

**IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

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**No. 09-72920**

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**FISHERMEN INTERESTED IN SAFE HYDROKINETICS, *ET AL.*,  
PETITIONERS,**

**v.**

**FEDERAL ENERGY REGULATORY COMMISSION,  
RESPONDENT.**

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**ON PETITION FOR REVIEW OF ORDERS OF THE  
FEDERAL ENERGY REGULATORY COMMISSION**

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**BRIEF FOR RESPONDENT  
FEDERAL ENERGY REGULATORY COMMISSION**

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**STATEMENT OF THE ISSUE**

Whether the Federal Energy Regulatory Commission (“FERC” or “Commission”), in issuing a preliminary permit for a hydrokinetic (wave energy) project under sections 4(f) and 5 of the Federal Power Act, 16 U.S.C. §§ 797(f), 798, adequately explained its decision to defer consideration of the relationship of the project to a comprehensive plan, under section 10(a)(1) of the Act, 16 U.S.C. § 803(a)(1), until the licensing stage, if the project reaches that stage.

## STATEMENT REGARDING JURISDICTION

This Court has jurisdiction under section 313(b) of the Federal Power Act (“FPA”), 16 U.S.C. § 825l(b). Although the Commission is not raising a jurisdictional objection, as set forth *infra*, page 32, in light of *Summers v. Earth Island Institute*, 129 S. Ct. 1142 (2009), the Commission is not certain whether the petitioners have established an injury adequate for Article III standing purposes.

## STATUTORY AND REGULATORY PROVISIONS

The pertinent statutes and regulations are contained in the Addendum.

## STATEMENT OF THE CASE

### I. NATURE OF THE CASE, COURSE OF PROCEEDINGS AND DISPOSITION BELOW

In the orders on review, the Commission issued a preliminary permit to Green Wave Energy Solutions, LLC for the proposed hydrokinetic Green Wave Mendocino Project, to be located on the Pacific Ocean in Mendocino County, California. *Green Wave Energy Solutions, LLC*, 127 FERC ¶ 62,093 (“Permit Order”), ER<sup>1</sup> 171, *reh’g denied*, 128 FERC ¶ 61,034 (2009) (“Rehearing Order”), ER 1. Under section 5 of the FPA, 16 U.S.C. § 798, the purpose of the preliminary permit is to preserve Green Wave’s priority of application for a license. The

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<sup>1</sup> ER refers to the Excerpts of Record filed by petitioners. P refers to the internal paragraph number within FERC orders. Br. refers to the petitioners’ initial Brief.

parties do not dispute that the permit does not confer property rights or authorize construction. *See* Permit Order at P 7, ER 173.

Petitioners Fishermen Interested in Safe Hydrokinetics, the County of Mendocino, California, the City of Fort Bragg, California, the Recreational Fishing Alliance, the Pacific Coast Federation of Fishermen’s Associations, the Institute for Fisheries, the Ocean Protection Council and Elizabeth R. Mitchell (collectively, “Fishermen”) claim that the Commission failed to provide adequate support and explanation for its decision to issue a preliminary permit without first developing and considering a comprehensive plan for the entire Pacific Ocean off the coasts of California, Oregon and Washington, and the adjacent marine waters. Br. 4-5 (Fishermen describe this area as the Pacific Region). The comprehensive plan requirement arises from FPA section 10(a)(1), which permits the Commission to issue a license only where a proposed hydroelectric project “will be best adapted to a comprehensive plan for improving or developing a waterway.” 16 U.S.C. § 803(a)(1). Relying upon this Court’s companion decisions in *National Wildlife Federation v. FERC*, 801 F.2d 1505 (9th Cir. 1986), and *Washington Department of Fisheries v. FERC*, 801 F.2d 1516 (9th Cir. 1986), Fishermen argue that the Commission must, in these circumstances, prepare a comprehensive plan prior to issuing a permit (as opposed to a license).

The Commission, following a rationale adopted in 1988 subsequent to *National Wildlife Federation*, explained that the very purpose of a preliminary permit is to allow the permittee, like any other potential license applicant, the time to prepare the site-specific and cumulative impact information that the Commission requires, at the licensing stage, to consider whether a project is “best adapted to a comprehensive plan.” 16 U.S.C. § 803(a)(1); *see, e.g.*, Permit Order at P 12, ER 175; Rehearing Order at P 9 & n.8, ER 3-4 (citing cases). All potential license applicants must, pursuant to regulations adopted following *National Wildlife Federation*, provide the Commission with the information it requires for this purpose at the time a license application is filed, and hydrokinetic permit holders are subject to additional monitoring to ensure that adequate information is developed. Permit Order at P 12, ER 175. Though Fishermen claim that the increasing interest in wave energy development in the Pacific Ocean requires the early development of a comprehensive plan, the Commission found that Fishermen’s concerns for potential project impacts are premature at the permit stage, but assured Fishermen that such impacts will be considered at the licensing stage. *See, e.g., id.* at PP 8, 12, ER 173, 175. Fishermen now bring this same claim before this Court.

## II. STATEMENT OF FACTS

### A. Statutory And Regulatory Framework

Part I of the FPA constitutes “a complete scheme of national regulation” to “promote the comprehensive development of the water resources of the Nation.” *First Iowa Hydro-Elec. Coop. v. FPC*, 328 U.S. 152, 180 (1946). As relevant here, the Commission’s jurisdiction to authorize hydroelectric projects includes nonfederal projects located on navigable waters, which the Commission has interpreted to include waters off the U.S. coast. *See Preliminary Permits for Wave, Current, and Instream New Technology Hydropower Projects*, Notice of Inquiry and Interim Statement of Policy, 118 FERC ¶ 61,112 at P 4 (2007) (“Notice of Inquiry”).

The FPA establishes two distinct types of authorizations: preliminary permits and licenses. Under sections 4(f) and 5 of the FPA, 16 U.S.C. §§ 797(f), 798, the Commission may issue preliminary permits “for the sole purpose of maintaining priority of application for a license [for a period] not exceeding a total of three years.” FPA § 5, 16 U.S.C. § 798. In other words, the permit conveys only priority of application, not land-disturbing or other property rights. Permit Order at P 7, ER 173 (citing, *e.g.*, *Town of Summersville v. FERC*, 780 F.2d 1034 (D.C. Cir. 1986) (discussing nature of preliminary permits)).

Preliminary permits, as described in FPA section 4(f), 16 U.S.C. § 797(f), “enabl[e] applicants for a license . . . to secure the data and to perform the acts required by” FPA section 9, 16 U.S.C. § 802, which details the requirements for a license application. *See National Wildlife Federation*, 801 F.2d at 1508 (“the primary purpose for issuing preliminary permits is to induce the permittees to gather the information necessary for licensing”); *see also Northern Colo. Water Conservancy Dist. v. FERC*, 730 F.2d 1509, 1512 (D.C. Cir. 1984) (“the licensing process is also structured to account for at least two related policy goals: promoting extensive data collection by applicants prior to their receipt of licenses and promoting public development and operation of hydroelectric projects”). Obtaining a preliminary permit is optional, and is not a prerequisite to seeking or obtaining a license. *Marseilles Land & Water Co. v. FERC*, 345 F.3d 916, 918 (D.C. Cir. 2003).

The application requirements for obtaining a preliminary permit are found in the Commission’s regulations. In addition to a description of the proposed location and the project facilities (18 C.F.R. § 4.81(b)), the application must include a description of the studies conducted or to be conducted for the purpose of determining the feasibility of the project and for preparation of a license application. 18 C.F.R. §§ 4.81(c). However, at the permit stage, a “project proposal is by definition imprecise and fluid.” *Symbiotics, LLC*, 99 FERC ¶

61,101, 61,419 (2002). Thus, as this Court has recently recognized, the Commission will generally issue a preliminary permit “[u]nless a permanent legal barrier precludes FERC from licensing the project.” *Fall River Rural Elec. Coop. v. FERC*, 543 F.3d 519, 530 (9th Cir. 2008) (quoting *Town of Summersville*, 780 F.2d at 1038).

Licenses, governed by FPA section 4(e), 16 U.S.C. § 797(e), are required for the construction, operation and maintenance of jurisdictional projects. *American Rivers v. FERC*, 201 F.3d 1186, 1191 (9th Cir. 1999). Under section 10(a) of the FPA, before issuing a license, FERC must decide that an approved project

will be best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water-power development, for the adequate protection, mitigation and enhancement of fish and wildlife . . . and for other beneficial public uses . . . .

FPA § 10(a)(1), 16 U.S.C. § 803(a)(1); *see also LaFlamme v. FERC*, 945 F.2d 1124, 1127 (9th Cir. 1991).

In order to reach this determination, the Commission reviews the filed license application and conducts its own independent evaluation under both the FPA and the National Environmental Policy Act, 42 U.S.C. §§ 4321, *et seq.*, and other applicable laws. The process for gathering the data and conducting the studies required by FPA section 9, 16 U.S.C. § 802, is governed by the Commission’s regulations, which require extensive pre-filing consultation and also



require potential license applicants to perform all reasonable studies requested by resource agencies. *See* 18 C.F.R. §§ 5.1, 5.5-5.18, 4.34, 4.38. Thus, “the licensing process is completely distinct from the permit process.” *Notice of Inquiry*, 118 FERC ¶ 61,112 at P 6.

The Commission has described the comprehensive plan requirement of FPA section 10(a)(1) as not necessarily requiring a specific document, but rather “consider[ation of] the comprehensive picture of the water system of which the project is a part, based on the record developed in each particular proceeding.” *Sayles Hydro Assocs.*, 52 FERC ¶ 61,249, 61,868 (1990) (citing *LaFlamme v. FERC*, 852 F.2d 389, 402 (9th Cir. 1988) (*LaFlamme I*)), *aff’d*, *LaFlamme v. FERC*, 945 F.2d at 1128 (*LaFlamme II*) (finding that the environmental assessment and Commission orders “satisfied the FPA’s requirement of developing a comprehensive plan for the Project, despite the fact that no document entitled ‘Comprehensive Plan’ was prepared or filed”). “The Commission does not itself collect the data and perform the studies required for a comprehensive analysis of a proposed project’s potential impact on the waterway; that is the applicant’s responsibility.” *Cowlitz Basin 1 Limited P’ship*, 62 FERC ¶ 61,165, 62,131 (1993) (also noting that “a comprehensive plan under section 10(a)(1) is not a specific ‘blueprint’ for a waterway against which a proposed project must be measured”).

## **B. Hydrokinetic Projects**

In recent years, the Commission has seen increasing interest in the development of innovative hydroelectric projects that use the forces of currents, waves, and tides (referred to as “hydrokinetic” projects) to generate renewable electric energy. *See also Policy Statement on Conditioned Licenses for Hydrokinetic Projects*, 121 FERC ¶ 61,221 at P 1 (2007) (“Policy Statement”).

The Commission has recognized the significant potential for hydrokinetic power production: “Estimates suggest that new hydrokinetic technologies, if fully developed, could double the amount of hydropower production in the United States, bringing it from just under 10 percent to close to 20 percent of the national electric energy supply.” *Id.* at P 2.

The Commission has conducted outreach and developed policies intended to address the particular characteristics of hydrokinetic projects, including the large number of permits sought in recent years and the emerging nature of the technologies. *Notice of Inquiry*, 118 FERC ¶ 61,112 at P 9. Specifically with regard to preliminary permits, the Commission adopted a new “strict scrutiny” standard of review for the issuance of hydrokinetic preliminary permits and the monitoring of progress under those permits. *Id.* at PP 10, 14. The Commission acknowledged that “traditionally, [it] has not subjected most preliminary permit applications to extensive scrutiny.” *Id.* at P 12. Under the new strict scrutiny

approach, however, the Commission “process[es] new technology preliminary permit applications with a view toward limiting the boundaries of the permits, to prevent site-banking and to promote competition.” *Id.* at P 14. The Commission found that this approach could also “encourage more thoughtful development of permit applications.” *Id.* Further, during the permit term, the Commission carefully scrutinizes progress reports “to ensure that permit holders are actively pursuing project exploration.” *Id.*

The Commission has also developed a pilot licensing process for hydrokinetic projects to allow developers to test new technologies and locate appropriate sites. *See Policy Statement*, 121 FERC at P 5. The pilot licensing process allows for expedited licensing of small projects and is limited to those that are removable or able to be shut down quickly, and are not located in environmentally sensitive areas. *Id.* In addition, in the *Policy Statement*, the Commission announced that it would, in appropriate cases, issue conditioned licenses for hydrokinetic projects, allowing license activities, though not construction, to proceed pending the licensee’s receipt of authorizations from other entities under federal laws including the Clean Water Act, the Coastal Zone Management Act, and the Endangered Species Act. *Id.* at PP 6, 8.

To date, the Commission has issued one license for a wave-based hydrokinetic project, which was proposed to be located in the Pacific Ocean off the

coast of Washington. *Finavera Renewables Ocean Energy, Ltd.*, 121 FERC ¶ 61,288 (2007). The Commission later approved the voluntary surrender of that license after the licensee determined that the project had become uneconomic. *Finavera Renewables Ocean Energy, Ltd.*, 127 FERC ¶ 62,054 (2009).

At the time of this brief, there are ten issued preliminary permits for wave-type hydrokinetic projects and one pending application for a preliminary permit for a wave-type hydrokinetic project. There are no pending license applications for hydrokinetic projects. The Commission maintains information regarding issued and pending permits and licenses for hydrokinetic projects on its website. See <http://www.ferc.gov/industries/hydropower/indus-act/hydrokinetics.asp>.

## **C. The Commission's Proceedings And Orders**

### **1. Green Wave's Preliminary Permit Application**

Green Wave filed its preliminary permit application on October 19, 2007, proposing to study the feasibility of the Green Wave Mendocino Project (“Project”), to be located in the Pacific Ocean off the coast of Mendocino County, California. Permit Order at P 1, ER 171. On January 14, 2008, the Commission sent Green Wave a letter indicating that the application was deficient and directing Green Wave to provide additional information concerning the proposed facilities and the company. ER 316-322. Green Wave submitted its response on March 6, 2008 (ER 299), and the Commission issued public notice of the filing of the permit

application on December 9, 2008, establishing a deadline for the filing of motions to intervene, competing applications and comments. ER 295.

The proposed Project site is located approximately 0.5 to 2.6 miles from shore. Application, ER 325. The approximate dimensions of the site are 2.5 miles wide (east-west) by 6.9 miles long (north-south), with a total project area of approximately 17 square miles. *Id.* The proposed Project would consist of 10 to 100 Pelamis or Ocean Power Technologies hydrokinetic devices having a total installed capacity of 100 megawatts; a 2 to 3-mile-long underwater transmission line; and appurtenant facilities, including shore facilities. Permit Order at P 2, ER 171; Application, ER 325; Deficiency Response, ER 304-11 (describing two devices currently under consideration). Green Wave's proposal suggests that it intends to pursue phased development of the Project, with an initial development intended to evaluate different technology options, and, if warranted by the results of the initial phase, a later commercial-size development. ER 328.

Comments and motions to intervene were filed by the Fishermen Interested in Safe Hydrokinetics and the other petitioners before this Court. Permit Order at PP 3-4, ER 171-72. Comments and/or motions to intervene were also filed by the National Marine Fisheries Service, the Department of Interior, the Sierra Club Coastal Program, the Surfrider Foundation, Pacific Gas & Electric Company, other local and regional organizations, and numerous individuals. *Id.* Fishermen

Interested in Safe Hydrokinetics and Elizabeth R. Mitchell filed a motion requesting that the Commission develop a comprehensive plan for hydrokinetic energy for the portion of the Pacific Ocean off the coasts of California, Oregon, and Washington, and either deny or hold in abeyance the permit application. ER 214. Mendocino County, City of Fort Bragg, Ocean Protection Coalition, Recreational Fishing Alliance, Sierra Club, Pacific Coast Federation of Fishermen's Associations and Institute for Fisheries Resources submitted similar filings. Permit Order at P 6, ER 172; *see* ER 180, 181, 182, 183, 193, 270.

## **2. The Commission's Orders On Review**

On May 1, 2009, the Commission issued a preliminary permit to Green Wave for the Green Wave Mendocino Project. Permit Order, ER 171. The Commission explained that the permit grants Green Wave "first priority in applying for a license for the project that is being studied," and "grants no land-disturbing or other property rights." *Id.* at P 7, ER 173. The purpose of the permit is to allow Green Wave time to investigate the feasibility of the Project and to secure the information required by the FPA and the Commission's regulations for preparation of a license application. That being the case, the Commission concluded that "[i]ssues related to project impacts are premature at the permit stage, but can properly be addressed during the licensing process." *Id.* at P 8, ER 173.

Regarding the comprehensive plan requirements of FPA section 10(a), the Commission first rejected arguments that section 10(a) mandates development of a comprehensive plan prior to issuing a preliminary permit. *Id.* at P 10, ER 174. Further, the Commission explained that *National Wildlife Federation*, 801 F.2d 1505, likewise does not mandate considering a proposed project's relationship to a comprehensive plan at this stage, but rather requires the Commission to adequately explain its reasons for declining to do so. *Id.* at P 11, ER 174. Accordingly, the Commission explained the rationale it adopted subsequent to *National Wildlife Federation*, which provides that instead of preparing a single, abstract comprehensive plan, the Commission measures definitive project proposals, in the form of license applications, against the aggregate of all information concerning a waterway developed in a licensing proceeding. *Id.* at P 12, ER 175. The Commission ensures that it has adequate information for this purpose by requiring "license applicants to provide detailed information regarding the proposed project, and, before applying, to have performed all reasonable studies requested by resource agencies." *Id.*; *see also id.* at P 14, ER 176 (discussing the pre-filing consultation and study development requirements that precede the filing of a license application).

Fishermen sought rehearing of the Permit Order, reiterating their argument that section 10(a)(1) of the FPA, as interpreted in *National Wildlife Federation*,

requires the Commission to consider a comprehensive plan prior to issuing a preliminary permit in this case. *See* ER 11. In the Rehearing Order, the Commission rejected these arguments for the reasons stated in the Permit Order. Rehearing Order at PP 8-9, ER 3. In particular, the Commission reaffirmed that any comprehensive plan prepared at the preliminary permit stage would be speculative and of little value, because, at the permit stage, the Commission lacks the site-specific information necessary to satisfy the comprehensive planning responsibility and because so few preliminary permits result in license applications. *Id.* at P 9, ER 3-4. The Commission again assured Fishermen that the “impact issues mentioned in the filings requesting preparation of a comprehensive plan *will be addressed* in a licensing processing *if* this project reaches that stage.” *Id.* (emphasis added).



