERC ¶ 61,079 (1987), we found certain fish screens to be a component of the project because they were designed to be incorporated into a system for upstream and downstream fish passage. In *Eugene Water and Electric Board*, 49 FERC ¶ 61,211 (1989), we cited section 18 in requiring the licensee to construct fish facilities for downstream passage of juveniles. Our treatment of the concept of "fishway" in these orders, which treatment in retrospect we consider unduly broad, and the usage of the term by others as cited above, reflects a tendency to regard the term at times as denoting any fish passage facility, in contrast to its more restricted meaning.

We are confronted, then, with a term that conveyed different meanings to different people. It would be treacherous to conclude that either the broad (bi-directional) or the narrow (upstream) interpretation has constituted the single common usage of the term. But inability to divine a definitive, universally understood meaning does not render our formulation of a "fishway" definition here either impossible or arbitrary. To the contrary, we are persuaded that adoption of the narrower interpretation is the more justifiable approach, for several reasons. First, experts in the field appear more apt to use the term in a precise, technical, and narrow sense, to describe particular devices whose purpose is to move fish up-stream past a dam or the like. Conversely, these experts are often apt to use different terms and concepts in describing the methods of protecting downstream-moving juveniles from mortality at dams. In addition, it seems uncontroverted that, especially during the time prior to passage of section 18, the inability of fish to ascend dams during their spawning migration appears to have constituted the principal incentive for the construction of fishways, which were designed particularly to overcome that problem.

Finally, a narrow interpretation comports more closely with the statutory scheme that Congress has chosen for this Commission's operation. At the heart of that scheme is section 10(a)(1) of the FPA, which requires us, in licensing hydropower projects, to balance the improvement and development of waterways for the benefit of commerce, the improvement and utilization of waterpower development, the adequate protection, mitigation, and enhancement of fish and wildlife, and other beneficial public uses. This statutory provision clearly seeks to afford us latitude in determining the conditions under which a project is to be licensed, if it is to be licensed at all. Section 18, which allows other agencies to be involved in the conditioning process, is best construed narrowly to avoid imbuing it with the potential for interfering with the exercise of our judgment in balancing the factors Congress instructed us to consider.

As a practical matter, our adoption of this restrictive interpretation of "fishway" will not result in any lessening of our efforts to ensure safe downstream passage of fish in licensing hydroelectric projects. Agencies are free to propose recommendations relating to downstream passage under their authority granted under section 10(j). We are required to adopt conditions based on these recommendations unless they are inconsistent with the requirements of the FPA or applicable law. Even if fishways were traditionally constructed for the purpose of ensuring upstream passage, we have always recognized the importance of downstream passage in the life-cycle of migratory fish and will continue to treat conditions for downstream passage as seriously as conditions for upstream passage.

Limiting the application of "fishway" to "anadromous" or "marine migratory" fish, as NHA urges, is not supportable. As with downstream passage, Congress was silent on this issue. However, there is nothing in the literature of the time or in the legislative history of previous dam acts to indicate that Congress would have contemplated such a limitation. Even before the General Dam Acts of 1906 and 1910, acts authorizing the building of individual dams reserved approval of fishways to the United States Fish Commissioner (Commission of Fish and Fisheries), even as to streams that did not have marine migratory fish.[56]

Several authorities that discuss fishways as measures to promote upstream passage also refer to migratory fish, but we cannot assume that the term "migratory" necessarily means "anadromous" in this context. The Department of Commerce, in the 1917 circular referred to above, noted that some fishes not ordinarily called anadromous, since they spend their entire lives in fresh water, still show a tendency to move toward headwaters at the time of spawning and therefore require fishways. Rogers, cited previously, refers to the fact that almost all river fish are more or less migratory at certain seasons of the year. Wildlife Federation, in its comments, points out that the limitation would fail to provide for the migratory behavior patterns of resident fish. We are convinced that no limitation should be placed on the type of fish for which fishways may be prescribed.

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[53] Department of Commerce, Bureau of Fisheries, Economic Circular No. 24 (1917).

[54] Baker, S. and Gilroy, U.B., Problems of Fishway Construction, Civil Engineering (1933), at pp. 671–675.

[55] Congressional Record, Vol. 56, p. 10037 (September 5, 1918).

[56] This Commission, which in 1911 evolved into the Bureau of Fisheries in the Department of Commerce, was created to address the depletion of food fish, apparently without restriction, throughout the country's coastal waters and lakes. Thompson, Seton H., The National Marine Fisheries Service Agencies, 1871–1987: An Historical Overview.

The most strongly contested element of the proposed definition is its limitation to particular structures, facilities, and devices. But this physical limitation is well rooted in the traditional meaning of "fishway," as reflected in literature from the period of the enactment of the General Dam Acts and of section 18. For instance, von Bayer, in 1908, refers to the "construction" of fishways. He further classifies fishways in four systems by "style of construction:"

I. The inclined plane system, in which a series of baffle or deflecting plates are so arranged in an inclined flume as to cause the water to follow in its descent a long sinuous route.

II. The pool and fall or step system, in which the water is brought down to a lower level by a series of short falls with intervening pools.

III. The counter current system, in which the descending volume of water is being checked by meeting a current opposing it at certain intervals.

IV. The lock and gate system, in which a higher level is reached through one or more locks operated by gates.

The structural nature of these fishways is immediately apparent from their descriptions.[57]

This insistence on the essential physical or structural nature of a fishway persists in more modern times. Clay (1961) refers to a fishway as a "device" by which fish may swim by their own efforts past an obstruction. In addition, even modern authorities have often observed strict limits on the types of structures they would consider fishways. Both Clay and Bell (1973) treat fish locks and fish elevators differently from fishways because those devices lift fish over obstructions, rather than letting them move by their own efforts. Not all experts have observed this distinction; von Bayer, for example, states that "fishways" include both locks and ladders. Moreover, we would consider such a strict interpretation inflexible and impractical in the context of section 18 authority. Nevertheless, the exactness with which authorities define fishways illustrates the unlikelihood that Congress would have intended the term to encompass a wide variety of non-structural elements, such as minimum flow and temperature control regimes, not to mention such all-embracing concepts as "project operation scenarios designed to promote or enhance fish passage."

While practically no commenters object to the specified structures and devices included in the definition, numerous commenters object to our exclusion of some screens and barriers and emphasize the necessarily mixed purpose of some of these devices. In contrast, Public Generating Pool urges that the definition include only screens and barriers whose sole purpose is to guide fish to a fish passage facility. Imposition of such a restriction would seem capricious. While we do not necessarily exclude screens and barriers that serve more than one purpose, as a practical matter, they must clearly be designed to guide upstream-moving fish directly to the fishway and thereby past the project works.[58] Consequently, we envision geographical proximity of these devices to the other physical structures of the fishway. We reject the position of several commenters that the definition should include even screens and barriers designed only to prevent injury to fish at a hydropower facility. There is no indication that Congress contemplated the prescription of fishways to protect fish from project works in situations where no actual fish passage would occur.

Our proposed definition included "flow regulation necessary for proper operation of the fishway itself," although this is a non-structural feature. The importance of adequate flows in fishway operation was recognized early. Von Bayer refers to "an abundant discharge of water through the outlet [of the fishway] so as to attract the fish" as an important condition for a fishway's successful operation.[59] Another authority, Schoklitsch, indicates that for fish to find a fishway "the flow through the fishway must be ample; the water must leave it with a high velocity and, if possible, with some noise." [60]

We agree with Washington Wildlife and Wildlife Federation that a physical facility lacking sufficient flows to attract and pass fish through it is not a functioning fishway. We consider the provision of such flows so intimately related to the purpose and effective operation of a fishway that we will continue to include this flow regulation in the definition, but we will substitute the term "flow within the fishway necessary for its operation." This inclusion is not meant as an invitation for prescription of an elaborate minimum flow regime. By "flow within the fishway necessary for its operation," we mean, specifically, regulation of flow required for attraction water to guide fish into a fishway; for transport water to provide a medium for fish to pass through a facility, such as through a fish ladder; and for water necessary for holding fish in a facility, such as in the collection channel of a fish lift prior to operating the lift.

In all other respects, we would consider minimum flow prescriptions not to be embraced by the term "fishway," but rather to be simply a condition of fishway operation, and thus of project operation. As with other conditions of project operation, as well as with detailed design specifications of a project, we would consider such a prescription so intrusive as to be outside the scope of authority that Congress granted to Commerce and Interior. As we stated in *Lynchburg Hydro Associates*,[61] we consider section 18 to be a narrow and specific grant of authority. It does not authorize Commerce and Interior to impose far-reaching conditions or to require substantial revision with respect to the design and operation of a proposed project. These are matters which we must weigh and balance and which are entrusted to our ultimate judgment, since we have the final responsibility and authority to balance the various public uses of a waterway under FPA section 10(a)(1).

Moreover, ECPA furnished these agencies a separate mechanism for submitting recommended license conditions for the protection, mitigation of damage to, and enhancement of fish resources, and we are obligated by section 10(j) of the FPA to include conditions based on such recommendations unless the recommendations are inconsistent with the purposes and requirements of applicable law. We stated this position in *Lynchburg Hydro Associates* and subsequent orders, and the comments do not convince us to change it. Commenters urging us to adopt a broad definition of "fishway" seem to argue only that authority to prescribe wide-ranging conditions of license would be desirable in ensuring the proper operation of fishways. They do not attempt to demonstrate that Congress, in enacting and amending section 18, meant

[57] Von Bayer, *supra*, at pp. 1043–44. The only possible exception, considered superficially, might be the counter current system, which might seem to consist only of the provision of current. But von Bayer (at pp. 1050–51) includes diagrams and descriptions of two such fishway systems, one of which involves "a series of centrally located buckets inclined downstream into another series of buckets at either side of the fishway" and the other a "chute submerged in the water * * * provided with a series of slits in the bottom." The nature of these fishways as "structures, facilities, or devices" is thus clear.

[58] Our conclusion that a fishway applies only to upstream passage of fish naturally restricts the definition's inclusion of screens and barriers to those facilitating upstream passage.

[59] Von Bayer, *supra*, at p. 1043.

[60] Schoklitsch, Armin, Hydraulic Structures, Vol. II (1937), at p. 682.

[61] 39 FERC ¶ 61,079 at p. 61,218.

to equate prescription of fishways with the exercise of such extensive authority by Commerce and Interior over project operation and design.

Our revised definition reflects the above discussion, but several other modifications to the proposed definition require explanation. We are eliminating reference to the "safe" passage of fish, because the goal that fish passage through a fishway should be safe is implicit. Since "migratory or nonmigratory fish (including juvenile)" embraces all fish, reference simply to "fish" is sufficient. "Fish bypass facility" strikes us, on reflection, as an overly inclusive term and will be eliminated; it should be adequately clear from the revised definition what physical features qualify as a fishway. Finally, we will not enumerate the various structural and non-structural features that would be excluded from the definition. We do not wish to encourage an interpretation that items not specifically excluded would be encompassed by the definition. Again, it should be reasonably clear from the revised definition's language and this discussion what kinds of features and conditions we intended to exclude.

5. *Ready for Environmental Analysis.* The rule requires that, within 14 days of filing an application, an applicant is required to publish a notice setting forth the fact that the application has been filed and requesting comment on whether additional information or studies are needed before the Commission can process the application. Once the Commission has determined that adequate studies have been completed, the Commission will accept the application for filing and normally will publish a notice inviting comment on the application and interventions in the proceeding. In some cases, where studies are still ongoing or there are requests for additional information from the applicant, we stated that the Commission will accept the application for filing but delay the request for comment until the studies have been completed and the requested information has been filed, at which point the application is ready for environmental analysis.

In setting out the proposed regulation for notice and comment hearings,[62] we stated that all comments (including mandatory and recommended terms and conditions or prescriptions) on an application for exemption or license must be filed with the Commission no later than 60 days after issuance by the Commission of notice declaring that the application "is ready for environmental analysis."

Public Generating Pool and Seattle Light suggest that, since the notice declaring that the application is ready for environmental analysis will become a critical event in the licensing process, the rule should include a definition of the status of "ready for environmental analysis." They suggest that the rule describe the form and substance of information or other material which is required of the applicant to obtain an application that is ready for environmental analysis. They add that it should also describe the relationship of this determination to the determination that the application is "accepted for filing," together with a description of the differences in the level of data which will trigger either of these determinations.[63]

Inasmuch as the regulations themselves set forth what must be submitted by applicants, we do not perceive a need to include in a definition a list of all the information which constitutes readiness for environmental analysis.

As we stated in the preamble to the NOPR,[64] the determination that an application for license or exemption is "ready for environmental analysis" may or may not coincide with the determination that the application is accepted for filing. In some cases, an application will be sufficiently informative that both determinations can be made simultaneously, in which case the public notice accepting an application for filing and inviting interventions would also call for public comment and all proposed license conditions. However, there may be cases where, although the application is not deficient and is therefore accepted for filing, for some reason additional information is needed to conduct a complete environmental analysis of the application (as when a study is requested too late in the consultation process to be undertaken before filing, or where a study reveals the need for further studies). In order to clarify that an application which is "ready for environmental analysis"means an application which has been accepted for filing and regarding which any additional information requested by the Commission has for the most part been filed and found adequate, we will add a new § 4.30(b)(26) which defines the term.

6. *Resource Agency.* The NOPR proposed to define "resource agency" as: [65]

> * * * a Federal, state, or interstate agency with responsibilities in the areas of flood control, navigation, irrigation, recreation, fish and wildlife, water resource management, or cultural or other relevant resources of the state or states in which a project is located.

EPA suggests that agencies with responsibilities in the areas of water quality management and protection be added to the definition. Public Generating Pool suggests that the regulation should define the nature of "responsibilities" that might qualify an agency as a resource agency, and that the language of FPA section 10(a)(2)(B), which refers to the recommendations of agencies "exercising administration over" the matters listed in the regulation is more appropriate than the regulation's reference to agencies "with responsibilities in the areas of" these matters.

Interior argues that Indian tribes should be included in the definition of "resource agency" because they have significant natural resource management authority both on and off reservations by virtue of their inherent sovereignty, treaty rights and federal statutes; in some circumstances they possess exclusive jurisdiction, while in other circumstances they share jurisdiction with the states. Interior contends that ECPA did not limit or define the terms "resource" or "fish and wildlife" agency, and therefore there is nothing to prevent the Commission from including Indian tribes in the definition.

The final rule incorporates the change recommended by Public Generating Pool, so that the definition of resource agency refers to any agency "exercising administration over" the specified resources.

We do not believe that any of the other proposed changes are needed. Agencies with responsibilities in the areas of water quality management and protection are included within the definition, since they are agencies exercising administration over water resource management. Indian tribes are not included in the definition because they are not resource agencies, and the Commission does not believe that trying

[62] Proposed § 4.34(b).

[63] Public Generating Pool also notes that some commenters inquired about the relation of this term to NEPA and suggest that the term be renamed so as to indicate that it is the notice of the start of the official 10(j) recommendations process, and to eliminate any confusion of this determination with the environmental review process under NEPA. However, there is no confusion involved, since the notice stating an application is ready for environmental analysis signals the beginning of both the section 10(j) process and the NEPA process.

[64] See NOPR, IV FERC Stats. & Regs. ¶ 32,470 at 32,378.

[65] Proposed § 4.30(b)(26) (emphasis added). As adopted in the final rule, it is new § 4.30(b)(28).

to equate tribes with resource agencies is necessary or appropriate. However, we recognize that some Indian tribes have authority to manage resources, and have special knowledge and contributions to make to the licensing process. Therefore, although not defined as a resource agency, they have been given treatment that is parallel to the treatment given to a resource agency in part of the rule.[66]

However, we will make two further changes in the definition of resource agency in § 4.30(b)(28). In order to eliminate unnecessary language and to make it consistent with the relicensing definition of a resource agency now in § 16.2(d), we will change § 4.30(b)(28) to apply to "the state" [67] in which a project "is or will be located." The duplicative definition in § 16.2(d) is deleted.

Finally, although unrelated to the matters addressed in the NOPR, we will take this occasion to delete the definition of "initial license" in § 4.30(b)(11) because it is confusing and unnecessary.

B. Pre-hearing Procedures and Related Issues.

1. *Pre-filing Consultation.* In the NOPR the Commission proposed that § 4.38 be comprehensively revised. The revision follows the structure of § 16.8 governing applications for a new license, a nonpower license, or exemption from licensing or for surrender of a project subject to sections 14 and 15 of the FPA.[68]

The final rule clarifies exactly when each of the three stages of the consultation process begins and ends. The first stage begins with contact by the potential applicant of the resource agencies to be consulted and the delivery to the agencies of an information package describing in reasonable detail the proposed facilities the potential applicant is considering, and ends with written comment by each resource agency to the potential applicant on its project proposal.[69] The second stage begins with the conduct by the potential applicant of all reasonable and necessary studies not yet completed, and ends with the conclusion of any necessary negotiation between the potential applicant and the resource agencies on their comments on the applicant's draft application.[70] The third stage consists of the filing of the application with the Commission and its service on all resource agencies consulted.[71]

Like the previously existing § 4.38, the final rule requires a potential applicant to furnish the resource agencies with a detailed information package. Unlike the previous regulation, the final rule expressly requires the potential applicant to seek in the first stage the resource agencies' views on reasonable hydropower alternatives to the proposed hydropower facilities and on what studies it should conduct on the impact of the facilities.[72] The rule imposes a requirement that the applicant conduct a joint meeting with all consulted resource agencies between 30 and 60 days after the information package on the proposed facilities is delivered to the agencies.[73]

The final rule requires all agencies consulted to respond to the potential applicant in writing, no later than 60 days from the date of the joint meeting.[74] This response must include a description of the resource issues the agency believes the proposal presents and of what studies the potential applicant should conduct and what information it should gather to form an adequate factual basis for complete evaluation of the proposal.[75] An applicant and an agency that disagree as to what studies or additional information are reasonable and necessary must negotiate in good faith in an attempt to resolve their disagreement.[76]

The final rule clarifies that, prior to filing its application with the Commission, an applicant need not complete any study requested by a resource agency or supply any information the agency requested be obtained by the applicant if the study or information-gathering would take longer to complete than the time between the conclusion of the first stage of the pre-filing consultation and the expiration of the applicant's preliminary permit or any application filing deadline set by the Commission.[77] This additional time, after filing, for completing studies requested before filing would be allowed only if the applicant has promptly begun and diligently conducted the pre-filing consultation. Once the study is completed, the applicant must amend or supplement its application, as appropriate, before resource agency comments are requested.

The heart of the second stage of consultation is, as in the previous regulation, the potential applicant's submittal to the resource agencies of a copy of its draft application and the agencies' submittal of comments thereon. The final rule requires that this draft include a response to any comments and recommendations of the agencies made during the first stage of consultation and a discussion of potential project impacts and mitigation measures based on the results of any additional studies conducted and information obtained by the potential applicant.[78] The resource agencies then would have 90 days (instead of the 30 to 60 days under the previous regulation) to review and provide written comments on the draft application.[79] If the resource agency substantively disagrees with the potential applicant as to the proposal's "resource impacts or its proposed protection, mitigation, or enhancement measures," the rule directs that no later than 60 days from the date of that agency's written comments [80] the

[66] See the definition of Indian tribe, in section IV.A.3., *supra*, and Participation of Indian Tribes, in section IV.D.1., *infra*.

[67] In the Commission's regulations, the singular includes the plural. See 18 CFR 1.102(a).

[68] See 54 FR 23,756 (1989), *reh'g*, 55 FR 4 (Jan. 2, 1990), FERC Stats. & Regs. ¶ 30,869 (1989).

[69] Section 4.38(b).

[70] Section 4.38(c).

[71] Section 4.38(d).

[72] Section 4.38(b)(1).

[73] Section 4.38(b)(2). The meeting must include an opportunity for a site visit, and members of the public and Indian tribes may fully participate. The previous § 4.38 did not require a meeting.

[74] Section 4.38(b)(4). This date may be extended for an additional 60 days at the option of the resource agency. This extension option does not appear in § 16.8, applying to pre-filing consultation by renewal applicants.

[75] We stress that a resource agency must, as early as possible in the pre-filing consultation process, inform a potential applicant of the specific scientific studies, criteria and methodologies the agency believes are necessary to evaluate the impact of the proposed project. Without a prompt response on these issues a potential applicant may be unable to complete the necessary studies prior to the expiration of its preliminary permit. *E.g.*, Natural Energy Resources Co., 48 FERC ¶ 61,032 (1989).

[76] Section 4.38(c)(1) directs a potential applicant to "diligently conduct all reasonable studies and obtain all reasonable information requested by resource agencies under paragraph (b) of this section that are necessary for the Commission to make an informed decision regarding the merits of the application."

[77] Section 4.38(c)(1). If holders of preliminary permits were not allowed to complete such studies after filing, their applications might be deemed unacceptable for filing, and the applicant could lose the comparative advantage of holding a preliminary permit simply because it could not complete a lengthy study requested prior to the expiration of its permit. See Natural Energy Resource Co., *supra*. The Commission might also set a specific deadline for the filing of a license application, as in the case of an unlicensed project. An operator should not be deemed to have failed to meet this deadline merely because it could not diligently have completed all required studies before this deadline. *Id.*

[78] Section 4.38(c)(4).

[79] Section 4.38(c)(5).

[80] Comments should be dated when they are mailed or delivered.

applicant must meet with the disagreeing agency (and with any other agencies of similar or related areas of interest, expertise, or responsibility) in an attempt to reach agreement on project impacts and appropriate remedial or corrective measures.[81] Signed, comprehensive agreements with resource agencies are not expected or required, nor are they binding on the Commission, which will determine whether the terms of any such agreement are in the public interest. The filed application must reflect any areas where disagreements between an applicant and a resource agency still exist.

The third stage of consultation consists of the filing of the application with the Commission and service of a copy on each consulted agency.[82] The final rule provides that a resource agency may waive in writing its consultation rights for a stage of the pre-filing process, as, for example, by consenting to a potential applicant's completion of necessary scientific studies after it files its application.[83] A resource agency may also waive compliance with all consultation requirements, as in the previous regulation.[84] The final rule also sets forth material the applicant must submit with its application, including a summary of the consultation process, comments of resource agencies, and any disagreements between the applicant and any resource agency regarding the need for a study or information on any environmental protection, mitigation, or enhancement measures.[85]

A number of industry representatives [86] object to the new requirement in proposed § 4.38(b)(1) that the applicant describes in its information package, for resource agencies and the public, reasonable hydropower alternatives to the proposed project. These parties fear distraction from the applicant's proposal and the cost of conducting studies on alternatives. Criticism is also directed at the new requirement for a public meeting, on the ground that frequently the public had not taken advantage of the similar requirement in § 16.8, applicable to applicants for new licenses (at relicensing). Teleconferencing or other less expensive alternatives are suggested.

Public power representatives, environmental groups, and resource agencies [87] support the proposed public meeting requirement. They generally consider the proposal as expediting the licensing process by helping to identify as early as possible all significant environmental and other concerns. American Rivers and EPA want an expansion of the requirement that the applicant study hydropower alternatives to its proposal, so that the applicant would also have to explore non-hydro alternatives, such as energy conservation and energy demand management.

Wildlife Federation and American Rivers seek greater participation by Indian tribes and the public in the pre-filing consultation process. PG&E recommends a greater role for the Commission in the pre-filing consultation process, as by giving the Commission advance notice of meetings and promptly serving the transcript of the initial public meeting on the Commission.[88]

Interior raises a number of issues. It asks that the National Park Service be listed as a resource agency that the applicant must consult and that the Commission clarify an applicant's duty to consult with agencies controlling an existing dam site when it proposes to add new hydropower facilities. Interior also is concerned by a possible conflict between proposed §§ 4.38(a)(4)(ii) and 4.38(a)(6), which deals with the kinds of applications that are subject to the pre-filing consultation requirements of § 4.38. Interior is not sure which joint meeting sets the 60-day clock running under proposed § 4.38(b)(6). The agency claims that there should be a required meeting between the applicant and the resource agencies whenever there is a conflict over necessary scientific studies, project design, and similar issues, and that the Commission should participate in the meeting if there is a conflict over appropriate protection for endangered species. Finally, Interior claims that the 90 days allowed for a resource agency to respond to draft applications pursuant to proposed § 4.38(c)(5) is insufficient for complex projects. Extensions of time should be allowed, and the starting date should run from the time the agency receives the draft application.

The Commission has decided not to make any further change in the proposed regulations governing the applicant's obligation to consider reasonable hydropower alternatives in the pre-filing consultation process under § 4.38(b)(1). Since the applicant's proposal is often not fixed precisely at this point, as the applicant itself considers the alternatives available to achieve its hydropower objective, it would not be productive to limit the consultation process to the one alternative selected by the applicant at this early stage. At the same time, the Commission is sensitive to the concerns expressed by industry representatives that the consultation process not encompass alternatives that the applicant has no intention of pursuing at the Commission. For this reason, we stress that the pre-filing exploration of alternatives must be "reasonable" and have a meaningful relationship to the applicant's objectives, not the least of which is pursuit of a project that is efficient and makes economic sense.

The Commission will not expand this required consideration of alternatives in the pre-filing consultation process to the non-hydro arena. The Commission fully recognizes its obligation to consider energy conservation in deciding whether to issue licenses, pursuant to FPA section 4(e). The Commission is concerned, however, that requiring the study of issues such as energy conservation potential and energy demand management in the pre-filing consultation process would needlessly complicate and prolong it. Such issues, where relevant, are best addressed in the hearing process, where they can be examined as appropriate.

The Commission retains the public meeting requirement in § 4.38(b)(2). As discussed more fully below, it is important to apprise the public of the applicant's intentions at the earliest possible stage, before they have ripened into a concrete proposal before the Commission. In this way, the applicant can adjust its Proposal as appropriate to respond to any public criticism and address in its application the significant environmental and other issues raised by the public during the pre-filing process. We believe that the experience gained from this requirement in § 16.8, for relicensing, has been successful and will continue to serve a useful purpose, especially for controversial projects.

Consistent with the addition to § 4.38 of a mechanism for resolving disputes

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[81] Section 4.38(c)(6).

[82] Section 4.38(d)(2). The previous regulation only required service on the consulted agencies at the time of filing of minor applications. In the case of major applications, the previous regulation required a copy to be served on each consulted agency only when (and if) the application is accepted for filing by the Commission. See § 4.38(b)(3).

[83] *E.g.*, Natural Energy Resources Co., *supra.*

[84] Compare new §§ 4.38(e) and (f)(4) with previous § 4.38(e)(1).

[85] Compare new §§ 4.38(f)(1)–(3) and (5) with previous §§ 4.38(c)(1) and (d).

[86] *E.g.*, Alabama Power and American Paper.

[87] *E.g.*, Seattle Light, American Rivers, and Energy.

[88] PG&E proposes changes to § 4.38(c)(6)(ii) to parallel § 16.8(c)(6)(ii), and proposes to make § 4.38(f)(8) part of § 4.38(b)(3)). PG&E also asks that the term "or Indian tribe" be inserted after the term "resource agency" at appropriate places.

between applicants and resource agencies,[89] the Commission is changing § 4.38(c)(6) to more closely parallel § 16.8(c)(6) by requiring 15-day notice to the Commission of all meetings. Similarly, the Commission is changing § 4.38(b)(3) to require a copy of the transcript of the public meeting to be served on the Commission as soon as it is available.