## SUMMARY OF ARGUMENT

The Commission and Fishermen agree that the Commission's consideration of a proposed project's relationship to a comprehensive plan is an essential element in the FPA's hydroelectric licensing scheme, and that the Commission must complete this step prior to issuing a license. In *National Wildlife Federation*, this Court held that the Commission need not prepare a comprehensive plan prior to issuing a preliminary permit, so long as it explains its rationale for deferring this analysis until the licensing stage. Shortly after *National Wildlife Federation*, the Commission articulated its rationale, and it has adhered to this policy ever since. Here, however, Fishermen insist that the increasing interest in hydrokinetic development in the Pacific Ocean warrants a deviation from this policy. But, the Commission, relying upon its long-standing policy and precedent, as well as the enhanced regulatory requirements imposed upon hydrokinetic preliminary permittees, found otherwise.

The Commission's interpretation of the FPA's comprehensive planning standard is reasonable, well within the constraints of *National Wildlife Federation*, and merits deference. The Court's opinion in *National Wildlife Federation* allows that if the Commission can ensure that the information necessary to determine whether a proposed project is best adapted to a comprehensive plan can be obtained prior to licensing, it is not necessary to prepare a comprehensive plan

before issuing a preliminary permit. As demonstrated in the orders on review, the Commission has taken steps since *National Wildlife Federation* to enhance and clarify the standards applicable to all applicants. Further, the Commission has recently adopted policies requiring additional steps of hydrokinetic permittees, like Green Wave here.

The Commission understands that Fishermen believe the potential impacts of construction of the Project, and other potential projects in the Pacific Ocean, to be unique, warranting a departure from the Commission's traditional practice. But, Fishermen do not argue (nor can they argue) that the preliminary permit on review before this Court authorizes construction. *See* Br. 11. Thus, while the potential impacts associated with Project construction may (or may not) be significant, the Commission reasonably concluded that consideration of Fishermen's evidence concerning impacts would be premature and unhelpful at this point. The orders on review definitively state, however, that, if Green Wave does pursue a license application for the Project, the potential impacts of construction will be addressed at that stage.

## ARGUMENT

### I. STANDARD OF REVIEW

Under the Administrative Procedure Act, the Court generally reviews Commission orders to determine whether they are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. 5 U.S.C. § 706(2)(A); *see, e.g., Fall River*, 543 F.3d at 525; *City of Fremont v. FERC*, 336 F.3d 910, 914 (9th Cir. 2003). “In determining whether an agency’s action is arbitrary or capricious,” the Court “must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.” *Forest Guardians v. U.S. Forest Serv.*, 329 F.3d 1089, 1097 (9th Cir. 2003) (quoting *Morongo Band of Mission Indians v. FAA*, 161 F.3d 569, 573 (9th Cir. 1998)) (internal citations omitted). Further, the Commission’s policy assessments are owed “great deference.” *Transmission Access Policy Study Group v. FERC*, 225 F.3d 667, 702 (D.C. Cir. 2000), *aff’d*, *New York v. FERC*, 535 U.S. 1 (2002); *see also, e.g., Brannan v. United Student Aid Funds, Inc.*, 94 F.3d 1260, 1263 (9th Cir. 1996) (“We defer to the specific policy decisions of an administrative agency unless they are arbitrary, capricious, or manifestly contrary to statute”).

FERC’s factual findings are conclusive if supported by substantial evidence. FPA § 313(b), 16 U.S.C. § 825l(b); *Bear Lake Watch, Inc. v. FERC*, 324 F.3d 1071, 1076 (9th Cir. 2003). Further, FERC’s interpretations of its own orders are

entitled to deference. *Cal. Dep't of Water Res. v. FERC*, 489 F.3d 1029, 1036 (9th Cir. 2007).

Finally, the Commission's reasonable interpretation of the statute it administers, here the FPA, is entitled to *Chevron* deference. *Fall River*, 543 F.3d at 525 (citing *American Rivers*, 201 F.3d at 1194).

## **II. THE COMMISSION FULLY EXPLAINED ITS RATIONALE FOR CONSIDERING COMPREHENSIVE PLAN ISSUES AT THE LICENSING STAGE, NOT EARLIER AT THE PRELIMINARY PERMIT STAGE.**

### **A. The FPA Requires The Commission To Consider The Relationship Of A Proposed Project To A Comprehensive Plan Prior To Licensing.**

FPA section 10(a)(1) establishes the standards and conditions upon which the Commission must make a licensing determination. The statute provides:

*All licenses issued under this subchapter shall be on the following conditions: (a)(1) That the project adopted, including the maps, plans, and specifications, shall be such as in the judgment of the Commission will be best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water-power development, for the adequate protection, mitigation, and enhancement of fish and wildlife (including related spawning grounds and habitat), and for other beneficial public uses, including irrigation, flood control, water supply, and recreational and other purposes referred to in section 797(e) of this title; and if necessary in order to secure such plan the Commission shall have authority to require the modification of any project and of the plans and specifications of the project works before approval.*

FPA § 10(a)(1), 16 U.S.C. § 803(a)(1) (emphasis added). In the orders on review, the Commission explained that the standard at issue, ensuring that a project is “best

adapted to a comprehensive plan,” must be satisfied prior to licensing. Permit Order at P 10, ER 174 (“section 10(a) . . . applies specifically to licenses”); Rehearing Order at P 8, ER 3 (same).

The Commission’s conclusion that the requirement to consider comprehensive plan issues applies to licenses is fully consistent with this Court’s 1986 decisions in *National Wildlife Federation* and *Washington Department of Fisheries*. (*Washington Department of Fisheries* incorporated the Court’s holding in *National Wildlife Federation* as to the FPA’s requirements for comprehensive planning and therefore is not addressed separately in the Commission’s orders. *See Washington Department of Fisheries*, 801 F.2d at 1517.) In *National Wildlife Federation*, the petitioners challenged the Commission’s decision to issue seven permits in a single river basin without developing a comprehensive plan, requiring studies of cumulative impacts, imposing uniform study guidelines or collecting baseline environmental data. 801 F.2d at 1507, 1509-10. As to the statutory requirements, the Court held that “[t]he Federal Power Act requires that a comprehensive plan for river basin development be available before licensing. The Act contains no express provision that such a plan must be developed before issuance of preliminary permits.” *Id.* at 1507-08. Rather, the Court explained that “[i]f the needed information can be collected by permittees in the absence of a comprehensive plan, it may not be necessary to develop such a plan before

preliminary permits are issued.” *Id.* at 1508-09. However, in that case, the Court found that the Commission did not adequately explain its decision to defer consideration of the relationship of the proposed projects to a comprehensive plan until the licensing stage. *Id.* at 1511.

Likewise, while Fishermen argue that in this case the Commission should develop and consider a comprehensive plan at the permit stage, they agree that there is no statutory mandate for the Commission to do so at this time. Br. 12 (the FPA “is silent as to when [before licensing] the comprehensive plan should be developed”). As further described below, in the nearly 24 years since *National Wildlife Federation*, the Commission has articulated its rationale for choosing – as Fishermen agree is permitted by the statute – to consider the relationship of a proposed project to a comprehensive plan at the licensing stage.

**B. The Commission Has Reasonably Determined That The Comprehensive Plan Analysis Is Best Performed At The Licensing Stage.**

In the orders on review, the Commission explained that, subsequent to *National Wildlife Federation*, it articulated its complete “rationale for not preparing a comprehensive plan during the preliminary permitting process.” Permit Order at P 12, ER 175 (citing *Symbiotics, LLC*, 99 FERC ¶ 61,101); Rehearing Order at P 9 n.8, ER 3 (citing, *e.g.*, *Skykomish River Hydro*, 39 FERC ¶ 61,361 (1987), *appeal denied*, 42 FERC ¶ 61,283, *reh’g denied*, 43 FERC ¶ 61,123

(1988)). As discussed in the Permit Order and Rehearing Order, as well as the Commission precedent dating back to 1987 referenced in those orders, the Commission’s decision is based on the purpose of preliminary permits, as well as the application requirements and decision-making standards for both preliminary permits and licenses.

As the Commission explained in the Rehearing Order, the comprehensive plan analysis, referenced in FPA section 10(a)(1), requires “site-specific information, which includes an analysis of the cumulative impacts of the proposed project and any other relevant activities.” Rehearing Order at P 9, ER 4; *see also* Permit Order at P 12, ER 175 (“instead of preparing a single comprehensive plan against which all proposed projects are measured, we measure such projects against the aggregate of information on beneficial public uses of a waterway developed in the record of a licensing proceeding”). In determining whether the Commission adequately discharged its duty to consider comprehensive plan issues in the licensing context, this Court has articulated a similar standard:

In *LaFlamme*, we held that the Commission must, under the FPA, consider all facts relevant to the public interest in developing a comprehensive plan. . . . This consideration necessarily includes a comprehensive analysis of the water system of which the Project is a part, and the interdependent impact of the Project on other projects in the region.

*LaFlamme II*, 945 F.2d at 1128 (citing, *e.g.*, *LaFlamme I*, 852 F.2d at 402-03; *National Wildlife Federation*, 801 F.2d at 1507).

As provided by statute and interpreted by the Commission, the *very purpose* of a preliminary permit is to allow for the development of the site-specific and cumulative impact information the Commission requires to determine, at the licensing stage, whether a project is “best adapted to a comprehensive plan for development of a waterway.” 16 U.S.C. § 803(a)(1). As set forth in FPA section 5, preliminary permits are issued “for the sole purpose of maintaining priority of application for a license.” 16 U.S.C. § 798; Permit Order at P 7, ER 173. The statute contemplates, in section 4(f), 16 U.S.C. § 797(f), that this period of priority will “enabl[e] applicants for a license . . . to secure the data and to perform the acts required by” FPA section 9, 16 U.S.C. § 802, which details the requirements for a license application. Permit Order at P 7, ER 173. This Court has concurred: “The [FPA] and the regulations implementing the permit process demonstrate that the primary purpose for issuing preliminary permits is to induce the permittees to gather the information necessary for licensing.” *National Wildlife Federation*, 801 F.2d at 1508. The Commission’s conclusion in the orders on review is fully consistent with the dictates of the FPA.

**1. The Commission’s Licensing Procedures Require The Development Of The Information Necessary To Satisfy The Commission’s FPA Section 10(A)(1) Responsibilities.**

The Commission has requirements in place to ensure that all license applicants – whether preliminary permit holders or not – obtain all the information



required for the Commission to make a licensing determination, thus eliminating the need for considering comprehensive plan issues at the permit stage. *See National Wildlife Federation*, 801 F.2d at 1508-09. “To ensure that we have adequate information for this purpose, we require license applicants to provide detailed information regarding the proposed project, and, before applying, to have performed all reasonable studies requested by resource agencies, including site-specific and cumulative impact analyses.” Permit Order at P 12, ER 175; Rehearing Order at P 9, ER 3-4 (same) (citing, *e.g.*, *Skykomish*). *See also* Permit Order at P 14, ER 176 (explaining that a permittee is expected to engage in pre-filing consultation and study development under the Commission’s regulations).

In *Skykomish*, the Commission explained in detail the pre-filing consultation requirements of its regulations, specifically 18 C.F.R. § 4.38, which were adopted after the issuance of the permits challenged in *National Wildlife Federation* and *Washington Department of Fisheries*.<sup>2</sup> *Skykomish*, 39 FERC ¶ 61,361 at 62,133.

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<sup>2</sup> In 2003, the Commission adopted a new hydroelectric licensing process, 18 C.F.R. pt. 5, which provides for the applicant’s pre-filing consultation and the Commission’s scoping, pursuant to the National Environmental Policy Act, to be performed concurrently, rather than sequentially (as under 18 C.F.R. pt. 4). *See Hydroelectric Licensing under the Federal Power Act*, 104 FERC ¶ 61,109 at P 2 (2003). As explained in the Permit Order, a permittee must use this process unless the Commission grants a request to use another process. Permit Order at P 14, ER 176.

While the Commission's regulations pre-dating Section 4.38 required some pre-filing consultation, section 4.38

established new, clearly delineated pre-filing agency consultation procedures . . . in order to improve the adequacy of site-specific and cumulative environmental information submitted at the time a development application is filed and to stress the importance of agency consultation and the studies conducted pursuant to such consultation in the preparation of acceptable development applications.

*Id.* *Skykomish* summarizes the consultation required by section 4.38, emphasizing, as the Commission did in the instant case, that license applicants must perform all reasonable studies requested by resource agencies, as well as the Commission. *Id.*; Rehearing Order at P 9, ER 4. The Commission therefore concluded, in reasoning reflected in the orders on review, that the revised “procedures have clarified and standardized information requirements and have proven effective in gathering the necessary data.” *Skykomish*, 39 FERC at 62,134; *see* Permit Order at P 12, ER 175.

Following *Skykomish*, the Commission has consistently applied the same rationale when parties seek to require a comprehensive plan at the permit stage. Permit Order at P 12 n.13, ER 175 (citing *Symbiotics, LLC*, 99 FERC ¶ 61,101 (denying requests for studies and a comprehensive plan, where applicant sought numerous permits, on the same basis as the orders on review); Rehearing Order at P 9 n.8, ER 3 (citing *Cowlitz*, 62 FERC ¶ 61,165 (denying, on the same basis, requests for studies and a comprehensive plan, where numerous permits were

sought for projects located in a river basin in which there were several existing, licensed projects), and *Three Mile Falls Hydro, LLC*, 102 FERC ¶ 61,301 (2003) (denying, on the same basis, a request for studies and a comprehensive plan)).

As the Commission explained in the Rehearing Order, it “require[s] license applicants to provide detailed information regarding the proposed project” and “this site-specific information . . . includes an analysis of the cumulative impacts of the proposed project and any other relevant activities.” Rehearing Order at P 9, ER 4; Permit Order at P 12, ER 175. As further detailed in the *Skykomish* decisions, the Commission’s regulations “set[] forth the types of data, studies, reports, and analysis that we expect an applicant to provide with its application.” *Skykomish*, 39 FERC at 62,133 (citing, *e.g.*, 18 C.F.R. §§ 4.41, 4.61). This includes “information on (1) water use and quality; (2) fish, wildlife, and botanical resources; (3) historic and archeological resources; (4) socio-economic impacts; (5) geological and soil resources; (6) recreational resources; (7) aesthetic resources; (8) land use; and (9) alternative locations, designs, and energy resources.” *Id.* An application must also address cumulative impacts. *See* 18 C.F.R. § 5.18(b)(2). The Commission, of course, may reject or deny applications that fail to comply with its regulations, including the pre-filing consultation requirements. *See* 18 C.F.R. §§ 4.32, 5.20.

**2. Additional Requirements In Green Wave’s Preliminary Permit Further Ensure The Development Of All Information Necessary For A Licensing Determination, Should The Project Reach The Licensing Stage.**

In addition to the requirements of the Commission’s license application regulations, holders of preliminary permits, and in particular hydrokinetic preliminary permits, like Green Wave here, are subject to additional monitoring and timelines to ensure the development of all information, including information concerning cumulative impacts, required for a licensing determination.

Preliminary permits include a standard condition reiterating the statutory requirement for a permittee to conduct necessary studies to determine project feasibility. *See* Permit Order, Art. 1, ER 179. Permittees must file progress reports every six months describing “the nature and timing of what the permittee has done under the pre-filing requirements of 18 C.F.R. sections 4.38 and 5.1-5.31 and other applicable regulations.” *Id.* at Art. 4, ER 179.

In the context of hydrokinetic projects, the Commission has continued to apply its rationale for requiring consideration of the relationship of a proposed project to a comprehensive plan at the licensing stage. Rehearing Order at P 9 n.8, ER 3 (citing *Maine Tidal Energy Co.*, 125 FERC ¶ 61,044 at P 11 (2008) (“the purpose of a preliminary permit is to allow a potential licensee to gather the very information about the project that [petitioner] asks us to consider, and to conduct necessary studies, including site-specific and cumulative impact analyses”)). The

Commission has recognized the potential regulatory challenges associated with increasing interest in hydrokinetic projects, as well as the developing nature of the technology itself. *Notice of Inquiry*, 118 FERC ¶ 61,112 at PP 2, 3, 9, 11. As a result, and as explained in the Permit Order, the Commission has adopted a “strict scrutiny” approach which places additional requirements upon hydrokinetic permittees. Permit Order at P 13, ER 175.

As relevant to the development of the information required by FPA Section 10(a)(1), “the Commission will carefully scrutinize the reports that permit holders [like Green Wave here] are required to file . . . and would, where sufficient progress was not shown, consider cancelling the permit.” Permit Order at P 13, ER 175. As a hydrokinetic permit holder, Green Wave is also required to file a schedule of activities to be conducted under the permit, a requirement not imposed on conventional projects. *Id.* at P 15, ER 176. As explained above, all permittees are expected to “carry out pre-filing consultation and study development leading to the possible development of a license application.” *Id.* at P 14, ER 176. However, permit holders for hydrokinetic projects must actually start the clock on the licensing process (either by filing a notice of intent to file a license application and pre-application document within one year of permit issuance, or by filing a notice of intent to file a license application and a draft license application for a pilot

project under the Commission’s hydrokinetic pilot project licensing procedures within two years of permit issuance). *Id.* at P 15, ER 176.<sup>3</sup>

As relevant here, the requirements for both the pre-application document and the draft license application for a pilot project are rigorous. For example, a pre-application document must include, *inter alia*, “a preliminary list of issues identified and necessary studies related to these issues.” *Id.*; *see also* 18 C.F.R. § 5.6 (pre-application document requirements). Accordingly, the burden of “actively pursuing project exploration” (Permit Order at P 13, ER 175) upon the holder of a preliminary permit for a hydrokinetic project, like Green Wave here, is higher than that associated with a permit for a conventional hydroelectric project.

As to pre-application information development, *National Wildlife Federation* provides that “[i]f the needed information can be collected by permittees in the absence of a comprehensive plan, it may not be necessary to develop such a plan before preliminary permits are issued.” 801 F.2d at 1508-09. The Commission has demonstrated that it is able to ensure that all the information necessary for it to make the licensing determination required by FPA section 10(a)(1) is developed prior to licensing. While there may be more than one

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<sup>3</sup> Under the Commission’s regulations, 18 C.F.R. § 5.8(a), filing a notice of intent commences a mandatory process requiring consultation between the potential applicant, resource agencies and the interested public. These procedures have associated deadlines, culminating in the filing of a license application with the Commission.

method or procedure for eliciting the information necessary under FPA section 10(a)(1), the Commission's decision to require development of this information *after* issuance of a permit (if a permit is sought), but *before* issuance of a licensing decision,<sup>4</sup> is consistent with the FPA and reflects the Commission's judgment and licensing expertise. *See Brannan*, 94 F.3d at 1263 (agency policy decisions warrant deference unless "manifestly contrary to statute"). *See Skykomish*, 39 FERC at 62,133 ("[w]e do not believe, however, that an additional and explicit requirement at the permit stage for studies . . . is the only appropriate method of obtaining the necessary" information).

The issue here is fundamentally one of timing. The Commission's well-reasoned choice to consider the impact of a proposed project on a comprehensive plan during the licensing process, when all information is available, and not the permit process, when necessary information is unavailable, warrants deference. *See Mobil Oil Exploration & Producing Se., Inc. v. United Distrib. Cos.*, 498 U.S. 211, 231 (1991) ("an agency need not solve every problem before it in the same proceeding"); *Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council*, 435 U.S. 519, 543 (1978) ("Absent constitutional constraints or extremely compelling circumstances the administrative agencies should be free to . . . pursue

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<sup>4</sup> Further, any future licensing decision would also be subject to judicial review under FPA section 313(b), 16 U.S.C. § 825l(b).

methods of inquiry capable of permitting them to discharge their multitudinous duties.”) (citations omitted).

**3. Requiring Consideration Of Comprehensive Plan Issues At The Permit Stage Is Inconsistent With Existing Preliminary Permit Standards.**

A preliminary permit confers upon the holder priority of application for a license, and nothing more. Consequently, as recognized by this Court, the standards for evaluation of a permit application are significantly lower than those applicable to licensing. *See Fall River*, 543 F.3d at 530. Requiring the development and consideration of comprehensive plans prior to issuance of a preliminary permit is inconsistent with these existing standards.

“[A] preliminary permit does not authorize a permittee to undertake any construction,” Permit Order at P 8, ER 173; “it grants no land-disturbing or other property rights,” *id.* at P 7, ER 173. Thus, a permit holder can neither enter lands it does not own, nor conduct any studies without obtaining all necessary authorizations from other federal, state and local authorities. *Id.* at P 7 & n.6, ER 173 (citing, *e.g.*, *Town of Summersville*, 780 F.2d 1034); Rehearing Order at P 7 n.4, ER 2 (also noting that “issuance of a permit does not preclude others from studying the site”). *See also Sierra Club v. FERC*, 754 F.2d 1506, 1510 (9th Cir. 1985) (“The issuance of a preliminary permit in this case does not change the



status quo.”); *Marseilles Land & Water Co.*, 345 F.3d at 917 (“The preliminary permit does not itself, however, give the bearer the right to develop the project.”).

(Much of Fishermen’s brief focuses on the potential impacts of the construction and operation of the Project. Br. 20-22, 34-35. Because the preliminary permit does not authorize the construction with which Fishermen are concerned, the Commission is unable to identify the source of Fishermen’s injury for Article III standing purposes. While the petitioners in *National Wildlife Federation* were found to have an injury adequate for Article III purposes, 801 F.2d at 1506 n.1, the Commission is uncertain of the extent to which that precedent remains determinative following the Supreme Court’s recent decision in *Summers v. Earth Island Institute*, 129 S. Ct. 1142. Consistent with *Summers*, Fishermen have an obligation, minimally, to identify their alleged injury to permit the Court to satisfy itself that Article III standing is proper. *Id.* at 1149; *see also id.* at 1151 (procedural injury based on claimed deprivation of statutory or regulatory right does not establish standing; there still must be a demonstrated threat of “imminent and concrete harm”). If not for the finding of standing in *National Wildlife Federation*, the Commission would be raising a jurisdictional objection based upon Fishermen’s failure to satisfy its burden to demonstrate Article III standing.)

As a result of the limited purpose of preliminary permits, the Commission has repeatedly held, as it did here, that “[i]ssues related to project impacts are

premature at the permit stage, but can properly be addressed during the licensing process.” Permit Order at P 8, ER 173. In *Fall River*, this Court recently confirmed the lesser standard applicable to preliminary permits:

“[t]he preliminary permit is actually only a minor threshold hurdle for the applicant, and the grant of a preliminary permit is in no respect an indication of the merits of a license proposal.” . . . Therefore, “[u]nless a permanent legal barrier precludes FERC from licensing the project, FERC will issue a preliminary permit.”

*Fall River*, 543 F.3d at 530 (quoting *Town of Summersville*, 780 F.2d at 1038-39) (internal citations omitted) (affirming FERC orders dismissing a license application even though FERC previously issued a preliminary permit for the same project); *see also Energie Group v. FERC*, 511 F.3d 161, 164 (D.C. Cir. 2007) (noting “FERC’s general policy of granting permits whenever there is no legal bar”). Thus, the Commission and Courts have repeatedly recognized the limited authority conferred by a preliminary permit, and the general policy of granting such permits in the absence of a legal bar. *See Sierra Club v. FERC*, 754 F.2d at 1510 (“Since the preliminary permit alone did not allow the applicants to conduct any studies on federal lands, no [environmental impact statement] was required.”); *City of Bedford v. FERC*, 718 F.2d 1164 (D.C. Cir. 1983) (affirming Commission orders declining to investigate, at the preliminary permit stage, whether a potential licensee meets all the requirements for licensing). *See also* Permit Order at P 9, ER 173 (declining to investigate Green Wave’s financial

capability and experience at the permit stage). Requiring the extensive analysis involved in considering comprehensive plan issues prior to issuing a permit is contrary to this established policy and precedent.

**C. The Commission Reasonably Relied Upon Its Precedent In Declining To Require Consideration Of A Comprehensive Plan For The Green Wave Project At The Permit Stage.**

Fishermen assert that the Commission has failed to respond to the information regarding the environmental sensitivity of the proposed Project area and the potential impacts of the Project, as well as the potential cumulative impacts of the multiple projects proposed for the Pacific Ocean, now at various stages of consideration. Br. 28-32. Fishermen are simply incorrect: The Commission both acknowledged and responded to Fishermen's concerns and comments.

In the Permit Order, the Commission acknowledged Fishermen's and others' comments concerning the potential effect of the construction and operation of the Project. Permit Order at P 5, ER 172 ("Generally, the commenters addressed issues and concerns with the potential effects associated with the construction of the project and provided a list of information to be obtained during future studies to address potential impacts."); *id.* at P 8, ER 173 ("The majority of the comments filed addressed the construction of the project, including the cable to shore, and potential impacts the project might have on fish and wildlife, aesthetics, navigation, recreation, and the local fishing and tourism[-]based economy.").

Many of these same issues were identified in Green Wave’s permit application. *See* ER 332-33; *e.g.*, ER 332 (“GreenWave will work with regulatory agency staff to understand the migratory patterns of gray whales in the vicinity of the project area and to minimize any potential effects that the construction and operation of the project may have on them.”).

The Commission did not dismiss or reject Fishermen’s concerns and comments. Rather it held that “[i]ssues related to project impacts are premature at the permit stage, but can properly be addressed during the licensing process.” Permit Order at P 8, ER 173; *id.* at P 12, ER 175 (“Consistent with that approach, the impact issues mentioned in the filings requesting preparation of a comprehensive plan *will be addressed* in a licensing proceeding if this project reaches that stage.”) (emphasis added); *id.* at P 14, ER 176 (“Should the permittee file a development application, notice of the application will be published, and interested persons and agencies will have an opportunity to intervene and to present their views concerning the project and the effects of its construction and operation.”); Rehearing Order at P 9, ER 4 (same).

The Commission’s determination that issues concerning potential Project impacts are premature here, and clear commitment to address those issues in any future licensing proceeding, are fully supported by the reasoning described in Parts II.A and B above. Put simply, because a preliminary permit does not authorize

construction, potential impacts of construction are not relevant factors here. While Fishermen correctly claim that the Commission must consider “all relevant facts,” the Commission reasonably found Fishermen’s information concerning potential impacts of construction irrelevant at this early stage because the preliminary permit does not authorize construction. Br. 32 (citing *Confederated Tribes and Bands of the Yakima Indian Nation v. FERC*, 746 F.2d 466, 472 (9th Cir. 1984)); see also Br. 37. Consistent with the differing statutory purposes of preliminary permits and licenses, the “relevant facts” in a licensing proceeding, like *Confederated Tribes*,<sup>5</sup> may reasonably differ from those in a preliminary permit proceeding.

Fishermen malign the Commission’s decision as relying on mere “policy,” suggesting that its policies are necessarily suspect. Br. 37. But, the Commission’s policy, in place since the *Skykomish* decision following *National Wildlife Federation*, is based on the Commission’s reasonable interpretation of the FPA and the Commission’s extensive permit and licensing procedures. Fishermen bear the burden here of demonstrating that the Commission’s adherence to its policy is arbitrary and capricious. See *Cal. Dep’t of Water Res.*, 489 F.3d at 1036 (“When an agency has adopted a general policy, an irrational departure from that policy . . .

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<sup>5</sup> Fishermen’s reliance on *Confederated Tribes*, a licensing case, underscores their error in claiming that the Commission must consider environmental issues at the permit stage. To the contrary, *Confederated Tribes* makes clear that the Commission’s section 10(a)(1) obligations must be satisfied prior to (and not after) licensing. *Confederated Tribes*, 746 F.2d at 471.

could constitute action that must be overturned as arbitrary, capricious, [or] an abuse of discretion.”) (internal citations omitted); *see also Cal. Trout v. FERC*, 572 F.3d 1003, 1023-1026 (9th Cir. 2009) (holding that the Commission reasonably refused to deviate from precedent). Because they offer evidence only of the potential impacts of construction, evidence that the Commission reasonably rejected as premature at the permit stage, Fishermen have failed to satisfy their burden.

## CONCLUSION

For the foregoing reasons, the petition for review should be denied in all respects.

Respectfully submitted,

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March 19, 2010

## STATEMENT OF RELATED CASES

Respondent is not aware of any related cases pending before this or another Court.

## **CERTIFICATE OF COMPLIANCE**

In accordance with Fed. R. App. P. 32(a)(7)(C)(i) and Circuit Rule R.32-1, I certify that the Brief of Respondent Federal Energy Regulatory Commission is proportionally spaced, has a typeface of 14 points, and contains 8,211 words, not including the tables of contents and authorities, the certificates of counsel, and the addendum.

/s/ Holly E. Cafer  
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March 19, 2010



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**The Administrative Procedure Act, 5 U.S.C. § 706(2)(A), provides as follows:**

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall\_\_

(2) hold unlawful and set aside agency action, findings, and conclusions found to be\_\_

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

**Section 4(e) of the Federal Power Act, 16 U.S.C. § 797(e), provide as follow:**

(e) Issue of licenses for construction, etc., of dams, conduits, reservoirs, etc.

To issue licenses to citizens of the United States, or to any association of such citizens, or to any corporation organized under the laws of the United States or any State thereof, or to any State or municipality for the purpose of constructing, operating, and maintaining dams, water conduits, reservoirs, power houses, transmission lines, or other project works necessary or convenient for the development and improvement of navigation and for the development, transmission, and utilization of power across, along, from, or in any of the streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States, or upon any part of the public lands and reservations of the United States (including the Territories), or for the purpose of utilizing the surplus water or water power from any Government dam, except as herein provided: Provided, That licenses shall be issued within any reservation only after a finding by the Commission that the license will not interfere or be inconsistent with the purpose for which such reservation was created or acquired, and shall be subject to and contain such conditions as the Secretary of the department under whose supervision such reservation falls shall deem necessary for the adequate protection and utilization of such reservations: Provided further, That no license affecting the navigable capacity of any navigable waters of the United States shall be issued until the plans of the dam or other structures affecting the navigation have been approved by the Chief of Engineers and the Secretary of the Army. Whenever the contemplated improvement is, in the judgment of the Commission, desirable and justified in the public interest for the purpose of improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, a finding to that effect shall be made by the Commission and shall become a part of the records of the Commission: Provided further, That in case the Commission shall find that any Government dam may be advantageously used by the United States for public purposes in addition to navigation, no license therefor shall be issued until two years after it shall have reported to Congress the facts and conditions relating thereto, except that this provision shall not apply to any Government dam constructed prior to June 10, 1920: And provided further, That upon the filing of any application for a license which has not been preceded by a preliminary permit under subsection (f) of this section, notice shall be given and published as required by the proviso of said subsection. In deciding whether to issue any license under this subchapter for any project, the Commission, in addition to the power and development purposes for which licenses are issued, shall give equal consideration to the purposes of energy conservation, the protection, mitigation of damage to, and enhancement of, fish and wildlife (including related spawning grounds and habitat), the protection of recreational opportunities, and the preservation of other aspects of environmental quality

**Section 4(f) of the Federal Power Act, 16 U.S.C. § 797(f), provides as follows:**

States for public purposes in addition to navigation, no license therefor shall be issued until two years after it shall have reported to Congress the facts and conditions relating thereto, except that this provision shall not apply to any Government dam constructed prior to June 10, 1920: And provided further, That upon the filing of any application for a license which has not been preceded by a preliminary permit under subsection (f) of this section, notice shall be given and published as required by the proviso of said subsection. In deciding whether to issue any license under this subchapter for any project, the Commission, in addition to the power and development purposes for which licenses are issued, shall give equal consideration to the purposes of energy conservation, the protection, mitigation of damage to, and enhancement of, fish and wildlife (including related spawning grounds and habitat), the protection of recreational opportunities, and the preservation of other aspects of environmental quality.

**Section 5 of the Federal Power Act, 16 U.S.C. § 798(f) provides as follows:**

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

**Section 9 of the Federal Power Act, 16 U.S.C. § 802 provides as follows:**

§ 802. Information to accompany application for license; landowner notification

(a) Each applicant for a license under this chapter shall submit to the commission—

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

(2) Satisfactory evidence that the applicant has complied with the requirements of the laws of the State or States within which the proposed project is to be located with respect to bed and banks and to the appropriation, diversion, and use of water for power purposes and with respect to the right to engage in the business of developing, transmitting and distributing power, and in any other business necessary to effect the purposes of a license under this chapter.

(3) [1] Such additional information as the commission may require.

(b) Upon the filing of any application for a license (other than a license under section 808 of this title) the applicant shall make a good faith effort to notify each of the following by certified mail:

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

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



**Section 10(a)(1) of the Federal Power Act, 16 U.S.C. § 803(a)(1), provide as follows:**

(a) Modification of plans; factors considered to secure adaptability of project; recommendations for proposed terms and conditions

(1) That the project adopted, including the maps, plans, and specifications, shall be such as in the judgment of the Commission will be best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water-power development, for the adequate protection, mitigation, and enhancement of fish and wildlife (including related spawn-ing grounds and habitat), and for other beneficial public uses, including irrigation, flood control, water supply, and recreational and other purposes referred to in section 797 (e) of this title; and if necessary in order to secure such plan the Commission shall have authority to require the modification of any project and of the plans and specifications of the project works before approval.

**Section 313(b) of the Federal Power Act, 16 U.S.C. § 825l (b), provides as follows:**

(b) Judicial review

Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the United States court of appeals for any circuit wherein the licensee or public utility to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of title 28. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reason-able ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings which, if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of title 28.

**18 C.F.R. § 4.32, provides as follows:**

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

(a) Each application must:

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

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

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

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

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

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

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

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

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

(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.

(3)(i) For a license (other than a license under section 15 of the Federal Power Act) state that the applicant has made, either at the time of or before filing the application, a good faith effort to give notification by certified mail of the filing of the application to:

(A) Every property owner of record of any interest in the property within the bounds of the project, or in the case of the project without a specific boundary, each such owner of property which would underlie or be adjacent to any project works including any impoundments; and

(B) The entities identified in paragraph (a)(2) of this section, as well as any other Federal, state, municipal or other local government agencies that there is reason to believe would likely be interested in or affected by such application.

(ii) Such notification must contain the name, business address, and telephone number of the applicant and a copy of the Exhibit G contained in the application, and must state that a license application is being filed with the Commission.

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

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

State of \_\_\_\_\_

County of \_\_\_\_\_

by: \_\_\_\_\_

(Name) \_\_\_\_\_

(Address) \_\_\_\_\_

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

\_\_\_\_\_  
(Applicant(s))

By: \_\_\_\_\_

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

/SEAL/ [if any]

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(Notary Public, or other authorized official)

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

- (i) Preliminary permit: Sec. 4.81;
- (ii) License for a minor water power project and a major water power project 5 MW or less: Sec. 4.61;
- (iii) License for a major unconstructed project and a major modified project: Sec. 4.41;
- (iv) License for a major project--existing dam: Sec. 4.51;
- (v) License for a transmission line only: Sec. 4.71;
- (vi) Nonpower license for a licensed project: Sec. 16.11;
- (vii) Exemption of a small conduit hydroelectric facility: Sec. 4.92;
- (viii) Case-specific exemption of a small hydroelectric power project: Sec. 4.107; or
- (ix) License or exemption for a project located at a new dam or diversion where the applicant seeks PURPA benefits: Sec. 292.208.

(b) (1) Each applicant for a preliminary permit, license, and transfer or surrender of license and each petitioner for surrender of an exemption must submit to the Commission's Secretary for filing an original and eight copies of the application or petition. The applicant or petitioner must serve one copy of the application or petition on the Director of the Commission's Regional Office for the appropriate region and on each resource agency, Indian tribe, and member of the public consulted pursuant to Sec. 4.38 or Sec. 16.8 of this chapter or part 5 of this chapter. In the case of an application for a preliminary permit, the applicant must, if the Commission so directs, serve copies of the application on the U.S. Department of the Interior and the U.S. Army Corps of Engineers. The application may include reduced prints of maps and drawings conforming to Sec. 4.39(d). The originals (microfilm) of maps and drawings are not to be filed initially, but will be required pursuant to paragraph (d) of this section. The Commission may also ask for the filing of full-sized prints in appropriate cases.