We have revised § 4.38 to ensure that it refers to Indian tribes as well as resource agencies.[90] We have not added the National Park Service to the list of resource agencies that applicants subject to § 4.38 must consult during pre-filing. The Commission does not have authority to issue original licenses for hydropower projects in national parks.[91] The regulations adopted clearly require consultation with any federal agency (such as the Bureau of Reclamation or the Corps of Engineers) operating a federal dam at which the applicant proposes to construct a hydropower facility.

Additional meetings during the pre-filing consultation process, as between the applicant and the resource agencies, will not be required. Section 4.38 already requires two such meetings, one during the first stage and one during the second stage (if there were disagreements between the applicant and a resource agency). If additional meetings are appropriate under the circumstances of the proposal and the particular consultation process, the Commission encourages the applicant and resource agencies to schedule them, but we do not believe it would serve any useful purpose to require them in all cases.

As new § 4.38 grants to resource agencies a substantially expanded time frame in which to respond to an applicant's draft application, and since this time frame is the same as that adopted in § 16.8, there does not appear to be any reason to extend this time still further based on the comments in the record. The Commission is also concerned about the burden on the applicant of allowing for additional extensions of time in the pre-filing consultation process, since as proposed the process can take a minimum of 270 days to complete.[92]

2. *Dispute Resolution.* The Commission did not propose to include any dispute-resolution mechanism in § 4.38, unlike in § 16.8. The Commission deliberately omitted such a proposal due to the high attrition rate experienced in recent years by potential applicants for original licenses, as contrasted to the very low attrition rate by applicants for new licenses.[93] The Commission was concerned about preserving its limited staff resources for the processing of filed applications of all kinds and for dispute resolutions for potential applicants for new licenses, where the prompt resolution of the dispute would most likely expedite the filing of an acceptable and complete application with the Commission. In contrast, the Commission was concerned that adding a dispute-resolution mechanism to § 4.38 would in most cases waste the Commission's time, as such potential applicants would not likely ever file with the Commission an application for license or exemption.

Commenters of every description[94] strongly recommend that the Commission reconsider this omission and insert into § 4.38 a mechanism for resolving disputes between applicants and resource agencies, especially as the disputes relate to what scientific studies the applicant must conduct prior to filing any application for license or exemption with the Commission. These commenters point out the risk to an applicant of rejecting an agency's study request: The risk that its application will be subject to rejection by the Commission as deficient. Potential applicants must estimate the amount of time and money that will be required to perfect their applications; enabling them to request the Commission's decision on disputes over needed studies gives them guidance and certainty early in the pre-filing consultation process, so that the licensing process becomes more efficient. One commenter believes that adding such a mechanism to § 4.38 will encourage agencies to be more flexible in their demands for scientific studies and will reduce the number of irrelevant and burdensome study requests with which potential applicants have to contend.

EEI and Interior recommend a dispute-resolution mechanism based on that contained in § 16.8(b)(5), which could be substituted for proposed § 4.38(b)(5). PG&E also asks the Commission to add language to proposed § 4.38(c)(2) that would require an applicant to conduct a study only if the Commission concludes that it is proper.

The Commission is revising §§ 4.38 (b) and (c) to incorporate a dispute-resolution mechanism for applicants for original licenses and exemptions that parallels the mechanism in § 16.8 for relicensing proceedings. The Commission agrees with the commenters that this change should make the hydropower procedures more efficient and less burdensome for potential applicants and resource agencies and should help to achieve the principal objective of the pre-filing consultation regulation, the filing with the Commission of complete applications that are ready for processing. The Commission remains concerned about the potential for this dispute-resolution mechanism to divert limited staff resources from those proposals that are eventually filed with the Commission but is hopeful that this demand will be more than outweighed by the assistance provided to applicants and resource agencies that have serious disagreements about the nature or scope of scientific studies that are necessary. The Commission's experience to date under Part 16 does not reveal an extremely large number of such requests, suggesting that the existence of this option may encourage all concerned to reach agreement on the study question without contesting the issue before the Commission in the pre-filing consultation process.

As explained in the most recent rulemaking on part 16,[95] opinions expressed in response to requests for resolution of disputes concerning necessary pre-licensing studies may be reconsidered by the Commission after an application is filed, where this reconsideration is necessary to address concerns raised by intervenors or to comply with legal requirements. Such reconsideration will not, however, cause any application to be dismissed as deficient, so long as the applicant conducts any study ordered by the Commission. It should also be pointed out that Commission decisions on requests for resolution of disputes over necessary studies during the pre-filing consultation process can be no more helpful than the facts on which the requests are based, and of course

[89] *See* section IV.B.2., below.

[90] *See* the discussion of the definition of Indian tribe in section IV.A.3., above.

[91] Certain existing hydropower projects are located in national parks. The consultation requirements for applicants for new licenses for such facilities are set forth in § 16.8, and these applicants would have to consult the National Park Service.

[92] The 60-day or 120-day period under § 4.38(b)(6) starts running from the date of the public meeting held by the potential applicant pursuant to, § 4.38(b)(2)(i).

[93] The FPA refers to the first license issued for a project as the original license. The FPA refers to all subsequent licenses for the project as new licenses. These subsequent licenses are also sometimes referred to as "relicenses."

[94] *E.g.*, EEI, Alabama Power, American Paper, Wisconsin River, American Rivers, and Wildlife Federation, and various state and federal agencies.

[95] Order No. 513, 54 FR 23,756 (June 2, 1989), III FERC Stats. & Regs. ¶ 30,854 (May 17, 1989).

changes in those facts (such as in the hydropower proposal itself) may require further environmental analysis, supplements to scientific studies, or even, in some cases, entirely new studies. The standards the Commission will use in making such determinations are discussed in section IV.B.3. below.

The Commission declines to require only those pre-licensing studies expressly approved by the Commission. As the experience under Part 16 illustrates, in most cases it is possible for applicants and resource agencies to reach agreement on necessary studies without obtaining a decision on the matter from the Commission. The Commission desires to do everything possible to encourage all concerned with a hydropower proposal to attempt to work out their differences at every stage of the process. Requiring the Commission to decide every study request, no matter how routine, would place a severe burden on the Commission's limited staff resources and could cause unnecessary delays in the hydropower licensing process.

3. *Scientific Studies.* The NOPR discussed one of the most critical questions facing the hydropower program relating to consultation with resource agencies: "What kinds of scientific studies are necessary to be conducted on the impact of the proposed project to satisfy the statutory requirements for the licensing process?" Taking measures to protect the environment is a cost of doing business of applicants for and holders of hydropower licenses and exemptions. Conducting scientific studies is often necessary in order to determine what measures should be taken at a hydropower project to protect, mitigate damages to, and enhance fish and wildlife and to achieve other resource goals. These studies are typically the responsibility of the applicant, who must coordinate with resource agencies and other involved parties in the consultation process on what studies are appropriate.

In this context it is important for the Commission to have in place consultation and hearing procedures that will enable all concerned to address, and the Commission to resolve, as logically and efficiently as possible, questions about what scientific studies should be conducted, who should conduct them, what data are needed to determine the environmental impact of a hydropower project, and the level of mitigation required to reduce those impacts. The Commission is entrusted by the FPA with the responsibility of establishing a reasonable approach to processing license applications for hydropower projects. The Commission seeks to strike an appropriate balance between the sometimes conflicting goals of complete, thorough analysis and timely license decisions.

The NOPR asked a number of questions on this issue of scientific studies. As part of the consultation process, should resource agencies be entitled to expect potential hydropower applicants to finance and conduct any requested scientific study related to the impact of the proposed project, so long as the study and its methodology are generally accepted in the scientific community as necessary or appropriate to determine the project's resource impacts? What procedures would best ensure a reasonable balance concerning required studies that satisfies legal requirements and facilitates development and maintenance of the nation's hydropower resources while protecting and enhancing the environment and achieving other resource objectives? What procedures would best ensure development of the data that is necessary and appropriate for the Commission to analyze a project on its merits without jeopardizing it through undue delay or unacceptable financial burden on the applicant or resource agencies?

The Commission welcomed comments on this issue, including what scientific studies a hydropower applicant may be expected to conduct during the consultation process, the extent of the financial resources available to developers and resource agencies to pursue such studies, and whether the regulatory revisions to §§ 4.32, 4.34 and 4.38 proposed in the NOPR adequately address this issue.

Industry representatives [96] support the requirement in proposed § 4.38(b)(4) that resource agencies specify in detail, and document the basis for, their study recommendations, on the ground that this requirement should reduce requests for studies that are irrelevant to the analysis of the impacts of the hydropower project under consideration. These commenters object to proposed § 4.32(b)(6)–(8), granting certain rights to raise, within 45 days of the filing of an application with the Commission, questions about the adequacy of the scientific studies the applicant had conducted, claiming that this new procedure will cause delay and extra costs for applicants.

Some of these commenters assert that the Commission should require resource agencies to justify each study request according to the study's economic impact on the project, comparing total costs of the project (including the costs of the study requested) and the value of the project's proposed mode of operation (*i.e.*, peaking or run-of-river) with the total costs of alternative sources of electrical energy, in order to avoid a bias in favor of the study requested. These commenters express concern about agencies requesting potential hydropower applicants to conduct unnecessary, expensive, and time-consuming studies in order to fill gaps in their databases, and a need is alleged for standards to determine what studies should be performed.

On the other hand, American Rivers argues that a potential applicant should conduct all studies requested by resource agencies unless the Commission can conclude that the study would serve no useful purpose. It claims that an applicant's duty to conduct studies extends to all reasonable mitigation and enhancement measures proposed by resource agencies or the public and a complete examination of all alternatives to the proposed project. American Rivers disagrees with the EPRI methodology for assessing the economic value of proposed resource studies and questions whether it is a workable method for resolving conflicts over study requests.

Wildlife Federation contends that there should be no limit on what studies an applicant may be required to conduct to evaluate a project's effect on the environment. It suggests that, if the costs of such studies are too great for the developer to absorb, the proposed project ought not to be approved or built.

Energy asks the Commission to approve all study requests in the first stage of pre-filing consultation and would limit the Commission's discretion subsequently to require additional studies unless there was a change in the developer's proposal or the results of the approved studies indicated a need for additional studies. Resource agencies would have to demonstrate a need for and the reasonableness of requested studies, and Energy recommends that the Commission set forth in the regulatory text the procedures it will use in deciding issues concerning requested studies, as well as criteria for the final determination.[97]

[96] *E.g.*, EEI, American Paper, Alabama Power, Wisconsin River, Grant, and PG&E.

[97] Energy specifically recommends, as a minimum, the following criteria for the Commission to use in deciding on necessary studies: (1) That the study will produce relevant information not otherwise in the record; (2) that the study objectives and methodology demonstrate an understanding of

Continued

Interior agrees with Energy that the Commission should codify in its regulations the standards it will use in deciding on appropriate studies. These standards should relate to the potential impact on fish and wildlife resources and not be based on the size, power output, or economics of the proposed project. Interior wants a rebuttable presumption that studies recommended by fish and wildlife agencies are appropriate and necessary to obtain information needed to develop the recommendations of the agencies to protect, enhance, and mitigate damage to fish and wildlife resources that may be caused by a hydropower project.[98] Applications should not be accepted for filing if an applicant has "patently refused to initiate studies requested by agencies."

Commerce also supports proposed § 4.32(b), which would create a review before the Commission of the adequacy of studies immediately after an application is filed. Commerce asks for a deadline for Commission action on any post-filing dispute about necessary studies and urges a deadline for an applicant to conduct necessary studies. If the applicant missed the deadline, its application would be dismissed without prejudice. Interior claims that the Commission "bears a great burden of proof should it choose to ignore the agencies' information needs."

EPA contends that requested studies must be conducted "unless license applicants provide substantial evidence why requested studies are not necessary and these agencies have adequate opportunity to respond to the applicants' claims."

The Commission has decided not to change the proposed regulations governing scientific studies, other than to insert a dispute-resolution mechanism, as discussed above. Because the Commission has just begun to gain significant experience under the dispute-resolution mechanism in § 16.8, applicable to applicants for relicensing, it appears premature now to attempt to create and codify additional standards beyond those proposed in the NOPR for determining what scientific studies an applicant may be required to conduct in specific cases.

The Commission remains very concerned about the potential for study requests to cause undue delay in the preparation and processing of hydropower applications. The need for any study requested by a resource agency must be adequately supported. Under revised § 4.38(b)(4), during the first stage of pre-filing consultation the agency must furnish the applicant with a clear description of the basis for a study request, an explanation of why the study methodology specified is more appropriate than alternatives, and documentation that the use of the study methodology is a generally accepted practice that will be useful to the agency in furthering the resource goals affected by the proposed project. Under revised § 4.38(c)(1), during the second stage of pre-filing consultation an applicant must conduct any reasonable study that is necessary for the Commission to make an informed decision on the merits of its application. While the applicant remains responsible for making a decision on these requests for studies in the first instance, if the applicant desires it can refer any request to the Commission for decision under the dispute-resolution mechanism adopted in this final rule.

Under revised § 4.32(b)(7), within 45 days after an application is filed anyone can recommend that an additional study be conducted by an applicant, but the request must be accompanied by a detailed showing:

> For any such additional study request, the requester must describe the recommended study and the basis for the request in detail, including who should conduct and participate in the study, its methodology and objectives, whether the recommended study methods are generally accepted in the scientific community, how the study and information sought will be useful in furthering the resource goals that are affected by the proposed facilities, and approximately how long the study will take to complete, and must explain why the study objectives cannot be achieved using the data already available. In addition, in the case of a study request by a resource agency or Indian tribe that had failed to request the study during the pre-filing consultation process under § 4.38 or § 16.8 of this chapter, the agency or Indian tribe must explain why this request was not made during the pre-filing consultation process and show good cause why its request for the study should be considered by the Commission.

In resolving disputes over necessary studies arising during pre-filing consultation under §§ 4.38 and 16.8, the Commission will use similar standards. In order to determine whether a study is necessary for an informed decision on the merits of an application, the Commission will consider all relevant facts before it. These facts include whether the study methodology is generally accepted, how the information sought relates to the impact of the proposed project on resources administered by the agency, and whether adequate information is alreadv available. The Commission does not expect applicants to conduct experimental research projects on behalf of resource agencies, to expand the boundaries of general scientific knowledge, or to repeat experiments that have already been conducted by others. For example, information on fish mortality attributable to passage through turbines may be available and could in specific cases eliminate the need for an applicant to conduct new studies on this issue. If such studies are needed, it may be appropriate for a number of applicants or licensees to conduct them jointly, sharing the costs. Laboratory studies or the use of information developed to evaluate similar environmental questions may be appropriate in lieu of original, on-site field studies. Computer-generated simulations may also be used in appropriate cases to control study costs.

The Commission does not believe it is necessary to codify the criteria for evaluating study requests recommended by Energy, quoted above. The criteria for evaluating study requests in the final rule, at §§ 4.32(b)(7) and 4.38(c)(1), encompass Energy's recommendations. The Commission believes that these new regulatory provisions, together with the experience gained in deciding on study requests in specific cases, should be sufficient to ensure the gathering of information necessary for decision and place a reasonable burden on hydropower applicants that will not interfere with an expeditious licensing process.[99]

4. *Program workload.* This rulemaking proceeding was initiated, in part, to assist the Commission's hydropower program in efficiently handling the workload it faces in the near future and to comply with the consultation requirements of the FWCA, NEPA and the FPA. This workload will consist largely of applications to relicense hydropower projects under section 15 of

the relevant environmental issues and have a reasonable probability of successfully resolving the issues to be addressed; and (3) that the proposed study and methodology be appropriate for the site-specific conditions and issues.

[98] A number of state agencies, such as Minnesota, make similar recommendations.

[99] The Commission declines to adopt any specific method to evaluate the economic impact of a study request on a proposed project. It is true that the cost of a study alone is not sufficient reason to deny a request to conduct it, but large study costs, either in absolute terms or relative to the size of the project, raise legitimate questions as to whether the information sought to be gathered by the study cannot be obtained from other sources. No study will answer with complete finality all questions about the resource impacts of a proposed project, and in the interests of an efficient licensing process it may be necessary for the Commission to limit the fact-finding process to those facts that are already available or that can be developed and analyzed with reasonable effort and cost within a reasonable period of time, using accepted scientific methods.

the FPA, applications for original licenses for environmentally sensitive proposed projects, and applications to license unlicensed operating projects.

The Commission invited comments on the relationship between this rulemaking proposal and the various types of applications being considered in the hydropower licensing program. The Commission asked whether the same regulations on consultation with resource agencies and related matters should apply to hydropower applications in each of these areas and whether there are any reasons to apply different regulations.

The comments on this issue [100] generally support the approach taken in the proposed regulation, establishing uniform procedural regulations for the Commission's pre-filing consultation and hearing process and providing flexibility where appropriate. No commenter suggested any workable regulatory standards for differentiating between different types of applications in the regulations governing an applicant's duty to consult, the type of hearing the Commission conducts on an application or other similar requirements.

The revisions adopted herein do not create any new distinctions for different types of applicants. The Commission is confident that these new procedures contain adequate flexibility, both pre- and post-filing, to deal with the great range of applications for hydropower license and exemption filed with the Commission.

5. *Non-capacity amendments.* In proposed § 4.38(a)(4)(iii), the Commission proposed to apply the pre-filing consultation requirements of § 4.38 to an application to amend an existing license if the amendment involved:

(A) The construction of a new dam or diversion or of a new hydroelectric facility;

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

(C) The installation of additional waterpower turbines;

(D) The licensing or exemption of facilities not previously licensed to the applicant or not exempted from licensing; or

(E) Any new development or change in project facilities or operation that could result in a significant environmental impact.

A number of commenters [101] ask us to narrow the category of license amendment applications that require pre-filing consultation, on the ground that the time and burden are not justified by the benefit.

EEI suggests that increasing the number of turbines without substantially increasing the capacity or altering the operation of a project would not justify consultation, because the environmental ramifications are minimal. EEI also suggests that some amendments involve safety or environmental improvements such that the effect of requiring consultation would be to delay the benefits of the amendment: *e.g.*, installation of a fish ladder or fish screen, or dam stabilization devices. EEI also points out the overlap and interrelationship of § 4.38(a)(4)(iii) with §§ 4.200 and 4.201, which also pertain to applications for license amendment, and proposes revisions to all three of these sections.

Wisconsin River suggests that a license amendment to add recreational facilities could be processed more efficiently by consulting only the one or two agencies that have an interest in those facilities. Solano suggests that no useful purpose would be served by requiring pre-filing consultation on an application it intends to file, to amend its license to include therein certain existing facilities that are currently owned and operated by the federal government. Alabama Power suggests that the pre-filing consultation requirements be made applicable only if the amendment to the license could result in significant environmental impact. Pend Oreille suggests that we consider adopting the "material amendment" standard in § 4.35 as the determinant of when pre-filing consultation is required before filing an application to amend a license.

We originally developed the three-stage consultation process in § 4.38 in an effort to expedite our processing of the applications. The consultation requirements were designed to ensure that the applicant had considered a broad range of significant environmental factors in preparing its application, and had undertaken whatever studies were necessary and appropriate, so that the application could be evaluated more quickly once it was filed. (We note in passing that the phrase "three-stage consultation" is somewhat inapposite, in that the third stage consists merely of filing the application, an event that is elementary to the licensing process even absent any pre-filing consultation requirements.) We adapted the § 4.38 process into § 16.8 for relicensing proceedings to further the same objectives of expeditious processing.

We extended the pre-filing consultation requirement to applications to amend licenses because there are many situations in which the amendment could have a significant environmental impact. In those situations, pre-filing consultation could expedite the application review process by ensuring that these environmental impacts have been considered in preparing the application.

We recognize, however, that there is a significant category of amendments to licenses in which the pre-filing consultation requirement would slow the application process rather than facilitate it. We also are wary of discouraging beneficial amendments. We want to encourage amendments that increase capacity or efficiency by replacing older equipment with newer or better equipment under circumstances in which there is no operational impact on the environment. To the extent legally feasible, we want to do this by avoiding extraneous issues in such proceedings. We also want to encourage amendments that implement safety or environmental improvements without delaying such improvements by woodenly imposing all-purpose consultation prerequisites.

The problem we face is how to define a standard that requires pre-filing consultation when it is appropriate and omits it when it is unwarranted. The ultimate goal is to require pre-filing consultation when the license amendment has a potentially significant environmental impact, but that standard cannot be codified into a regulatory test because it begs the question. The whole purpose of the consultation process is to identify the environmental impacts.

Defining the standard in terms of additions to capacity is tempting but elusive. There are some amendments which could affect the environment without increasing capacity, while other amendments could increase capacity without any impact on the environment.

We agree with EEI that § 4.201 is integrally related to § 4.38(a)(4)(iii), and that both need to be reconsidered in conjunction with each other. We have done so in light of the comments received and the considerations discussed above, and have decided to revise them as follows:

Revised § 4.38(a) (4), (5) and (6):

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

(i) Original license;

(ii) Exemption;

(iii) Amendment to an application for original license or exemption that materially amends the proposed plans of development as defined in § 4.35(f)(1);

[100] *See, e.g.*, Colorado, Minnesota, and Washington Fisheries.

[101] EEI, Wisconsin River, Alabama Power, Solano, and Pend Oreille.

(iv) Amendment to an existing license that would increase the capacity of the project as defined in § 4.201(b); or

(v) Amendment to an existing license that would not increase the capacity of the project as defined in § 4.201(b), but that would involve:

(A) The construction of a new dam or diversion in a location where there is no existing dam or diversion;

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

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

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

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

* * * * *

Revised § 4.201(b) and (c):

(b) *Required exhibits for capacity related amendments.* Any application to amend a license for a hydropower project that involves additional capacity not previously authorized, and that (1) would increase the actual or proposed total installed capacity of the project, (2) would result in an increase in the maximum hydraulic capacity of the project of 15 percent or more, and (3) would result in an increase in the installed name-plate capacity of 2 megawatts or more, must contain the following exhibits, or revisions or additions to any exhibits on file, commensurate with the scope of the licensed project:

* * * * *

(c) *Required exhibits for non-capacity related amendments.* Any application to amend a license for a water power project that would not be a capacity related amendment as described in paragraph (b), above, must contain those exhibits that require revision in light of the nature of the proposed amendments.

New § 4.201(b) defines a capacity related amendment as one that would result in both an increase in maximum hydraulic capacity of the project of 15 percent or more and an increase in installed name-plate capacity of two megawatts or more. We believe that these limits would minimize the pre-filing expense for licensees seeking most efficiency upgrades and small project upgrades having minimal expected impacts.

After consideration of this issue, and in response to the comments received, we have adopted these provisions in the final rule. We invite interested persons to comment on them by filing requests for rehearing of this order.

Section 4.35 of the Commission's regulations provides that, when a hydropower applicant amends its application for license or exemption in order "to materially amend the proposed plans of development," the date of acceptance of the application under § 4.32(f) of the regulations becomes the date on which the amendment to the application was filed. As a consequence, applicants disfavor such amendments, which may cause them to lose whatever priority the application has over competing applications by virtue of the filing dates.[102]

There are a number of exceptions to this general rule, set forth in § 4.35(e), that encourage certain types of amendments by allowing them to be filed without altering the application's filing date. Section 4.35(e)(4) allows an applicant to file an amendment to proposed plans of development "to satisfy requests of fish and wildlife agencies" with which the applicant has consulted under § 4.38. On further review of this exception in response to the comments received that seek to improve the Commission's consultation procedures, § 4.35(e)(4) appears too narrowly drawn, and should be revised to encourage appropriate amendments to proposed plans in order to respond to concerns raised by any consulted entity during the consultation process. As discussed in section IV.B.l. above, for example, an applicant must consult with a wide range of resource agencies and affected Indian tribes. An applicant may also wish to amend the plans in its application in response to concerns raised by the Commission, as by amending the application to change the project applied for to an alternative suggested by the staff that would reduce adverse environmental effects of the original proposal.

In order to encourage all such amendments and to promote the objectives for the FPA and related laws, the Commission is hereby revising § 4.35(e) to provide that any amendment to a license or exemption application "to satisfy requests of resource agencies or Indian tribes * * * or concerns of the Commission" may be filed without altering the application's filing date.[103]

Finally American Rivers notes that there are consultation requirements in both § 4.38 (for original licenses) and § 16.8 (for "new" licenses in relicensing proceedings). American Rivers inquires as to which procedures apply in the event that a substantial amendment of an original license results in acceleration of the license expiration date.

We recognize that there may be other situations in which questions or ambiguities may arise as to whether a proceeding involves original licensing or relicensing.[104] However, there is no need to sort out those issues here. Our intention in this final rule is to conform § 4.38 and § 16.8 in such a manner. as to prescribe substantially identical consultation procedures for both types of proceedings. To the extent that there are any inadvertent discrepancies, we invite interested persons to point them out by filing a request for rehearing, so that we can eliminate them. Thus, participants ought to be able to pursue the consultation process in the same manner, without need to consider whether the proceeding is best characterized as original licensing or relicensing.

C. Hearing Process

1. *Filing requirements.* Section 4.32(b)(3) requires an applicant to make certain information regarding its proposed project available to the public for inspection and reproduction.

American Rivers argues that § 4.32(b)(3) should be revised to include correspondence and comments received

[102] Under the Commission's hydropower regulations, for example, if two competing applications for license are equally well adapted to develop, conserve, and utilize in the public interest the water resources of the region, and neither permittee nor municipal preference is involved, the Commission will favor the applicant with the earliest application filing date. 18 CFR 4.37.

[103] Although not specifically proposed in the NOPR, this change is procedural only and is necessary to make more effective the Commission's consultation process and environmental review of hydropower applications under the FPA and NEPA, as discussed in the NOPR and in sections IV.B. and IV.C. Specific advance notice and comment on this rule change are therefore not required, and the Commission welcomes comments on this change in requests for rehearing of the final rule.

[104] *See, e.g.,* the Notice of Inquiry in Docket No. RM91-5-000, Preferences at Relicensing of Units of Development, 56 FR 8165 (Feb. 27, 1991), IV FERC Stats. & Regs. ¶ 35,522 (Feb. 20, 1991).

by the applicant in connection with the project. It suggests that language of the rule be revised by adding the words "or received by the applicant from a resource agency or the public." The additional language requested by American Rivers is unnecessary to achieve the purpose of the public file requirement for applicants for original licenses or exemptions, which is to enable the public to obtain convenient access to information about the applicant's proposal to the Commission. Should a person desire the types of additional information discussed by American Rivers, he can obtain such information from the person originating the correspondence or comments or directly from the Commission's files. Applicants for new licenses must maintain a more extensive public file, in order to give the public convenient access to information about the applicant's operating and compliance record at the project for which the new license is sought.[105]

PG&E suggests that a statement be added to § 4.32(b)(3) precluding an applicant from making cultural resource information available to other persons if this could lead to a violation of any federal law. PG&E's suggested addition is aimed at protecting archeological or Native American cultural resources in a manner consistent with the protection stated in the relicensing regulations.[106] We agree that such protection is appropriate and have added parallel language to § 4.32(b)(3).

Section 4.32(b)(4)(iii) requires the applicant to provide a copy of the complete application, as amended, to a public library or other convenient public office. South Carolina argues that, if public involvement is desired throughout the pre-filing and filing process, then applicants should also be required under § 4.32(b)(4)(iii) to make copies of the first stage of consultation document and the initial consultation packet, as well as the application, available to the public at the stated libraries and public offices.[107] Inasmuch as § 4.32(b)(3) states that information is to be made available from the date on which the applicant files its application, and the information submitted at that point provides a more complete picture of the project than does the initial consultation document, we see no need to require that the first-stage consultation document be made available at a public library or other public office.