(2) Each applicant for exemption must submit to the Commission's Secretary for filing an original and eight copies of the application. An applicant must serve one copy of the application on the Director of the Commission's Regional Office for the appropriate region and on each resource agency consulted pursuant to Sec. 4.38. For each application filed following October 23, 2003, maps and drawings must conform to the requirements of Sec. 4.39. The originals (microfilm) of maps and drawing are not to be filed initially, but will be requested pursuant to paragraph (d) of this section.

(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 notice twice 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 the publications 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 60 days after the application is filed and serve a copy of the request on the applicant. The Commission will issue public notice of the tendering for filing of each application for hydropower license or exemption; each such applicant must submit a draft of this notice to the Commission with its application. 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 Sec. 4.38 of this part or Sec. 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.

(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 Sec. 16.7 of this chapter.

(c)(1) Every application for a licensee or exemption for a project with a capacity of 80 megawatts or less must include in its application copies of the statements made under Sec. 4.38(b)(1)(vi).

(2) If an applicant reverses a statement of intent not to seek PURPA benefits:

(i) Prior to the Commission issuing a license or exemption, the reversal of intent will be treated as an amendment of the application under Sec. 4.35 and the applicant must:

(A) Repeat the pre-filing consultation process under Sec. 4.38; and

(B) Satisfy all the requirements in Sec. 292.208 of this chapter; or

(ii) After the Commission issues a license or exemption for the project, the applicant is prohibited from obtaining PURPA benefits.

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

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

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

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

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



(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.

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

(1) Deficient applications.

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

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

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

(2) Patently deficient applications.

(i) If, within 90 days of its filing date, the Director of the Office of Energy Projects determines that an application patently fails to substantially comply with the requirements of paragraph (a), (b), and (c) of this section and of Sec. 4.38 of this part or Sec. 16.8 of this chapter, or is for a project that is precluded by law, the application will be rejected as patently deficient with the specification of the deficiencies that render the application patently deficient.

(ii) If, after 90 days of its filing date, the Director of the Office of Energy Projects determines that an application patently fails to substantially comply with the requirements of paragraphs (a), (b), and (c) of this section and of Sec. 4.38 of this part or Sec. 16.8 of this chapter, or is for a project that is precluded by law:

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

(B) The application will be considered deficient under paragraph (e)(1) of this section, if the Commission determines it is not patently deficient.

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

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

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

(h) A prospective applicant, prior to submitting its application for filing, may seek advice from the Commission staff regarding the sufficiency of the application. For this purpose, five copies of the draft application should be submitted to the Director of the Division of Hydropower

time regarding deficiencies or other matters related to its application. All conferences are subject to the requirements of Sec. 385.2201 of this chapter governing ex parte communications. The opinions or advice of the staff will not bind the Commission or any person delegated authority to act on its behalf.

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

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

(k) Critical Energy Infrastructure Information. (1) If this section requires an applicant to reveal Critical Energy Infrastructure Information (CEII), as defined in Sec. 388.113(c) of this chapter, to any person, the applicant shall omit the CEII from the information made available and insert the following in its place:

(i) A statement that CEII is being withheld;

(ii) A brief description of the omitted information that does not reveal any CEII; and

(iii) This statement: ``Procedures for obtaining access to Critical Energy Infrastructure Information (CEII) may be found at 18 CFR 388.113. Requests for access to CEII should be made to the Commission's CEII Coordinator."`

(2) The applicant, in determining whether information constitutes CEII, shall treat the information in a manner consistent with any filings that applicant has made with the Commission and shall to the extent practicable adhere to any previous determinations by the Commission or the CEII Coordinator involving the same or like information.

(3) The procedures contained in Sec. Sec. 388.112 and 388.113 of this chapter regarding designation of, and access to, CEII, shall apply in the event of a challenge to a CEII designation or a request for access to CEII. If it is determined that information is not CEII or that a requester should be granted access to CEII, the applicant will be directed to make the information available to the requester.

(4) Nothing in this section shall be construed to prohibit any persons from voluntarily reaching arrangements or agreements calling for the disclosure of CEII.

**18 C.F.R. § 4.34, provides as follows:**

Sec. 4.34 Hearings on applications; consultation on terms and conditions; motions to intervene; alternative procedures.

(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 public 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 Sec. 385.2010 of this chapter. If a party or interceder (as defined in Sec. 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 Sec. 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. In the case of an

application prepared other than pursuant to part 5 of this chapter, 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. The 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 document, 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 document.

(ii) If an applicant files an amendment to its application that would materially change the project's proposed plans of development, as provided in Sec. 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.

(5)(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), an applicant shall file within 60 days from the date of issuance of the notice of ready for environmental analysis:

(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 (b)(5)(ii) of this section.

(ii) In the case of an application process using the alternative procedures of paragraph 4.34(i), the filing requirement of paragraph (b)(5)(i) shall apply upon issuance of notice the Commission has accepted the application as provided for in paragraph 4.32(d) of this part.

(iii) 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.

(iv) Notwithstanding any other provision in title 18, chapter I, subchapter B, part 4, any application to amend an existing license, and any application to amend a pending application for a license, requires a new request for water quality certification pursuant to paragraph (b)(5)(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.

(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 (including related spawning grounds and habitat) 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) The agency must specifically identify and explain the recommendations and the relevant resource goals and objectives and their evidentiary or legal basis. The Commission may seek clarification of any recommendation from the appropriate fish and wildlife agency. 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. If the Commission believes any fish and wildlife recommendation may be inconsistent with the Federal Power Act or other applicable law, the Commission will make a preliminary determination of inconsistency in the draft environmental document or, if none, the environmental assessment. The preliminary determination, for any recommendations believed to be inconsistent, shall include an explanation why the Commission believes the recommendation is inconsistent with the Federal Power Act or other applicable law, including any supporting analysis and conclusions, and an explanation of how the measures recommended in the environmental document would adequately and equitably protect, mitigate damages to, and enhance, fish and wildlife (including related spawning grounds and habitat) affected by the development, operation, and management of the project.

(3) Any party, affected resource agency, or Indian tribe may file comments in response to the preliminary determination of inconsistency, including any modified recommendations, within the time frame allotted for comments on the draft environmental document or, if none, the time frame for comments on the environmental analysis. 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.

(4) The Commission shall attempt, with the agencies, to reach a mutually acceptable resolution of any such inconsistency, giving due weight to the recommendations, expertise, and statutory responsibilities of the fish and wildlife agency. If the Commission decides, or an affected resource agency requests, the Commission will conduct a meeting, telephone, or video conference, or other procedures 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. Any meeting, conference, or additional procedure to address these issues will be scheduled to take place within 90 days of the date the Commission issues a preliminary determination of inconsistency. The Commission will prepare a written summary of any meeting held under this subsection to discuss section 10(j) issues, including any proposed resolutions and supporting analysis, and a copy of the summary will be sent to all parties, affected resource agencies, and Indian tribes.

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

(f) Licenses and exemption conditions and required findings - (1) License conditions.

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

(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.

(h) Unless otherwise provided by statute, regulation or order, all filings in hydropower hearings, except those conducted by trial-type procedures, shall conform to the requirements of subpart T of part 385 of this chapter.

(i) Alternative procedures.

(1) An applicant may submit to the Commission a request to approve the use of alternative procedures for pre-filing consultation and the filing and processing of an application for an original, new or subsequent hydropower license or exemption that is subject to Sec. 4.38 or Sec. 16.8 of this chapter, or for the amendment of a license that is subject to the provisions of Sec. 4.38.

(2) The goal of such alternative procedures shall be to:

(i) Combine into a single process the pre-filing consultation process, the environmental review process under the National Environmental Policy Act and administrative processes associated with the Clean Water Act and other statutes;

(ii) Facilitate greater participation by and improve communication among the potential applicant, resource agencies, Indian tribes, the public and Commission staff in a flexible pre-filing consultation process tailored to the circumstances of each case;

(iii) Allow for the preparation of a preliminary draft environmental assessment by an applicant or its contractor or consultant, or of a preliminary draft environmental impact statement by a contractor or consultant chosen by the Commission and funded by the applicant;

(iv) Promote cooperative efforts by the potential applicant and interested entities and encourage them to share information about resource impacts and mitigation and enhancement proposals and to narrow any areas of disagreement and reach agreement or settlement of the issues raised by the hydropower proposal; and

(v) Facilitate an orderly and expeditious review of an agreement or offer of settlement of an application for a hydropower license, exemption or amendment to a license.

(3) A potential hydropower applicant requesting the use of alternative procedures must:

(i) Demonstrate that a reasonable effort has been made to contact all resource agencies, Indian tribes, citizens' groups, and others affected by the applicant's proposal, and that a consensus exists that the use of alternative procedures is appropriate under the circumstances;

(ii) Submit a communications protocol, supported by interested entities, governing how the applicant and other participants in the pre-filing consultation process, including the Commission staff, may communicate with each other regarding the merits of the applicant's proposal and proposals and recommendations of interested entities; and

(iii) Serve a copy of the request on all affected resource agencies and Indian tribes and on all entities contacted by the applicant that have expressed an interest in the alternative pre-filing consultation process.

(4) As appropriate under the circumstances of the case, the alternative procedures should include provisions for:

(i) Distribution of an initial information package and conduct of an initial information meeting open to the public;

(ii) The cooperative scoping of environmental issues (including necessary scientific studies), the analysis of completed studies and any further scoping; and

(iii) The preparation of a preliminary draft environmental assessment or preliminary draft environmental impact statement and related application.

(5)(i) If the potential applicant's request to use the alternative procedures is filed prior to July 23, 2005, the Commission will give public notice in the Federal Register inviting comment on the applicant's request to use alternative procedures. The Commission will consider any such comments in determining whether to grant or deny the applicant's request to use alternative procedures. Such a decision will not be subject to interlocutory rehearing or appeal.

(ii) If the potential applicant's request to use the alternative procedures is filed on or after July 23, 2005 and prior to the deadline date for filing a notification of intent to seek a new or subsequent license required by Sec. 5.5 of this chapter, the Commission will give public notice and invite comments as provided for in paragraph (i)(5)(i) of this section. Commission approval of the potential applicant's request to use the alternative procedures prior to the deadline date for filing of the notification of intent does not waive the potential applicant's obligation to file the notification of intent required by Sec. 5.5 of this chapter and Pre-Application Document required by Sec. 5.6 of this chapter.

(iii) If the potential applicant's request to use the alternative procedures is filed on or after July 23, 2005 and is at the same time as the notification of intent to seek a new or subsequent license required by Sec. 5.5, the public notice and comment procedures of part 5 of this chapter shall apply.

(6) If the Commission accepts the use of alternative procedures, the following provisions will apply.

(i) To the extent feasible under the circumstances of the proceeding, the Commission will give notice in the Federal Register and the applicant will give notice, in a local newspaper of general circulation in the county or counties in which the project is located, of the initial information meeting and the scoping of environmental issues. The applicant will also send notice of these stages to a mailing list approved by the Commission.

(ii) Every six months, the applicant shall file with the Commission a report summarizing the progress made in the pre-filing consultation process and referencing the applicant's public file, where additional information on that process can be obtained. Summaries or minutes of meetings held in the process may be used to satisfy this filing requirement. The applicant must also file with the Commission a copy of its initial information package, each scoping document, and the preliminary draft environmental review document. All filings with the Commission under this section must include the number of copies required by paragraph (h) of this section, and the applicant shall send a copy of these filings to each participant that requests a copy.

(iii) At a suitable location, the applicant will maintain a public file of all relevant documents, including scientific studies, correspondence, and minutes or summaries of meetings, compiled during the pre-filing consultation process. The Commission will maintain a public file of the applicant's initial information package, scoping documents, periodic reports on the pre-filing consultation process, and the preliminary draft environmental review document.

(iv) An applicant authorized to use alternative procedures may substitute a preliminary draft environmental review document and additional material specified by the Commission instead of Exhibit E to its application and need not supply additional documentation of the pre-filing consultation process. The applicant will file with the Commission the results of any studies conducted or other documentation as directed by the Commission, either on its own motion or in response to a motion by a party to the licensing or exemption proceeding.

(v) Pursuant to the procedures approved, the participants will set reasonable deadlines requiring all resource agencies, Indian tribes, citizens' groups, and interested persons to submit to the applicant requests for scientific studies during the pre-filing consultation process, and additional requests for studies may be made to the Commission after the filing of the application only for good cause shown.

(vi) During the pre-filing process the Commission may require the filing of preliminary fish and wildlife recommendations, prescriptions, mandatory conditions, and comments, to be submitted in final form after the filing of the application; no notice that the application is ready for environmental analysis need be given by the Commission after the filing of an application pursuant to these procedures.

(vii) Any potential applicant, resource agency, Indian tribe, citizens' group, or other entity participating in the alternative pre-filing consultation process may file a request with the Commission to resolve a dispute concerning the alternative process (including a dispute over required studies), but only after reasonable efforts have been made to resolve the dispute with other participants in the process. No such request shall be accepted for filing unless the entity submitting it certifies that it has been served on all other participants. The request must document what efforts have been made to resolve the dispute.

(7) If the potential applicant or any resource agency, Indian tribe, citizens' group, or other entity participating in the alternative pre-filing consultation process can show that it has cooperated in the process but a consensus supporting the use of the process no longer exists and that continued use of the alternative process will not be productive, the participant may petition the Commission for an order directing the use by the potential applicant of appropriate procedures to complete its application. No such request shall be accepted for filing unless the entity submitting it certifies that it has been served on all other participants. The request must recommend specific procedures that are appropriate under the circumstances.

(8) The Commission may participate in the pre-filing consultation process and assist in the integration of this process and the environmental review process in any case, including appropriate cases where the applicant, contractor, or consultant funded by the applicant is not preparing a preliminary draft environmental assessment or preliminary draft environmental impact statement, but where staff assistance is available and could expedite the proceeding.

(9) If this section requires an applicant to reveal Critical Energy Infrastructure Information (CEII), as defined by Sec. 388.113(c) of this chapter, to any person, the applicant shall follow the procedures set out in Sec. 4.32(k).

**18 C.F.R. § 4.38, provides as follows:**

Sec. 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 National Park 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. Sec. 2341(c)(1), and any Indian tribe that may be affected by the proposed project.

(2) Each requirement in this section to contact or consult with resource agencies or Indian tribes shall be construed to require as well that the potential applicant contact or consult with members of the public.

(3) If a potential applicant for an original license commences first stage pre-filing consultation on or after July 23, 2005 it shall file a notification of intent to file a license application pursuant to Sec. 5.5 and a pre-application document pursuant to the provisions of Sec. 5.6.

(4) The Director of the Office of Energy Projects will, upon request, provide a list of known appropriate Federal, state, and interstate resource agencies, Indian tribes, and local, regional, or national non-governmental organizations likely to be interested in any license application proceeding.

(5) 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 Sec. 4.301.

(6) 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 Sec. 4.35(f)(1);

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

(v) Amendment to an existing license that would not increase the capacity of the project as defined in Sec. 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.

(7) Before it files a non-capacity related amendment as defined in Sec. 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.

(8) 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.

(9) 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 Energy Projects.

(b) First stage of consultation.

(1) A potential applicant for an original license that commences pre-filing consultation on or after July 23, 2005 must, at the time it files its notification of intent to seek a license pursuant to

Sec. 5.5 of this chapter and a pre-application document pursuant to Sec. 5.6 of this chapter and, at the same time, provide a copy of the pre-application document to the entities specified in Sec. 5.6(a) of this chapter.

(2) A potential applicant for an original license that commences pre-filing consultation under this part prior to July 23, 2005 or for an exemption must promptly contact each of the appropriate resource agencies, affected Indian tribes, and members of the public likely to be interested in the proceeding; 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 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 Sec. 292.203 of this chapter;

(B) If benefits under section 210 of PURPA are sought, a statement on whether or not the applicant believes diversion (as that term is defined in Sec. 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 Sec. 4.301(a) of this part.

(3) (i) A potential exemption applicant and a potential applicant for an original license that commences pre-filing consultation;

(A) On or after July 23, 2005 pursuant to part 5 of this chapter and receives approval from the Commission to use the license application procedures of part 4 of this chapter; or

(B) Elects to commence pre-filing consultation under part 4 of this chapter prior to July 23, 2005; must:

(1) Hold a joint meeting at a convenient place and time, including an opportunity for a site visit, with all pertinent agencies, Indian tribes, and members of the public 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;

(2) Consult with the resource agencies, Indian tribes and members of the public on the scheduling and agenda of the joint meeting; and

(3) 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.

(ii) The joint meeting must be held no earlier than 30 days, but no later than 60 days, from, as applicable;

(A) The date of the Commission's approval of the potential applicant's request to use the license application procedures of this part pursuant to the provisions of part 5 of this chapter; or

(B) The date of the potential applicant's letter transmitting the information required by paragraph (b)(2) of this section, in the case of a potential exemption applicant or a potential license applicant that commences pre-filing consultation under this part prior to July 23, 2005.

(4) Members of the public must be informed of and invited to attend the joint meeting held pursuant to paragraph (b)(3) of this section by means of the public notice provision 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)(3) 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, Indian tribe, or member of the public.

(5) Not later than 60 days after the joint meeting held under paragraph (b)(3) of this Section (unless extended within this time period by a resource agency, Indian tribe, or members of the public for an additional 60 days by sending written notice to the applicant and the Director of the Office of Energy Projects 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 the 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 any other available methodology alternatives, including those identified by the potential applicant pursuant to paragraph (b)(2)(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, Indian tribe, or member of the public in furthering its resource goals and objectives that are affected by the proposed project.

(6)(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 Energy Projects (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)(6)(i) or (b)(6)(ii) of this section must be filed with 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 Sec. 4.38(b)(6).

(iv) The Director will resolve the 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 a potential applicant to obtain information or conduct studies (other than a dispute regarding the information specified in paragraph (b)(2) of this section), or a study to the Director under paragraph (b)(6) 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)(2) 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 Sec. 4.32(e)(1) or (e)(2) of this part, merely because the application does not include a particular study or particular information if the Director had previously found, under paragraph (b)(6)(iv) of this section, that each 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.