The California Water Board requests that it be listed in § 4.38(a)(1) as a resource agency that must be consulted in stage one of the three-stage consultation process. It states that this early consultation requirement is necessary because of its dual authority in water resource allocation and water quality certification.

The specific listing of the California Water Board as a resource agency in § 4.38(a)(1) is unnecessary, since, as an agency with responsibility in water resource management, it fits the definition of a resource agency in proposed § 4.30(b)(28), and, as a certifying agency under section 401 of the Clean Water Act, it meets the stated criteria in § 4.38(a)(1).[108]

Section 4.38(f) sets out what must be included in the applicant's Exhibit E of its application to document that it has met the Commission's consultation requirements. Section 4.38(f)(2) requires that Exhibit E include any letters from the public containing comments and recommendations.

Section 4.38(h) is a transition provision that applies to applicants who file their license applications on or after the effective date of the rule, but who, because they conducted consultation before the effective date of the final rule, did not hold a public meeting in accordance with the new requirement in the rule. Section 4.38(h)(4)(i) requires such applicants to hold a public meeting within 90 days from the effective date of this rule. Section 4.38(h)(4)(iv) requires the applicant to include in its filed application a description of how the applicant's proposal addresses the significant resource issues raised during the public meeting.

American Rivers suggests that the Commission make § 4.38(f)(2) consistent with § 4.38(h)(4)(iv) by revising § 4.38(f)(2) to require that Exhibit E of the application include a description of how the applicant's proposal addresses the significant resource issues raised during the public meeting. American Rivers also requests that § 4.38(h)(4)(iv) be revised to include a reference to copies of any letters from the public containing comments and recommendations.

The proposed addition to § 4.38(f)(2) is unnecessary, because such language is already contained in § 4.38(f)(8), and thus is applicable to all applicants. The proposed addition to § 4.38(h)(4)(iv) is also unnecessary, because the transitional applicant is filing its application after the effective date of the rule and thus must comply with § 4.38(f)(2) as part of its filing requirement.

In order that the agencies reviewing Exhibit E will have a comprehensive list of all agencies the applicant consulted during pre-filing consultation, we have added § 4.38(f)(9), which requires the applicant to include such a list, including addresses, in Exhibit E. A list of agency names and addresses will be useful in identifying multiple resource agencies for projects located in more than one state, and will provide the reader with a complete and quick reference guide to all the agencies that were consulted.

2. *Water quality certification.* The NOPR proposed to modify the showing previously required by an applicant concerning its compliance with section 401(a)(1) of the Federal Water Pollution Control Act (the Clean Water Act),[109] where the state certifying agency has received a request for water quality certification but has not acted on it for one year. The previous regulations required that the applicant provide the Commission a copy of its request for certification, including proof of the date that the certifying agency received the request "in accordance with applicable law governing filings with that agency." [110] Revised § 4.38(f)(7)(i)(B) and § 16.8(f)(7)(i)(B) [111] require only that the applicant provide proof of the date on which the certifying agency received the request for water quality certification. The revised regulations make clear that the certifying agency is deemed to have waived the certification requirements of the Clean Water Act if it has not denied or granted a request for certification within one year from receipt of the request.

The NOPR explained that if a certifying agency does not have, within one year, sufficient information to analyze a request for certification, the agency can deny certification and

[105] 18 CFR 16.7.

[106] 18 CFR 16.7(d)(5)(ii). PG&E proposes the following language: "A licensee shall delete from any information made available under this section [or paragraph], specific site or property locations the disclosure of which would create a risk of harm, theft or destruction of archaeological or Native American cultural resources or to the site at which such resources are located, or would violate any federal law, including the Archaeological Resources Protection Act of 1979, 16 U.S.C. § 470w–3, and the National Historic Preservation Act of 1966, 16 U.S.C. section 470hh."

[107] For a specified time period, a potential applicant must make the first-stage consultation package available to the public for inspection and reproduction. Section 4.38(g)(2)(i) and (h)(4)(iii)(A).

[108] In any event, the listing of resource agencies in proposed § 4.38 was not meant to be exclusive.

[109] 33 U.S.C. 1341(a)(1).

[110] 18 CFR 4.38(c)(2)(ii) and 16.8(f)(7)(i)(B).

[111] The regulations, and the amendments thereto, are substantially identical. Part 4 pertains to applications for original licenses, while part 16 pertains to applications for new licenses in relicensing proceedings.

thereby require the applicant to reapply. An applicant therefore has no incentive to withhold from the certifying agency the information that the agency considers necessary for ruling on the merits of the request.

A number of commenters [112] object to the revision, contending in various ways that it seeks to circumvent or undermine the Court of Appeals' decision in *City of Fredericksburg, Va.* v. *FERC.*[113] In that case, the court held that, under the Commission's regulations, "a valid request for certification occurs only if the prospective licensee complies with the state agency's filing procedures." [114] The prior regulation, as construed in *City of Fredericksburg,* was unduly burdensome, because it put the Commission in the frequently difficult posture of trying to ascertain and construe the procedural requirements of numerous and divergent state statutes and state agency regulations.[115] The amendment proposed in the NOPR in effect implements the Commission's original intent in adopting those regulations. The commenters misconstrue the purpose and effect of the amendment. It does *not* override the procedural requirements of state agencies. To the contrary, it fully preserves those requirements, and in that sense is fully consistent with the court's decision in *City of Fredericksburg.* Under both the old and the new regulations, there is no issue of whether state agency procedural requirements apply; clearly they do, and they must be complied with. The sole issue is who has the responsibility for determining whether the applicant has complied with those procedural requirements. The amended regulation places that responsibility squarely where it belongs, and where the Commission always intended it to be: on the state agencies responsible for implementing those procedural requirements.

The amendment to the regulations does not undermine the ability of state agencies to make this decision. If an applicant fails to comply with a state agency's procedural requirements, the agency has the power to deny the request for certification, and that denial is binding on this Commission. The denial can be issued without prejudice to the applicant's refiling of an application that complies with the agency's requirements. The only burden placed on the agency is to look at the request and make a clear decision within one year. That is ample time to determine whether the agency's procedural regulations have been complied with. If the agency does not either grant or deny the water quality certification request within one year, then the requirement for certification is deemed waived.

For all of the reasons discussed above, and after careful consideration of the comments received, we have decided to adopt the revised § 4.38(f)(7)(i)(B) and § 16.8(f)(7)(i)(B) as proposed in the NOPR.[116]

Wildlife Federation suggests that we further amend the regulations so as to preclude the possibility that a license applicant might file evidence of its request for water quality certification while not disclosing that the request had been denied within the ensuing year. Clearly, the whole thrust and purpose of the regulation is to identify situations in which water quality certification requirements have been waived through state agency inaction. A denial of certification within one year would clearly not be a waiver. Any applicant that filed with us evidence of its water certification request without disclosing that the state agency had denied the request would be guilty of a serious misrepresentation and abuse of our processes; we are not aware of any such problem having occurred in the past, and Wildlife Federation does not make any such allegations. Nevertheless, in an abundance of caution, we have added the following sentence to § 4.38(f)(7)(ii) and to § 16.8(f)(7)(ii):

> If a certifying agency denies certification, the applicant must file a copy of the denial within 30 days after the applicant received it.

Wildlife Federation also suggests that the regulations be amended to provide for inclusion of the section 401 certification conditions in the license. Pursuant to section 401(d) of the Clean Water Act, these water quality certification conditions become terms and conditions of the license as a matter of law. Therefore, it is not necessary to expressly adopt them in the order issuing the license.[117]

Finally, EEI and Oklahoma Water propose revisions to § 4.38(f)(7)(iii) and its counterpart, § 16.8(f)(7)(iii), with respect to material amendments. As currently in effect, those sections require that, if an applicant amends its application for license "to materially amend the proposed plans of development," [118] it must file a new request for water quality certification.

Oklahoma Water contends that an applicant should be required to file a new request for water quality certification even if the amendment does not propose material changes to the proposed plans of development. In particular, Oklahoma Water suggests that a change in identity of the applicant might warrant requiring a new certification. EEI, on the other hand, contends that a new request for certification should not be required if the applicant has already received a water quality certification for the project, and if the material amendment to the license application does not in any way modify the project's discharge or water quality impacts. EEI, therefore, proposes a revision to the regulations that would limit the need to obtain a second water quality certification to situations in which the amendment would have some nexus to discharges or water quality.

We find some merit in both proposals. First of all, if the applicant has filed a request for water quality certification and the state agency has not yet acted upon the request at the time that the applicant files a material amendment with the Commission, we believe that the applicant has an obligation to notify the state agency of the amendment regardless of its relationship to discharges and water quality. Under those circumstances, the state agency is entitled to know all the relevant facts before it acts on the certification request, and it is the state agency's prerogative to determine which facts are relevant.

With respect to Oklahoma Water's specific example, if a state agency has issued a water quality certification to a particular applicant, and if the applicant then files an amendment with the Commission that changes the identity of

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[112] California Water Board, Oklahoma Water, Oregon, Nevada, Wildlife Federation, and American Rivers.

[113] 876 F.2d 1109 (4th Cir. 1989).

[114] *Id.* at 1111–12.

[115] *See, e.g.,* Central Maine Power Co., 52 FERC ¶ 61,033 (1990) at pp. 61,171–72, and John N. Webster, 51 FERC ¶ 61,351 (1990) at p. 62,138 n.7. At least one state has apparently allowed requests for certification to be made orally. We are amending § 4.38(f)(7)(ii) and § 16.8(f)(7)(ii) to specify that waiver can occur only if the request for certification is submitted in writing.

[116] If a request for water quality certification was filed with a certifying agency prior to the effective date of this final rule, and if that certifying agency had not accepted the request for filing as of that date, then the one year in which the certifying agency must act on the request in order to avoid the waiver commences on the date of the effectiveness of this final rule. If the certifying agency had accepted the request for filing, then the one-year period commences running on the date of that acceptance for filing.

[117] *See* Carex Hydro, 52 FERC ¶ 61,216 (1990) at p. 61,769.

[118] The quotation is from § 4.35(b)(1). Section 4.35 deals with amendments to applications. Sections 4.38(f)(7)(iii) and 16(f)(7)(iii) refer by cross-reference to § 4.35(f), which defines "material amendment to proposed plans of development."

the applicant without changing the project, a question may arise as to the transferability of the state certification to the reconstituted applicant. We recognize the issue that Oklahoma is raising, but prefer to deal with it on a case-by-case basis, on the particular facts and legal context presented if such a situation arises.

We agree with EEI that, if a state agency has issued water quality certification for a project, and if the applicant then files an amendment that materially changes the project but in a manner that has no material adverse impact on water quality, no useful purpose would be served by requiring the applicant to obtain a second certification. If, for instance, an amendment would add recreational facilities without having any effect on discharges of water, a new request for certification would clearly not be required. Similarly, if an amendment would replace outmoded electrical facilities with more efficient facilities without adversely affecting the quality of the water discharged, a new request would not be required. On the other hand, we recognize that situations may arise involving a fundamental alteration of the project or proposed project, such as adding or deleting a dam or comparably significant facility, or relocating the entire project to an area that had not previously been evaluated. In those situations, we expect the applicant to request new water quality certification, and will require it to obtain one, or a waiver thereof.

We believe that these principles are equally applicable in two situations: (1) Amendments to pending applications for license; and (2) applications to amend an existing license. Accordingly, we have amended § 4.38(f)(7)(iii) to read as follows:

(iii) Notwithstanding any other provision in Title 18, chapter I, subpart B, any application to amend an existing license, and any amendment to a pending application for a license, requires a new request for water quality certification pursuant to paragraph (f)(7)(i) of this section if the amendment would have a material adverse impact on the water quality in the discharge from the project or proposed project.

We have adopted a comparable revision of § 16.8(f)(7)(iii) with respect to amendments to applications for a new license (relicensing). In reviewing amendments to license applications and applications to amend existing licenses, the Commission will ascertain whether a water quality certification was issued or waived, and if not, whether certification or waiver is required under the circumstances presented.

Finally, we note that on March 8, 1991, the United States Court of Appeals for the District of Columbia Circuit issued a decision regarding water quality certification for hydropower projects. *Keating* v. *FERC*, No. 90–1080. The court held that, once a federal agency has issued a construction permit or license with respect to a facility which has obtained water quality certification under section 401(a)(1) of the CWA, such certification is presumed to be valid for purposes of a second federal license related to the operation of the same facility. A state may overcome that presumption and revoke certification for purposes of the second federal license, but only under the limited circumstances expressly defined in section 401(a)(3) of the CWA. Section 401(a)(3) requires the agency to whom application is made for the second federal license to notify the certifying state of that application. The state then has 60 days in which to notify the federal agency that specified changed circumstances are present, in which case certification can be revoked for purposes of the second federal license.

In light of section 401(a)(3), the court ruled that, if, based on a state's issuance of water quality certification, the U.S. Army Corps of Engineers has issued to a hydropower project a dredge and fill permit under section 404 of the CWA,[119] the Commission is at a minimum required to find that the state's purported revocation of its certification is timely and was assertedly taken in response to changed circumstances pursuant to section 401(a)(3).

The court recognized that, in some cases, the resolution of a disputed claim over "changed circumstances" may involve a question of state law or an application of state water quality standards. The court did not decide whether the Commission must go on to determine whether an asserted changed circumstance falls within one of section 401(a)(3)'s enumerated categories, but did require the Commission either to make the determination itself or to articulate "a satisfactory explanation for why Congress would have intended to leave the application of some or all of section 401(a)(3)'s categorical provisions to the state courts alone."

The Commission will, of course, implement the final rule consistent with the court's decision.

3. *Notice-and-comment hearing.* The NOPR proposed to slightly revise the existing text of § 4.34, which would become proposed § 4.34(a), to focus on those cases where the Commission decides to designate particular issues for a trial-type hearing. All other cases (and issues) would be handled by notice-and-comment procedures.

For applications for license or exemption, the NOPR proposed to add new §§ 4.34 (b) to (g).[120] The proposed rule directed that all comments on an application, including all mandatory and recommended terms and conditions for exemption or license, must be filed with the Commission within "60 days after issuance by the Commission of a notice declaring that the application was ready for environmental analysis." [121] Reply comments would be due within 90 days of that notice. These comment periods are longer than those provided by current practice (in the public notice accepting an application for filing and inviting interventions), in order to provide more time to prepare these comments, which typically serve as the primary opportunity to present argument and evidence on the issues raised by the application for license or exemption.[122]

The Commission could extend these comment periods if appropriate. Parties could ask for extensions of time for good cause shown in accordance with § 385.2008. The proposed rule also made clear that all filings in a proceeding on a hydropower application for license or exemption must be served on all parties and entities listed in the official service list in the proceeding, prepared in accordance with § 385.2010.[123]

The proposed rule expressly required that any agency responsible for mandatory terms and conditions or prescriptions for hydropower licenses and exemptions file any such terms and conditions or prescriptions with the Commission no later than the date specified for the submission of public comments.[124] The proposed rule recognized that in certain cases the proceedings before the agency to determine mandatory terms and conditions or prescriptions may not be completed. In such cases, the agency would be obligated to submit to the

[119] 33 U.S.C. 1344.

[120] Certain applications to amend a license by adding new project works may be applications for original licensing under the FPA as amended by ECPA. However, the ECPA amendments would not apply to the already licensed project. *See* Fieldcrest Mills, Inc., 37 FERC ¶ 61,264 (1986).

[121] The definition of "ready for environmental analysis" is discussed above, at section IV.A.5.

[122] *See* the discussion at section IV.C.4., below.

[123] Proposed § 4.34(b) also required that, if anyone submits written material to the Commission relating to the merits of an issue that may affect the responsibilities of a resource agency, the entity submitting this material must serve a copy on the resource agency affected.

[124] Section 4.34(b)(1).

Commission by the due date for comments on the application:

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

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

The proposed rule required that all fish and wildlife agencies submit to the Commission their recommended terms and conditions for the protection, mitigation of damages to, and enhancement of fish and wildlife, pursuant to the FWCA and the FPA 10(j), no later than the due date for public comments on the application.[125] The proposed rule also required these agencies to discuss their understanding of the resource issues presented by the application and the evidentiary basis for the recommended terms and conditions.

The proposed rule allowed an agency to modify terms and conditions or prescriptions it had previously submitted to the Commission under two circumstances:

(1) Where the information and analysis presented in a draft environmental statement indicated a need for such modification; and

(2) Where an amendment to an application would significantly change a project's proposed plans of development.[126]

The proposed rule deleted the different deadlines set by the current regulations for the submission of fish and wildlife terms and conditions on various types of applications.

The proposed rule allowed the Commission to require additional procedures, such as a pre-hearing conference or further notice and comment on specific issues, in particular cases.[127] Such procedures would be useful in particularly complex and controversial cases.

The proposed rule stated that the Commission will analyze "all timely terms and conditions recommended by fish and wildlife agencies pursuant to the Fish and Wildlife Coordination Act for the protection, mitigation of damages to and enhancement of fish and wildlife * * *."[128] This analysis would follow prior practice and be done in connection with the Commission's environmental review of an application. The analysis would be released to the public with the environmental assessment or environmental impact statement prepared on the application. In the case of an environmental impact statement, the analysis would be released in draft form as part of the draft environmental impact statement, and public comment would be invited in accordance with NEPA procedures.

The analysis of the recommended terms and conditions of license, submitted by fish and wildlife agencies for the protection of fish and wildlife, would include a preliminary determination of whether the recommended terms and conditions are inconsistent with the purposes and requirements of applicable law.[129] If a preliminary determination of inconsistency were made, the Commission's staff would consult with the fish and wildlife agency concerned in an attempt to resolve the inconsistency, giving due weight to the recommendations, expertise, and statutory responsibilities of the agency.

The proposed rule specified the statutory standards under which the Commission would issue terms and conditions for licenses and exemptions. All licenses issued would include the conditions specified in FPA section 10(a)(1).[130] Fish and wildlife conditions would be based on all *timely* recommendations received pursuant to the FWCA from fish and wildlife agencies.[131] Licenses for a project located within any Federal reservation would be issued only after the required findings have been made and would be subject to such conditions as the Commission may timely receive under FPA section 4(e).[132] Fishways [133] timely prescribed by the Secretary of Commerce or the Secretary of the Interior would be required pursuant to FPA section 18. Exemptions issued for conduit facilities or for small hydropower projects would include any terms and conditions timely submitted by fish and wildlife agencies pursuant to FPA section 30(c) and PURPA section 405(d).[134]

If the Commission were not able to adopt in whole or in part the fish and wildlife recommendations of a fish and wildlife agency, the Commission would publish the findings and statements required by FPA section 10(j)(2).[135]

NHA and other industry commenters state their strong support for the proposed regulatory requirement that the resource agencies furnish the evidentiary basis for their proposed terms and conditions and prescriptions. North Carolina Electric asks that the reference to the Federal Power Act in proposed § 4.34(f)(1)(i) be broadened to include all of section 10(a). Public Generating Pool and Seattle Light want the Commission to ensure that the proposed changes in § 4.34(b)(4), allowing resource agencies to change their terms and conditions and prescriptions under certain conditions, are not used by resource agencies and tribes to delay hydropower licensing proceedings.

Environmental groups like American Rivers contend that the proposed changes in the Commission's procedural regulations are too confusing to the public, and that the proposed regulations contain too many critical stages and notices in the administrative process, *i.e.*, at the pre-filing, filing, and hearing stages. These groups want intervenors and protesters to be able to file comments on an application as soon as it is filed, prior to its acceptance for filing by the Commission. Under this view, parties should have liberal leave to intervene later in the proceeding and to revise their comments, recommendations, or terms and conditions at any time.[136] American Rivers and National Heritage argue that the proposed regulations fail to adequately address the requirement that the Commission give equal consideration to environmental and other values in the licensing process.

[125] Section 4.34(b)(2).

[126] Section 4.34(b)(4).

[127] Section 4.34(c).

[128] Section 4.34(e).

[129] Section 4.34(e)(2). The Commission's staff would make this preliminary determination, as it is also responsible for the preparation of the necessary NEPA documents. See the discussion of administrative procedures on environmental issues in section IV.C.6. and the proposed changes to the delegation of authority to the Director of OHL in section IV.D.4., below. The preliminary determination would be made in connection with the environmental assessment or environmental impact statement.

[130] Proposed § 4.34(f)(1)(i). FPA section 10(a)(1) requires that all licenses issued under this part be based on the following standards:

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

[131] Section 4.34(f)(1)(ii).

[132] Section 4.34(f)(1)(iv).

[133] Section 4.34(f)(1)(v). See the discussion of the definition of a "fishway" in section IV.A.4., above.

[134] Section 4.34(f)(2).

[135] Section 4.34(f)(3).

[136] Wildlife Federation asks the Commission to codify in its regulations the current practice of accepting motions to intervene and granting interventions in the period after an application is filed but before it is accepted for filing.

such as energy conservation.[137] One of these commenters urges the Commission to adopt least-cost planning in the licensing process and to incorporate energy conservation and other demand-side options into its decisionmaking process.

Interior wants proposed § 4.34(b)(4) changed to ensure that agencies can modify recommended terms and conditions whenever necessary. Interior writes that it is unfair to impose on a federal agency a requirement to show good cause in order to obtain an extension of time for a filing deadline or to show "extraordinary circumstances" to justify failure to act in a timely manner, as required by § 385.2008.[138] Interior maintains that the Commission cannot require an agency (such as a federal land management agency) to provide an evidentiary basis for FPA section 4(e) conditions; only a joint rulemaking in which all the affected agencies participate could create such a requirement. Interior also asks the Commission to undertake any service of copies required under proposed § 4.34(b); alternatively, it requests that the Commission publish the service list along with its notice declaring an application ready for environmental analysis.

Commerce contends that the proposed regulations do not contain procedures to ensure that the Commission has a sufficient record for its decision. The regulations should reflect that the applicant, not the resource agencies, has the burden of proof in hydropower proceedings.

Except for the changes discussed in other sections of this preamble, dealing with such issues as the precise time deadlines for taking certain actions in hydropower hearings, the section 10(j) process, and interventions, the Commission has decided not to make any major changes in its proposed regulations governing the hearing process for hydropower applications. These regulations accurately reflect the manner in which these proceedings have been conducted and codify many existing practices; in addition, the regulations make certain changes in the hearing process that are designed to make the process fairer to all concerned, easier to understand and administer, and more expeditious. The Commission is confident that the result should be improved decisionmaking in this important regulatory area.

Requiring agencies to set forth the evidentiary basis for their terms and conditions is elementary, and the minimum procedure required to enable the Commission (as well as the applicant and other parties) to understand those terms and conditions and to respond to them or implement them as appropriate. It is not necessary to broaden the reference in proposed § 4.34(f)(1)(i) to refer to FPA section 10(a), as requested, since the Commission is clearly obligated to comply with the entire Act in its decisions on hydropower applications. The Commission does not find that there is any reason to change proposed § 4.34(b)(4), which appears adequately to protect against the risk that agencies using their right to revise recommended terms and conditions will unreasonably delay hydropower proceedings. These agencies remain under an obligation to submit their terms and conditions to the Commission within the time frames specified.

We cannot agree that the revised procedural regulations are too confusing, given the responsibilities of the Commission to implement the FPA. The regulations clearly distinguish among the different stages through which the processes of preparing, filing, and conducting a hearing on a hydropower application must pass. As discussed more fully in section IV.D.2. below, in these revised regulations the Commission has added a number of requirements for an applicant to comply with in order to keep the public informed as fully as possible of the status of its hydropower application and the public's participation rights. Every public notice required by these regulations must clearly communicate the information specified in the regulations.

The regulations expressly recognize the many statutory and other legal requirements to which the hydropower hearing process is subject. To the extent that the law requires that the Commission give equal consideration to a specified value, such consideration will be given. The Commission will not burden its procedural regulations with additional provisions (such as an adoption of least-cost planning as a decisional criterion) not relevant to the laws governing the hydropower hearing process and clearly beyond the scope of this rulemaking.

The Commission is convinced that it is within its authority, fair, and appropriate at this time, to adopt procedural regulations that require resource agencies to submit their recommended terms and conditions and prescriptions, whatever their statutory basis, on time and in a manner that will protect the rights of all parties to the hearing process, as discussed more fully in section IV.C.4. below. Similarly, the Commission concludes that it has ample authority to set various procedural requirements for the content of these submissions, such as the requirement in these regulations that an agency explain the evidentiary basis for its recommendations, and to prevent any action (such as a revision of a previously stated position) that is untimely.

The Commission does not believe that it places an unreasonable burden on parties and participants in a proceeding (other than persons merely filing protests) to require the party or participant (such as a resource agency) to serve a copy of its submissions on all persons on the service list in the proceeding. Requirements of service are routine in judicial and administrative proceedings and are an accepted cost of participating in them. The Commission will ensure that its staff takes the necessary steps to inform all participants, after the deadline for filing interventions has passed, of the official service list in the proceeding, and to keep them informed of any changes, to help all participants comply with this service requirement. It is simply not efficient to expect the Commission to provide this service.

4. *Deadlines.* The timely submission of all resource agency recommendations, mandatory terms and conditions, and prescriptions is extremely important to avoid unnecessary delays in processing hydropower applications and to prevent the Commission from wasting its limited resources on proposals that may have to be significantly changed to address these recommendations, terms and conditions, and prescriptions. Unless the Commission is promptly informed of resource agency recommendations, mandatory terms and conditions, and prescriptions, a proper NEPA analysis may be difficult to conduct. For example, an agency's exercise of the FPA section 4(e) conditioning authority

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[137] Two commenters, Commerce and California Indian Legal Services, note that the NOPR did not propose guidelines for the Commission to develop comprehensive plans for river basins, or for utilizing comprehensive plans in the licensing process. The Commission's policy on comprehensive plans has been enunciated in a series of orders. *See, e.g.,* Skykomish River Hydro, *et al.*, 42 FERC ¶ 61,283 (1988) at p. 61,880, *reh'g denied*, 43 FERC ¶ 61,123 (1988). We do not perceive a need to reopen that matter here. Section 4.38(f)(6), as proposed in the NOPR and adopted herein without change, requires the applicant to include in Exhibit E of its application an explanation of "how and why the project would, would not, or should not, comply" with any relevant comprehensive plan and a description of any relevant resource agency determination regarding the consistency of the project with any such comprehensive plan.

[138] The Commission has not proposed to change § 385.2008.

pertaining to government reservations may require a project's relocation, or a change in its design, with concomitant effects on the environmental analysis required of the Commission under NEPA. It is also important that fish and wildlife agencies timely submit their recommended fish and wildlife conditions.

In the NOPR the Commission therefore proposed to set deadlines, in the regulations, for the submission of all resource recommendations (including fish and wildlife conditions), mandatory conditions, and prescriptions. These deadlines would allow the same number of days for a response and would apply to all hydropower applications for license or exemption, regardless of application type.

Consulting agencies have a responsibility not only to submit their initial recommended or mandatory terms and conditions and prescriptions on time, but also to keep these terms and conditions and prescriptions current in light of any significant changed circumstances.[139] Under the regulations proposed in the NOPR and adopted herein, agencies may request an extension of time within which to submit their terms and conditions. Failure to submit the terms and conditions or prescriptions on a timely basis would result in the hydropower hearing process, including the NEPA process, being conducted without the input of the consulting agency and might result in a final Commission decision that does not address the needs and concerns of the agency.

If a fish and wildlife agency filed its recommended fish and wildlife terms and conditions after the due date specified by the Commission (pursuant to proposed § 4.34(b)), the recommendations would not be subject to the requirements of proposed §§ 4.34(e), 4.34(f)(1)(ii), and 4.34(f)(3). In other words, the recommendations would be considered by the Commission under FPA section 10(a) but would not be subject to the determination, consultation, and funding requirements of FPA section 10(j). Section 4.34(b). If an agency responsible for submitting mandatory terms and conditions or prescriptions to the Commission failed to do so by the deadlines specified by the Commission, the Commission would consider the terms and conditions or prescriptions under FPA section 10(a), but only if such consideration would not delay or disrupt the proceeding. Section 4.34(b). Otherwise, the terms and conditions or prescriptions may be omitted from any license or exemption issued. Extensions of time for submitting mandatory terms and conditions or prescriptions would be granted by the Commission for good cause or extraordinary circumstances shown, in accordance with § 385.2008.

The proposal to set deadlines in the regulations for participants' submissions in hydropower proceedings is supported by a large number of commenters.[140] EEI discusses in detail the Commission's authority to take this action, based on section 309 of the FPA and widely accepted concepts of administrative law.[141] Public Generating Pool calls the imposition of deadlines the cornerstone of the proposed regulations, without which the hydropower licensing process will not work. Resource agencies should not be able to disrupt or stop a hydropower hearing by delay and refusal to submit recommendations on a timely basis. All decisional bodies, judicial and administrative, use deadlines, which are necessary for them to carry out their functions. Without deadlines for comments and recommendations, parties opposing a hydropower proposal, such as resource agencies, would have a veto power over hydropower development that Congress never granted to them. Energy describes deadlines as necessary to maintain the integrity and efficiency of the licensing process.

Other commenters,[142] however, question the Commission's authority in this regard, citing a lack of any statutory provision expressly authorizing the Commission to set deadlines. Wildlife Federation argues that the Commission cannot set deadlines for agency submissions of fish and wildlife recommendations but concedes the Commission may have this authority if a fish and wildlife agency's failure to submit fish and wildlife recommendations causes undue delay in a specific case.

A large number of detailed recommendations are made to improve the deadlines set in the proposed regulations. Industry representatives[143] want to move the deadline for protests and interventions from 45 to 60 days after an application's acceptance for filing[144] to 60 days after the Commission declares an application ready for environmental analysis. These commenters want an extra 30 to 60 days (*i.e.*, 60 to 90 days after the filing of any comments on the application) for an applicant to respond to any comments filed. Criticism is levelled at proposed § 4.34(b)(4), that would allow resource agencies, in response to a draft environmental impact statement or an amendment that would significantly change the project's proposed plan of development, to revise terms and conditions and prescriptions that had been filed earlier with the Commission. EEI contends that if any revisions are permitted, they should only be made in response to a material amendment of an application (as defined in § 4.201) or on a showing of extraordinary circumstances. NHA requests a shorter deadline, 60 days rather than 90 days, for a resource agency to respond to a draft application during the pre-filing consultation process.

Wildlife Federation claims that the proposed deadlines in the regulations are "simply unworkable" and that they should be revised to allow an agency to submit revised recommendations after the NEPA analysis. Recommendations filed earlier than this stage would be tentative only, possibly expressed in the alternative, and used as a basis for the environmental analysis of the application.

Resource agencies like Interior and Commerce emphasize the need for flexibility in any deadlines, that should be set according to the size and complexity of the hydropower proposal and the difficulty of the environmental analysis. Where there is a potential impact on endangered species, it may be impossible for a resource agency to comply with the proposed deadlines for submitting recommendations. Interior

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[139] Comments were invited on two situations where a resource agency may be unable to submit final mandatory terms and conditions by the deadline for comments, and on the situation where a 4(e) condition may conflict with a fish and wildlife recommendation. In the first situation a federal land management agency, such as the U.S. Forest Service, may have its own administrative procedures for determining mandatory conditions, including appeal procedures. These procedures may not have been completed by the Commission's deadline for comments. In the second situation, if a resource agency is a "cooperating agency" with the Commission under NEPA, the agency will be unable to submit to the Commission final mandatory conditions until completion of the agency's environmental analysis (issued jointly with the Commission). In these situations, the Commission stated its belief that it is appropriate to require such agencies to give preliminary terms and conditions to the Commission pending completion of their agency proceedings, at which time they would submit final terms and conditions.

[140] *E.g.*, EEI, NHA, Public Generating Pool, Grant, and Energy.

[141] EEI cites judicially recognized authority for agencies to set deadlines to deal with similar problems, such as those presented by competing applications.

[142] *E.g.* Wildlife Federation and Commerce.

[143] *E.g.*, EEI (citing §§ 4.32(d), 4.34, and 4.36), Alabama Power, PG&E, and Seattle Light.

[144] This deadline is set by the Commission in the public notice of the acceptance of an application for filing pursuant to 18 CFR 4.32(d)(2). The Commission is required to publish notice of the filing of an application by FPA section 4(e).

contends that it places an unfair burden on fish and wildlife agencies to treat late-filed fish and wildlife recommendations as comments under FPA § 10(a) as opposed to section 10(j).

Interior contends that under the *Escondido* case,[145] the Commission is powerless to impose any penalty on a federal land management agency that does not meet a deadline for submitting FPA section 4(e) conditions. Interior also contends that any system of deadlines must also take into account the need in certain cases to reserve authority for future prescriptions of fishways, when changes in circumstances make it appropriate to prescribe a specific fishway. Commerce contends that an agency should be able to modify a recommendation previously submitted whenever indicated by new biological information or a change in the agency's policy position.

Agencies insist that the Commission must consider late-filed terms and conditions under FPA section 4(e) and that there must be liberal provision for flexibility in the deadlines and for extensions of time. Commerce contends that final FPA section 10(j) recommendations should not be due until 90 days after the issuance of an EIS or EA. One commenter suggests that the term "timely" be deleted from proposed § 4.34(f)(1)(iv), and that § 4.34(b) should allow 90 instead of 60 days for comments and recommendations in response to notice that an application is ready for environmental analysis. Agriculture contends that time limits on agency participation in Commission proceedings should only be established jointly pursuant to inter-agency agreement. Interior asks that proposed § 4.34(b) be revised to allow the submission of modified recommendations whenever new information is developed in the process of environmental analysis (including by means of an EA); that the comment period be extended on amendments to a pending application that would significantly change the project or its anticipated impact on resources; and that § 4.34(d) be applied only to license applications.

Indian tribes [146] generally agree with the agencies that additional time is needed to respond to hydropower applications, as by extending the time for a response under proposed § 4.34(b) from 60 to 90 days. The Indian tribes cite their lack of funds as a reason for their difficulty in submitting comments as promptly as called for by the proposed regulations.

The Commission expected the comments it received on this aspect of the NOPR. Some parties generally seek more time for their participation in hydropower proceedings but oppose granting additional time to parties with different points of view. In the NOPR the Commission attempted to strike a reasonable balance in setting deadlines for hydropower proceedings, to allow all parties time to prepare and submit materials to the Commission that would express their concerns and assist in the resolution of all important issues presented by a hydropower application and to move the proceeding along as quickly as practicable toward a conclusion. While it is true that many hydropower applications present unique issues that take some time to present and analyze, ultimately it is in the interest of no one to postpone the development of an adequate record that the Commission can use as a basis to issue a final decision.

The Commission is confident that it has adequate authority to impose such deadlines on participants in hydropower proceedings, pursuant to section 309 of the FPA, which provides:

> The Commission shall have power to perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders, rules, and regulations as it may find necessary or appropriate to carry out the provisions of this Act. Among other things, such rules and regulations * * * may prescribe the form or forms of all statements, declarations, applications, and reports to be filed with the Commission, the information which they shall contain, and the time within which they shall be filed * * *.[147]

The Commission has used this authority repeatedly since its passage; it remains the basis for a wide range of procedural regulations of the Commission (including deadlines) that apply to electric rate and hydropower proceedings; and these same procedural regulations also apply to natural gas proceedings pursuant to the similar provision in the Natural Gas Act.[148] Many of these deadlines are administered by the Commission's Administrative Law Judges, and we are not aware of any case that even raises a question about their authority to set deadlines that are necessary for the proper conduct of trial-type hearings, even though these deadlines may affect a wide range of participants in complicated proceedings, including government agencies.

The Commission also sets deadlines under its NEPA regulations that govern the participation of interested persons in the environmental review of pending applications.[149] These NEPA regulations affect other government agencies, and no claims have been made that agencies are free to dictate to the Commission the timing of important steps in the environmental review process, such as when scoping meetings are held or when comments are due on a DEIS. Since the Commission has determined that setting deadlines is a necessary part of its regulation of hydropower development, pursuant to the authorities granted to the Commission in the FPA, and since the Act does not make any distinction in the Commission's procedural powers based on the type of proceeding being conducted (*i.e.*, trial-type or notice-and-comment), we conclude that adopting the proposed scheme of deadlines for hydropower proceedings is well within the Commission's statutory authority.

After a careful review of the comments submitted, the Commission has decided to adopt in the final rule most of the specific deadlines set forth in the NOPR, but it appears appropriate to make certain adjustments in these deadlines.[150] The regulations set deadlines that are designed to fit most cases. The Commission will grant requests for extensions of time in specific cases upon a showing of good cause; additional procedures, such as further rounds of notice and comment on specific issues, may be employed as required. Thus, for example, in an exceptionally difficult or complex case, the Commission will accommodate the need to allow more time to develop the record needed for good decisionmaking.

The Commission will revise the deadline for applicants and other parties to submit reply comments. Under § 4.34(b), comments will continue to be due as a matter of course 60 days after issuance of a notice that the application

[145] *Escondido Mutual Water Co.* v. *La Jolla Band of Mission Indians*, 466 U.S. 765 (1984).

[146] California Indian Legal Services, Klamath, Native American Rights Fund, and Tulalip.

[147] 16 U.S.C. 825h (emphasis added).

[148] 18 CFR part 385; Natural Gas Act, 16 U.S.C. 717o (1988).

[149] 18 CFR part 380.

[150] Certain state agencies recommend that the Commission require service of documents on them via certified mail and that the time period within which an agency must respond begin as of the date the agency actually receives the document. We decline to make these changes. Use of first-class mail for such purposes is routine in administrative proceedings, and the agencies have not shown that the substantial extra cost of requiring service via certified mail is justified or would result in quicker delivery of the documents. The time periods in the Commission's regulations and notices have been selected in order to allow sufficient time for a response when the period is measured from the date of mailing or issuance of a notice or decision, for example, and in order to allow the Commission and other parties to be able to determine the date when a response is due.

is ready for environmental analysis, but reply comments will be due 45 days later, *i.e.*, 105 days after issuance of this public notice.

The Commission will not provide in the regulations for additional opportunities to submit or revise recommendations, terms and conditions, or prescriptions. Adequate opportunity was provided in the proposed regulations, and where appropriate in particular cases, either upon the Commission's own initiative or in response to a request showing good cause, the Commission will afford additional opportunity for all parties to submit or revise their comments. For the reasons explained in the next section, it is unacceptable to postpone the deadline for agency recommendations until after the completion of the Commission's environmental review, since it is based in part on those recommendations.

5. *Ex parte restrictions.* As discussed in the NOPR, compliance with the FWCA and FPA section 10(j) requires the Commission staff to confer with fish and wildlife agencies, in order to understand and clarify their fish and wildlife recommendations and, as necessary and appropriate, to negotiate with those agencies on terms and conditions believed to be inconsistent with the law. Implementation of FPA sections 4(e), 18, and 30 and PURPA section 405(d) may involve a similar consultation process regarding the mandatory terms and conditions other government agencies may propose for inclusion in hydropower licenses and exemptions. Questions have been raised as to how the Commission's ex parte rule [151] applies to these communications.[152]

The NOPR stated that, if anyone has filed a protest or been granted intervention, either of which opposes a license application, Commission practice has been: (1) To apply the *ex parte* rule to communications with resource agencies, including fish and wildlife agencies on 10(j) matters; and (2) to follow the strictures set out below:

1. There can be no consideration of an *ex parte*, off-the-record communication between Commission staff and a resource agency on the merits of the case.

2. There can be communications regarding procedural matters.

3. Commission staff can communicate orally on the merits of a case with the resource agency or applicant if it gives all parties the opportunity to participate.

4. Copies of letters and documents sent to and received from any resource agency will be placed in the public file. If the letters or documents submitted relate to the merits of the case, they will be served on the applicant and all other parties, all of whom may file timely comments thereon.[153]

5. If an inconsistency exists between a fish and wildlife agency's fish and wildlife recommendation and applicable law, pursuant to FPA section 10(j) Commission staff will notify all agencies concerned and all parties in writing [154] and will attempt to resolve the inconsistency by appropriate means, keeping all parties informed of the communications used. If the inconsistency is not resolved, the staff may also decide to hold a meeting to resolve it and will notify and invite at least all affected resource agencies, the applicant, and all other parties. However, only the Commission and the fish and wildlife agency that submitted the recommendation in question are consulting parties, although all interested parties and resource agencies may participate.

6. The applicant or any other party may appeal the fish and wildlife conditions as they appear in the issued license order.

If no one has filed a protest or intervention opposing a license application, Commission practice has been: (1) To not apply the *ex parte* rule to communications with resource agencies or fish and Wildlife agencies and the 10(j) process; and (2) to follow the strictures set out below:

1. Commission staff can communicate with the pertinent resource agency orally or in writing.

2. Commission staff and a fish and wildlife agency can try to resolve an apparent inconsistency between a fish and wildlife recommendation and applicable law by correspondence or telephone calls until the environmental assessment (EA) or draft environmental impact statement (DEIS) has been completed.

3. In instances where the inconsistency has not been resolved by the time the EA or DEIS has been completed, Commission staff sends the EA or DEIS, with a letter summarizing staff's position, to the pertinent fish and wildlife agency, and sends copies of this package to all other interested resource agencies, the applicant, and all other parties for comment to try to resolve the apparent inconsistency.

4. Appropriate consultation, including meetings, will be held to resolve any remaining inconsistencies between fish and wildlife recommendations and applicable law.

The NOPR did not propose any specific regulatory text addressed to *ex parte* communications, but invited comments on the application of the Commission's *ex parte* rule to these consultation procedures.[155]

In general, most commenters agree with the Commission's practice with regard to application of its *ex parte* rule. However, they recommend that the Commission go further to impose similar restrictions in uncontested cases as well. Only two commenters appear to support a more limited application of the *ex parte* rule.

Interior questions why the *ex parte* prohibition should apply when fish and wildlife agencies are not intervenors in a proceeding. Interior adds that the addition of *ex parte* restrictions would promote inefficiencies in the licensing process without any significant benefits.

Similarly, Public Generating Pool comments that, in its experience, the extensive use and strict interpretation of limits on *ex parte* communications are not conducive to rapid resolution of differences. It observes that fair and constructive communications are possible if concerned entities are kept informed and the Commission staff makes its decisions with broad input. Public Generating Pool recommends that informal communications be allowed during as much of the section 10(j) process as possible and that the *ex parte* prohibitions be applied only during limited and specific circumstances. It adds that, once the *ex parte* rule has been invoked, it must be applied uniformly to all entities with an interest in the proceeding rather than just those with formal party status.

In contrast, most commenters not only agree with the Commission's practice with regard to its *ex parte* rule, but urge the Commission to go further than the rule would require. Commerce, American Rivers, and Wildlife Federation argue that the *ex parte* restrictions should be observed whenever there is an intervenor in a licensing proceeding, regardless of whether the intervenor opposes the project (making the proceeding "contested") or simply seeks the imposition of certain license conditions. They argue that an intervenor's interest in the merits of an agency's section 10(j)

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[151] 18 CFR 385.2201. See 5 U.S.C. 554, 557; Municipal Electric Utilities Ass'n of New York, 23 FERC ¶ 61,064 (1983) (and cases cited therein).

[152] See, for example, the letter of John L. Spinks, Jr., Deputy Regional Director, U.S. Fish and Wildlife Service, to the Commission, dated August 5, 1988, concerning the relicensing of the Kingsley Dam Project No. 1417 and the North Platte/Keystone Diversion Dam Project No. 1835, located near the confluence of the North and South Platte Rivers in Nebraska.

[153] The proposed rule clarified the obligation of those submitting written material relating to the merits of a case to serve a copy of the material on any resource agency whose responsibilities may be affected. Proposed § 4.34(b). See also 18 CFR 385.2010 (obligation to serve copies of all documents submitted on all parties in a proceeding).

[154] This is now done in connection with the environmental assessment or environmental impact statement prepared on the proposal, in the same manner as for uncontested cases.

[155] The proposed rule contained a brief section summarizing the Commission's consultation procedures. See proposed § 4.34(d).

recommendations and in any negotiations regarding those recommendations does not turn on whether the intervenor opposes licensing of the project or merely supports licensing coupled with specific conditions. These commenters therefore urge the Commission to apply the same procedural protections regarding notice and an opportunity to be heard in all cases in which an intervention has been filed.

Similarly, many commenters argue that an applicant's right to be informed of and to participate in section 10(j) negotiations should not turn on whether a case is "contested," thereby triggering application of the Commission's *ex parte* rule.[156] They argue that the distinction between "contested" and "uncontested" cases is an artificial and unreasonable basis for differing application of the *ex parte* rule.[157] These commenters therefore urge the Commission to provide the same procedural protection for applicant in both "contested" and "uncontested" cases. PG&E points out that, to ensure a fair and complete process, the Commission should keep all parties informed of all consultations with agencies regarding possible license terms and conditions to protect, mitigate, and enhance resources. PG&E adds that, without the applicant's input, the Commission will risk imposing less effective or even unworkable terms and conditions.

As discussed in section IV.C.8. below in connection with the section 10(j) process, the final rule clarifies that applicants and other parties will be provided notice of meetings involving section 10(j) negotiations, and all parties, including applicants and intervenors, will be given an opportunity to comment on the Commission's proposed resolution of fish and wildlife recommendations where there is a preliminary determination that they are inconsistent with applicable law. This is consistent with the notice-and-comment hearing procedures ordinarily used in hydroelectric licensing proceedings, and is intended to ensure that the process is both equitable and efficient.

In adopting this approach, the Commission does not mean to signal agreement with comments that such procedures are required by its *ex parte* rule, the Administrative Procedure Act, or due process considerations. The Commission does not believe that the record in this rulemaking is sufficient to undertake any significant revisions to its *ex parte* rule. Accordingly, the final rule adopts the recommendations for greater involvement of applicants and intervenors in the section 10(j) process without making any changes to the existing *ex parte* rule.[158]

We note, however, that the Commission has recently begun a comprehensive review of its *ex parte* regulations. Through the use of a negotiated rulemaking process, we hope to revise the *ex parte* rule before the end of 1991. Thus, to the extent applicable, the resolution in this final rule will be subject to the outcome of the Commission's comprehensive review in the generic proceeding.

In its discussion of the *ex parte* rule in the NOPR, the Commission stated that, in contested cases, copies of letters and documents exchanged between Commission staff and resource agencies would be placed in the public file and, if related to the merits of the case, would be served on the applicant and all other parties, who could file timely comments thereon.

With regard to this aspect of the proposal, Commerce recommends that, in the interest of fairness, applicant-supplied letters and documents pertinent to fish and wildlife issues also be made a part of the public record, and that all parties be provided an opportunity to comment on these documents as well. In response, the Commission notes that its existing rule regarding service requires any participant who files a document in a proceeding to serve a copy on each person whose name appears on the official service list for the proceeding.[159] Thus, if the applicant or a resource agency files any letters or documents concerning fish and wildlife issues (or any other written communications) for the Commission's consideration in the licensing proceeding, these documents are covered by this rule and may be the subject of comments filed by other parties. If no participant files them in the proceeding, they will not be part of the public record and the rule regarding service on the parties will not apply. As a result, they will not be considered in any decision on the license application.

With regard to the service of documents, American Rivers observes that, under the Commission's service rule discussed above, this is an obligation of participants to the proceeding, and the Commission should not take on the burden of effecting service. American Rivers adds that the service rule applies to all written communications, not only those related to the merits. In contrast, American Paper suggests that the Commission serve on the applicant and all other parties copies of all written communications, both substantive and procedural, between Commission staff and the resource agencies. American Paper notes that resource agencies often do not serve the applicant or other parties and that there is no guarantee that the Commission's proposal to require such service will be effective.

The Commission believes that the existing rule regarding service of documents, coupled with language in § 4.34(b) of the final rule, is sufficient to alert participants to their obligation to serve documents on all persons whose names appear on the official service list. The Commission agrees that it would be inappropriate for the Commission to assume the burden of effectuating such service, which is an obligation of participants in Commission proceedings. To assist participants in meeting the requirements of the rules, the Commission will continue its existing practice of making copies of the official service list for a proceeding available to all participants on request.

Concerning the Commission's discussion of the *ex parte* rule in the NOPR, American Rivers states that a resource agency that comments on a pending application, especially when 10(j) negotiations are underway, is at least an interceder under the Commission's *ex parte* rule. American Rivers therefore concludes that the Commission staff could not meet with a resource agency to discuss the substance of the agency's 10(j) recommendations consistent with the Commission's *ex parte* rule without giving other agencies and every party an opportunity to participate. This is one of the issues the Commission expects to examine in the generic and comprehensive review of its *ex parte* regulations.

Concerning the types of communications covered, American Rivers also states that general

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[156] These commenters are EEI, NHA, American Paper, Alabama Power, Wisconsin River, Pend Oreille, and Vernon. American Rivers agrees with this position, as long as the Commission also recognizes the similar interests of intervenors. In its reply comments, EEI agrees with American Rivers that all parties, including applicants and intervenors, should be permitted to participate in the section 10(j) process in order to protect their interests.

[157] In that regard, American Paper points out that the applicant's right to due process is potentially at issue.

[158] Commerce recommended that the Commission include its application of the *ex parte* rule in the text of the final rule. Interior and Michigan recommended that the phrases "in opposition to" and "merits of the case" be clarified. For the reasons discussed above, the Commission has not followed these recommendations.

[159] 18 CFR 385.2010.

discussion of procedural matters should be prohibited by the *ex parte* rule. As an example, American Rivers cites the request for an evidentiary hearing on the annual licenses in the relicensing of the Platte River projects.[160] Alabama Power notes that it does not oppose communications regarding technical clarifications to agency recommendations, but that applicants should be allowed to attend and be a full participating party in substantive communications and negotiations.

The Commission disagrees with American Rivers; the *ex parte* rule expressly permits discussion of procedural matters. Once again, the Commission expects to address this issue in the comprehensive review of its *ex parte* regulations.

American Rivers comments that parties require adequate advance notice of a scheduled communication in order to have a reasonable opportunity to participate, and that if the time proposed for a telephone call or meeting is inconvenient for a party, the Commission should make some effort to accommodate that party. The Commission agrees that reasonable advance notice should be given and that an effort should be made to accommodate the parties' schedules. Obviously, the reasonableness of the measures requested and the degree of accommodation required will depend on the particular circumstances surrounding the proposed call or meeting.

With regard to timing, American Rivers argues that the *ex parte* rule should apply from the time a motion to intervene has been filed, and not only after the section 10(j) recommendations are filed. EEI comments that the combination of the Commission's late intervention policy for resource agencies and application of the *ex parte* rule encourages fish and wildlife agencies not to intervene in a timely manner so that they can discuss their recommendations with Commission staff without the applicants and other parties present.

The situations that American Rivers and EEI posit would not arise because the applicant will have a right to participate in the section 10(j) process under the final rule regardless of whether the proceeding is contested.

Finally, NHA argues that, if the Commission determines that a section 10(j) conflict exists, the Commission should treat the licensing as a contested proceeding for purposes of application of the *ex parte* rule, even if no intervention or protest opposing the license application has been filed. As noted, the final rule recognizes the interest of applicants and intervenors to participate in the section 10(j) process in the interests of fairness and efficiency, rather than as a result of any application of the *ex parte* rule.

6. *NEPA process.* The Commission did not propose to make any significant changes to its NEPA regulations, but it did discuss the relationship between the hydropower licensing process, including the new pre-filing, hearing and other procedures proposed, and the NEPA process.

The Commission regards the administrative procedures to implement FPA section 10(j), the FWCA, and NEPA in hydropower proceedings as related and having similar objectives. The Commission has the responsibility to integrate compliance with these and other applicable statutes into a single administrative process extending from pre-filing consultation through the filing with the Commission of a hydropower application for license or exemption, the submission of fish and wildlife recommendations by fish and wildlife agencies, the Commission's environmental analysis (requiring an environmental assessment or an environmental impact statement), and the resolution of inconsistencies (if any) between the fish and wildlife recommendations and applicable law, to the final order in the case with its required findings. The Commission expects applicants to be fully aware of the environmental consequences of their proposals and to consider every reasonable measure to minimize adverse impacts from hydropower projects, consistent with the goal of developing hydropower potential and other public interest concerns.

The Commission also expects consulted fish and wildlife agencies to timely recommend measures to protect, mitigate damages to, and enhance the fish and wildlife that a proposed project may affect. Alternatives that could lessen or eliminate adverse impacts or improve environmental conditions, mitigation measures, and enhancements that could benefit fish and wildlife (as well as other environmental resources) will be explored in the NEPA process as appropriate.

Each of these statutes only mandates that the Commission take certain steps in its decisionmaking process but does not indicate the appropriate outcome of the case.[161] The substantive standards affecting decisions on hydropower applications remain those of FPA sections 4(e) and 10(a)(1).

NEPA requires the Commission to evaluate whether approval of a particular hydropower proposal would constitute a major federal action significantly affecting the quality of the human environment. The steps followed in the NEPA process may include the preparation of an environmental assessment (EA) by the Commission. If approval of the proposal may significantly affect the quality of the human environment, the Commission must prepare an environmental impact statement (EIS), analyzing any adverse environmental effects of the proposal and alternatives to it. The NEPA process necessarily includes a careful evaluation of the impact of the proposed project on fish and wildlife.

Preparing an environmental impact statement involves public participation in commenting on the draft statement and may also involve public participation in scoping sessions, devoted to planning the extent and sequence of the environmental review. The Commission must consider public comment on the draft environmental impact statement (DEIS) in preparing its final environmental impact statement, which is a public document available to everyone.[162] Release of a draft environmental impact statement also allows interested persons to intervene in the proceeding as a party no later than the date on which comments on the statement are due.

While in its NEPA process the Commission does not rely solely on comments and recommendations from other government agencies, such as fish and wildlife agencies, the Commission solicits their comments in preparing an environmental impact statement. Most importantly, the Commission in its NEPA environmental document analyzes the effect of the proposal on fish and wildlife, based on the recommendations made by fish and wildlife agencies pursuant to the FWCA.[163] These FWCA

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[160] These projects are cited in the footnote at the outset of this section.

[161] *See. e.g., Strycker's Bay Neighborhood Council* v. *Karlen*, 444 U.S. 223, 227 (1980) (NEPA duties are essentially procedural); *County of Bergen* v. *Dole*, 620 F. Supp. 1009 (D.C. N.J. 1985), *aff'd*, 800 F.2d 1130 (3rd Cir. 1986); and *Sierra Club* v. *Alexander*, 484 F. Supp. 455, 470 (N.D.N.Y. 1980) (the FWCA requires only that the views of fish and wildlife agencies "be given serious consideration"), *aff'd*, 633 F.2d 206 (2d Cir. 1980).