(7) The first stage of consultation ends when all participating agencies and Indian tribes provide the written comments required under paragraph (b)(5) of this section or 60 days after the joint meeting held under paragraph (b)(3) of this section, whichever occurs first, unless a resource agency or Indian tribe timely notifies the applicant and the Director of Energy Projects of its need for more time to provide written comments under paragraph (b)(5) of this section, in which case the first stage of consultation ends when all participating agencies and Indian tribes provide the written comments required under paragraph (b)(5) of this section or 120 days after the joint meeting held under paragraph (b)(5) of this section, whichever occurs first.

(c) Second stage of consultation. (1) Unless determined to be unnecessary by the Director pursuant to paragraph (b)(6) 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)(2) 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)(7) 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)(5) (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 Energy Projects for dispute resolution under the procedures set forth in paragraph (b)(6) 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 Sec. 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)(2)(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, accompanied by a transmittal letter certifying that at the same time copies of the application are being mailed to the resource agencies, Indian tribes, other government offices, and consulted members of the public specified in paragraph (d)(2) of this section.

(2) As soon as 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, as the

Commission may direct the applicant must serve on every resource agency, Indian Tribes, and member of the public consulted, and on other government offices copies 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.
- (4) Following October 23, 2003, a potential license applicant engaged in pre-filing consultation under part 4 may during first stage consultation request to incorporate into pre-filing consultation any element of the integrated license application process provided for in part 5 of this chapter. Any such request must be accompanied by a:
- (i) Specific description of how the element of the part 5 license application would fit into the pre-filing consultation process under this part; and
  - (ii) Demonstration that the potential license applicant has made every reasonable effort to contact all resource agencies, Indian tribes, non-governmental organizations, and others affected by the applicant's proposal, and that a consensus exists in favor of incorporating the specific element of the part 5 process into the pre-filing consultation under this part.
- (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 Sec. 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) A description of how the applicant's proposal addresses the significant resource issues raised at the joint meeting held pursuant to paragraph (b)(3) of this section; and

(8) 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)(3) 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)(2) of this section from the date on which the notice required by paragraph (g)(1) of this section is first published until a final order is issued on any license application.



(ii) The provisions of Sec. 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)(3) of this section at least two copies of the information specified in paragraph (b)(2) of this section.

(h) Critical Energy Infrastructure Information. If this section requires an applicant to reveal Critical Energy Infrastructure Information (CEII), as defined by Sec. 388.113(c) of this chapter, to any person, the applicant shall follow the procedures set out in Sec. 4.32(k).

**18 C.F.R. § 4.41, provides as follows:**

Sec. 4.41 Contents of application.

Any application under this subpart must contain the following information in the form prescribed:

- (a) Initial statement.

Before the Federal Energy Regulatory Commission

Application for License for Major Unconstructed Project or Major  
Modified Project

(1) [Name of applicant] applies to the Federal Energy Regulatory Commission for a [license or new license, as appropriate] for the [name of project] water power project, as described in the attached exhibits. [Specify any previous FERC project number designation.]

- (2) The location of the proposed project is:

State or territory: \_\_\_\_\_

County: \_\_\_\_\_

Township or nearby town: \_\_\_\_\_

Stream or other body of  
water: \_\_\_\_\_

- (3) The exact name, business address, and telephone number of the applicant are:

\_\_\_\_\_  
\_\_\_\_\_

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

(5)(i) The statutory or regulatory requirements of the state(s) in which the project would be located and that affect the project as proposed with respect to bed and banks and to the appropriation, diversion, and use of water for power purposes, and with respect to the right to

engage in the business of developing, transmitting, and distributing power and in any other business necessary to accomplish the purposes of the license under the Federal Power Act, are: [provide citation and brief identification of the nature of each requirement; if the applicant is a municipality, the applicant must submit copies of applicable state or local laws or a municipal charter or, if such laws or documents are not clear, any other appropriate legal authority, evidencing that the municipality is competent under such laws to engage in the business of developing, transmitting, utilizing, or distributing power.]

(ii) The steps which the applicant has taken, or plans to take, to comply with each of the laws cited above are: [provide brief description for each requirement]

(b) Exhibit A is a description of the project. If the project includes more than one dam with associated facilities, each dam and the associated component parts must be described together as a discrete development. The description for each development must contain:

(1) The physical composition, dimensions, and general configuration of any dams, spillways, penstocks, powerhouses, tailraces or other structures proposed to be included as part of the project;

(2) The normal maximum water surface area and normal maximum water surface elevation (mean sea level), gross storage capacity of any impoundments to be included as part of the project;

(3) The number, type and rated capacity of any proposed turbines or generators to be included as part of the project;

(4) The number, length, voltage and interconnections of any primary transmission lines proposed to be included a part of the project [See 16 U.S.C. 796(11)];

(5) The description of any additional mechanical, electrical, and transmission equipment appurtenant to the project; and

(6) All lands of the United States, including lands patented subject to the provisions of section 24 of the Act, 16 U.S.C. 818, that are enclosed within the project boundary described under paragraph (h) of this section (Exhibit G), identified and tabulated by legal subdivisions of a public land survey, by the best available legal description. The tabulation must show the total acreage of the lands of the United States within the project boundary.

(c) Exhibit B is a statement of project operation and resource utilization. If the project includes more than one dam with associated facilities, the information must be provided separately for each discrete development. The exhibit must contain:

- (1) A description of each alternative site considered in selecting of the proposed site;
- (2) A description of any alternative facility designs, processes, and operations that were considered.
- (3) A statement as to whether operation of the power plant will be manual or automatic, an estimate of the annual plant factor, and a statement of how the project will be operated during adverse, mean, and high water years;
- (4) An estimate of the dependable capacity and average annual energy production in kilowatt-hours (or mechanical equivalent), supported by the following data:
  - (i) The minimum, mean, and maximum recorded flows in cubic feet per second of the stream or other body of water at the powerplant intake or point of diversion, with a specification of any adjustment made for evaporation, leakage minimum flow releases (including duration of releases) or other reductions in available flow; monthly flow duration curves indicating the period of record and the gauging stations used in deriving the curves; and a specification of the critical streamflow used to determine the dependable capacity;
  - (ii) An area-capacity curve showing the gross storage capacity and usable storage capacity of the impoundment, with a rule curve showing the proposed operation of the impoundment and how the usable storage capacity is to be utilized;
  - (iii) The estimated minimum and maximum hydraulic capacity of the powerplant in terms of flow and efficiency (cubic feet per second at one-half, full and best gate), and the corresponding generator output in kilowatts;
  - (iv) A tailwater rating curve; and
  - (v) A curve showing powerplant capability versus head and specifying maximum, normal, and minimum heads;
- (5) A statement of system and regional power needs and the manner in which the power generated at the project is to be utilized, including the amount of power to be used on-site, if any, supported by the following data:
  - (i) Load curves and tabular data, if appropriate;
  - (ii) Details of conservation and rate design programs and their historic and projected impacts on system loads; and
  - (iii) The amount of power to be sold and the identity of proposed purchaser(s); and

(6) A statement of the applicant's plans for future development of the project or of any other existing or proposed water power project on the affected stream or other body of water, indicating the approximate location and estimated installed capacity of the proposed developments.

(d) Exhibit C is a proposed construction schedule for the project. The information required may be supplemented with a bar chart. The construction schedule must contain:

(1) The proposed commencement and completion dates of any new construction, modification, or repair of major project works;

(2) The proposed commencement date of first commercial operation of each new major facility and generating unit; and

(3) If any portion of the proposed project consists of previously constructed, unlicensed water power structures or facilities, a chronology of original completion dates of those structures or facilities specifying dates (approximate dates must be identified as such) of:

(i) Commencement and completion of construction or installation;

(ii) Commencement of first commercial operation; and

(iii) Any additions or modifications other than routine maintenance.

(e) Exhibit D is a statement of project costs and financing. The exhibit must contain:

(1) A statement of estimated costs of any new construction, modification, or repair, including:

(i) The cost of any land or water rights necessary to the development;

(ii) The total cost of all major project works;

(iii) Indirect construction costs such as costs of construction equipment, camps, and commissaries;

(iv) Interest during construction; and

(v) Overhead, construction, legal expenses, and contingencies;

(2) If any portion of the proposed project consists of previously constructed, unlicensed water power structures or facilities, a statement of the original cost of those structures or facilities

specifying for each, to the extent possible, the actual or approximate total costs (approximate costs must be identified as such) of:

- (i) Any land or water rights necessary to the existing project works;
- (ii) All major project works; and
- (iii) Any additions or modifications other than routine maintenance;

(3) If the applicant is a licensee applying for a new license, and is not a municipality or a state, an estimate of the amount which would be payable if the project were to be taken over pursuant to section 14 of the Federal Power Act, 16 U.S.C. 807, upon expiration of the license in effect including:

- (i) Fair value;
- (ii) Net investment; and
- (iii) Severance damages;

(4) A statement of the estimated average annual cost of the total project as proposed, specifying any projected changes in the costs (life-cycle costs) over the estimated financing or licensing period if the applicant takes such changes into account, including:

- (i) Cost of capital (equity and debt);
- (ii) Local, state, and Federal taxes;
- (iii) Depreciation or amortization,
- (iv) Operation and maintenance expenses, including interim replacements, insurance, administrative and general expenses, and contingencies; and
- (v) The estimated capital cost and estimated annual operation and maintenance expense of each proposed environmental measure;

(5) A statement of the estimated annual value of project power based on a showing of the contract price for sale of power or the estimated average annual cost of obtaining an equivalent amount of power (capacity and energy) from the lowest cost alternative source of power, specifying any projected changes in the costs (life-cycle costs) of power from that source over the estimated financing or licensing period if the applicant takes such changes into account;

(6) A statement describing other electric energy alternatives, such as gas, oil, coal and nuclear-fueled powerplants and other conventional and pumped storage hydroelectric plants;

(7) A statement and evaluation of the consequences of denial of the license application and a brief perspective of what future use would be made of the proposed site if the proposed project were not constructed;

(8) A statement specifying the sources and extent of financing and annual revenues available to the applicant to meet the costs identified in paragraphs (e) (1) and (4) of this section;

(9) An estimate of the cost to develop the license application; and

(10) The on-peak and off-peak values of project power, and the basis for estimating the values, for projects which are proposed to operate in a mode other than run-of-river.

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

(1) General description of the locale. The applicant must provide a general description of the environment of the proposed project area and its immediate vicinity. The description must include location and general information helpful to an understanding of the environmental setting.

(2) Report on water use and quality. The report must discuss water quality and flows and contain baseline data sufficient to determine the normal and seasonal variability, the impacts expected during construction and operation, and any mitigative, enhancement, and protective measures proposed by the applicant. The report must be prepared in consultation with the state and Federal agencies with responsibility for management of water quality and quantity in the affected stream or other body of water. The report must include:

(i) A description of existing instream flow uses of streams in the project area that would be affected by construction and operation; estimated quantities of water discharged from the proposed project for power production; and any existing and proposed uses of project waters for irrigation, domestic water supply, industrial and other purposes;

(ii) A description of the seasonal variation of existing water quality for any stream, lake, or reservoir that would be affected by the proposed project, including (as appropriate) measurements of: significant ions, chlorophyll a, nutrients, specific conductance, pH, total dissolved solids, total alkalinity, total hardness, dissolved oxygen, bacteria, temperature, suspended sediments, turbidity and vertical illumination;

(iii) A description of any existing lake or reservoir and any of the proposed project reservoirs including surface area, volume, maximum depth, mean depth, flushing rate, shoreline length, substrate classification, and gradient for streams directly affected by the proposed project;

(iv) A quantification of the anticipated impacts of the proposed construction and operation of project facilities on water quality and downstream flows, such as temperature, turbidity and nutrients;

(v) A description of measures recommended by Federal and state agencies and the applicant for the purpose of protecting or improving water quality and stream flows during project construction and operation; an explanation of why the applicant has rejected any measures recommended by an agency; and a description of the applicant's alternative measures to protect or improve water quality stream flow;

(vi) A description of groundwater in the vicinity of the proposed project, including water table and artesian conditions, the hydraulic gradient, the degree to which groundwater and surface water are hydraulically connected, aquifers and their use as water supply, and the location of springs, wells, artesian flows and disappearing streams; a description of anticipated impacts on groundwater and measures proposed by the applicant and others for the mitigation of impacts on groundwater; and

(3) Report on fish, wildlife, and botanical resources. The applicant must provide a report that describes the fish, wildlife, and botanical resources in the vicinity of the proposed project; expected impacts of the project on these resources; and mitigation, enhancement, or protection measures proposed by the applicant. The report must be prepared in consultation with the state agency or agencies with responsibility for these resources, the U.S. Fish and Wildlife Service, the National Marine Fisheries Service (if the proposed project may affect anadromous, estuarine, or marine fish resources), and any state or Federal agency with managerial authority over any part of the proposed project lands. The report must contain:

(i) A description of existing fish, wildlife, and plant communities of the proposed project area and its vicinity, including any downstream areas that may be affected by the proposed project and the area within the transmission line corridor or right-of-way. A map of vegetation types should be included in the description. For species considered important because of their commercial or recreational value, the information provided should include temporal and spatial distributions and densities of such species. Any fish, wildlife, or plant species proposed or listed as threatened or endangered by the U.S. Fish and Wildlife Service or National Marine Fisheries Service [see 50 CFR 17.11 and 17.12] must be identified;

(ii) A description of the anticipated impacts on fish, wildlife and botanical resources of the proposed construction and operation of project facilities, including possible changes in size, distribution, and reproduction of essential population of these resources and any impacts on human utilization of these resources;



(iii) A description of any measures or facilities recommended by state or Federal agencies for the mitigation of impacts on fish, wildlife, and botanical resources, or for the protection or enhancement of these resources, the impact on threatened or endangered species, and an explanation of why the applicant has determined any measures or facilities recommended by an agency are inappropriate as well as a description of alternative measures proposed by applicant to protect fish, wildlife and botanical resources; and

(iv) The following materials and information regarding any mitigation measures or facilities, identified under clause (iii), proposed for implementation or construction:

(A) Functional design drawings;

(B) A description of proposed operation and maintenance procedures for any proposed measures or facilities;

(C) An implementation, construction and operation schedule for any proposed measures or facilities;

(D) An estimate of the costs of construction, operation, and maintenance of any proposed facilities or implementation of any measures;

(E) A statement of the sources and amount of financing for mitigation measures or facilities; and

(F) A map or drawing showing, by the use of shading, crosshatching or other symbols, the identity and location of any proposed measures or facilities.

(4) Report on historic and archaeological resources. The applicant must provide a report that discusses any historical and archaeological resources in the proposed project area, the impact of the proposed project on those resources and the avoidance, mitigation, and protection measures proposed by the applicant. The report must be prepared in consultation with the State Historic Preservation Officer (SHPO) and the National Park Service of the U.S. Department of Interior. The report must contain:

(i) A description of any discovery measures, such as surveys, inventories, and limited subsurface testing work, recommended by the specified state and Federal agencies for the purpose of locating, identifying, and assessing the significance of historic and archaeological resources that would be affected by construction and operation of the proposed project, together with a statement of the applicant's position regarding the acceptability of the recommendations;

(ii) The results of surveys, inventories, and subsurface testing work recommended by the state and Federal agencies listed above, together with an explanation by the applicant of any variations from the survey, inventory, or testing procedures recommended;

(iii) An identification (without providing specific site or property locations) of any historic or archaeological site in the proposed project area, with particular emphasis on sites or properties either listed in, or recommended by the SHPO for inclusion in, the National Register of Historic Places that would be affected by the construction of the proposed project;

(iv) A description of the likely direct and indirect impacts of proposed project construction or operation on sites or properties either listed in, or recommended as eligible for, the National Register of Historic Places;

(v) A management plan for the avoidance of, or mitigation of, impacts on historic or archaeological sites and resources based upon the recommendations of the state and Federal agencies listed above and containing the applicant's explanation of variations from those recommendations; and

(vi) The following materials and information regarding the mitigation measures described under paragraph (f)(4)(v) of this section:

(A) A schedule for implementing the mitigation proposals;

(B) An estimate of the cost of the measures; and

(C) A statement of the sources and extent of financing.

(vii) The applicant must provide five copies (rather than the eight copies required under Sec. 4.32(b)(1) of the Commission's regulations) of any survey, inventory, or subsurface testing reports containing specific site and property information, and including maps and photographs showing the location and any required alteration of historic and archaeological resources in relation to proposed project facilities.

(5) Report on socio-economic impacts. The applicant must provide a report which identifies and quantifies the impacts of constructing and operating the proposed project on employment, population, housing, personal income, local governmental services, local tax revenues and other factors within the towns and counties in the vicinity of the proposed project.

The report must include:

(i) A description of the socio-economic impact area;

(ii) A description of employment, population and personal income trends in the impact area;

(iii) An evaluation of the impact of any substantial in-migration of people on the impact area's governmental facilities and services, such as police, fire, health and educational facilities and programs;

(iv) On-site manpower requirements and payroll during and after project construction, including a projection of total on-site employment and construction payroll provided by month;

(v) Numbers of project construction personnel who:

(A) Currently reside within the impact area;

(B) Would commute daily to the construction site from places situated outside the impact area; and

(C) Would relocate on a temporary basis within the impact area;

(vi) A determination of whether the existing supply of available housing within the impact area is sufficient to meet the needs of the additional population;

(vii) Numbers and types of residences and business establishments that would be displaced by the proposed project, procedures to be utilized to acquire these properties, and types and amounts of relocation assistance payments that would be paid to the affected property owners and businesses; and

(viii) A fiscal impact analysis evaluating the incremental local government expenditures in relation to the incremental local government revenues that would result from the construction of the proposed project. Incremental expenditures may include, but are not be limited to, school operating costs, road maintenance and repair, public safety, and public utility costs.