[162] Notice of the availability of environmental assessments is currently published in the Federal Register, and copies are usually sent to resource agencies and intervenors.

[163] In certain cases these recommendations may even constitute a separate alternative to the applicant's proposal.

recommendations thus influence the entire NEPA process and must be submitted to the Commission prior to the commencement of the Commission's environmental analysis in order for it to achieve its purposes of evaluating the environmental consequences of the applicant's proposal and of necessary mitigative measures, so that the Commission can consider these factors in its final decision. The Commission recognizes that in turn a draft environmental impact statement may lead a fish and wildlife agency to modify its fish and wildlife recommendations based on information and analysis presented in the statement.

Some commenters [164] recommend that the Commission begin the NEPA process during pre-filing consultation, prior to any filing of a hydropower application with the Commission. They argue that, pursuant to NEPA, the Commission should play a more active role in the pre-filing consultation process because it is the critical phase in the Commission's decisionmaking process on hydropower applications. In this view, during the pre-filing process the Commission should: (1) Evaluate all reasonable alternatives to the developer's proposal, including nonhydropower energy sources and conservation measures; (2) gather all relevant information; and (3) grant more opportunity for public involvement, especially to review the draft application and to participate fully in any meeting between applicant and any resource agency, during the second stage of pre-filing consultation.[165] Other commenters oppose these recommendations, because they appear impractical in light of the need to conduct studies and develop information prior to filing.[166]

American Rivers claims that the Commission relies too much on the use of EAs instead of EISs to fulfill its NEPA responsibilities for hydropower proceedings, with the result that public involvement in the environmental review process is improperly excluded. Several commenters [167] recommend that the Commission set forth the actual terms and conditions of license proposed in the EA or EIS and that a draft on any controversial project be circulated for comment by all parties and resource agencies. At the least, they contend, the Commission should wait until the EIS is completed before requiring the submission of comments and recommendations. Certain state agencies ask the Commission to require the preparation of an EIS in any case where the Commission finds that a fish and wildlife recommendation under FPA section 10(j) is inconsistent with applicable law.

CEQ believes that the Commission's NEPA process is too adversarial and that the Commission should minimize the use of trial-type hearings on environmental issues. CEQ recommends that the Commission consider the use of programmatic EISs in the hydropower licensing program in order to lessen the Commission's environmental review workload.

As stated above, the NOPR did not propose any significant change in the Commission's NEPA regulations but only explained how the Commission was applying those regulations to and integrating them into the hydropower program. The procedural regulations proposed were designed to codify the Commission's current practices in hydropower proceedings. Some changes were proposed in order to make the conduct of those proceedings fairer and more efficient. The comments offered on the NEPA process appear to reflect some misunderstanding of the Commission's procedures and suggest an altogether new and different approach to implementation of the Commission's responsibilities in this area that would require significant changes in the Commission's hearing process.[168] These comments raise more questions than they answer.

It is important to understand that the Commission's prefiling consultation procedures help the Commission to implement its statutory responsibilities, including NEPA, for regulating the development of hydropower. The procedures under §§ 4.38 and 16.8, as revised, require applicants to conduct extensive consultation with resource agencies and Indian tribes on the hydropower proposal, including hydropower alternatives, impacts on resources, and mitigation measures. Reasonable and necessary scientific studies must be considered and conducted by the applicant, who must also furnish the information required to evaluate the effects of the proposal on the environment. The public also is invited to participate in this process, and provision has been made to expand Commission involvement (as through dispute resolution).

This process is conducted collegially and directly influences any application (including environmental exhibits) filed with the Commission. An important goal of the process is to focus the applicant on an environmentally acceptable proposal (if it exists) and to furnish the Commission with the basic material it needs to complete its environmental analysis of the proposal. This analysis is conducted through an administrative proceeding on the application which is typically conducted by notice and comment, with abundant opportunity for public participation and without the adversarial spirit often found in trial-type proceedings.

Would the alternative NEPA scheme suggested by some commenters, involving the Commission's starting its environmental analysis during the pre-filing consultation phase, be compatible with the realities of the hydropower program? In the recent past, a very high percentage of proposals for new hydropower facilities were changed or abandoned by developers during the pre-filing consultation phase, or were abandoned after filing but before Commission decision. It is not entirely clear why this high rate of attrition took place and whether it is likely to continue in the future. If this trend continues, however, it raises doubts about the wisdom of committing a substantial amount of the Commission's limited resources to an intrusive environmental review by staff of proposed facilities that are highly unlikely ever to be built. Indeed, by expanding the use of the dispute resolution mechanism, the Commission will be involved even further, when necessary, in the pre-filing process. We think this strikes a reasonable balance between concentrating Commission resources on those applications that have moved beyond the pre-filing consultation process and are thus much more likely to result in additions to the nation's hydropower resources and the need to resolve disputes as early as possible in the licensing process.

As stated above, the Commission does make available to all parties and agencies, at the same time as a decision on a hydropower application is issued, any EA completed on the application. Any party seeking rehearing of the decision can thus respond to any statement in the EA with which the

[164] *E.g.*, Alabama Power, American Rivers, Wildlife Federation, and CEQ.

[165] Wildlife Federation suggests that the Commission look to other agencies, such as the Army Corps of Engineers, that supposedly initiate the NEPA process at an earlier stage than the Commission and accept final recommendations under the FWCA in comments on the DEIS.

[166] *E.g.*, Public Generating Pool. EEI asks that the Commission complete this rulemaking without trying to evaluate these proposals, which should be considered separately.

[167] American Rivers, Wildlife Federation, and Interior.

[168] These comments raise issues that are beyond the scope of this rulemaking.

party disagrees. In appropriate cases, the Commission may issue the EA in draft form for comment, prior to reaching any decision in the case. The EA will usually not contain the exact language for terms and conditions intended to be adopted in any license or exemption but will contain a complete discussion of the proposal's environmental impact. As discussed in section IV.C.8. below, when the Commission makes a preliminary determination of inconsistency of a fish and wildlife agency's fish and wildlife recommendation with applicable law, pursuant to FPA section 10(j), the Commission will provide a copy of this determination and the EA or DEIS to all parties and affected resource agencies and Indian tribes for comment. This procedure will occur prior to the issuance of a decision on the application.

Whether the Commission is justified in issuing an EA rather than an EIS on a particular application is a matter that can be resolved only on a case-by-case basis, according to the standards set down in the Commission's NEPA regulations, NEPA itself, and cases construing that act. The Commission will not require the preparation of an EIS in all proceedings where there has been a determination that a fish and wildlife recommendation is inconsistent with applicable law, but will follow in all such cases the procedures required by FPA section 10(j), which the final rule implements [169] Where appropriate, the Commission consolidates one or more license applications for a single environmental review, as in the case of certain river basins.[170]

7. *Endangered Species Act.* The NOPR cited the Endangered Species Act (ESA), 16 U.S.C. 1531 *et seq.*, as an element of the Commission's environmental review and noted that license applicants must include in their applications information on threatened or endangered species.[171] Several federal and state agencies commented that further discussion of the ESA and its role in the hydropower licensing process is warranted.[172]

Section 4 of the ESA authorizes the Secretary of the Interior to list species as "threatened" or "endangered" and to designate a "critical habitat" for those species.[173] Section 7 of the ESA requires the Commission to use its authority to conserve endangered and threatened species and to ensure that actions it authorizes do not jeopardize the continued existence of those species or result in the destruction or modification of their critical habitat. In doing so, the Commission must consult with the U.S. Fish and Wildlife Service or the National Marine Fisheries Service, as appropriate.[174]

Interior comments that the rule should include procedures needed to fulfill the Commission's responsibilities under section 7 of the ESA. The Commission agrees and has added language to § 4.34(d) of the final rule to address its ESA responsibilities in general terms. However, the Commission does not believe that it should attempt to set forth in detail how the requirements of the ESA will be implemented in particular cases. In view of the many different species that may be affected, the various times at which species might be listed as threatened or endangered, and the different types of actions that may be contemplated, the issues involved are more appropriately considered in particular cases.

Interior observes that the ESA consultation requirements would affect both the need for studies and the timing of fish and wildlife recommendations, and that the information required to evaluate impacts to threatened or endangered species should be collected when other resource studies are conducted. Similarly, West Virginia comments that the need for studies of affected endangered species should be acknowledged prior to licensing. In response, the Commission notes that the final rule requires the applicant to consult with resource agencies concerning the studies needed before an application is filed. Moreover, it requires the applicant to conduct all studies necessary for the Commission to reach a determination on the merits of the application. This would include any studies necessary for the Commission to determine the impact of the project on any threatened or endangered species.

Interior points out that both the ESA and the implementing regulations in 50 CFR part 402 require the Commission, rather than the applicant, to consult with Interior's Fish and Wildlife Service (or Commerce's National Marine Fisheries Service for marine species). Interior therefore recommends that the rule acknowledge the Commission's involvement during the pre-application consultation process.

The Commission agrees that, in some cases, it may be appropriate for the Commission staff to become more involved during the pre-application consultation process. To that end, the final rule includes procedures for dispute resolution that can be used if an applicant and a resource agency disagree on the studies needed to evaluate a project. However, before an application is filed, there is no federal action being considered that could call the consultation requirement of the ESA into play. For this reason and those discussed earlier, the final rule provides for the Commission's involvement in ESA consultation after the license application has been filed. Appropriate language to reflect this has been included in final § 4.34(d).

Interior also observes that, if a project may affect an endangered or threatened species, formal consultation between the Commission and the Fish and Wildlife Service (or the National Marine Fisheries Service) will be necessary. Interior argues that, because the results of that consultation could affect its recommendations for other fish and wildlife species, the Fish and Wildlife Service will be unable to provide final fish and wildlife recommendations, mandatory terms and conditions, or prescriptions until after completion of the formal section 7 consultation. Interior adds that the time provided in the proposed rule would not be adequate in these circumstances, because formal consultation usually occurs at the draft environmental impact statement stage when the preferred alternative has been identified. Interior recommends that the Commission adapt its rule to correspond with Interior's existing section 7 consultation regulations.

In response, the Commission clarifies that consultation under the ESA may take place at any time and need not await the draft EIS. In addition, proposed § 4.34(b)(1) recognized that, in certain cases, the proceedings before an

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[169] *See* section IV.C.8. below.

[170] The Commission will carefully consider CEQ's suggestion that it should make use of programmatic EISs in the hydropower program. It is doubtful, however, that such an approach would be useful, given the unique nature and environmental impacts of the many different potential hydropower proposals that developers may choose to pursue under the FPA.

[171] *See, e.g.*, III FERC Stats. & Regs. ¶ 32,470 at pp. 32,356–58.

[172] These agencies were Interior, Colorado, and West Virginia.

[173] 16 U.S.C. 1533. An "endangered species" is defined as "any species which is in danger of extinction throughout all or a significant portion of its range * * *." *Id.* at section 1532(6). A "threatened species" is "any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range." *Id.* at section 1531(20). "Critical habitat" means "the specific areas within the geographical area occupied by the species * * * on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection * * *." *Id.* at section 1532(5)(A)(i).

[174] 16 U.S.C. 1536.

agency to determine mandatory terms and conditions might not be completed by the date specified. In such cases, the agency would be obligated to submit either preliminary terms and conditions or (if appropriate) a waiver of the right to file the terms and conditions. This procedure would adequately address the situation in which consultation regarding endangered or threatened species is ongoing. A similar approach would be appropriate for fish and wildlife conditions or fishway prescriptions if consultation regarding endangered or threatened species has not been completed by the date specified for filing the recommendations or prescriptions.

Colorado points out that the applicant should be aware of state lists of threatened and endangered species and species of special concern, as well as the ESA requirements. The Commission agrees, and notes that the Commission's existing rules concerning the environmental information that the applicant must provide and the environmental analysis that the Commission must undertake are sufficiently broad to require such information.

Finally, EPA states that agency determinations of a project's compliance with the ESA and subsequent recommendations that affect such compliance "should be considered as constraints not subject to FERC staff balancing or lack of evidence determinations." [175] EPA adds that staff discretion should be restricted if federal statutory requirements could be violated.

The Commission must comply with ESA and other federal law in its licensing decisions. However, it would be inappropriate to suggest that balancing is prohibited whenever endangered species are present. For example, if there are alternative means of providing adequate protection for endangered species, other public purposes may be considered in choosing among those alternatives. In addition, the balancing that may be required under section 10(a)(1) of the FPA or the implications of the need to base Commission decisions under the FPA on substantial evidence cannot be addressed in any meaningful sense apart from the particular facts presented in specific cases. Accordingly, the Commission will not adopt the specific prescription that EPA suggests.

[175] Letter from Richard E. Sanderson, Director, Office of Federal Activities, EPA, to Lois Cashell dated June 15, 1990, Enclosure (emphasis in original deleted).

8. *Section 10(j) process.* The Commission did not propose extensive language to codify its implementation of the 10(j) process, which was discussed at length in the NOPR. In its discussion, the Commission explained that the FWCA applies to consultation with fish and wildlife agencies only. The agencies may rest their recommendations on studies conducted by others, including the applicant, or by themselves. In order for their fish and wildlife recommendations to serve their intended role in hydropower proceedings, fish and wildlife agencies must file their recommendations on a timely basis, at the beginning of the administrative process, and keep these recommendations current in light of any major changes in circumstances, such as an amendment to the application that would significantly change a project's proposed plans of development or the discovery of new and significant information on the environmental impact of the proposed hydroelectric project.[176] Under the FWCA, the Commission must consider the fish and wildlife recommendations made, with the purpose of conserving fish and wildlife resources along with promoting waterpower development.

Resource agencies must therefore provide the benefit of their technical expertise to the Commission as soon as possible in the administrative process on hydropower applications. The only sequence that works to produce an efficient administrative process is to have fish and wildlife recommendations precede the Commission's environmental analysis. A resource agency's need at times to modify its recommendation in light of the information and analysis presented in a draft environmental impact statement should not be used to delay submitting its recommendations until after the Commission has completed its environmental analysis. As discussed above, FPA section 10(j) specifically requires the Commission to include in all hydropower licenses conditions for the protection, mitigation of damages to, and enhancement of fish and wildlife. These conditions must be based on recommendations made by fish and wildlife agencies pursuant to the FWCA. In cases where the Commission believes those recommendations to be inconsistent with the law, certain additional procedures (including consultation and findings) are required.

FPA section 10(j) does not authorize the submission of fish and wildlife recommendations by fish and wildlife agencies apart from the FWCA and does not require the repetition of environmental scoping, studies, and analysis undertaken pursuant to NEPA. Compliance with FPA section 10(j) builds on compliance with the FWCA and NEPA.[177] Thus the purposes of FPA section 10(j) can be achieved only if all agencies involved, including the Commission and the fish and wildlife agencies, fulfill their responsibilities in a timely manner in the context of the Commission's conduct of a single administrative process to evaluate and decide upon a specific hydropower proposal.

[176] *See, e.g.*, Action for Rational Transit v. Westside Highway project, 536 F. Supp. 1225 (S.D. N.Y. 1982).

In general, the commenters [178] strongly support granting to all parties, including applicants, the right to participate fully in any section 10(j) consultation between the Commission and fish and wildlife agencies. While Wildlife Federation wants the Commission to withdraw the NOPR and start anew, and American Rivers opposes any more formal regulations on the section 10(j) process, many commenters recommend that the Commission codify its section 10(j) procedures, revising them where appropriate. They request that we define in the regulations how, and at what organizational level, section 10(j) negotiations will proceed. EEI maintains that applicants should be provided with a written summary of a preliminary "no inconsistency" determination by staff and be allowed to file written comments on or objections to the preliminary determination before it is incorporated into a decision on the license applied for.

Commenters like Interior ask the Commission to clarify the standards the Commission will use in making a determination of inconsistency between a fish and wildlife agency's 10(j) recommendation and applicable law. Environmental groups like American Rivers argue that the Commission may not reject a fish and wildlife recommendation because it conflicts with the balancing of competing waterway uses under section 10(a)(1) or because there is a lack of substantial evidence in the record before the

[177] Courts have recognized that overlapping legal requirements to protect the environment can be satisfied by a single administrative process. *See, e.g., Environmental Defense Fund* v. *Froehlke*, 473 F.2d 346, 356 (8th Cir. 1972) (agency complying in good faith with NEPA will "automatically take into consideration all of the factors required by the Fish and Wildlife Act"). See also Monongahela Power Company, 58 F.P.C. 2702, 2706 (1977).

[178] *E.g.*, EEI, Pend Oreille, Vernon, American Rivers, and Energy.

Commission to support the recommendation. Interior claims that ECPA places on the Commission the burden of demonstrating why any recommended fish and wildlife conditions cannot be included in any license issued.

Commerce states that final section 10(j) recommendations should not be due until 90 days after receipt by the agency of the final NEPA analysis. After this time, any necessary section 10(j) negotiations may begin and be held in the region where the project is located. Commerce and Interior contend that the section 10(j) process should be subject to reopening if needed, as in the case of a license amendment or the results of post-licensing studies. Wildlife Institute, however, wants any change to fish and wildlife recommendations to be made only according to NEPA procedures. National Heritage asks that "evidentiary hearings" be conducted on section 10(j) recommendations, with full rights of public participation and cross-examination of witnesses, in any case where conflicts between the fish and wildlife recommendation and applicable law are not resolved through negotiation. At such a trial-type hearing, expert testimony and documentary evidence could be introduced. Certain state agencies also ask for a hearing prior to the Commission's rejection of any fish and wildlife recommendation.

Wildlife Federation says that the result of the section 10(j) consultation process should be a written set of license conditions on which any party in the proceeding could submit comments prior to a Commission decision. Interior asks the Commission to clarify in the regulations the relationship between its *ex parte* rule and the section 10(j) procedures, especially in reference to explaining when the Commission will consider that a filing has been made "in opposition to" a hydropower application and what relates to the "merits of the case."

In light of the comments received, the Commission has decided to codify its section 10(j) procedures in the regulations. The Commission has now accumulated sufficient experience with the section 10(j) process, since ECPA was passed in 1986, to believe that the procedures adopted herein will be practical, fair to all parties, and consistent with the language and intent of FPA section 10(j). This codification is based on the steps outlined and discussed at length in the NOPR, to which the comments received were directed.

Accordingly, the regulations will specify that the section 10(j) process, applicable to applications for licenses, will consist of the following six steps:

(1) Submittal of fish and wildlife recommendations;

(2) Clarification of fish and wildlife recommendations;

(3) Preliminary determination (in EA or draft EIS) of any inconsistency of the fish and wildlife recommendations with applicable law by Commission staff and notification to all parties, affected resource agencies, and Indian tribes of this determination;

(4) Response by fish and wildlife agency, affected resource agencies, Indian tribes, and other parties to any preliminary determination of inconsistency;

(5) Meeting to be held at the discretion of the Commission staff, as requested by the fish and wildlife agency, any party, or affected resource agency or Indian tribe; and

(6) Issuance of the order on the license application.

The submittal of fish and wildlife recommendations must be made pursuant to the FWCA and by the deadline specified in the regulations for all comments and recommendations on a license application, *i.e.*, 60 days after the Commission declares that the application is ready for environmental analysis. Recommendations filed after this date will not be considered under the FPA section 10(j) process unless an extension of time has been granted by the Commission for such a filing.

Pursuant to delegated authority, the Director of the Office of Hydropower Licensing (OHL) will seek clarification of the fish and wildlife recommendation if it is unclear in any respect, within 45 days of receipt of the recommendation, unless this deadline is extended by OHL with notice to all parties. If the Commissions's questions are communicated in writing to the fish and wildlife agency, copies of the communication will be sent to all parties [179] and affected resource agencies and Indian tribes. In such cases, the fish and wildlife agency, as well as any party or affected resource agency or Indian tribe, may respond to the Commission's questions. In uncontested cases, or if only minor technical clarifications are involved, OHL staff may seek clarification by telephone contact with the fish and wildlife agency.

The Director will make the preliminary determination of any inconsistency of the fish and wildlife recommendation with applicable law. As explained in the NOPR, this determination may for example rest on a conflict between the recommendation and the balancing of competing values, including hydropower potential, required under FPA section 10(a)(1), or it may rest on a finding that the fish and wildlife recommendation is not supported by substantial evidence, required under section 313 of the FPA.[180] Contrary to the claims of some commenters, ECPA neither limited the basis for a determination of inconsistency by the Commission (which may be based on any applicable law) nor established a presumption of validity for any fish and wildlife recommendation, regardless of its lack of evidentiary support.[181]

The Director will notify all fish and wildlife agencies, parties, and affected resource agencies or Indian tribes of his preliminary determination of any inconsistency. The notification will be made in writing and will explain the determination and its basis. Anyone notified will have a right to file written comments with the Commission within 45 days of the date of this determination.[182] Any request for a meeting or telephone or video conference to discuss the determination must be filed with the Commission at the same time.

The Director may schedule a meeting or telephone or video conference with the fish and wildlife agency to discuss any preliminary determination of inconsistency, either on the Director's own initiative or as requested by the fish and wildlife agency, or any party or interested resource agency. If such a meeting or conference is scheduled, it may be held at such time and place as the Director determines, but every reasonable effort will be made to arrange the details of the meeting to suit the convenience of the Director and the participants. At least 15 days' prior notice will be given of any section 10(j) meeting. The Director's staff will conduct the meeting or conference and will be responsible for ensuring that it proceeds in an orderly fashion. Any fish and wildlife agency, party, or affected resource agency or Indian tribe may participate in the meeting or conference, but the focus will be on the attempts of

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[179] The applicant is of course a party in all hydropower licensing proceedings.

[180] The final rule requires that a fish and wildlife agency submitting a fish and wildlife recommendation specify the evidentiary support for the recommendation. Section 4.34(b)(2).

[181] It is obvious, for example, that where there are different and conflicting fish and wildlife recommendations made by different fish and wildlife agencies concerned with a single hydropower proposal, some of the recommendations must be rejected, and the only basis to do so under section 10(j) is the conflict of the rejected recommendation with applicable law.

[182] Under the regulations adopted, anyone filing such comments must serve a copy on every party on the official service list in the proceeding. See new § 4.34(b).

OHL staff and the representatives of the fish and wildlife agency to understand each other's position and attempt to resolve their differences as required by section 10(j). After the conclusion of the meeting or conference, OHL will prepare a written summary of it, which will be circulated to everyone on the official service list in the proceeding.

The section 10(j) process concludes with the issuance by the Commission of a decision in the license proceeding, which will contain the conclusion or findings required by the FPA. Pursuant to Commission rules, any party may request rehearing of this decision to challenge the Commission's determination under section 10(j) and any relevant findings.

Interlocutory appeals of preliminary section 10(j) determinations will not be entertained, nor will trial-type hearings be conducted on section 10(j) matters. Preliminary determinations of consistency of fish and wildlife recommendations with applicable law will not be issued for comment. The rights of commenters requesting such measures are fully protected by the Commission's procedures, as they are revised in this final rule. These commenters have not shown why such measures are helpful or required by FPA section 10(j), nor have they addressed the significant potential of these measures for increasing the burden on the Commission and other participants and delaying decisions in hydropower proceedings.

9. *Intervention.* The NOPR explained that the first opportunity for persons interested in a hydropower proceeding to intervene as a party is when the Commission issues public notice of its acceptance of the application for filing, and that a second opportunity arises if comments are invited on a draft environmental impact statement. In Order No. 511, the Commission issued a policy statement allowing fish and wildlife agencies to intervene as parties "within 30 days after the issuance by staff pursuant to delegated authority of an order rejecting or materially modifying any of its fish and wildlife recommendations, for the limited purpose of permitting that agency to appeal such action to the Commission itself." [183] Order No. 511 stated that this policy would remain in effect on an interim basis pending consideration of this issue in the instant rulemaking.

The NOPR invited comment on whether the Order No. 511 policy statement should be codified in the regulations, and whether it should be expanded to allow a fish and wildlife agency to intervene if the Commission, in a contested case, rejects or materially modifies an agency's recommendation, for the limited purpose of allowing the agency to seek rehearing of the Commission's decision on this point. The NOPR indicated a tentative inclination to codify and expand this procedure, in proposed § 4.34(g), in the interest of dampening the potential for an adversarial spirit in the consultation process. The Commission's objective was to enable fish and wildlife agencies to participate in the proceeding in a less formal posture without foregoing the right to seek rehearing at a later stage, after the deadline for intervention as a party had passed.

Numerous comments were received. Many state agencies [184] request that the period for intervention be 60 days instead of 30, or that it be 30 days from the date of receipt of a notice and that such notices be sent by registered or certified mail. Washington Fisheries doubts that actively interested agencies would delay their intervention even if given a special opportunity to intervene later. California Indian Legal Services requests that the extra intervention opportunity also be extended to Indian tribes. Wildlife Federation supports the proposed regulation but suggests deleting the word "materially" in several places.

American Rivers objects to limiting the special intervention opportunity to state agencies, and advocates making the extra opportunity available to all interested persons on a non-discriminatory basis. Wisconsin River expresses hope that the proposal would reduce "adversarial posturing." NHA, on the other hand, believes that delays in intervention could increase "misunderstanding, miscommunication and hostility." NHA, EEI, and PG&E object to the proposal as unnecessary and unfair, and contend that it would discourage the full and open airing of views at the earliest stages of the proceeding. A number of commenters express doubt that the timing of opportunities to intervene would have any discernible impact on the demeanor of the participants or the adversarial spirit of the proceeding.

We are persuaded by the commenters that the policy adopted on an interim basis in Order No. 511, and the expansion of that policy in proposed § 4.34(g), are unwarranted. Accordingly, the final rule does not adopt proposed § 4.34(g). The interim policy enunciated in Order No. 511, by its terms, is not effective beyond the date of issuance of this order.

On balance, we believe that all interested persons ought to have the same opportunities to participate as formal parties in the proceeding, and that the procedural deadlines for intervening ought to be the same for everyone. We stress to fish and wildlife agencies that the filing of a timely notice or motion to intervene is not burdensome, and does not require the agency to take any position with respect to the merits of the application; a short, neutral expression of interest in the proceeding will suffice to intervene as a timely party to it. The agencies will have ample opportunity to study the applicant's proposal and express a position in later stages of the proceeding. Thus, we believe that it is reasonable to set a uniform deadline for intervention that applies equally to all participants, including fish and wildlife agencies, and we do not believe that this evenhanded approach will impart an adversarial spirit to the consultation proceedings. The Commission will continue to evaluate late requests for intervention on a case-by-case basis, pursuant to the considerations set forth in the Commission's rule governing intervention.[185]

D. Miscellaneous

1. Participation of Indian Tribes. In the NOPR, the Commission proposed to revise its consultation regulation to allow participation by affected Indian tribes.[186] The Commission observed that adoption of such a regulation should not prolong the consultation process, given the time deadlines proposed and the Commission's authority to supervise this process through its review of filed applications. The Commission noted that such a regulation may also avoid needless confrontation and delay that may result from excluding from consultation Indian tribes with important treaty rights that must be taken into account in the administrative process.

Under the proposed rule, applicants would be required to identify Indian tribes that could be affected by a proposed project.[187] The Commission

[183] Statement of Policy Permitting Limited Intervention by Fish and Wildlife Agencies at the Appeal Stage of a Licensing Proceeding, 46 FERC ¶ 61,161 (1989).