(6) Report on geological and soil resources. The applicant must provide a report on the geological and soil resources in the proposed project area and other lands that would be directly or indirectly affected by the proposed action and the impacts of the proposed project on those resources. The information required may be supplemented with maps showing the location and description of conditions. The report must contain:

(i) A detailed description of geological features, including bedrock lithology, stratigraphy, structural features, glacial features, unconsolidated deposits, and mineral resources;

(ii) A detailed description of the soils, including the types, occurrence, physical and chemical characteristics, erodability and potential for mass soil movement;

(iii) A description showing the location of existing and potential geological and soil hazards and problems, including earthquakes, faults, seepage, subsidence, solution cavities, active and abandoned mines, erosion, and mass soil movement, and an identification of any large landslides or potentially unstable soil masses which could be aggravated by reservoir fluctuation;

(iv) A description of the anticipated erosion, mass soil movement and other impacts on the geological and soil resources due to construction and operation of the proposed project; and

(v) A description of any proposed measures or facilities for the mitigation of impacts on soils.

(7) Report on recreational resources. The applicant must prepare a report containing a proposed recreation plan describing utilization, design and development of project recreational facilities, and public access to the project area. Development of the plan should include consideration of the needs of the physically handicapped. Public and private recreational facilities provided by others that would abut the project should be noted in the report. The report must be prepared in consultation with appropriate local, regional, state and Federal recreation agencies and planning commissions, the National Park Service of the U.S. Department of the Interior, and any other state or Federal agency with managerial responsibility for any part of the project lands. The report must contain:

(i) A description of any areas within or in the vicinity of the proposed project boundary that are included in, or have been designated for study for inclusion in:

(A) The National Wild and Scenic Rivers Systems (see 16 U.S.C. 1271);

(B) The National Trails System (see 16 U.S.C. 1241); or

(C) A wilderness area designated under the Wilderness Act (see 16 U.S.C. 1132);

(ii) A detailed description of existing recreational facilities within the project vicinity, and the public recreational facilities which are to be provided by the applicant at its sole cost or in cooperation with others no later than 3 years from the date of first commercial operation of the proposed project and those recreation facilities planned for future development based on anticipated demand. When public recreation facilities are to be provided by other entities, the applicant and those entities should enter into an agreement on the type of facilities to be provided and the method of operation. Copies of agreements with cooperating entities are to be appended to the plan;

(iii) A provision for a shoreline buffer zone that must be within the project boundary, above the normal maximum surface elevation of the project reservoir, and of sufficient width to allow public access to project lands and waters and to protect the scenic, public recreational, cultural, and other environmental values of the reservoir shoreline;

(iv) Estimates of existing and future recreational use at the project, in daytime and overnight visitation (recreation days), with a description of the methodology used in developing these data;

(v) A development schedule and cost estimates of the construction, operation, and maintenance of existing, initial, and future public recreational facilities, including a statement of the source and extent of financing for such facilities;

(vi) A description of any measures or facilities recommended by the agencies consulted for the purpose of creating, preserving, or enhancing recreational opportunities at the proposed project, and for the purpose of ensuring the safety of the public in its use of project lands and waters, including an explanation of why the applicant has rejected any measures or facilities recommended by an agency; and

(vii) A drawing or drawings, one of which describes the entire project area, clearly showing:

(A) The location of project lands, and the types and number of existing recreational facilities and those proposed for initial development, including access roads and trails, and facilities for camping, picnicking, swimming, boat docking and launching, fishing and hunting, as well as provisions for sanitation and waste disposal;

(B) The location of project lands, and the type and number of recreational facilities planned for future development;

(C) The location of all project lands reserved for recreational uses other than those included in paragraphs (f)(7)(vii) (A) and (B) of this section; and

(D) The project boundary (excluding surveying details) of all areas designated for recreational development, sufficiently referenced to the appropriate Exhibit G drawings to show that all lands reserved for existing and future public recreational development and the shoreline buffer zone are included within the project boundary. Recreational cottages, mobile homes and year-round residences for private use are not to be considered as public recreational facilities, and the lands on which these private facilities are to be developed are not to be included within the proposed project boundary.

(8) Report on aesthetic resources. The applicant must provide a report that describes the aesthetic resources of the proposed project area, the expected impacts of the project on these resources, and the mitigation, enhancement or protection measures proposed. The report must be prepared following consultation with Federal, state, and local agencies having managerial responsibility for any part of the proposed project lands or lands abutting those lands. The report must contain:

(i) A description of the aesthetic character of lands and waters directly and indirectly affected by the proposed project facilities;

(ii) A description of the anticipated impacts on aesthetic resources from construction activity and related equipment and material, and the subsequent presence of proposed project facilities in the landscape;

(iii) A description of mitigative measures proposed by the applicant, including architectural design, landscaping, and other reasonable treatment to be given project works to preserve and enhance aesthetic and related resources during construction and operation of proposed project facilities; and

(iv) Maps, drawings and photographs sufficient to provide an understanding of the information required under this paragraph. Maps or drawings may be consolidated with other maps or drawings required in this exhibit and must conform to the specifications of Sec. 4.39.

(9) Report on land use. The applicant must provide a report that describes the existing uses of the proposed project lands and adjacent property, and those land uses which would occur if the project is constructed. The report may reference the discussions of land uses in other sections of this exhibit. The report must be prepared following consultation with local and state zoning or land management authorities, and any Federal or state agency with managerial responsibility for the proposed project or abutting lands. The report must include:

(i) A description of existing land use in the proposed project area, including identification of wetlands, floodlands, prime or unique farmland as designated by the Natural Resources Conservation Service of the U.S. Department of Agriculture, the Special Area Management Plan of the Office of Coastal Zone Management, National Oceanic and Atmospheric Administration, and lands owned or subject to control by government agencies;

(ii) A description of the proposed land uses within and abutting the project boundary that would occur as a result of development and operation of the project; and

(iii) Aerial photographs, maps, drawings or other graphics sufficient to show the location, extent and nature of the land uses referred to in this section.

(10) Alternative locations, designs, and energy sources. The applicant must provide an environment assessment of the following:

(i) Alternative sites considered in arriving at the selection of the proposed project site;

(ii) Alternative facility designs, processes, and operations that were considered and the reasons for their rejection;

(iii) Alternative electrical energy sources, such as gas, oil, coal, and nuclear-fueled power plants, purchased power or diversity exchange, and other conventional and pumped-storage hydroelectric plants; and

(iv) The overall consequences if the license application is denied.

(11) List of literature. Exhibit E must include a list of all publications, reports, and other literature which were cited or otherwise utilized in the preparation of any part of the environmental report.

(g) Exhibit F consists of general design drawings of the principal project works described under paragraph (b) of this section (Exhibit A) and supporting information used as the basis of design. If the Exhibit F submitted with the application is preliminary in nature, applicant must so state in the application. The drawings must conform to the specifications of Sec. 4.39.

(1) The drawings must show all major project structures in sufficient detail to provide a full understanding of the project, including:

(iii) Profiles (side view); and

(iv) Sections.

(2) The applicant may submit preliminary design drawings with the application. The final Exhibit F may be submitted during or after the licensing process and must show the precise plans and specifications for proposed structures. If the project is licensed on the basis of preliminary designs, the applicant must submit a final Exhibit F for Commission approval prior to commencement of any construction of the project.

(3) Supporting design report. The applicant must furnish, at a minimum, the following supporting information to demonstrate that existing and proposed structures are safe and adequate to fulfill their stated functions and must submit such information in a separate report at the time the application is filed. The report must include:

(i) An assessment of the suitability of the site and the reservoir rim stability based on geological and subsurface investigations, including investigations of soils and rock borings and tests for the evaluation of all foundations and construction materials sufficient to determine the location and type of dam structure suitable for the site;

(ii) Copies of boring logs, geology reports and laboratory test reports;

(iii) An identification of all borrow areas and quarry sites and an estimate of required quantities of suitable construction material;

(iv) Stability and stress analyses for all major structures and critical abutment slopes under all probable loading conditions, including seismic and hydrostatic forces induced by water loads up to the Probable Maximum Flood as appropriate; and

(v) The bases for determination of seismic loading and the Spillway Design Flood in sufficient detail to permit independent staff evaluation.

(4) The applicant must submit two copies of the supporting design report described in paragraph (g)(3) of this section at the time preliminary and final design drawings are submitted to the Commission for review. If the report contains preliminary drawings, it must be designated a "Preliminary Supporting Design Report."

(h) Exhibit G is a map of the project that must conform to the specifications of Sec. 4.39. In addition, to the other components of Exhibit G, the Applicant must provide the project boundary data in a geo-referenced electronic format--such as ArcView shape files, GeoMedia files, MapInfo files, or any similar format. The electronic boundary data must be positionally accurate to  $\pm 40$  feet, in order to comply with the National Map Accuracy Standards for maps at a 1:24,000 scale (the scale of USGS quadrangle maps). The electronic exhibit G data must include a text file describing the map projection used (i.e., UTM, State Plane, Decimal Degrees, etc.), the map datum (i.e., feet, meters, miles, etc.). Three sets of the maps must be submitted on compact disk or other appropriate electronic media. If more than one sheet is used for the paper maps, the sheets must be numbered consecutively, and each sheet must bear a small insert sketch showing the entire project and indicate that portion of the project depicted on that sheet. Each sheet must contain a minimum of three known reference points. The latitude and longitude coordinates, or state plane coordinates, of each reference point must be shown. If at any time after the application is filed there is any change in the project boundary, the applicant must submit, within 90 days following the completion of project construction, a final exhibit G showing the extent of such changes. The map must show:

(1) Location of the project and principal features. The map must show the location of the project as a whole with reference to the affected stream or other body of water and, if possible, to a nearby town or any other permanent monuments or objects, such as roads, transmission lines or other structures, that can be noted on the map and recognized in the field. The map must also show the relative locations and physical interrelationships of the principal project works and other features described under paragraph (b) of this section (Exhibit A).

(2) Project boundary. The map must show a project boundary enclosing all project works and other features described under paragraph (b) of this section (Exhibit A) that are to be licensed. If accurate survey information is not available at the time the application is filed, the applicant must so state, and a tentative boundary may be submitted. The boundary must enclose only those lands necessary for operation and maintenance of the project and for other project purposes, such as



recreation, shoreline control, or protection of environmental resources (see paragraph (f) of this section (Exhibit E)). Existing residential, commercial, or other structures may be included within the boundary only to the extent that underlying lands are needed for project purposes (e.g., for flowage, public recreation, shoreline control, or protection of environmental resources). If the boundary is on land covered by a public survey, ties must be shown on the map at sufficient points to permit accurate platting of the position of the boundary relative to the lines of the public land survey. If the lands are not covered by a public land survey, the best available legal description of the position of the boundary must be provided, including distances and directions from fixed monuments or physical features. The boundary must be described as follows:

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

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

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

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

(4) Any combination of the above methods.

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

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

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

(1) Contour lines;

(2) Specified courses and distances;

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

(4) Any combination of the above methods.

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

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

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

(ii) The Federal agency, identified by symbol or legend, that maintains or manages each identified subdivision of the public land survey within the project boundary; or

(iii) In the absence of a public land survey, the location of the Federal lands according to the distances and directions from fixed monuments or physical features. When a Federal survey monument or a Federal bench mark will be destroyed or rendered unusable by the construction of project works, at least two permanent, marked witness monuments or bench marks must be established at accessible points. The maps show the location (and elevation, for bench marks) of the survey monument or bench mark which will be destroyed or rendered unusable, as well as of the witness monuments or bench marks. Connecting courses and distances from the witness monuments or bench marks to the original must also be shown.

(iv) The project location must include the most current information pertaining to affected Federal lands as described under Sec. 4.81(b)(5).

(4) Non-Federal lands. For those lands within the project boundary not identified under paragraph (h)(3) of this section, the map must identify by legal subdivision:

(i) Lands owned in fee by the applicant and lands that the applicant plans to acquire in fee; and

(ii) Lands over which the applicant has acquired or plans to acquire rights to occupancy and use other than fee title, including rights acquired or to be acquired by easement or lease.

**18 C.F.R. § 4.61, provides as follows:**

Sec. 4.61 Contents of application.

(a) General instructions—

(1) Entry upon land. No work may be started on any proposed project works until the applicant receives a signed license from the Commission. Acceptance of an application does not authorize entry upon public lands or reservations of the United States for any purpose. The applicant should determine whether any additional Federal, state, or local permits are required.

(2) Exhibits F and G must be submitted on separate drawings. Drawings for Exhibits F and G must have identifying title blocks and bear the following certification: ``This drawing is a part of the application for license made by the undersigned this ----- day of -----, 19----."`

(3) Each application for a license for a water power project 5 megawatts or less must include the information requested in the initial statement and lettered exhibits described by paragraphs (b) through (f) of this section, and must be provided in the form specified. The Commission reserves the right to require additional information, or another filing procedure, if data provided indicate such action to be appropriate.

(b) Initial statement.

Before the Federal Energy Regulatory Commission

Application for License for a [Minor Water Power Project, or Major Water Power Project, 5 Megawatts or Less, as Appropriate]

(1) ----- (Name of Applicant) applies to the Federal Energy Regulatory Commission for ----- (license or new license, as appropriate) for the ----- (name of project) water power project, as described hereinafter. (Specify any previous FERC project number designation.)

(2) The location of the project is:

State or territory: \_\_\_\_\_

County: \_\_\_\_\_

Township or nearby town: \_\_\_\_\_

Stream or other body of water: \_\_\_\_\_

(3) The exact name, address, and telephone number of the applicant are:

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(4) The exact name, address, and telephone number of each person authorized to act as agent for the applicant in this application, if applicable, are:

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

(6)(i) The statutory or regulatory requirements of the state(s) in which the project would be located that affect the project as proposed with respect to bed and banks and the appropriation, diversion, and use of water for power purposes, and with respect to the right to engage in the business of developing, transmitting, and distributing power and in any other business necessary to accomplish the purposes of the license under the Federal Power Act, are: [provide citation and brief identification of the nature of each requirement; if the applicant is a municipality, the applicant must submit copies of applicable state or local laws or a municipal charter or, if such laws or documents are not clear, any other appropriate legal authority, evidencing that the municipality is competent under such laws to engage in the business of developing, transmitting, utilizing, or distributing power.]

(ii) The steps which the applicant has taken or plans to take to comply with each of the laws cited above are: [provide brief description for each requirement]

(7) Brief project description

(i) Proposed installed generating capacity ----- MW.

(ii) Check appropriate box:

[ballot] existing dam [ballot] unconstructed dam [ballot] existing dam, major modified project (see Sec. 4.30(b)(14))

(8) Lands of the United States affected (shown on Exhibit G):

(Name) (Acres)

- (i) National Forest.....
- (ii) Indian Reservation.....
- (iii) Public Lands Under Jurisdiction of.....
- (iv) Other.....
- (v) Total U.S. Lands.....
- (vi) Check appropriate box:

[ballot] Surveyed land [ballot] Unsurveyed land

(9) Construction of the project is planned to start within ---- months, and is planned to be completed within ---- months, from the date of issuance of license.

(c) Exhibit A is a description of the project and the proposed mode of operation.

(1) The exhibit must include, in tabular form if possible, as appropriate:

(i) The number of generating units, including auxiliary units, the capacity of each unit, and provisions, if any, for future units;

(ii) The type of hydraulic turbine(s);

(iii) A description of how the plant is to be operated, manual or automatic, and whether the plant is to be used for peaking;

(iv) The estimated average annual generation in kilowatt-hours or mechanical energy equivalent;

(v) The estimated average head on the plant;

(vi) The reservoir surface area in acres and, if known, the net and gross storage capacity;

(vii) The estimated minimum and maximum hydraulic capacity of the plant (flow through the plant) in cubic feet per second and estimated average flow of the stream or water body at the plant or point of diversion; for projects with installed capacity of more than 1.5 megawatts, monthly flow duration curves and a description of the drainage area for the project site must be provided;

(viii) Sizes, capacities, and construction materials, as appropriate, of pipelines, ditches, flumes, canals, intake facilities, powerhouses, dams, transmission lines, and other appurtenances; and

(ix) The estimated cost of the project.

(x) The estimated capital costs and estimated annual operation and maintenance expense of each proposed environmental measure.

(2) State the purposes of project (for example, use of power output).

(3) An estimate of the cost to develop the license application; and

(4) The on-peak and off-peak values of project power, and the basis for estimating the values, for projects which are proposed to operate in a mode other than run-of-river.

(5) The estimated average annual increase or decrease in project generation, and the estimated average annual increase or decrease of the value of project power due to a change in project operations (i.e., minimum bypass flows, limiting reservoir fluctuations) for an application for a new license;

(6) The remaining undepreciated net investment, or book value of the project;

(7) The annual operation and maintenance expenses, including insurance, and administrative and general costs;

(8) A detailed single-line electrical diagram;

(9) A statement of measures taken or planned to ensure safe management, operation, and maintenance of the project.

(d) Exhibit E is an Environmental Report.

(1) For major unconstructed and major modified projects 5 MW or less. Any application must contain an Exhibit E conforming with the data and consultation requirements of Sec. 4.41(f) of this chapter, if the application is for license for a water power project which has or is proposed to have a total installed generating capacity greater than 1.5 MW but not greater than 5 MW, and which:

(i) Would use the water power potential of a dam and impoundment which, at the time of application, has not been constructed (see Sec. 4.30(b)(15)); or

(ii) Involves 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 involves any change in existing project works or operations that would result in a significant environmental impact (see Sec. 4.30(b)(14)).

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

(i) A description, including any maps or photographs which the applicant considers appropriate, of the environmental setting of the project, including vegetative cover, fish and wildlife resources, water quality and quantity, land and water uses, recreational uses, historical and archeological resources, and scenic and aesthetic resources. The report must include a discussion of endangered or threatened plant and animal species, any critical habitats, and any sites included in, or eligible for inclusion in, the National Register of Historic Places. The applicant may obtain assistance in the preparation of this information from state natural resources agencies, the state historic preservation officer, and from local offices of Federal natural resources agencies.

(ii) A description of the expected environmental impacts from proposed construction or development and the proposed operation of the power project, including any impacts from any proposed changes in the capacity and mode of operation of the project if it is already generating electric power, and an explanation of the specific measures proposed by the applicant, the agencies, and others to protect and enhance environmental resources and values and to mitigate adverse impacts of the project on such resources. The applicant must explain its reasons for not undertaking any measures proposed by any agency consulted.

(iii) A description of the steps taken by the applicant in consulting with Federal, state, and local agencies with expertise in environmental matters during the preparation of this exhibit prior to filing the application for license with the Commission. In this report, the applicant must:

(A) Indicate which agencies were consulted during the preparation of the environmental report and provide copies of letters or other documentation showing that the applicant consulted or attempted to consult with each of the relevant agencies (specifying each agency) before filing the application, including any terms or conditions of license that those agencies have determined are appropriate to prevent loss of, or damage to, natural resources; and

(B) List those agencies that were provided copies of the application as filed with the Commission, the date or dates provided, and copies of any letters that may be received from agencies commenting on the application.

(iv) Any additional information the applicant considers important.

(e) Exhibit F. See Sec. 4.41(g) of this chapter.

(f) Exhibit G. See Sec. 4.41(h) of this chapter.



**18 C.F.R. §§ 4.81(b) and (c)(1)(i), provides as follows:**

(b) Exhibit 1 must contain a description of the proposed project, specifying and including, to the extent possible:

(1) The number, physical composition, dimensions, general configuration and, where applicable, age and condition, of any dams, spillways, penstocks, powerhouses, tailraces, or other structures, whether existing or proposed, that would be part of the project;

(2) The estimated number, surface area, storage capacity, and normal maximum surface elevation (mean sea level) of any reservoirs, whether existing or proposed, that would be part of the project;

(3) The estimated number, length, voltage, interconnections, and, where applicable, age and condition, of any primary transmission lines whether existing or proposed, that would be part of the project [see 16 U.S.C. 796(11)];

(4) The total estimated average annual energy production and installed capacity (provide only one energy and capacity value), the hydraulic head for estimating capacity and energy output, and the estimated number, rated capacity, and, where applicable, the age and condition, of any turbines and generators, whether existing or proposed, that would be part of the project works;

(5) All lands of the United States that are enclosed within the proposed project boundary described under paragraph (e)(3) of this section, identified and tabulated on a separate sheet by legal subdivisions of a public land survey of the affected area, if available. If the project boundary includes lands of the United States, such lands must be identified on a completed land description form, provided by the Commission.

The project location must identify any Federal reservation, Federal tracts, and townships of the public land surveys (or official protractations thereof if unsurveyed). A copy of the form must also be sent to the Bureau of Land Management state office where the project is located;

(6) Any other information demonstrating in what manner the proposed project would develop, conserve, and utilize in the public interest the water resources of the region.

(c) Exhibit 2 is a description of studies conducted or to be conducted with respect to the proposed project, including field studies. Exhibit 2 must supply the following information:

(1) General requirement. For any proposed project, a study plan containing a description of:

- (i) Any studies, investigations, tests, or surveys that are proposed to be carried out, and any that have already taken place, for the purposes of determining the technical, economic, and financial feasibility of the pro-posed project, taking into consideration its environmental impacts, and of preparing an application for a license for the project; and

**18 C.F.R. § 5.1, provides as follows:**

(a) This part applies to the filing and processing of an application for an:

(1) Original license;

(2) New license for an existing project subject to Sections 14 and 15 of the Federal Power Act;  
or

(3) Subsequent license.

(b) Definitions. The definitions in Sec. 4.30(b) of this chapter and Sec. 16.2 of this chapter apply to this chapter.

(c) Who may file. Any citizen, association of citizens, domestic corporation, municipality, or state may develop and file a license application under this part.

(d) Requirement to consult.

(1) Before it files any application for an original, new, or subsequent license under this part, a potential applicant must consult with the relevant Federal, state, and interstate resource agencies, including as appropriate the National Marine Fisheries Service, the United States Fish and Wildlife Service, Bureau of Indian Affairs, the National Park Service, the United States Environmental Protection Agency, the Federal agency administering any United States lands utilized or occupied by the project, the appropriate state fish and wildlife agencies, the appropriate state water resource management agencies, the certifying agency or Indian tribe under Section 401(a)(1) of the Federal Water Pollution Control Act (Clean Water Act), 33 U.S.C. 1341(c)(1)), the agency that administers the Coastal Zone Management Act, 16 U.S.C. Sec. 1451-1465, any Indian tribe that may be affected by the project, and members of the public. A potential license applicant must file a notification of intent to file a license application pursuant to Sec. 5.5 and a pre-application document pursuant to the provisions of Sec. 5.6.

(2) The Director of the Office of Energy Projects will, upon request, provide a list of known appropriate Federal, state, and interstate resource agencies, Indian tribes, and local, regional, or national non-governmental organizations likely to be interested in any license application proceeding.

(e) Purpose. The purpose of the integrated licensing process provided for in this part is to provide an efficient and timely licensing process that continues to ensure appropriate resource protections through better coordination of the Commission's processes with those of Federal and state agencies and Indian tribes that have authority to condition Commission licenses.

(f) Default process. Each potential original, new, or subsequent license applicant must use the license application process provided for in this part unless the potential applicant applies for and receives authorization from the Commission under this part to use the licensing process provided for in:

(1) 18 CFR part 4, Subparts D-H and, as applicable, part 16 (i.e., traditional process), pursuant to paragraph (c) of this section; or

(2) Section 4.34(i) of this chapter, Alternative procedures.

**18 C.F.R. §§ 5.5(a)-(b), provides as follows:**

Sec. 5.5 Notification of intent.

(a) Notification of intent. A potential applicant for an original, new, or subsequent license, must file a notification of its intent to do so in the manner provided for in paragraphs (b) and (c) of this section.

(b) Requirement to notify. In order for a non-licensee to notify the Commission that it intends to file an application for an original, new, or subsequent license, or for an existing licensee to notify the Commission whether or not it intends to file an application for a new or subsequent license, a potential license applicant must file with the Commission pursuant to the requirements of subpart T of part 385 of this chapter an original and eight copies of a letter that contains the following information:

(1) The potential applicant or existing licensee's name and address.

(2) The project number, if any.

(3) The license expiration date, if any.

(4) An unequivocal statement of the potential applicant's intention to file an application for an original license, or, in the case of an existing licensee, to file or not to file an application for a new or subsequent license.

(5) The type of principal project works licensed, if any, such as dam and reservoir, powerhouse, or transmission lines.

(6) The location of the project by state, county, and stream, and, when appropriate, by city or nearby city.

(7) The installed plant capacity, if any.

(8) The names and mailing addresses of:

(i) Every county in which any part of the project is located, and in which any Federal facility that is used or to be used by the project is located;

(ii) Every city, town, or similar political subdivision;

(A) In which any part of the project is or is to be located and any Federal facility that is or is to be used by the project is located, or

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

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

(A) In which any part of the project is or is proposed to be located and any Federal facility that is or is proposed to be used by the project is located; or

(B) That owns, operates, maintains, or uses any project facility or any Federal facility that is or is proposed to be used by the project;

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

(v) Affected Indian tribes.

(c) Requirement to distribute. Before it files any application for an original, new, or subsequent license, a potential license applicant proposing to file a license application pursuant to this part or to request to file a license application pursuant to part 4 of this chapter and, as appropriate, part 16 of this chapter (i.e., the "traditional process"), including an application pursuant to Sec. 4.34(i) alternative procedures of this chapter must distribute to appropriate Federal, state, and interstate resource agencies, Indian tribes, local governments, and members of the public likely to be interested in the proceeding the notification of intent provided for in paragraph (a) of this section.

(d) When to notify. An existing licensee or non-licensee potential applicant must notify the Commission as required in paragraph (b) of this section at least five years, but not more than five and one-half years, before the existing license expires.

(e) Non-Federal representatives. A potential license applicant may at the same time it files its notification of intent and distributes its pre-application document, request to be designated as the Commission's non-Federal representative for purposes of consultation under section 7 of the Endangered Species Act and the joint agency regulations thereunder at 50 CFR part 402, Section 305(b) of the Magnuson-Stevens Fishery Conservation and Management Act and the implementing regulations at 50 CFR 600.920. A potential license applicant may at the same time request authorization to initiate consultation under section 106 of the National Historic Preservation Act and the implementing regulations at 36 CFR 800.2(c)(4).

(f) Procedural matters. The provisions of subpart F of part 16 of this chapter apply to projects to which this part applies.

(g) Construction of regulations. The provisions of this part and parts 4 and 16 shall be construed in a manner that best implements the purposes of each part and gives full effect to applicable provisions of the Federal Power Act.

**18 C.F.R. § 5.6, provides as follows:**

Sec. 5.6 Pre-application document.

(a) Pre-application document.

(1) Simultaneously with the filing of its notification of intent to seek a license as provided for in Sec. 5.5, and before it files any application for an original, new, or subsequent license, a potential applicant for a license to be filed pursuant to this part or part 4 of this chapter and, as appropriate, part 16 of this chapter, must file with the Commission an original and eight copies and distribute to the appropriate Federal, state, and interstate resource agencies, Indian tribes, local governments, and members of the public likely to be interested in the proceeding, the pre-application document provided for in this section.

(2) The agencies referred to in paragraph (a)(1) of this section include: Any state agency with responsibility for fish, wildlife, and botanical resources, water quality, coastal zone management plan consistency certification, shoreline management, and water resources; the U.S. Fish and Wildlife Service; the National Marine Fisheries Service; Environmental Protection Agency; State Historic Preservation Officer; Tribal Historic Preservation Officer; National Park Service; local, state, and regional recreation agencies and planning commissions; local and state zoning agencies; and any other state or Federal agency or Indian tribe with managerial authority over any part of project lands and waters.

(b) Purpose of pre-application document.

(1) The pre-application document provides the Commission and the entities identified in paragraph (a) of this section with existing information relevant to the project proposal that is in the potential applicant's possession or that the potential applicant can obtain with the exercise of due diligence. This existing, relevant, and reasonably available information is distributed to these entities to enable them to identify issues and related information needs, develop study requests and study plans, and prepare documents analyzing any license application that may be filed. It is also a precursor to the environmental analysis section of the Preliminary Licensing Proposal or draft license application provided for in Sec. 5.16, Exhibit E of the final license application, and the Commission's scoping document(s) and environmental impact statement or environmental assessment under the National Environmental Policy Act (NEPA).

(2) A potential applicant is not required to conduct studies in order to generate information for inclusion in the pre-application document. Rather, a potential applicant must exercise due diligence in determining what information exists that is relevant to describing the existing environment and potential impacts of the project proposal (including cumulative impacts), obtaining that information if the potential applicant does not already possess it, and describing or



summarizing it as provided for in paragraph (d) of this section. Due diligence includes, but is not limited to, contacting appropriate agencies and Indian tribes that may have relevant information and review of Federal and state comprehensive plans filed with the Commission and listed on the Commission's Web site at <http://www.ferc.gov>.

(c) Form and distribution protocol—

(1) General requirements. As specifically provided for in the content requirements of paragraph (d) of this section, the pre-application document must describe the existing and proposed (if any) project facilities and operations, provide information on the existing environment, and existing data or studies relevant to the existing environment, and any known and potential impacts of the proposed project on the specified resources.

(2) Availability of source information and studies. The sources of information on the existing environment and known or potential resource impacts included in the descriptions and summaries must be referenced in the relevant section of the document, and in an appendix to the document. The information must be provided upon request to recipients of the pre-application document. A potential applicant must provide the requested information within 20 days from receipt of the request. Potential applicants and requesters are strongly encouraged to use electronic means or compact disks to distribute studies and other forms of information, but a potential applicant must, upon request, provide the information in hard copy form. The potential applicant is also strongly encouraged to include with the pre-application document any written protocol for distribution consistent with this paragraph to which it has agreed with agencies, Indian tribes, or other entities.

(d) Content requirements—

(1) Process plan and schedule. The pre-application document must include a plan and schedule for all pre-application activity that incorporates the time frames for pre-filing consultation, information gathering, and studies set forth in this part. The plan and schedule must include a proposed location and date for the scoping meeting and site visit required by Sec. 5.8(b)(3)(viii).

(2) Project location, facilities, and operations. The potential applicant must include in the pre-application document:

(i) The exact name and business address, and telephone number of each person authorized to act as agent for the applicant;

(ii) Detailed maps showing lands and waters within the project boundary by township, range, and section, as well as by state, county, river, river mile, and closest town, and also showing the specific location of any Federal and tribal lands, and the location of proposed project facilities, including roads, transmission lines, and any other appurtenant facilities;

(iii) A detailed description of all existing and proposed project facilities and components, including:

(A) The physical composition, dimensions, and general configuration of any dams, spillways, penstocks, canals, powerhouses, tailraces, and other structures proposed to be included as part of the project or connected directly to it;

(B) The normal maximum water surface area and normal maximum water surface elevation (mean sea level), gross storage capacity of any impoundments;

(C) The number, type, and minimum and maximum hydraulic capacity and installed (rated) capacity of any proposed turbines or generators to be included as part of the project;

(D) The number, length, voltage, and interconnections of any primary transmission lines proposed to be included as part of the project, including a single-line diagram showing the transfer of electricity from the project to the transmission grid or point of use; and

(E) An estimate of the dependable capacity, average annual, and average monthly energy production in kilowatt hours (or mechanical equivalent);

(iv) A description of the current (if applicable) and proposed operation of the project, including any daily or seasonal ramping rates, flushing flows, reservoir operations, and flood control operations.

(v) In the case of an existing licensed project;

(A) A complete description of the current license requirements; i.e., the requirements of the original license as amended during the license term;

(B) A summary of project generation and outflow records for the five years preceding filing of the pre-application document;

(C) Current net investment; and

(D) A summary of the compliance history of the project, if applicable, including a description of any recurring situations of non-compliance.

(vi) A description of any new facilities or components to be constructed, plans for future development or rehabilitation of the project, and changes in project operation.

(3) Description of existing environment and resource impacts—

(i) General requirements. A potential applicant must, based on the existing, relevant, and reasonably available information, include a discussion with respect to each resource that includes:

(A) A description of the existing environment as required by paragraphs (d)(3)(ii)-(xiii) of this section;

(B) Summaries (with references to sources of information or studies) of existing data or studies regarding the resource;

(C) A description of any known or potential adverse impacts and issues associated with the construction, operation or maintenance of the proposed project, including continuing and cumulative impacts; and

(D) A description of any existing or proposed project facilities or operations, and management activities undertaken for the purpose of protecting, mitigating impacts to, or enhancing resources affected by the project, including a statement of whether such measures are required by the project license, or were undertaken for other reasons. The type and amount of the information included in the discussion must be commensurate with the scope and level of resource impacts caused or potentially caused by the proposed project. Potential license applicants are encouraged to provide photographs or other visual aids, as appropriate, to supplement text, charts, and graphs included in the discussion.

(ii) Geology and soils. Descriptions and maps showing the existing geology, topography, and soils of the proposed project and surrounding area. Components of the description must include:

(A) A description of geological features, including bedrock lithology, stratigraphy, structural features, glacial features, unconsolidated deposits, and mineral resources at the project site;

(B) A description of the soils, including the types, occurrence, physical and chemical characteristics, erodability and potential for mass soil movement;

(C) A description of reservoir shorelines and streambanks, including:

(1) Steepness, composition (bedrock and unconsolidated deposits), and vegetative cover; and

(2) Existing erosion, mass soil movement, slumping, or other forms of instability, including identification of project facilities or operations that are known to or may cause these conditions.

(iii) Water resources. A description of the water resources of the proposed project and surrounding area. This must address the quantity and quality (chemical/physical parameters) of

all waters affected by the project, including but not limited to the project reservoir(s) and tributaries thereto, bypassed reach, and tailrace. Components of the description must include:

(A) Drainage area;

(B) The monthly minimum, mean, and maximum recorded flows in cubic feet per second of the stream or other body of water at the powerplant intake or point of diversion, specifying any adjustments made for evaporation, leakage, minimum flow releases, or other reductions in available flow;

(C) A monthly flow duration curve indicating the period of record and the location of gauging station(s), including identification number(s), used in deriving the curve; and a specification of the critical streamflow used to determine the project's dependable capacity;

(D) Existing and proposed uses of project waters for irrigation, domestic water supply, industrial and other purposes, including any upstream or downstream requirements or constraints to accommodate those purposes;

(E) Existing instream flow uses of streams in the project area that would be affected by project construction and operation; information on existing water rights and water rights applications potentially affecting or affected by the project;

(F) Any federally-approved water quality standards applicable to project waters;

(G) Seasonal variation of existing water quality data for any stream, lake, or reservoir that would be affected by the proposed project, including information on:

(1) Water temperature and dissolved oxygen, including seasonal vertical profiles in the reservoir;

(2) Other physical and chemical parameters to include, as appropriate for the project; total dissolved gas, pH, total hardness, specific conductance, chlorophyll a, suspended sediment concentrations, total nitrogen (mg/L as N), total phosphorus (mg/L as P), and fecal coliform (E. Coli) concentrations;

(H) The following data with respect to any existing or proposed lake or reservoir associated with the proposed project; surface area, volume, maximum depth, mean depth, flushing rate, shoreline length, substrate composition; and

(I) Gradient for downstream reaches directly affected by the proposed project.

(iv) Fish and aquatic resources. A description of the fish and other aquatic resources, including invasive species, in the project vicinity. This section must discuss the existing fish and macroinvertebrate communities, including the presence or absence of anadromous, catadromous, or migratory fish, and any known or potential upstream or downstream impacts of the project on the aquatic community. Components of the description must include:

(A) Identification of existing fish and aquatic communities;

(B) Identification of any essential fish habitat as defined under the Magnuson-Stevens Fishery Conservation and Management Act and established by the National Marine Fisheries Service; and

(C) Temporal and spacial distribution of fish and aquatic communities and any associated trends with respect to:

(1) Species and life stage composition;

(2) Standing crop;

(3) Age and growth data;

(4) Spawning run timing; and

(5) The extent and location of spawning, rearing, feeding, and wintering habitat.

(v) Wildlife and botanical resources. A description of the wildlife and botanical resources, including invasive species, in the project vicinity. Components of this description must include:

(A) Upland habitat(s) in the project vicinity, including the project's transmission line corridor or right-of-way and a listing of plant and animal species that use the habitat(s); and

(B) Temporal or spacial distribution of species considered important because of their commercial, recreational, or cultural value.