[184] Alabama, Arizona, California Fish and Game, Missouri, Montana DFWP, Montana DNRC, Wyoming, and International Ass'n.

[185] 18 CFR 385.214(d).

[186] Proposed § 4.38. The Commission noted that the definition of "Indian tribe" in § 4.30(b)(10) would be an important part of the proposed regulatory scheme, and specifically invited comment on this definition.

[187] Proposed §§ 4.38(a)(1), 4.92(a) and 4.107(a). The Commission noted that applicants could seek

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would specifically seek the comments of Indian tribes on applications as part of its hearing process and would consider those comments in reaching its final decision, as directed by ECPA.[188]

Many of the comments regarding this portion of the NOPR involved the definitions of "Indian tribe" and "fish and wildlife agency" and their implications for the participation of Indian tribes in pre-filing consultation and the section 10(j) process. Comments concerning these definitions are discussed above in section IV.A. Comments concerning the participation of Indian tribes generally, apart from the definitions, are addressed below. For the most part, they concern the role of Indian tribes with respect to two major areas: (1) Pre-filing consultation, and (2) fish and wildlife recommendations.

With regard to pre-filing consultation, all commenters [189] agree as a general matter that Indian tribes should be included. Confederated Tribes state, for example, that adoption of the new regulations would avoid needless confrontation and delay by according Indian tribes, which often have important treaty rights, an opportunity to review and have a role in the planning process for a hydropower project. Similarly, Klamath points out that Native American peoples often have a large stake in the outcome of the Commission's hydropower decisions and are in a uniquely useful position to offer insights and suggestions concerning a particular application.

PG&E suggests that the term "Indian tribes" should be added to various sections of the final rule in the same manner as it appears in part 16 of the Commission's regulations concerning relicensing. Similarly, California Indian Legal Services suggests that the provisions concerning disagreements that may arise during the first stage of consultation in § 4.38(b)(5) should include Indian tribes as well as resource agencies. The Commission agrees, and has modified § 4.38 of the final rule as suggested.

California Indian Legal Services criticizes § 4.38(a)(2) of the proposed rule, which states that the Director of the Office of Hydropower Licensing or the Regional Director responsible for the area in which the project is located will provide, on request, a list of known Indian tribes that may be affected by a project. California Indian Legal Services argues that this should be required in every case, and that the Director should also provide notice of the project by letter to all tribes included on the list. Similarly, Pueblo de Cochiti argues that, as governmental entities, tribes should be entitled to receive notice of proposed projects, along with sufficient information to determine for themselves whether a proposed hydropower project might affect tribal rights or interests.

In response, the Commission notes that § 4.38 requires that, before a hydropower application may be filed with the Commission, an applicant must consult with any Indian tribe (as defined in the regulations) that may be affected by a proposed project. Section 4.38(a)(2), which permits an applicant to request a list of known resource agencies and Indian tribes, is simply a convenient starting point and does not limit the applicant's obligation to consult with any Indian tribe that may be affected. Indian tribes will therefore receive actual, advance notice of a proposed hydropower project by virtue of the requirement that applicants consult with them before an application may be filed with the Commission. Accordingly, no changes to this section of the rule are needed.

With regard to applications for exemption, California Indian Legal Services points out that, although the proposed rule in § 4.107(a) would require the applicant to identify in its application all Indian tribes that may be affected by the project, there are no corresponding provisions in §§ 4.93 and 4.105 requiring that the Indian tribes be provided notice of the application and an opportunity to comment on it.

The Commission agrees that the notices of applications for exemption that are sent to interested agencies pursuant to §§ 4.93 and 4.105 should be sent to affected Indian tribes as well, and has amended those sections as suggested. However, as discussed in section IV.B.2. above, the final rule makes clear that the pre-filing consultation process in § 4.38 applies to applications for exemption. Therefore, Indian tribes that may be affected will be consulted before the application for exemption is filed, and will also receive a copy of the draft application during the second stage of consultation. In addition, consulted Indian tribes will receive a copy of the exemption application when it is filed. Thereafter, Indian tribes will have an opportunity to file comments on the application as filed. Thus, Indian tribes will have many opportunities to comment on the applicant's proposal for exemption, and no changes to the rule are needed.

Klamath argues that the Commission's regulations should take into account the financial situation of Indian tribes and the need for protection of their interests. Klamath asserts that, as a federal agency, the Commission has a trust responsibility toward Indian tribes. Klamath therefore argues that, at a minimum, the Commission's final rule should permit an affected Indian tribe to request additional time within the consultation framework to permit the tribe to participate in a significant manner.

Similarly, Native American Rights Fund expresses concern that the short consultation, recommendation, and comment deadlines imposed by the rule may deprive Indian tribes of meaningful participation, cause severe economic loss, interfere with treaty rights, and violate the federal trust responsibility. Native American Rights Fund argues that the proposed rule does not recognize many tribes' limited resources, which may limit their ability to meet the deadlines. Native American Rights Fund adds that the rule does not allow tribes to request additional time within the consultation framework, to permit them to participate in a significant and effective manner.

The Commission believes that the final rule provides meaningful and significant participation rights to Indian tribes, both before and after an application is filed, and that the time limits established in the rule, including those governing pre-filing consultation, are reasonable, as discussed in section IV.C.4. above. Regarding the proposal to permit requests for extensions of time during pre-filing consultation, the Commission is concerned that adoption of such a proposal could significantly prolong the consultation process and burden the Commission's staff. Once the application is filed with the Commission, any participant may file a request for additional time if it can show good cause for an extension. For these reasons, the Commission does not believe that a change to the final rule is warranted.

With regard to the second major area of interest, many commenters [190] agree

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the assistance of the Commission and the Department of the Interior's Bureau of Indian Affairs in making this identification.

[188] Proposed § 4.34(b)(2).

[189] Energy, Interior, Washington Fisheries, Washington Wildlife, PG&E, California Indian Legal Services, Confederated Tribes, Klamath, Native American Rights Fund, Pueblo de Cochiti, Tulalip, and Nez Perce. As discussed above in section IV.A.3., however, many of these commenters criticize the proposed definition of "Indian tribe."

[190] Interior, California Indian Legal Services, Klamath, Native American Rights Fund, Pueblo de Cochiti, Tulalip, and Nez Perce. As discussed above and in section IV.A., however, many of these commenters believe that Indian tribes should be treated as "fish and wildlife agencies" and that their recommendations concerning fish and wildlife should be subject to the section 10(j) process.

as a general matter that the Commission's regulations must provide for consideration of the recommendations of Indian tribes concerning fish and wildlife. Interior notes, for example, that section 3 of ECPA requires the Commission to solicit and consider the recommendations (including fish and wildlife recommendations) of Indian tribes affected by a project. Similarly, Pueblo de Cochiti points out that the legislative history of ECPA recognizes that this provision was added in recognition of the high degree of concern and unique interests of Indian tribes, which can make important contributions in hydropower licensing proceedings. Accordingly, Pueblo de Cochiti argues that the Commission must fully include tribal governments in the consultation process for fish and wildlife recommendations. As discussed above in connection with the definition of "Indian tribe," other commenters [191] urge the Commission to go further and treat the fish and wildlife recommendations of Indian tribes in the same manner as those of the fish and wildlife agencies that are subject to the provisions of section 10(j) of the FPA.

The Commission believes that, by providing for extensive involvement of Indian tribes in the hydropower licensing process, both before and after an application is filed, the final rule establishes a role for Indian tribes that, in many respects, is parallel to that of fish and wildlife agencies. As discussed above, participation in the pre-filing consultation process includes an opportunity to comment on a proposal at the earliest possible stage as well as to request studies. In addition, the final rule permits Indian tribes to file fish and wildlife recommendations for the Commission's consideration at the same time that such recommendations are required to be proposed by fish and wildlife agencies. However, as stated in the NOPR and as discussed above in section IV.A., Indian tribes are not fish and wildlife agencies within the meaning of section 10(j) of the FPA. Therefore, the Commission will not subject the fish and wildlife recommendations of Indian tribes to the section 10(j) process.

California Indian Legal Services recommends that, because Indian tribes are subject to the same technical and evidentiary requirements as fish and wildlife agencies in § 4.34(b)(1)(i), their comments and recommendations should be accorded the same procedural treatment, and that 90 days, rather than 60, should be provided for submitting terms and conditions or prescriptions. The Commission notes that § 4.34(b)(1) does not concern Indian tribes, but is restricted to agencies responsible for mandatory terms and conditions and prescriptions. Recommended fish and wildlife conditions of fish and wildlife agencies and Indian tribes are addressed in § 4.34(b)(2). They are subject to the same general requirements, in that both agencies and tribes must discuss the resource issues presented and provide the evidentiary basis for their recommended terms and conditions. The Commission believes that the 60-day time limit is sufficient as a general matter and that, if circumstances so warrant, an agency or tribe may file a request for additional time.

California Indian Legal Services notes that, although § 4.34(f)(3) provides that the Commission will "consider" the timely recommendations of Indian tribes affected by the project, there is no specification of the particular standards for the Commission's consideration of these recommendations. The Commission notes that § 4.34(f)(3) concerns the findings that are required by section 10(j)(2) of the FPA if, after attempting to resolve inconsistencies, the Commission does not adopt a fish and wildlife recommendation of a fish and wildlife agency. The fish and wildlife recommendations of Indian tribes are addressed in § 4.34(f)(1)(iii). Although no specific standards are included, the Commission does not believe that they are necessary, as no specific statutory findings must be made. The Commission notes, however, that the licensing decision should include a discussion of any conditions recommended by the tribe and why they were or were not included in the license.

2. *Participation of the public.* In the NOPR, the Commission proposed a number of revisions to its regulations on hydropower applications to improve the flow of information to the public on proposed projects and to seek public input on studies that an applicant should conduct. The NOPR stated that the existing § 4.38 concerning applications for original licenses or exemptions did not require the applicant to consult with the public during the pre-filing consultation process and limited the public's access to information about a proposed project to the Commission's public reference room located in Washington, DC.

The NOPR explained that the proposed revisions to the consultation process in § 4.38, as adopted herein, would require a potential applicant for a license or exemption: (1) To hold a joint meeting at the first stage of the process; (2) to invite the public to participate; and (3) to make available to the public a description of the proposed hydropower facilities.[192] At the meeting, the applicant would be required to summarize the potential environmental impact of the proposed project and to discuss what scientific studies are necessary to support the application. After filing its application with the Commission, the applicant would be required: (1) To maintain a file, at its regular place of business or other more accessible location, containing its complete application for license or exemption; (2) to allow public access to this file during normal business hours; and (3) to make copies of the material available to the public on request after payment of reasonable fees.[193] The applicant would also be required to provide a copy of its complete application (as amended) to a public library or other convenient public office located in each county in which the proposed hydropower project is located.[194]

The NOPR stated that, within 14 days after filing its hydropower application with the Commission, an applicant for license or exemption would be required to publish a notice in a newspaper in each county in which the proposed hydropower project is located.[195] The notice would disclose the filing date of the application, briefly summarize the application, describe the places where a copy of the application is available to the public, and set forth the date by which any requests by the public for additional scientific studies on the proposed project are due to be filed with the Commission. The notice would also inform the public that the Commission will publish subsequent notices soliciting public participation if the application is found acceptable for filing.

As a general matter, most commenters [196] support the

[191] California Indian Legal Services, Klamath, Native American Rights Fund, and Nez Perce.

[192] Sections 4.38 (b)(3) and (g). Compare § 16.8 (applying to relicense applicants).

[193] Sections 4.32(b) (3)–(5). Compare the similar regulation recently adopted for relicensing applicants in 18 CFR 16.7.

[194] Section 4.32(b)(4)(ii). The Commission noted that, under the existing rules, only applicants for relicensing subject to part 16 must maintain a public file.

[195] Section 4.32(b)(6).

[196] Energy, Washington Fisheries, Washington Wildlife, Public Generating Pool, American Rivers, and Wildlife Federation.

Commission's proposal to permit public participation in the pre-filing consultation process. However, some commenters criticize specific aspects of the proposed rule, or urge the Commission to go further to increase the role of the public in the pre-filing consultation process.

Energy, American Rivers, and Wildlife Federation expressly agree with the provisions of the proposed rule requiring the applicant to hold a public meeting during the first stage of consultation and to maintain a file on the project accessible to the public after the application is filed. Similarly, Public Generating Pool supports involving the general public in the application process for licensing and exemptions in the early stage of consultation to a degree comparable to that provided in the Commission's relicensing regulations in 18 CFR part 16. Public Generating Pool observes that this should help to minimize unnecessary adversarial confrontation and possible litigation following submittal of license applications.

American Paper questions the need for a requirement to hold a public meeting, noting that several of its members have held joint meetings with resource agencies which no member of the public attended. American Paper suggests that, in view of the expense involved, it might be as effective for the Commission simply to require the applicant to notify the public in newspaper notices when the application is filed and to offer to meet individually with members of the public or to hold a public meeting if requested. American Paper also suggests that summaries of the meetings, rather than transcripts, could be provided.

The Commission continues to believe that the applicant should be required to hold a public meeting during the first stage of the pre-filing consultation process. In the Commission's experience, meetings of this type are generally helpful in identifying issues and information needs, and many are well attended. In addition, the rule permits either audio recordings or written transcripts; therefore, the expenses of a court reporter need not be incurred if the applicant so chooses. For these reasons, the Commission has decided to retain the public meeting requirement in the final rule.

American Rivers and Wildlife Federation argue that the public should not be excluded from the pre-filing consultation process. American Rivers asserts that the pre-filing consultation process is part of a Commission proceeding to which NEPA applies, thereby mandating early and effective public involvement. American Rivers adds that the public should be given an opportunity to comment before the applicant and resource agencies reach agreement on some of the terms and conditions of the hydropower license, arguing that, if public comments are not permitted until after consultation is complete and the application has been filed, they will either be ignored or will jeopardize the agreements made during consultation. American Rivers therefore asserts that the public should be permitted an opportunity to comment on all of the applicant's pre-filing submissions to the agencies, and to attend all meetings held during the pre-filing consultation process.

Similarly, Wildlife Federation argues that the early public meeting required in the proposed rule should be used to create a list of persons interested in participating in the pre-filing consultation process with the agencies, and that those persons should be given notice and invited to participate in each meeting and telephone call throughout the pre-filing consultation process. Wildlife Federation urges the Commission to make clear that applicants may not exclude members of the public from pre-filing consultations, even if the Commission does not require applicants to invite them. Wildlife Federation also argues that there is no basis for allowing applicants the discretion to exclude members of the public from site visits coordinated with resource agencies at the time of the public meeting.

The Commission believes that, by requiring the applicant to hold a public meeting in the vicinity of a proposed hydropower site during the first stage of consultation and to maintain a public file on the project, the final rule provides a significant new opportunity for early public involvement in the hydropower process. It bears emphasizing that this opportunity is provided before the application is filed. Additional opportunities for public involvement are provided at later stages in the process: when the application is filed, when it is accepted for filing, and when it undergoes environmental review. Additional public involvement in pre-filing consultation would delay the process without significantly improving the quality of the application that is filed with the Commission. In these circumstances, the additional public participation measures suggested are neither necessary nor appropriate.

With regard to NEPA, it should be noted that at the pre-filing stage there is no "federal action" contemplated, because the applicant's proposal has not yet been submitted for the Commission's consideration. Accordingly, NEPA does not require the expanded public involvement that American Rivers urges the Commission to adopt. Moreover, there is nothing in the final rule to prevent individuals or groups interested in the proposed project from contacting the applicant or the agencies directly to obtain information or to make their concerns known. Indeed, the requirement that the applicant hold a public meeting and maintain a project file should facilitate such efforts. In the Commission's view, the public participation measures in the final rule are substantial, and inclusion of the public in the various pre-filing meetings, site visits, and telephone calls is a matter that is appropriately left to the discretion of the applicant and the agencies involved.

PG&E recommends deletion of § 4.32(b)(6), which requires the applicant to publish a notice of its filing of the application within 14 days of the filing and specifies the information to be included in the notice. PG&E argues that this additional notice is unnecessary, inefficient, and potentially confusing. As an alternative, PG&E suggests that the Commission should be responsible for publishing the notice, because applicants do not receive timely notice from the Commission of the official filing date of their applications.

It appears that PG&E may misunderstand the purpose of this notice. It is not intended to inform the public of the official filing date of the application (*i.e.*, when the application is stamped "received" by the Secretary of the Commission). Rather, it is intended to inform the public, within a reasonable time after the actual filing, that the applicant has filed its application with the Commission. In order to comply with this provision, the applicant need only publish the required notice within 14 days of filing its application, regardless of the official filing date that is later established when the Commission actually receives the application. The Commission disagrees that this additional notice is unnecessary. It is intended to provide the public with additional information about the project and invite public input on necessary studies at an earlier stage of the licensing process.[197] It is not particularly burdensome, and may have a beneficial effect by allowing issues raised by the public to be resolved earlier rather than later. Therefore, the Commission has retained this provision in the final rule.

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[197] See § 4.32(b)(7).

American Rivers and Wildlife Federation argue that publication of a newspaper notice is inadequate to provide the public with actual notice of the application. American Rivers also criticizes the proposed rule for requiring the public to learn about and file comments by three separate deadlines: (1) For commenting on the adequacy of the record, (2) for filing a motion to intervene, and (3) for filing substantive comments on the application. American Rivers asserts that this places an extreme and needless burden on the public. As an alternative, American Rivers and Wildlife Federation both recommend that the Commission publish a public notice in the **Federal Register** and invite public comments and interventions immediately upon the filing of an application. Wildlife Federation adds that the Commission should codify its existing practice of accepting motions to intervene after an application has been filed but before the application has been accepted for filing.

The Commission believes that the final rules provide for adequate notice to the public. As discussed above, the applicant is required to hold a public meeting in the vicinity of the proposed project before filing the application, and to publish a notice of filing in local newspapers shortly after the application is filed. Moreover, the Commission will publish a **Federal Register** notice, inviting comments and interventions, when the application is accepted for filing, as required by FPA section 4(e). Thus, there is no need for a **Federal Register** notice at the time that the application is filed.

The Commission does not share the commenter's concern that the public will be burdened or confused by multiple notices. Different notices are appropriate at different stages of the process, and each will indicate what action is invited in response to the notice. With regard to intervention, the Commission notes that its existing practice permits the filing of a motion to intervene at any time after an application is filed, although the Commission does not formally invite such motions until after the application is accepted for filing. The Commission intends to continue this practice, but believes that its codification is not required.

Finally, American Rivers asserts that the Commission should improve the opportunity of the public to participate by requiring applicants to serve copies of their applications on all persons and entities that have been granted intervenor status. American Rivers asserts that the unreasonably high cost and administrative delays involved in obtaining copies of applications from the Commission's Public Information Office represent an unreasonable barrier to public involvement and that applicants should bear the cost of serving copies of their applications on intervenors as a cost of doing business.

The Commission disagrees with the assertion that the cost of obtaining a copy of the application represents an unreasonable barrier to public involvement in the hydropower process. Many hydropower proceedings are contested, suggesting that participants do not consider these costs prohibitive. Participation as a party necessarily involves some costs and administrative burdens, and each participant must decide whether its interests in the proceeding are such that it must intervene in order to protect them adequately, rather than merely filing a protest. In addition, the final rule requires the applicant to maintain a project file containing its complete license or exemption application at its principal place of business or more accessible location, and to provide a copy of the application, as amended, to a public library or other convenient public office located in each county in which the proposed project is located. This should alleviate the economic and administrative burdens associated with obtaining a copy of the application.

3. *Transition Provisions.* EEI suggests deleting the clause at the end of the sentence in proposed § 4.38(h)(1)[198] in order to avoid an unintended effect when that clause is read in conjunction with § 4.38(a)(4)(iii). The clause is in any event unnecessary and confusing; we have deleted it.

Interior and Michigan point out that the transition provisions in § 4.38(h) apply only to the consultation process, and request clarification as to the timing of the applicability of §§ 4.30, 4.32, and 4.34. The final rule adopted herein becomes effective 30 days after it is published in the **Federal Register**. The principal purpose of the transition provision in § 4.38(h) was to avoid the repetition of stages of the pre-filing consultation process that had already been completed even though the application had not yet been filed.

The final rule amends § 4.30 by adding and revising several definitions. These new definitions will become effective when the final rule itself becomes effective, and will be used by the Commission in its decisions on and after that date.

The amendments to § 4.32 generally impose requirements on applicants to file, maintain, and/or make available certain information, and authorize and/ or require the participants in the license application process to make various requests, responses, and filings. These procedural requirements apply as of the effective date of the final rule. This does not, for instance, require the applicant to create a backdated public file of material that it was not previously required to retain and make available, but it does require the applicant to commence retaining such material and to make available in its public file whatever such material it has in its possession.

Revised § 4.34 establishes procedures for hearings and related filings, consultations, negotiations, conditions, and requests for rehearing, etc. These provisions apply as of the effective date of the final rule, and govern the conduct of the hearing processes that occur on and after that date.

4. *Clarification of Delegated Authority.* Washington Wildlife inquires about delegations of authority to the staff to implement section 10(j). The Commission recognizes that its staff has had the authority to implement section 10(j), subject to appeal or requests for rehearing. New § 375.314(s) of the regulations, proposed in the NOPR and adopted herein with changes to make the section conform to the new § 10(j) regulations adopted herein,[199] clarifies that the Director of the Office of Hydropower Licensing has the authority to make preliminary determinations of inconsistency between a resource agency's fish and wildlife recommendations and applicable law, and to conduct through staff whatever consultation with the agency that is appropriate to attempt to resolve such inconsistencies.[200]

In light of the comments received on the pre-filing consultation process, we are also delegating to the Director the authority to waive the pre-filing consultation requirements in §§ 4.38 and 16.8 whenever the Director, in his discretion, determines that an emergency so requires, or that the potential benefit of expeditiously considering a proposed improvement in

[198] Proposed § 4.38(h)(1) read: "(1) The provisions of this section are not applicable to applications filed before (insert the effective date of this rule) if such applications are subject to this section as it existed prior to this date." (Emphasis added.)

[199] See § 4.34(e).

[200] This clarification of delegated authority simply codifies past practice and conforms it directly to the provisions of this final rule. The Commission expressly rejects any suggestion that any prior finding of consistency or inconsistency by the Director was made without the authority to make such a finding.

safety, environmental protection, efficiency, or capacity outweighs the potential benefit of requiring completion of the consultation process prior to the filing of an application. This delegation of authority is adopted in new § 375.314(t).

As discussed elsewhere above, the purpose of the pre-filing consultation requirement is to expedite the license application process by ensuring that the applicant has considered the relevant environmental factors when it prepares the application for filing. There may, however, be situations in which the Director determines that the pre-filing consultation process is unwarranted, or would delay consideration of significant proposed benefits. We anticipate that such situations would be most likely to arise in the context of applications to amend a license, but have crafted the authority in broader terms in case it is needed.

Finally, as stated above in section IV.C.4., the Commission has routinely set deadlines for submissions regarding hydropower applications, including comments, recommendations under the FWCA and FPA section 10(j), mandatory conditions under FPA section 4(e), and prescriptions under FPA section 18. The final rule adopts deadlines for such submissions, but in the case of many pending applications certain deadlines in the new regulations may not apply because the hearing process is too advanced. In some of these cases there may be questions as to whether earlier submissions still reflect the positions of the parties and agencies concerned, while in other cases there may be questions as to whether agencies that have not done so may submit recommendations, mandatory conditions, or prescriptions. Therefore, the Commission clarifies and confirms herein that the Director of the Office of Hydropower Licensing has the authority, under 18 CFR 375.314, to deal with these and other transitional questions in pending hydropower proceedings, and, where necessary or appropriate, to set deadlines for submissions or to take other action in order to ensure the completeness of the record for decision.

5. *Application of FPA Section 4(e) to relicensing.* In setting out license conditions and required findings,[201] we stated that licenses for a project located within any federal reservation shall be issued only after the findings required by, and subject to any conditions timely received pursuant to, section 4(e) of the FPA.[202]

[201] Section 4.34(f).

[202] Section 4.34(f)(1)(iv).

EEI argues that the authority to impose section 4(e) conditions does not extend to new licenses (relicenses), and requests that the section be modified to limit its applicability to original licenses. EEI notes the Commission's finding in *City of Pasadena* [203] that section 15 does not provide the exclusive authority to issue new licenses so as to exclude the applicability of section 4(e), but argues that the *Pasadena* decision and its codification in the Commission's regulations are inconsistent with the actual wording of the FPA and its underlying purposes. The Commission concludes that EEI's argument has no merit, for the reasons discussed in the *Pasadena* order.

6. *Filing requirements for certain applicants.* Section 15 of the FPA requires that applications for a new license [204] be filed at least two years before the existing license expires. The Commission's records indicate that approximately 170 applications for new hydropower licenses are due by December 31, 1991. These licenses expire on December 31, 1993. To facilitate the formidable task of processing all of these applications, the Commission is hereby changing specified filing requirements for all new license applications due between the effective date of this rule and December 31, 1991. The Commission hopes that these applications will be filed as soon as possible to enable staff to begin to process them.

Under the existing regulations, an applicant for a new hydropower license must file its application in accordance with the filing regulations set forth at 18 CFR 385.2004: An original and 14 copies of the application must be submitted to the Secretary, Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington, DC 20426. The submission may either be hand-delivered or mailed, and the official filing date is when the application is actually received by the Secretary. The requirements of 18 CFR 16.8, requiring service of a copy of the application on all resource agencies consulted, must be met.

Under the regulations as revised herein, an applicant for a new license must comply with different filing requirements if the application is due between the effective date of this rule and December 31, 1991. Under the final rule, if such an applicant hand-delivers copies of its application to the Secretary, the applicant must certify in its transmittal letter for the application that it has complied with the following requirements. The applicant must hand-deliver at the same time five copies of the application to the Director, Division of Project Review, Office of Hydropower Licensing, room 1023, 810 First Street, NE., Washington, DC 20426. In addition, the applicant must serve one copy of the application on each of the following addresses: [205] (1) The Commission's Regional Office responsible for the area in which the project is located; (2) the U.S. Bureau of Land Management; (3) the U.S. Corps of Engineers; and (4) the U.S. Department of the Interior.

[203] 48 FERC ¶ 61,004 (1989).

[204] See the definition of "new license" in 18 CFR 16.2(a).

The number of copies the applicant must file with the Secretary may be reduced by the number of copies required to be served on the addressees listed in appendix B. For example, if an applicant for a new license serves four copies of its application on pertinent addressees listed in appendix B, the applicant need mail only an original and ten copies to the Secretary. Furthermore, if an applicant for a new license hand delivers [206] copies of its application to the Secretary, and at the same time hand-delivers five copies of the application to the Director, Division of Project Review, Office of Hydropower Licensing,[207] and serves four copies on pertinent addressees listed in appendix B, the applicant need hand-deliver to the Secretary only an original and five copies of its application.

V. Environmental Analysis

Commission regulations describe the circumstances where preparation of an environmental assessment or an environmental impact statement will be required.[208] The Commission has categorically excluded certain actions from this requirement as not having a significant effect on the human environment.[209] No environmental consideration is necessary for the promulgation of a rule that is clarifying, corrective, or procedural, or that does not substantially change the effect of legislation or regulations being amended.[210]

[205] These addresses are listed in appendix B.

[206] Hand-delivery is considered the delivery by means other than the U.S. mail, and includes delivery by any messenger or package or courier service.

[207] The Office of Hydropower Licensing does not have a mail stop separate from the Secretary.

[208] Regulations Implementing National Environmental Policy Act, 52 FR 47897 (Dec. 17, 1987), codified at 18 CFR part 380.

[209] 18 CFR 380.4(a)(2)(ii).

[210] 18 CFR 380.4.

This final rule is procedural in nature. It identifies certain information that must be included with an application, and consultation and hearing procedures that would be employed by the Commission in hydropower proceedings. Thus, no environmental assessment or environmental impact statement is necessary for the requirements implemented in the rule.

VI. Regulatory Flexibility Certification

The Regulatory Flexibility Act of 1980 (RFA) [211] generally requires a description and analysis of final rules that will have significant economic impact on a substantial number of small entities.[212] Pursuant to section 605(b) of the RFA, the Commission hereby certifies that the final rule will not have a significant economic impact on a substantial number of small entities, and that, even if the rule were to have a significant impact on a substantial number of small entities, it would be to their benefit. The Commission believes that most of the entities affected by the proposed rule do not fall within RFA's definition of "small entity." Even if the rule would have a significant effect on a substantial number of small entities, however, the application requirements implemented in this rule are appropriate or necessary for the Commission to grant a license or exemption to an application. Any applicant may benefit substantially by obtaining a license or exemption.

VII. Information Collection Requirements

The Office of Management and Budget's (OMB) regulations [213] require that OMB approve certain information collection requirements imposed by agency rules. The information collection requirements in this final rule are contained in FERC–500, Application for License for Water Power Projects With More Than 5 MW Capacity, and FERC–505, Application for License for Water Power Projects 5 MW or Less.

Part I of the FPA gives the Commission jurisdiction over the licensing of hydropower projects. Owners and operators of potential hydropower projects subject to this rule are the likely respondents. Applications for licenses for water power projects having more than a 5 MW capacity (FERC–500) are estimated to have a total annual reporting time of 40,768 hours. The estimated number of respondents is 49; the frequency of response per year is one; and the estimated average number of hours per response is 832. Applications for licenses for a water power project having a capacity of 5 MW or less (FERC–505) are estimated to have a total annual reporting time of 12,460 hours. The number of respondents per year is estimated to be 70; the frequency of response per year is estimated to be one; and the estimated average number of hours per response is 178.

VIII. Effective Date

This rule is effective June 19, 1991. If OMB has not approved the information collection provisions at that time, the Commission will issue a notice delaying the effective date until OMB approval of the final rule.

List of subjects

18 CFR Part 4

Electric power, Reporting and recordkeeping requirements.

18 CFR Part 16

Electric power.

18 CFR Part 375

Authority delegations (Government agencies), Seals and insignia, Sunshine Act.

18 CFR Part 380

Environment, National Environmental Policy Act.

In consideration of the foregoing, the Commission amends parts 4, 16, 375, and 380 of Chapter I, Title 18, Code of Federal Regulations, as set forth below.

By the Commission. Commissioner Trabandt dissented in part on the application of section 4(e) and section 18 to relicensing. Commissioner Moler dissented in part with a separate statement attached. Commissioner Langdon dissented in part with a separate statement to be issued later.

Linwood A. Watson, Jr.,
Acting Secretary.

PART 4—LICENSES, PERMITS, EXEMPTIONS, AND DETERMINATION OF PROJECT COSTS

1. The authority citation for part 4 is amended to read as follows:

Authority: Federal Power Act, 16 U.S.C. 791a–825r, as amended by the Electric Consumers Protection Act of 1986, Pub. L. No. 99–495; Public Utility Regulatory Policies Act of 1978, 16 U.S.C. 2601–2645; Department of Energy Organization Act, 42 U.S.C. 7101–7352; E.O. 12009, 3 CFR 1978 Comp., p. 142.

2. In § 4.30, paragraph (b)(9) is revised, paragraph (b)(11) is removed, paragraph (b)(10) is redesignated as paragraph (b)(11), paragraphs (b)(25), (b)(26), (b)(27), and (b)(28) are redesignated as paragraphs (b)(26), (b)(28), (b)(29), and (b)(30), and new paragraphs (b)(10), (b)(25), and (b)(27) are added to read as follows:

§ 4.30 Applicability and definitions.

* * * * *

(b) * * *

(9)(i) *Fish and wildlife agencies* means the United States Fish and Wildlife Service, the National Marine Fisheries Service, and the state agency in charge of administrative management over fish and wildlife resources of the state in which a proposed hydropower project is located.

(ii) *Fish and wildlife recommendation* means any recommendation designed to protect, mitigate damages to, or enhance any wild member of the animal kingdom, including any migratory or nonmigratory mammal, fish, bird, amphibian, reptile, mollusk, crustacean, or other invertebrate, whether or not bred, hatched, or born in captivity, and includes any egg or offspring thereof, related breeding or spawning grounds, and habitat. A "fish and wildlife recommendation" includes a request for a study which cannot be completed prior to licensing, but does not include a request that the proposed project not be constructed or operated, a request for additional pre-licensing studies or analysis or, as the term is used in §§ 4.34(e)(2) and 4.34(f)(3), a recommendation for facilities, programs, or other measures to benefit recreation or tourism.

(iii) *Fishway* means any structure, facility, or device used for the upstream passage of fish through, over, or around the project works of a hydropower project, such as fish ladders, fish locks, fish lifts and elevators, and similar physical features; those screens, barriers, and similar devices that operate to guide fish to a fishway; and flows within the fishway necessary for its operation.

(10) *Indian tribe* means, in reference to a proposal to apply for a license or exemption for a hydropower project, an Indian tribe which is recognized by treaty with the United States, by federal statute, or by the U.S. Department of the Interior in its periodic listing of tribal governments in the **Federal Register** in accordance with 25 CFR 83.6(b), and whose legal rights as a tribe may be affected by the development and operation of the hydropower project proposed (as where the operation of the

[211] 5 U.S.C. 601–612 (1988).

[212] Section 601(c) of the RFA defines a "small entity" as a small business, a small not-for-profit enterprise, or a small governmental jurisdiction. A "small business" is defined by reference to section 3 of the Small Business Act as an enterprise which is "independently owned and operated and which is not dominant in its field of operation." 15 U.S.C. 632(a) (1988).

[213] 5 CFR 1320.13.

proposed project could interfere with the management and harvest of anadromous fish or where the project works would be located within the tribe's reservation).

* * * * *

(25) *Ready for environmental analysis* means the point in the processing of an application for an original or new license or exemption from licensing which has been accepted for filing, where substantially all additional information requested by the Commission has been filed and found adequate.

* * * * *

(27) *Resource agency* means a Federal, state, or interstate agency exercising administration over the areas of flood control, navigation, irrigation, recreation, fish and wildlife, water resource management, or cultural or other relevant resources of the state or states in which a project is or will be located.

* * * * *

3. In § 4.32, the heading is revised, paragraphs (a)(2)(iii)(B) and (a)(2)(iv) are revised, new paragraphs (a)(2)(v) and (b)(3) through (b)(9) are added, and paragraph (d)(4) is revised to read as follows:

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

(a) * * *

(2) * * *

(iii) * * *

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

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

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

* * * * *

(b) * * *

(3)(i) An applicant must make information regarding its proposed project reasonably available to the public for inspection and reproduction, from the date on which the applicant files its application for a license or exemption until the licensing or exemption proceeding for the project is terminated by the Commission. This information includes a copy of the complete application for license or exemption, together with all exhibits, appendices and any amendments, and any comments, pleadings, supplementary or additional information, or correspondence filed by the applicant with the Commission in connection with the application.

(ii) An applicant must delete from any information made available to the public under this section, specific site or property locations the disclosure of which would create a risk of harm, theft, or destruction of archeological or Native American cultural resources or to the site at which the sources are located, or would violate any federal law, including the Archaeological Resources Protection Act of 1979, 16 U.S.C. 470w-3, and the National Historic Preservation Act of 1966, 16 U.S.C. 470hh.

(4)(i) An applicant must make available the information specified in paragraph (b)(3) of this section in a form that is readily accessible, reviewable, and reproducible, at the same time as the information is filed with the Commission or required by regulation to be made available.

(ii) An applicant must make the information specified in paragraph (b)(3) of this section available to the public for inspection:

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

(B) During regular business hours; and

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

(iii) The applicant must provide a copy of the complete application (as amended) to a public library or other convenient public office located in each county in which the proposed project is located.

(iv) An applicant must make requested copies of the information specified in paragraph (b)(3) of this section available either:

(A) At its principal place of business or at any other location that is more accessible to the public, after obtaining reimbursement for reasonable costs of reproduction; or

(B) Through the mail, after obtaining reimbursement for postage fees and reasonable costs of reproduction.

(5) Anyone may file a petition with the Commission requesting access to the information specified in paragraph (b)(3) of this section if it believes that an applicant is not making the information reasonably available for public inspection or reproduction. The petition must describe in detail the basis for the petitioner's belief.

(6) An applicant must publish a notice of the filing of its application, no later than 14 days after the filing date, in a daily or weekly newspaper of general circulation in each county in which the project is located. The notice must disclose the filing date of the application and briefly summarize it, including the applicant's name and address, the type of facility applied for, its proposed location, the places where the information specified in paragraph (b)(3) of this section is available for inspection and reproduction, and the date by which any requests for additional scientific studies are due under paragraph (b)(7) of this section, and must state that the Commission will publish subsequent notices soliciting public participation if the application is found acceptable for filing. The applicant must promptly provide the Commission with proof of publication of this notice.

(7) If any resource agency, Indian tribe, or person believes that an additional scientific study should be conducted in order to form an adequate factual basis for a complete analysis of the application on its merits, the resource agency, Indian tribe, or person must file a request for the study with the Commission not later than 45 days after the application is filed and serve a copy of the request on the applicant. For any such additional study request, the requester must describe the recommended study and the basis for the request in detail, including who should conduct and participate in the study, its methodology and objectives, whether the recommended study methods are generally accepted in the scientific community, how the study and information sought will be useful in furthering the resource goals that are affected by the proposed facilities, and approximately how long the study will take to complete, and must explain why the study objectives cannot be achieved using the data already available. In addition, in the case of a study request by a resource agency or Indian tribe that had failed to request the study during the pre-filing consultation process under § 4.38 or § 16.8 of this chapter, the agency or Indian tribe must explain why this request was not made during the prefiling consultation process and show good cause why its request for the study should be considered by the Commission.

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

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

(d) * * *

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

* * * * *

4. Section 4.34 is revised to read as follows:

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

(a) *Trial-type hearing.* The Commission may order a trial-type hearing on an application for a preliminary permit, a license, or an exemption from licensing upon either its own motion or the motion of any interested party of record. Any trial-type hearing will be limited to the issues prescribed by order of the Commission. In all other cases the hearings will be conducted by notice and comment procedures.

(b) *Notice and comment hearings.* All comments (including mandatory and recommended terms and conditions or prescriptions) on an application for exemption or license must be filed with the Commission no later than 60 days after issuance by the Commission of notice declaring that the application is ready for environmental analysis. All reply comments must be filed within 105 days of that notice. All comments and reply comments and all other filings described in this section must be served on all persons listed in the service list prepared by the Commission, in accordance with the requirements of § 385.2010 of this chapter. If a party or interceder (as defined in § 385.2201 of this Chapter) submits any written material to the Commission relating to the merits of an issue that may affect the responsibilities of a particular resource agency, the party or interceder must also serve a copy of the submission on this resource agency. The Commission may allow for longer comment or reply comment periods if appropriate. A commenter or reply commenter may obtain an extension of time from the Commission only upon a showing of good cause or extraordinary circumstances in accordance with § 385.2008 of this chapter. Late-filed fish and wildlife recommendations will not be subject to the requirements of paragraphs (e), (f)(1)(ii), and (f)(3) of this section, and late-filed terms and conditions or prescriptions will not be subject to the requirements of paragraphs (f)(1)(iv), (f)(1)(v), and (f)(2) of this section. Late-filed fish and wildlife recommendations, terms and conditions, or prescriptions will be considered by the Commission under section 10(a) of the Federal Power Act if such consideration would not delay or disrupt the proceeding.

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

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

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

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

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

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

(ii) If an applicant files an amendment to its application that would materially change the project's proposed plans of development, as provided in § 4.35, an agency, Indian tribe or member of the public may modify the recommendations or terms and conditions or prescriptions it previously submitted to the Commission pursuant to paragraphs (b)(1), (b)(2), or (b)(3) of this section no later than the due date specified by the Commission for comments on the amendment.

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

(d) *Consultation procedures.* Pursuant to the Federal Power Act and the Public Utility Regulatory Policies Act of 1978, as amended, the Commission will coordinate as appropriate with other government agencies responsible for mandatory terms and conditions for exemptions and licenses for hydropower projects. Pursuant to the Federal Power Act and the Fish and Wildlife Coordination Act, the Commission will consult with fish and wildlife agencies concerning the impact of a hydropower proposal on fish and wildlife and appropriate terms and conditions for license to adequately and equitably protect, mitigate damages to, and enhance fish and wildlife (including related spawning grounds and habitat). Pursuant to the Federal Power Act and the Endangered Species Act, the Commission will consult with the U.S. Fish and Wildlife Service or the National Marine Fisheries Service, as appropriate, concerning the impact of a hydropower proposal on endangered or threatened species and their critical habitat.

(e) *Consultation on recommended fish and wildlife conditions; section 10(j) process.* (1) In connection with its environmental review of an application for license, the Commission will analyze all terms and conditions timely recommended by fish and wildlife agencies pursuant to the Fish and Wildlife Coordination Act for the protection, mitigation of damages to, and enhancement of fish and wildlife affected by the development, operation, and management of the proposed project. Submission of such recommendations marks the beginning of the process under section 10(j) of the Federal Power Act.

(2) Within 45 days of the filing of any fish and wildlife recommendation, the Commission may seek clarification of it, unless this deadline is extended by the Commission upon notice to the fish and wildlife agency concerned. If the Commission's request for clarification is communicated in writing, copies of the request will be sent by the Commission to all parties, affected resource agencies, and Indian tribes, which may file a response to the request for clarification within the time period specified by the Commission.

(3) The Commission will make a preliminary determination of inconsistency of the fish and wildlife recommendation with the purposes and requirements of the Federal Power Act or other applicable law. This preliminary determination will be done in writing and shall include an explanation of its basis, including appropriate references to the environmental analysis conducted on the license application. A copy of the environmental analysis will be provided with the determination, and will be sent to all parties, affected resource agencies, and Indian tribes.

(4) Any party, affected resource agency, or Indian tribe may file comments in response to the preliminary determination of inconsistency within 45 days of its issuance. In this filing, the fish and wildlife agency concerned may also request a meeting, telephone or video conference or other additional procedure to attempt to resolve any preliminary determination of inconsistency.

(5) If the Commission decides to conduct any meeting, telephone or video conference or to adopt any other procedure to address issues raised by its preliminary determination of inconsistency and comments thereon, the Commission will give at least 15 days' advance notice to each party, affected resource agency, or Indian tribe, which may participate in the meeting or conference. The Commission will prepare a written summary of any meeting held under this subsection to discuss section 10(j) issues, and a copy of the summary will be sent to all parties, affected resource agencies, and Indian tribes. If the Commission believes that any fish and wildlife recommendation submitted by a fish and wildlife agency may be inconsistent with the purposes and requirements of the Federal Power Act or other applicable law, the Commission will attempt to resolve any such inconsistency by appropriate means, giving due weight to the recommendations, expertise, and statutory responsibilities of the fish and wildlife agency.

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

(f) *License and exemption conditions and required findings*—(1) *License conditions.* (i) All licenses issued shall include the conditions specified in section 10(a)(1) of the Federal Power Act and such other conditions as the Commission determines are lawful and in the public interest.

(ii) Subject to paragraph (f)(3) of this section, fish and wildlife conditions shall be based on recommendations timely received from the fish and wildlife agencies pursuant to the Fish and Wildlife Coordination Act.

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

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

(v) The Commission will require the construction, maintenance, and operation by a licensee at its own expense of such fishways as may be timely prescribed by the Secretary of Commerce or the Secretary of the Interior, as appropriate, pursuant to section 18 of the Federal Power Act.

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

(3) *Required findings.* If, after attempting to resolve inconsistencies between the fish and wildlife recommendations of a fish and wildlife agency and the purposes and requirements of the Federal Power Act or other applicable law, the Commission does not adopt in whole or in part a fish and wildlife recommendation of a fish and wildlife agency, the Commission will publish the findings and statements required by section 10(j)(2) of the Federal Power Act.

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

5. In § 4.35, paragraph (e)(4) is revised to read as follows:

§ 4.35 Amendment of application; date of acceptance.

* * * * *

(e) * * *

(4) Any amendments made by a license or an exemption applicant to its proposed plans of development to satisfy requests of resource agencies or Indian tribes submitted after an applicant has consulted under § 4.38 or concerns of the Commission; and

* * * * *

6. Section 4.38 is revised to read as follows:

§ 4.38 Consultation requirements.

(a) *Requirement to consult.* (1) Before it files any application for an original license or an exemption from licensing that is described in paragraph (a)(4) of this section, a potential applicant must consult with the relevant Federal, state, and interstate resource agencies, including the National Marine Fisheries Service, the United States Fish and Wildlife Service, the United States Environmental Protection Agency, the Federal agency administering any United States lands or facilities utilized or occupied by the project, the appropriate state fish and wildlife agencies, the appropriate state water resource management agencies, the certifying agency under section 401(a)(1) of the Federal Water Pollution Control Act (Clean Water Act), 33 U.S.C. 1341(c)(1), and any Indian tribe that may be affected by the proposed project.

(2) The Director of the Office of Hydropower Licensing or the Regional Director responsible for the area in which the project is located will, upon request, provide a list of known appropriate Federal, state, and interstate resource agencies and Indian tribes.

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

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

(i) Original license;

(ii) Exemption;

(iii) Amendment to an application for original license or exemption that materially amends the proposed plans of development as defined in § 4.35(f)(1);

(iv) Amendment to an existing license that would increase the capacity of the project as defined in § 4.201(b); or

(v) Amendment to an existing license that would not increase the capacity of the project as defined in § 4.201(b), but that would involve:

(A) The construction of a new dam or diversion in a location where there is no existing dam or diversion;

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

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

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

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

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

(b) *First stage of consultation.* (1) A potential applicant must promptly contact each of the appropriate resource agencies and affected Indian tribes; provide them with a description of the proposed project and supporting information; and confer with them on project design, the impact of the proposed project (including a description of any existing facilities, their operation, and any proposed changes), reasonable hydropower alternatives, and what studies the applicant should conduct. The potential applicant must provide to the resource agencies, Indian tribes, and the Commission the following information:

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

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

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

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

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

(vi)(A) A statement (with a copy to the Commission) of whether or not the applicant will seek benefits under section 210 of PURPA by satisfying the requirements for qualifying hydroelectric small power production facilities in § 292.203 of this chapter;

(B) If benefits under section 210 of PURPA are sought, a statement on whether or not the applicant believes the project is located at a new dam or diversion (as that term is defined in § 292.202(p) of this chapter) and a request for the agencies' view on that belief, if any;

(vii) Detailed descriptions of any proposed studies and the proposed methodologies to be employed; and

(viii) Any statement required by § 4.301(a).

(2) No earlier than 30 days, but no later than 60 days, from the date of the potential applicant's letter transmitting the information to the agencies and Indian tribes under paragraph (b)(1) of this section, the potential applicant must:

(i) Hold a joint meeting at a convenient place and time, including an opportunity for a site visit, with all pertinent agencies and Indian tribes to explain the applicant's proposal and its potential environmental impact, to review the information provided, and to discuss the data to be obtained and studies to be conducted by the potential applicant as part of the consultation process;

(ii) Consult with the resource agencies and Indian tribes on the scheduling and agenda of the joint meeting; and

(iii) No later than 15 days in advance of the joint meeting, provide the Commission with written notice of the time and place of the meeting and a written agenda of the issues to be discussed at the meeting.

(3) Members of the public must be informed of and invited to attend the joint meeting held pursuant to paragraph (b)(2)(i) of this section by means of the public notice published in accordance with paragraph (g) of this section. Members of the public attending the meeting are entitled to participate in the meeting and to express their views regarding resource issues that should be

addressed in any application for license or exemption that may be filed by the potential applicant. Attendance of the public at any site visit held pursuant to paragraph (b)(2)(i) of this section will be at the discretion of the potential applicant. The potential applicant must make either audio recordings or written transcripts of the joint meeting, and must promptly provide copies of these recordings or transcripts to the Commission and, upon request, to any resource agency and Indian tribe.

(4) Not later than 60 days after the joint meeting held under paragraph (b)(2) of this section (unless extended within this time period by a resource agency or Indian tribe for an additional 60 days by sending written notice to the applicant and the Director of OHL within the first 60 day period, with an explanation of the basis for the extension), each interested resource agency and Indian tribe must provide a potential applicant with written comments:

(i) Identifying its determination of necessary studies to be performed or information to be provided by the potential applicant;

(ii) Identifying the basis for its determination;

(iii) Discussing its understanding of the resource issues and its goals and objectives for these resources;

(iv) Explaining why each study methodology recommended by it is more appropriate than other available methodology alternatives, including those identified by the potential applicant pursuant to paragraph (b)(1)(vii) of this section;

(v) Documenting that the use of each study methodology recommended by it is a generally accepted practice; and

(vi) Explaining how the studies and information requested will be useful to the agency or Indian tribe in furthering its resource goals and objectives that are affected by the proposed project.

(5)(i) If a potential applicant and a resource agency or Indian tribe disagree as to any matter arising during the first stage of consultation or as to the need to conduct a study or gather information referenced in paragraph (c)(2) of this section, the potential applicant or resource agency or Indian tribe may refer the dispute in writing to the Director of the Office of Hydropower Licensing (Director) for resolution.

(ii) At the same time as the request for dispute resolution is submitted to the Director, the entity referring the dispute must serve a copy of its written request for resolution on the disagreeing party and any affected resource agency or Indian tribe, which may submit to the Director a written response to the referral within 15 days of the referral's submittal to the Director.

(iii) Written referrals to the Director and written responses thereto pursuant to paragraphs (b)(5)(i) or (b)(5)(ii) of this section must be filed with the Secretary of the Commission in accordance with the Commission's Rules of Practice and Procedure, and must indicate that they are for the attention of the Director pursuant to § 4.38(b)(5).

(iv) The Director will resolve disputes by letter provided to the potential applicant and all affected resource agencies and Indian tribes.

(v) If a potential applicant does not refer a dispute regarding a request for information (other than a dispute regarding the information specified in paragraph (b)(1) of this section) or a study to the Director under paragraph (b)(5)(i) of this section, or if a potential applicant disagrees with the Director's resolution of a dispute regarding a request for information (other than a dispute regarding the information specified in paragraph (b)(1) of this section) or a study, and if the potential applicant does not provide the requested information or conduct the requested study, the potential applicant must fully explain the basis for its disagreement in its application.

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

(6) The first stage of consultation ends when all participating agencies and Indian tribes provide the written comments required under paragraph (b)(4) of this section or 60 days after the joint meeting held under paragraph (b)(2) of this section, whichever occurs first, unless a resource agency or Indian tribe timely notifies the applicant and the Director of OHL of its need for more time to provide written comments under paragraph (b)(4) of this section, in which case the first stage of consultation ends when all the participating agencies and Indian tribes provide the written comments required under paragraph (b)(4) of this section or 120 days after the joint meeting held under paragraph (b)(2) of this section, whichever occurs first.

(c) *Second stage of consultation.* (1) Unless determined to be unnecessary by the Director pursuant to paragraph (b)(5) of this section, a potential applicant must diligently conduct all reasonable studies and obtain all reasonable information requested by resource agencies and Indian tribes under paragraph (b) of this section that are necessary for the Commission to make an informed decision regarding the merits of the application. These studies must be completed and the information obtained:

(i) Prior to filing the application, if the results:

(A) Would influence the financial (*e.g.*, instream flow study) or technical feasibility of the project (*e.g.*, study of potential mass soil movement); or

(B) Are needed to determine the design or location of project features, reasonable alternatives to the project, the impact of the project on important natural or cultural resources (*e.g.*, resource surveys), or suitable mitigation or enhancement measures, or to minimize impact on significant resources (*e.g.*, wild and scenic river, anadromous fish, endangered species, caribou migration routes);

(ii) After filing the application but before issuance of a license or exemption, if the applicant otherwise complied with the provisions of paragraph (b)(1) of this section and the study or information gathering would take longer to conduct and evaluate than the time between the conclusion of the first stage of consultation and the expiration of the applicant's preliminary permit or the application filing deadline set by the Commission;

(iii) After a new license or exemption is issued, if the studies can be conducted or the information obtained only after construction or operation of proposed facilities, would determine the success of protection, mitigation, or enhancement measures (*e.g.*, post-construction monitoring studies), or would be used to refine project operation or modify project facilities.

(2) If, after the end of the first stage of consultation as defined in paragraph (b)(6) of this section, a resource agency or Indian tribe requests that the potential applicant conduct a study or gather information not previously identified and specifies the basis and reasoning for its request, under paragraphs (b)(4) (i)–(vi) of this section, the potential applicant must promptly initiate the study or gather the information, unless the study or information is unreasonable or unnecessary for an informed decision by the Commission on the merits of the

application or use of the methodology requested by a resource agency or Indian tribe for conducting the study is not a generally accepted practice. The applicant may refer any such request to the Director of the Office of Hydropower Licensing for dispute resolution under the procedures set forth in paragraph (b)(5) of this section and need not conduct prior to filing any study determined by the Director to be unreasonable or unnecessary or to employ a methodology that is not generally accepted.

(3)(i) The results of studies and information-gathering referenced in paragraphs (c)(1)(ii) and (c)(2) of this section will be treated as additional information; and

(ii) Filing and acceptance of an application will not be delayed and an application will not be considered deficient or patently deficient pursuant to § 4.32 (e)(1) or (e)(2) merely because the study or information gathering is not complete before the application is filed.

(4) A potential applicant must provide each resource agency and Indian tribe with:

(i) A copy of its draft application that:

(A) Indicates the type of application the potential applicant expects to file with the Commission; and

(B) Responds to any comments and recommendations made by any resource agency and Indian tribe either during the first stage of consultation or under paragraph (c)(2) of this section;

(ii) The results of all studies and information-gathering either requested by that resource agency or Indian tribe in the first stage of consultation (or under paragraph (c)(2) of this section if available) or which pertain to resources of interest to that resource agency or Indian tribe and which were identified by the potential applicant pursuant to paragraph (b)(1)(vii) of this section, including a discussion of the results and any proposed protection, mitigation, or enhancement measures; and

(iii) A written request for review and comment.

(5) A resource agency or Indian tribe will have 90 days from the date of the potential applicant's letter transmitting the paragraph (c)(4) information to it to provide written comments on the information submitted by a potential applicant under paragraph (c)(4) of this section.

(6) If the written comments provided under paragraph (c)(5) of this section indicate that a resource agency or Indian tribe has a substantive disagreement with a potential applicant's conclusions regarding resource impacts or its proposed protection, mitigation, or enhancement measures, the potential applicant will:

(i) Hold a joint meeting with the disagreeing resource agency or Indian tribe and other agencies with similar or related areas of interest, expertise, or responsibility not later than 60 days from the date of the written comments of the disagreeing agency or Indian tribe to discuss and to attempt to reach agreement on its plan for environmental protection, mitigation, or enhancement measures;

(ii) Consult with the disagreeing agency or Indian tribe and other agencies with similar or related areas of interest, expertise, or responsibility on the scheduling of the joint meeting; and

(iii) At least 15 days in advance of the meeting, provide the Commission with written notice of the time and place of the meeting and a written agenda of the issues to be discussed at the meeting.