(vi) Wetlands, riparian, and littoral habitat. A description of the flood plain, wetlands, riparian habitats, and littoral in the project vicinity. Components of this description must include:

(A) A list of plant and animal species, including invasive species, that use the wetland, littoral, and riparian habitat;

(B) A map delineating the wetlands, riparian, and littoral habitat; and

(C) Estimates of acreage for each type of wetland, riparian, or littoral habitat, including variability in such availability as a function of storage at a project that is not operated in run-of-river mode.

(vii) Rare, threatened and endangered species. A description of any listed rare, threatened and endangered, candidate, or special status species that may be present in the project vicinity. Components of this description must include:

(A) A list of Federal- and state-listed, or proposed to be listed, threatened and endangered species known to be present in the project vicinity;

(B) Identification of habitat requirements;

(C) References to any known biological opinion, status reports, or recovery plan pertaining to a listed species;

(D) Extent and location of any federally-designated critical habitat, or other habitat for listed species in the project area; and

(E) Temporal and spatial distribution of the listed species within the project vicinity.

(viii) Recreation and land use. A description of the existing recreational and land uses and opportunities within the project boundary. The components of this description include:

(A) Text description illustrated by maps of existing recreational facilities, type of activity supported, location, capacity, ownership and management;

(B) Current recreational use of project lands and waters compared to facility or resource capacity;

(C) Existing shoreline buffer zones within the project boundary;

(D) Current and future recreation needs identified in current State Comprehensive Outdoor Recreation Plans, other applicable plans on file with the Commission, or other relevant local, state, or regional conservation and recreation plans;

(E) If the potential applicant is an existing licensee, its current shoreline management plan or policy, if any, with regard to permitting development of piers, boat docks and landings, bulkheads, and other shoreline facilities on project lands and waters;

(F) A discussion of whether the project is located within or adjacent to a:

(1) River segment that is designated as part of, or under study for inclusion in, the National Wild and Scenic River System; or

(2) State-protected river segment;

(G) Whether any project lands are under study for inclusion in the National Trails System or designated as, or under study for inclusion as, a Wilderness Area.

(H) Any regionally or nationally important recreation areas in the project vicinity;

(I) Non-recreational land use and management within the project boundary; and

(J) Recreational and non-recreational land use and management adjacent to the project boundary.

(ix) Aesthetic resources. A description of the visual characteristics of the lands and waters affected by the project. Components of this description include a description of the dam, natural water features, and other scenic attractions of the project and surrounding vicinity. Potential applicants are encouraged to supplement the text description with visual aids.

(x) Cultural resources. A description of the known cultural or historical resources of the proposed project and surrounding area. Components of this description include:

(A) Identification of any historic or archaeological site in the proposed project vicinity, with particular emphasis on sites or properties either listed in, or recommended by the State Historic Preservation Officer or Tribal Historic Preservation Officer for inclusion in, the National Register of Historic Places;

(B) Existing discovery measures, such as surveys, inventories, and limited subsurface testing work, for the purpose of locating, identifying, and assessing the significance of historic and archaeological resources that have been undertaken within or adjacent to the project boundary; and

(C) Identification of Indian tribes that may attach religious and cultural significance to historic properties within the project boundary or in the project vicinity; as well as available information on Indian traditional cultural and religious properties, whether on or off of any federally-recognized Indian reservation (A potential applicant must delete from any information made available under this section specific site or property locations, the disclosure of which would create a risk of harm, theft, or destruction of archaeological or Native American cultural resources or to the site at which the resources are located, or would violate any Federal law, including the Archaeological Resources Protection Act of 1979, 16 U.S.C. 470w-3, and the National Historic Preservation Act of 1966, 16 U.S.C. 470hh).

(xi) Socio-economic resources. A general description of socio-economic conditions in the vicinity of the project. Components of this description include general land use patterns (e.g., urban, agricultural, forested), population patterns, and sources of employment in the project vicinity.

(xii) Tribal resources. A description of Indian tribes, tribal lands, and interests that may be affected by the project Components of this description include:

(A) Identification of information on resources specified in paragraphs (d)(2)(ii)-(xi) of this section to the extent that existing project construction and operation affecting those resources may impact tribal cultural or economic interests, e.g., impacts of project-induced soil erosion on tribal cultural sites; and

(B) Identification of impacts on Indian tribes of existing project construction and operation that may affect tribal interests not necessarily associated with resources specified in paragraphs (d)(3)(ii)-(xi) of this Section, e.g., tribal fishing practices or agreements between the Indian tribe and other entities other than the potential applicant that have a connection to project construction and operation.

(xiii) River basin description. A general description of the river basin or sub-basin, as appropriate, in which the proposed project is located, including information on:

(A) The area of the river basin or sub-basin and length of stream reaches therein;

(B) Major land and water uses in the project area;

(C) All dams and diversion structures in the basin or sub-basin, regardless of function; and

(D) Tributary rivers and streams, the resources of which are or may be affected by project operations;

(4) Preliminary issues and studies list. Based on the resource description and impacts discussion required by paragraph (d)(3) of this section; the pre-application document must include with respect to each resource area identified above, a list of:

(i) Issues pertaining to the identified resources;

(ii) Potential studies or information gathering requirements associated with the identified issues;

(iii) Relevant qualifying Federal and state or tribal comprehensive waterway plans; and



(iv) Relevant resource management plans.

(5) Summary of contacts. An appendix summarizing contacts with Federal, state, and interstate resource agencies, Indian tribes, non-governmental organizations, or other members of the public made in connection with preparing the pre-application document sufficient to enable the Commission to determine if due diligence has been exercised in obtaining relevant information.

(e) If applicable, the applicant must also provide a statement of whether or not it will seek benefits under section 210 of the Public Utility Regulatory Policies Act of 1978 (PURPA) by satisfying the requirements for qualifying hydroelectric small power production facilities in Sec. 292.203 of this chapter. If benefits under section 210 of PURPA are sought, a statement of whether or not the applicant believes the project is located at a new dam or diversion (as that term is defined in Sec. 292.202(p) of this chapter), and a request for the agencies' view on that belief, if any.

**18 C.F.R. § 5.8(a), provides as follows:**

Sec. 5.8 Notice of commencement of proceeding and scoping document, or of approval to use traditional licensing process or alternative procedures.

(a) Notice. Within 60 days of the notification of intent required under Sec. 5.5, filing of the pre-application document pursuant to Sec. 5.6, and filing of any request to use the traditional licensing process or alternative procedures, the Commission will issue a notice of commencement of proceeding and scoping document or of approval of a request to use the traditional licensing process or alternative procedures.

**18 C.F.R. §§ 5.9(a)-(b), provides as follows:**

Sec. 5.9 Comments and information or study requests.

(a) Comments and study requests. Comments on the pre-application document and the Commission staff's Scoping Document 1 must be filed with the Commission within 60 days following the Commission's notice of consultation procedures issued pursuant to Sec. 5.8. Comments, including those by Commission staff, must be accompanied by any information gathering and study requests, and should include information and studies needed for consultation under section 7 of the Endangered Species Act and water quality certification under Section 401 of the Clean Water Act.

(b) Content of study request. Any information or study request must:

(1) Describe the goals and objectives of each study proposal and the information to be obtained;

(2) If applicable, explain the relevant resource management goals of the agencies or Indian tribes with jurisdiction over the resource to be studied;

(3) If the requester is not a resource agency, explain any relevant public interest considerations in regard to the proposed study;

(4) Describe existing information concerning the subject of the study proposal, and the need for additional information;

(5) Explain any nexus between project operations and effects (direct, indirect, and/or cumulative) on the resource to be studied, and how the study results would inform the development of license requirements;

(6) Explain how any proposed study methodology (including any preferred data collection and analysis techniques, or objectively quantified information, and a schedule including appropriate field season(s) and the duration) is consistent with generally accepted practice in the scientific community or, as appropriate, considers relevant tribal values and knowledge; and

(7) Describe considerations of level of effort and cost, as applicable, and why any proposed alternative studies would not be sufficient to meet the stated information needs.

(c) Applicant seeking PURPA benefits; estimate of fees. If a potential applicant has stated that it intends to seek PURPA benefits, comments on the pre-application document by a fish and wildlife agency must provide the potential applicant with a reasonable estimate of the total costs the agency anticipates it will incur in order to set mandatory terms and conditions for the proposed project. An agency may provide a potential applicant with an updated estimate as it deems necessary. If any agency believes that its most recent estimate will be exceeded by more than 25 percent, it must supply the potential applicant with a new estimate and submit a copy to the Commission.

**18 C.F.R. § 5.11, provides as follows:**

Sec. 5.11 Potential Applicant's proposed study plan and study plan meetings.

(a) Within 45 days following the deadline for filing of comments on the pre-application document, including information and study requests, the potential applicant must file with the Commission a proposed study plan.

(b) The potential applicant's proposed study plan must include with respect to each proposed study:

(1) A detailed description of the study and the methodology to be used;

(2) A schedule for conducting the study;

(3) Provisions for periodic progress reports, including the manner and extent to which information will be shared; and sufficient time for technical review of the analysis and results; and

(4) If the potential applicant does not adopt a requested study, an explanation of why the request was not adopted, with reference to the criteria set forth in Sec. 5.9(b).

(c) The potential applicant's proposed study plan must also include provisions for the initial and updated study reports and meetings provided for in Sec. 5.15.

(d) The applicant's proposed study plan must:

(1) Describe the goals and objectives of each study proposal and the information to be obtained;

(2) Address any known resource management goals of the agencies or Indian tribes with jurisdiction over the resource to be studied;

(3) Describe existing information concerning the subject of the study proposal, and the need for additional information;

(4) Explain any nexus between project operations and effects (direct, indirect, and/or cumulative) on the resource to be studied;

(5) Explain how any proposed study methodology (including any preferred data collection and analysis techniques, or objectively quantified information, and a schedule including appropriate f

field season(s) and the duration) is consistent with generally accepted practice in the scientific community or, as appropriate, considers any known tribal interests;

(6) Describe considerations of level of effort and cost, as applicable.

(e) The potential applicant's proposed study plan must be accompanied by a proposal for conducting a study plan meeting or meetings during the 90-day period provided for in Sec. 5.12 for the purpose of clarifying the potential applicant's proposed study plan and any initial information gathering or study requests, and to resolve any outstanding issues with respect to the proposed study plan. The initial study plan meeting must be held no later than 30 days after the deadline date for filing of the potential applicant's proposed study plan.

**18 C.F.R. § 5.12, provides as follows:**

Sec. 5.12 Comments on proposed study plan.

Comments on the potential applicant's proposed study plan, including any revised information or study requests, must be filed within 90 days after the proposed study plan is filed. This filing must also include an explanation of any study plan concerns and any accommodations reached with the potential applicant regarding those concerns. Any proposed modifications to the potential applicant's proposed study plan must address the criteria in Sec. 5.9(b).

**18 C.F.R. § 5.13, provides as follows:**

Sec. 5.13 Revised study plan and study plan determination.

(a) Within 30 days following the deadline for filing comments on the potential applicant's proposed study plan, as provided for in Sec. 5.12, the potential applicant must file a revised study plan for Commission approval. The revised study plan shall include the comments on the proposed study plan and a description of the efforts made to resolve differences over study requests. If the potential applicant does not adopt a requested study, it must explain why the request was not adopted, with reference to the criteria set forth in Sec. 5.9(b).

(b) Within 15 days following filing of the potential applicant's revised study plan, participants may file comments thereon.

(c) Within 30 days following the date the potential applicant files its revised study plan, the Director of Energy Projects will issue a Study Plan Determination with regard to the potential applicant's study plan, including any modifications determined to be necessary in light of the record.

(d) If no notice of study dispute is filed pursuant to Sec. 5.14 within 20 days of the Study Plan Determination, the study plan as approved in the Study Plan Determination shall be deemed to be approved and the potential applicant shall proceed with the approved studies. If a potential applicant fails to obtain or conduct a study as required by Study Plan Determination, its license application may be considered deficient.



**18 C.F.R. § 5.15, provides as follows:**

Sec. 5.15 Conduct of studies.

(a) Implementation. The potential applicant must gather information and conduct studies as provided for in the approved study plan and schedule.

(b) Progress reports. The potential applicant must prepare and provide to the participants the progress reports provided for in Sec. 5.11(b)(3). Upon request of any participant, the potential applicant will provide documentation of study results.

(c) Initial study report.

(1) Pursuant to the Commission-approved study plan and schedule provided for in Sec. 5.13 or no later than one year after Commission approval of the study plan, whichever comes first, the potential applicant must prepare and file with the Commission an initial study report describing its overall progress in implementing the study plan and schedule and the data collected, including an explanation of any variance from the study plan and schedule. The report must also include any modifications to ongoing studies or new studies proposed by the potential applicant.

(2) Within 15 days following the filing of the initial study report, the potential applicant shall hold a meeting with the participants and Commission staff to discuss the study results and the potential applicant's and or other participant's proposals, if any, to modify the study plan in light of the progress of the study plan and data collected.

(3) Within 15 days following the meeting provided for in paragraph (c)(2) of this section, the potential applicant shall file a meeting summary, including any modifications to ongoing studies or new studies proposed by the potential applicant.

(4) Any participant or the Commission staff may file a disagreement concerning the applicant's meeting summary within 30 days, setting forth the basis for the disagreement. This filing must also include any modifications to ongoing studies or new studies proposed by the Commission staff or other participant.

(5) Responses to any filings made pursuant to paragraph (c)(4) of this section must be filed within 30 days.

(6) No later than 30 days following the due date for responses provided for in paragraph (c)(5) of this section, the Director will resolve the disagreement and amend the approved study plan as appropriate.

(7) If no participant or the Commission staff files a disagreement concerning the potential applicant's meeting summary and request to amend the approved study plan within 30 days, any proposed amendment shall be deemed to be approved.

(d) Criteria for modification of approved study. Any proposal to modify an ongoing study pursuant to paragraphs (c)(1)-(4) of this section must be accompanied by a showing of good cause why the proposal should be approved, and must include, as appropriate to the facts of the case, a demonstration that:

(1) Approved studies were not conducted as provided for in the approved study plan; or

(2) The study was conducted under anomalous environmental conditions or that environmental conditions have changed in a material way.

(e) Criteria for new study. Any proposal for new information gathering or studies pursuant to paragraphs (c)(1)-(4) of this section must be accompanied by a showing of good cause why the proposal should be approved, and must include, as appropriate to the facts of the case, a statement explaining:

(1) Any material changes in the law or regulations applicable to the information request;

(2) Why the goals and objectives of any approved study could not be met with the approved study methodology;

(3) Why the request was not made earlier;

(4) Significant changes in the project proposal or that significant new information material to the study objectives has become available; and

(5) Why the new study request satisfies the study criteria in Sec. 5.9(b).

(f) Updated study report. Pursuant to the Commission-approved study plan and schedule provided for in Sec. 5.13, or no later than two years after Commission approval of the study plan and schedule, whichever comes first, the potential applicant shall prepare and file with the Commission an updated study report describing its overall progress in implementing the study plan and schedule and the data collected, including an explanation of any variance from the study plan and schedule. The report must also include any modifications to ongoing studies or new studies proposed by the potential applicant. The review, comment, and disagreement resolution provisions of paragraphs (c)(2)-(7) of this section shall apply to the updated study report. Any proposal to modify an ongoing study must be accompanied by a showing of good cause why the proposal should be approved as set forth in paragraph (d) of this section. Any proposal for new

information gathering or studies is subject to paragraph (e) of this section except that the proponent must demonstrate extraordinary circumstances warranting approval. The applicant must promptly proceed to complete any remaining undisputed information-gathering or studies under its proposed amendments to the study plan, if any, and must proceed to complete any information-gathering or studies that are the subject of a disagreement upon the Director's resolution of the disagreement.

**18 C.F.R. § 5.20, provides as follows:**

Sec. 5.20 Deficient applications.

(a) Deficient applications.

(1) If an applicant believes that its application conforms adequately to the pre-filing consultation and filing requirements of this part without containing certain required materials or information, it must explain in detail why the material or information is not being submitted and what steps were taken by the applicant to provide the material or information.

(2) Within 30 days of the filing date of any application for a license under this part, the Director of the Office of Energy Projects will notify the applicant if, in the Director's judgment, the application does not conform to the pre-filing consultation and filing requirements of this part, and is therefore considered deficient. An applicant having a deficient application will be afforded additional time to correct the deficiencies, not to exceed 90 days from the date of notification. Notification will be by letter or, in the case of minor deficiencies, by telephone. Any notification will specify the deficiencies to be corrected. Deficiencies must be corrected by submitting a filing pursuant to the requirements of subpart T of part 385 of this chapter within the time specified in the notification of deficiency.

(3) If the revised application is found not to conform to the pre-filing consultation and filing requirements of this part, or if the revisions are not timely submitted, the revised application will be rejected. Procedures for rejected applications are specified in paragraph (b)(3) of this section.

(b) Patently deficient applications.

(1) If, within 30 days of its filing date, the Director of the Office of Energy Projects determines that an application patently fails to substantially comply with the pre-filing consultation and filing requirements of this part, or is for a project that is precluded by law, the application will be rejected as patently deficient with the specification of the deficiencies that render the application patently deficient.

(2) If, after 30 days following its filing date, the Director of the Office of Energy Projects determines that an application patently fails to comply with the pre-filing consultation and filing requirements of this part, or is for a project that is precluded by law:

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

(ii) The application will be considered deficient under paragraph (a)(2) of this Section, if the Commission determines that it is not patently deficient.

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

**18 C.F.R. § 5.31, provides as follows:**

Sec. 5.31 Transition provision.

This part shall apply to license applications for which the deadline for filing a notification of intent to seek a new or subsequent license, or for filing a notification of intent to file an original license application, as required by Sec. 5.5 of this part, is July 23, 2005 or later.

*Fishermen Interested in Safe  
Hydrokinetics, et al. v. FERC*  
9th Cir. No. 09-72920

FERC Docket No. P-13053

**CERTIFICATE OF SERVICE**

I hereby certify that I have, this 19th day of March 2010, electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that a participant in the case is not a registered CM/ECF user. I have mailed the foregoing document by First-Class Mail, postage prepaid, to the following non-CM/ECF participant:

Robert L. Gulley  
106A Ruelle Lane  
San Antonio, TX 78209

/s/ Holly E. Cafer  
Holly E. Cafer  
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