(7) The potential applicant and any disagreeing resource agency or Indian tribe may conclude a joint meeting with a document embodying any agreement among them regarding environmental protection, mitigation, or enhancement measures and any issues that are unresolved.

(8) The potential applicant must describe all disagreements with a resource agency or Indian tribe on technical or environmental protection, mitigation, or enhancement measures in its application, including an explanation of the basis for the applicant's disagreement with the resource agency or Indian tribe, and must include in its application any document developed pursuant to paragraph (c)(7) of this section.

(9) A potential applicant may file an application with the Commission if:

(i) It has complied with paragraph (c)(4) of this section and no resource agency or Indian tribe has responded with substantive disagreements by the deadline specified in paragraph (c)(5) of this section; or

(ii) It has complied with paragraph (c)(6) of this section and a resource agency or Indian tribe has responded with substantive disagreements.

(10) The second stage of consultation ends:

(i) Ninety days after the submittal of information pursuant to paragraph (c)(4) of this section in cases where no resource agency or Indian tribe has responded with substantive disagreements; or

(ii) At the conclusion of the last joint meeting held pursuant to paragraph (c)(6) of this section in cases where a resource agency or Indian tribe has responded with substantive disagreements.

(d) *Third stage of consultation.* (1) The third stage of consultation is initiated by the filing of an application for a license or exemption.

(2) When an applicant files such application documents with the Commission, or promptly after receipt in the case of documents described in paragraph (d)(2)(iii) of this section, it must serve on every resource agency and Indian tribe consulted, a copy of:

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

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

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

(e) *Waiver of compliance with consultation requirements.* (1) If a resource agency or Indian tribe waives in writing compliance with any requirement of this section, a potential applicant does not have to comply with that requirement as to that agency or tribe.

(2) If a resource agency or Indian tribe fails to timely comply with a provision regarding a requirement of this section, a potential applicant may proceed to the next sequential requirement of this section without waiting for the resource agency or Indian tribe to comply.

(3) The failure of a resource agency or Indian tribe to timely comply with a provision regarding a requirement of this section does not preclude its participation in subsequent stages of the consultation process.

(f) *Application requirements documenting consultation and any disagreements with resource agencies.* An applicant must show in Exhibit E of its application that it has met the requirements of paragraphs (b) through (d) and paragraphs (g) and (h) of this section, and must include a summary of the consultation process and:

(1) Any resource agency's or Indian tribe's letters containing comments, recommendations, and proposed terms and conditions;

(2) Any letters from the public containing comments and recommendations;

(3) Notice of any remaining disagreement with a resource agency or Indian tribe on:

(i) The need for a study or the manner in which a study should be conducted and the applicant's reasons for disagreement, and

(ii) Information on any environmental protection, mitigation, or enhancement measure, including the basis for the applicant's disagreement with the resource agency or Indian tribe;

(4) Evidence of any waivers under paragraph (e) of this section;

(5) Evidence of all attempts to consult with a resource agency or Indian tribe, copies of related documents showing the attempts, and documents showing the conclusion of the second stage of consultation;

(6) An explanation of how and why the project would, would not, or should not, comply with any relevant comprehensive plan as defined in § 2.19 of this chapter and a description of any relevant resource agency or Indian tribe determination regarding the consistency of the project with any such comprehensive plan;

(7)(i) With regard to certification requirements for a license applicant under section 401(a)(1) of the Federal Water Pollution Control Act (Clean Water Act):

(A) A copy of the water quality certification;

(B) A copy of the request for certification, including proof of the date on which the certifying agency received the request; or

(C) Evidence of waiver of water quality certification as described in paragraph (f)(7)(ii) of this section.

(ii) A certifying agency is deemed to have waived the certification requirements of section 401(a)(1) of the Clean Water Act if the certifying agency has not denied or granted certification by one year after the date the certifying agency received a written request for certification. If a certifying agency denies certification, the applicant must file a copy of the denial within 30 days after the applicant received it.

(iii) Notwithstanding any other provision in title 18, chapter I, subpart B, any application to amend an existing license, and any amendment to a pending application for a license, requires a new request for water quality certification pursuant to paragraph (f)(7)(i) of this section if the amendment would have a material adverse impact on the water quality in the discharge from the project or proposed project.

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

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

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

(2)(i) A potential applicant must make available to the public for inspection and reproduction the information specified in paragraph (b)(1) of this section from the date on which the notice required by paragraph (g)(1) of this section is first published until the date of the joint meeting required by paragraph (b)(2) of this section.

(ii) The provisions of § 4.32(b) will govern the form and manner in which the information is to be made available for public inspection and reproduction.

(iii) A potential applicant must make available to the public for inspection at the joint meeting required by paragraph (b)(2) of this section at least two copies of the information specified in paragraph (b)(1) of this section.

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

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

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

(4)(i) Any applicant that files its application on or after June 19, 1991, and that complied with the provisions of paragraphs (a) and (b)(1) of this section prior to June 19, 1991, must hold a public meeting, within 90 days from June 19, 1991, at or near the site of the proposed project, to generally explain the potential applicant's proposal for the site and to obtain the views of the public regarding resource issues that should be addressed in any application for license or exemption that may be filed by the potential applicant. The public meeting must include both day and evening sessions, and the potential applicant must make either audio recordings or written transcripts of both sessions.

(ii)(A) At least 15 days in advance of the meeting, the potential applicant must provide all affected resource agencies, Indian tribes, and the Commission with written notice of the time and place of the meeting and a written agenda of the issues to be discussed at the meeting.

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

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

(B) The provisions of § 4.32(b) will govern the form and manner in which the information is to be made available for public inspection and reproduction.

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

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

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

7. In § 4.92, paragraphs (a)(2) and (a)(3) are revised and paragraph (a)(4) is added to read as follows:

§ 4.92 Contents of exemption application.

(a) * * *

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

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

(4) Identification of all Indian tribes that may be affected by the project.

* * * * *

8. In § 4.93, paragraph (b) is revised to read as follows:

§ 4.93 Action on exemption applications.

* * * * *

(b) The Commission will circulate a notice of application for exemption to interested agencies and Indian tribes at the time the applicant is notified that the application is accepted for filing.

* * * * *

9. In § 4.105, paragraph (b)(1) is revised to read as follows:

§ 4.105 Action on exemption applications.

* * * * *

(b)(1) *Consultation.* The Commission will circulate a notice of application for exemption from licensing to interested agencies and Indian tribes at the time the applicant is notified that the application is accepted for filing.

* * * * *

10. In § 4.107, paragraph (a) is amended by adding the following sentence at the end to read as follows:

§ 4.107 Contents of application for exemption from licensing.

(a) *General requirements.* * * * The applicant must identify in its application all Indian tribes that may be affected by the project.

* * * * *

11. In § 4.201, paragraph (b) introductory text and paragraph (c), are revised to read as follows:

§ 4.201 Contents of application.

* * * * *

(b) *Required exhibits for capacity related amendments.* Any application to amend a license for a hydropower project that involves additional capacity not previously authorized, and that would increase the actual or proposed total installed capacity of the project, would result in an increase in the maximum hydraulic capacity of the project of 15 percent or more, and would result in an increase in the installed name-plate capacity of 2 megawatts or more, must contain the following exhibits, or revisions or additions to any exhibits on file, commensurate with the scope of the licensed project:

* * * * *

(c) *Required exhibits for non-capacity related amendments.* Any application to amend a license for a water power project that would not be a capacity related amendment as described in paragraph (b) of this section must contain those exhibits that require revision in light of the nature of the proposed amendments.

* * * * *

PART 16—PROCEDURES RELATING TO TAKEOVER AND RELICENSING OF LICENSED PROJECTS

12. The authority citation for part 16 is revised to read as follows:

Authority: Federal Power Act, 16 U.S.C. 791a–825r, as amended by the Electric Consumers Protection Act of 1986, Pub. L. No. 99–495; Department of Energy Organization Act, 42 U.S.C. 7101–7352; E.O. 12009, 3 CFR 1978 Comp., p. 142.

13. In § 16.2, paragraphs (d) and (f) are removed, and paragraph (e) is redesignated as paragraph (d).

14. In § 16.8, paragraphs (f)(7)(i)(B), (f)(7)(ii), and (f)(7)(iii) are revised to read as follows:

§ 16.8 Consultation requirements.

* * * * *

(f) * * *

(7)(i) * * *

(B) A copy of the request for certification, including proof of the date on which the certifying agency received the request; or

* * * * *

(ii) A certifying agency is deemed to have waived the certification requirements of section 401(a)(1) of the Clean Water Act if the certifying agency has not denied or granted certification by one year after the date the certifying agency received a written request for certification. If a certifying agency denies certification, the applicant must file a copy of the denial within 30 days after the applicant received it.

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

* * * * *

15. In § 16.10, the heading is revised and new paragraph (f) is added to read as follows:

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

* * * * *

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

(1) If the application is hand-delivered to the Commission, as by messenger or courier service, only an original and five copies of the application need be delivered to the Secretary, but the filing must be accompanied by a transmittal letter certifying that at the same time five copies of the application are being hand-delivered to the Director, Division of Project Review, Office of Hydropower Licensing, and one copy is being mailed to each of the following:

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

(ii) The U.S. Department of the Interior, Washington, DC;

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

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

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

PART 375—THE COMMISSION

16. The authority citation for part 375 is revised to read as follows:

Authority: Omnibus Budget Reconciliation Act of 1986, 42 U.S.C. 7178; Electric Consumers Protection Act of 1986, 16 U.S.C. 791a note; Department of Energy Organization Act, 42 U.S.C. 7101–7532, E.O. 12009, 3 CFR 1978 Comp., p. 142; Administrative Procedure Act, 5 U.S.C. 551–557; Federal Power Act, 16 U.S.C. 791–828c, as amended; Natural Gas Act, 15 U.S.C. 717–717w, as amended; Natural Gas Policy Act of 1978, 15 U.S.C. 3301–3432; Public Utility Regulatory Policies Act of 1978, 16 U.S.C. 2601 *et seq.*, as amended.

17. In § 375.314, paragraphs (s) and (t) are added to read as follows:

§ 375.314 Delegations to the Director of the Office Hydropower Licensing.

* * * * *

(s) Make any preliminary determination of inconsistency between a fish and wildlife agency's fish and wildlife recommendation and applicable law, and conduct through staff whatever consultation with the agency that is necessary or appropriate in order to attempt to resolve any inconsistency, under section 10(j) of the Federal Power Act, and to take such related actions as are required under that section.

(t) Waive the pre-filing consultation requirements in §§ 4.38 and 16.8 of this title whenever the Director, in his discretion, determines that an emergency so requires, or that the potential benefit of expeditiously considering a proposed improvement in safety, environmental protection, efficiency, or capacity outweighs the potential benefit of requiring completion of the consultation process prior to the filing of an application.

PART 380—REGULATIONS IMPLEMENTING THE NATIONAL ENVIRONMENTAL POLICY ACT

18. The authority citation for part 380 is revised to read as follows:

Authority: National Environmental Policy Act of 1969, 42 U.S.C. 4321–4370a; Department of Energy Organization Act, 42 U.S.C. 7101–7352; E.O. 12009 3 CFR 1978 Comp., p. 142.

§ 380.3 [Amended]

19. In § 380.3, paragraph (b)(3) is amended by adding after the words "§ 4.38" the words "and § 16.8".

20. In § 380.3, paragraph (c)(1) is amended by adding after the words "Part 4" the words "or 16".

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

Appendix A—List of Commenters

Federal Agencies

1. U.S. Department of Energy (Energy)
2. U.S. Department of the Interior (Interior)
3. U.S. Department of Commerce (Commerce)
4. U.S. Department of Agriculture (Agriculture)
5. U.S. Environmental Protection Agency (EPA)
6. Council on Environmental Quality (CEQ)

State Agencies

7. Alabama Dept. of Conservation and Natural Resources (Alabama)
8. Arizona Game and Fish Dept. (Arizona)
9. California Dept. of Fish and Game (California Fish & Game)
10. California State Water Resources Control Board (Cal. Water Board)
11. Colorado Dept. of Natural Resources, Division of Wildlife (Colorado)
12. International Association of Fish and Wildlife Agencies (International Ass'n)
13. Michigan Dept. of Natural Resources (Michigan)
14. Minnesota Dept. of Natural Resources (Minnesota)
15. Missouri Dept. of Conservation (Missouri)
16. Montana Dept. of Fish, Wildlife and Parks (Montana DFWP)
17. Montana Dept. of Natural Resources and Conservation (Montana DNRC)
18. Nevada Dept. of Conservation and Natural Resources, Division of Environmental Protection (Nevada)
19. New Mexico Dept. of Game and Fish (New Mexico)
20. Oklahoma Attorney General (Oklahoma)
21. Oklahoma Water Resources Board (Oklahoma Water)
22. Oklahoma Dept. of Wildlife Conservation (Oklahoma Wildlife)
23. Oregon Water Resources Dept. (Oregon)
24. South Carolina Wildlife and Marine Resources Dept. (South Carolina)
25. Washington Dept. of Wildlife (Washington Wildlife)
26. Washington Dept. of Fisheries (Washington Fisheries)
27. West Virginia Dept. of Natural Resources (West Virginia)
28. Wisconsin Dept. of Natural Resources (Wisconsin)
29. Wyoming Game and Fish Dept. (Wyoming)

Indian Tribes and Representatives

30. California Indian Legal Services
31. Confederated Tribes of Coos, Lower Umpqua & Siuslaw Indians (Confederated Tribes)
32. The Klamath Tribe (Klamath)
33. Mississippi Band of Choctaw Indians (Choctaw)
34. Nambe Pueblo
35. National Congress of American Indians
36. Native American Rights Fund
37. Nez Perce Tribe (Nez Perce)
38. Pueblo de Cochiti
39. The Tulalip Tribes (Tulalip)

Municipalities, Associations, Companies, and Individuals

40. Alabama Power Company, Georgia Power Company, and Southern Company Services, Inc. (Alabama Power)
41. American Paper Institute (American Paper)
42. American Rivers, Inc., Friends of the River, Trout Unlimited, California Save Our Streams Council, and American Whitewater Affiliation (American Rivers)
43. Mark Bagdovitz (Bagdovitz)
44. Edison Electric Institute (EEI)
45. National Heritage Institute (National Heritage)
46. National Hydropower Association (NHA)
47. National Wildlife Federation (Wildlife Federation)
48. Myers Engineering Co. (Myers)
49. North Carolina Electric Membership Corp. (North Carolina Electric)
50. Pacific Gas and Electric Co. (PG&E)
51. Public Generating Pool
52. PUD District No. 1 of Pend Oreille County, Washington (Pend Oreille)
53. PUD District No. 2 of Grant County (Grant)
54. Seattle City Light (Seattle Light)
55. Solano Irrigation District (Solano)
56. City of Vernon, California (Vernon)
57. Wildlife Management Institute (Wildlife Institute)
58. Wisconsin River Power Co., Wisconsin Public Service Corp., Weyerhauser Paper Co., Nekoosa Papers, Inc., and Consolidated Water Power Co. (Wisconsin River)

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

Appendix B—List of Addresses

U.S. Department of the Interior

Addressee	Area of Jurisdiction
U.S. Department of the Interior, 19th and C Street NW., Room 4239, Washington, DC 20240.	Nationwide.
Chief, Branch of Records, Bureau of Land Management, P.O. Box 36800, Billings, MT 59107.	Montana, North Dakota, and South Dakota.
Chief, Branch of Records, Bureau of Land Management, P.O. Box 1828, Cheyenne, WY 82003.	Wyoming and Nebraska.
Chief, Branch of Records, Bureau of Land Management, P.O. Box 1449, Santa Fe, NM 87504.	New Mexico, Oklahoma, Kansas, and Texas.
State Director, Bureau of Land Management, 2850 Youngfield Street, Denver, CO 80215-7076.	Colorado.
Chief, Branch of Records, Bureau of Land Management, 3380 Americana Terrace, Boise, ID 83706.	Idaho.
Chief, Branch of Records, Bureau of Land Management, 324 South State, suite 301, Salt Lake City, UT 84111-2303.	Utah.
Chief, Branch of Records, Bureau of Land Management, P.O. Box 16563, Phoenix, AZ 85011.	Arizona.
Chief, Branch of Records, Bureau of Land Management, P.O. Box 2965, Portland, OR 97208.	Oregon and Washington.
Chief, Branch of Records, N-943.2, Bureau of Land Management, P.O. Box 12000, Reno, NV 89520, ATTN: Vienna Wolder.	Nevada.
Chief, Branch of Records, Bureau of Land Management, 2800 Cottage Way, Sacramento, CA 95825.	California.
State Director, Bureau of Land Management, 701 C Street, Box 13, Anchorage, AK 99512, ATTN: Lands Section 965.	Alaska.
Bureau of Land Management, U.S. Department of the Interior, Interior Building, 1849 C Street NW., Washington, DC 20240.	All other regions.

U.S. Corps of Engineers

Lower Mississippi Valley Office

U.S. Corps of Engineers, P.O. Box 80, Vicksburg, MS 39180

Missouri River Office

U.S. Corps of Engineers, P.O. Box 103, Downtown Station, Omaha, NE 68101

South Atlanta Office

U.S. Corps of Engineers, 510 Title Building, Atlanta, GA 30303

Southwestern Office

U.S. Corps of Engineers, 1114 Commerce Street, Dallas, TX 75242-0216

New England Office

U.S. Corps of Engineers, 424 Trapelo Road, Waltham, MA 02154

North Atlanta Office

U.S. Corps of Engineers, 90 Church Street, New York, NY 10007

North Central Office

U.S. Corps of Engineers, 536 S. Clark Street, Chicago, IL 60605

South Pacific Office

U.S. Corps of Engineers, 630 Sansom Street, San Francisco, CA 94111

North Pacific Office

U.S. Corps of Engineers, 220 NW. 8th Avenue, Portland, OR 97209

Ohio River Office

U.S. Corps of Engineers, P.O. Box 1159, Cincinnati, OH 45201

Federal Energy Regulatory Commission Regional Offices

Atlanta Regional Office, 730 Peachtree Street, NE, room 800, Atlanta, GA 30308

Chicago Regional Office, Federal Building, 230 South Dearborn Street, room 3130, Chicago, IL 60604

New York Regional Office, 201 Varick Street, room 664, New York, NY 10014

Portland Regional Office, suite 1340, Portland, OR 97204

San Francisco Regional Office, 901 Market Street, suite 350, San Francisco, CA 94103

MOLER, Commissioner, *dissenting in part:*

The regulations we adopt with this rule are of paramount importance if the Commission is to address hydropower licensing responsibly in the coming years. These new regulations invest our process with much needed discipline and, at the same time, balance the varied concerns of prospective licensees, interested parties, resource agencies and the public. I am an enthusiastic supporter of this final rule in all respects except one: The definition of the term "fishway".

The Notice of Proposed Rulemaking leading to this Final Rule included both upstream and downstream fish passage facilities in the definition of what constitutes a fishway. This Final Rule redefines the term fishway as a "one way" fishway; that is, it applies only to a structure, facility, or device for upstream passage. This result cannot be justified by reference to historical documents. It represents an arbitrary departure from Commission practice and precedent. It subjects downstream fishways to the weighing and balancing of the comprehensive development criteria of section 10(a) of the FPA. Finally, defining the term this way tortures the plain meaning of the term and simply does not make good sense.

The Historical Context

Congress has not defined the term "fishway".[1] Thus the task is up to this Commission. It is not surprising that a careful review of the literature and expert opinion reveals at least two points of view as to what is intended. The majority attempts to buttress its narrow reading of the term fishway by calling it "the more justifiable approach". They selectively invoke the technical literature and perceptions of past practice near the time of the 1920 legislation. This approach cannot be taken seriously. Recourse to technical experts is inappropriate. A preferable approach would be to look at the definition used at the time by the expert agency. In this case, it is the Department of Commerce. But the majority inexplicably rejects this established position.

The Department of Commerce, as long ago as 1917, provided the following definition of the term "fishway":

It is the function of a fishway, or fish ladder, to permit fish to pass over a dam from the stream below to the stream or pool above the dam, and also to permit the same or other fish to pass in the reverse direction without injury.[2]

This is also the common sense reading of the term "fishway".[3] It should be used.

The majority argues that the term "fishway" applies only to upstream passage since that was the principal concern at the time. To be sure, upstream passage then may well have "constituted the principal incentive for the construction of fishways".[4] It does not follow, however, that Congress therefore meant fishways to cover only upstream passage.

In the first place, as the above-quoted excerpt from the Department of Commerce's 1917 report on fishways demonstrates, downstream fish passage was indeed a problem "prior to passage of section 18".[5] Commerce explains why, "[i]t is, of course just as important for the young fish to return to the ocean as for the adult breeders to ascend the streams." [6] The fact that it was not as big a problem as upstream passage cannot be used to argue that Congress meant the Secretaries to ignore the problem altogether and vest the solution with the Commission instead. More to the point, the legislative history of the 1920 Act shows, rather, the problem Congress sought to address was not narrowly drawn to upstream passage but to the impact of hydropower development on the fishing industry as a whole.[7]

Commission Practice and Precedent

This is not the first time the Commission has interpreted what constitutes a fishway under section 18. The Commission has previously included facilities for both upstream and downstream fish passage. The Final Rule does not proffer any satisfactory explanation (saying simply that the past treatment, in retrospect, is "unduly broad") as to why those precedents are not applicable and are being disregarded.[8]

Section 18 vs. Section 10

It is incredible to assume that Congress, in providing the Secretaries of Commerce and Interior authority to prescribe fishways, meant only for the Departments to be concerned with upstream passage, leaving to the Commission's balancing under section 10 whether to provide for downstream passage. Yet this is exactly the majority's position.

The majority narrowly construes section 18, "to avoid imbuing it with the potential for interfering with the exercise of our judgement in balancing the factors Congress instructed us to consider." [9] The concern is obvious, if unstated. Fishways are expensive, particularly to retrofit existing projects. If they are to include downstream facilities, this places added authority in the hands of those statutorily responsible for protecting fisheries to (at least potentially) increase the cost of hydropower development. Whether or not this concern is well founded, Congress has decided the matter.

The problem with the majority's position is that, with section 18, Congress set fishways outside of the Commission's section 10 authority to balance competing factors.[10] The Commission cannot then rely on section 10 to circumscribe the Secretaries' authority under section 18. As the Supreme Court stated in rejecting the same argument when offered to limit the Secretaries' authority under section 4(e) of the Act to protect reservations:

It is thus clear enough that while Congress intended that the Commission would have exclusive authority to issue all licenses, it wanted the individual Secretaries to continue to play the major role in determining what conditions would be included in the license in order to protect the resources under their respective jurisdictions.[11]

---

[1] Section 18 of the Federal Power Act (FPA) reads, in pertinent part:

The Commission shall require the construction, maintenance, and operation by a licensee at its own expense of * * * such fishways as may be prescribed by the Secretary of the Interior or the Secretary of Commerce, as appropriate.

16 U.S.C. 811 (1988).

[2] *The Question of Fishways*, Department of Commerce Economic Circular No. 24 at 1 (May 8, 1917) (hereafter, Commerce).

[3] Common sense aside, this statement should be accepted as authoritative. Before the 1920 passage of the Federal Water Power Act, the Secretary of Commerce had primary responsibility for fish passage facilities at federally licensed projects. See, e.g., An Act to regulate the construction of dams across navigable waters, Pub. L. No. 262, 34 Stat. 386, § 3 (1906) ("The persons owning or operating any such dam shall maintain, at their own expense, * * * such fishways as the Secretary of Commerce and Labor shall prescribe"). With the passage of the 1920 Act, and until the reorganization of 1939 which brought Interior into the picture, Commerce had the exclusive authority under section 18 to prescribe fishways. See Act of 1920, Pub. L. No. 280, 41 Stat. 1073 (1920).

[4] Slip op. at 43.

[5] As the Solicitor General explained in a 1908 memorandum to Congress, the early dam licensing acts providing for fishways encompassed "sluiceways and ladders for fish." Memorandum by Solicitor General Hoyt (May 11, 1908) (reproduced at Papers submitted to the Committee on Commerce of the United States Senate at 50). Sluiceways are recognized as providing fish with downstream access.

[6] *Commerce* at 1.

[7] See 56 Cong. Rec. at H. 10035–36 (September 5, 1918) (colloquy discussing sections 18 and 25 of the legislation); see also *id.* at H. 10037.

[8] See. e.g., Eugene Water and Electric Board, 49 FERC ¶ 61,211 at 61,740–61,741, 61,743 and 61,757 (1989) (discussing need for and requirements of fishways to mitigate impact of project on, among other things, "downstream migrant protection"); Greenwood Ironworks, 41 FERC ¶ 62,023 at 63,032 and 63,040 (1987) (Director's Order: licensee to provide fishways as prescribed by Departments of Interior and Commerce "[t]o facilitate upstream and downstream passage of anadromous fishes"); Lynchburg Hydro Assoc., 39 FERC ¶ 61,079 at 61,219 (1987) (fish screens required under section 18 as part of "a system for upstream and downstream fish passage"); New England Power Company, 33 FERC ¶ 62,340 at 63,470 (1985)(Director's Order discussing need to modify fishways "to mitigate any adverse impacts to downstream migrating smolts or upstream migrating adults") (emphasis added in each).

[9] Slip op. at 43.

[10] The Commission, after a thorough discussion of section 18 and its history, adopted this view in its *Lynchburg* decision, *supra*, n.8 at 61,217–61,218. ("We have no discretionary authority in this regard; fishways must be required when properly prescribed by the Secretaries.") The majority rejects this precedent without discussion.

[11] *Escondido Mutual Water Co.* v. *LaJolla Band of Mission Indians*, 466 U.S. 765, 775 (1984). *Escondido*, of course, involves the mandatory conditioning authority provided the Departments under section 4(e) of the Act for the protection and

Continued

The logic applies equally here. By enacting section 18 Congress placed the protection of fish passage under the jurisdictions of the Secretaries. The Commission's attempt to change that statutory scheme as it applies to downstream fish passage facilities must fail.[12]

utilization of reservations. But the fundamental rationale for the Commission's position there was the same as offered here: That no Department may impinge upon the Commission's licensing authority. The fault with this logic, as the Supreme Court recognized, is that the majority assumes the question presented, i.e., whether the Departments' authority is to be limited.

Conclusion

I cannot support the majority's reading of the term "fishways" in section 18 of the Act to mean devices providing for only the upstream passage of fish. Such a narrow reading—and with it the attempt to circumscribe the authority of the Secretaries of Interior and Commerce—cannot be squared with the statute or any common sense use of the term "fishway". It seems crazy to me for us to say that we think Congress meant to provide statutory protection for fish trying to make it upstream around hydropower facilities, and then to abandon that protection for fish on their way back downstream. Thus, I dissent on this important issue.

[12] It is no answer to claim, as the majority does, that its restrictive reading of the term fishway "will not result in any lessening of our efforts to ensure safe downstream passage of fish in licensing hydroelectric projects." Slip op. at 43. Those "efforts" are subject to the balancing mandated by section 10(a).

Elizabeth Anne Moler,

Commissioner.

[FR Doc. 91-11478 Filed 5-17-91; 8:45 am]

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