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Lawrence J. Wolfe

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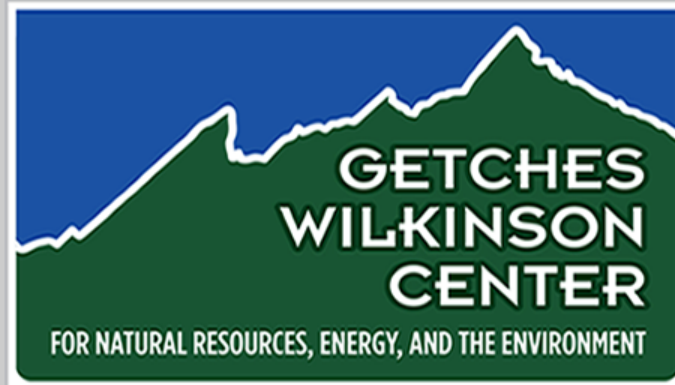
Wolfe, Lawrence J., "FERC, PURPA and the Federal Power Act" (1984). *The Federal Impact on State Water Rights (Summer Conference, June 11-13)*.

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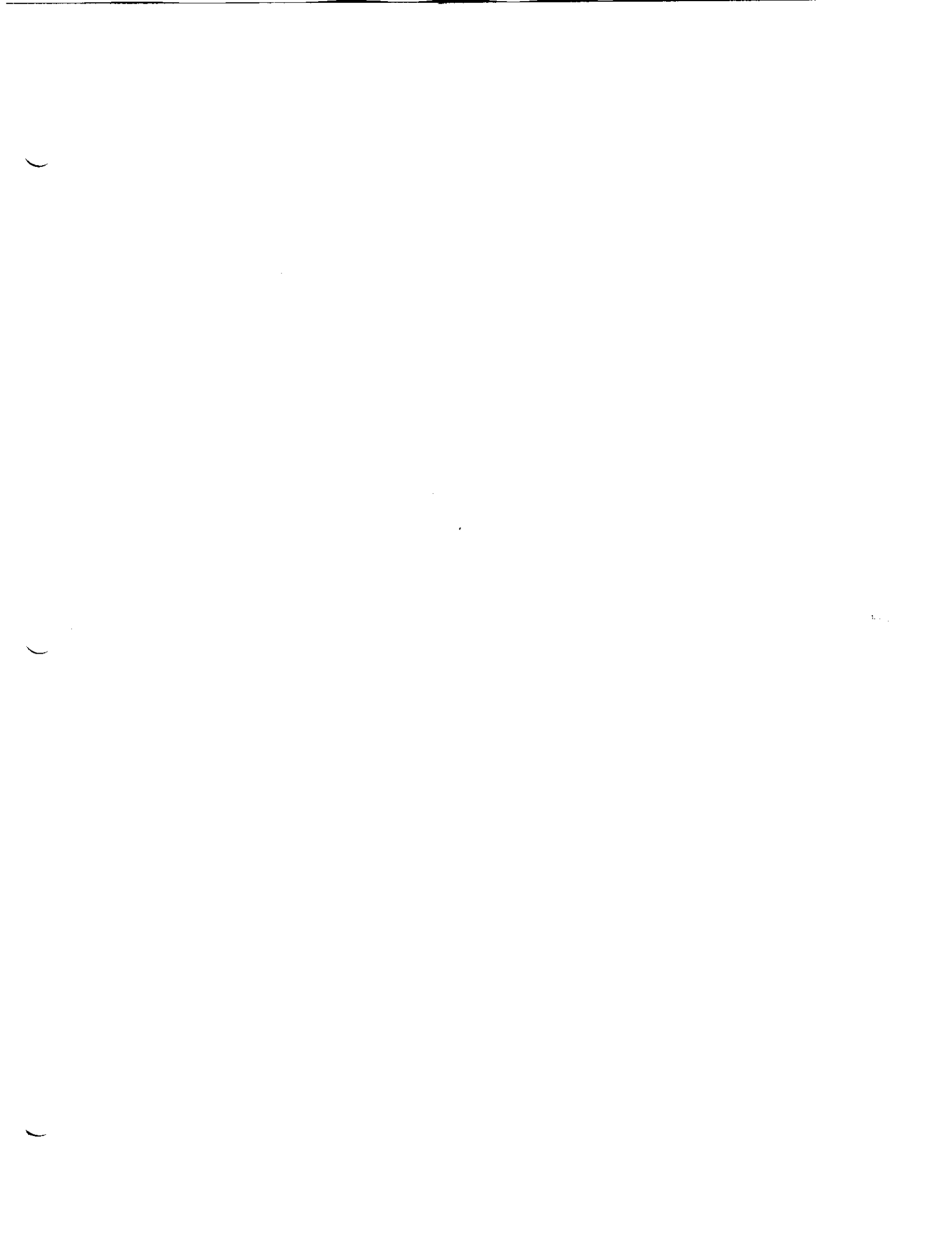
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FERC, PURPA and the FEDERAL POWER ACT

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THE FEDERAL IMPACT
ON STATE WATER RIGHTS

A short course sponsored by the
Natural Resources Law Center
University of Colorado School of Law
June 11-13, 1984



I. INTRODUCTION

A. There is a historic tension between western water law and the broad preemptive authority given the federal government by the Federal Power Act (FPA) to control the development of hydroelectric power. The increased interest in hydropower in the last five years has caused even greater stress on western water laws as hydropower developers have scrambled for the economic benefits supposedly available from new hydropower projects.

B. Reference Sources

1. General sources on the Federal Power Act.

- a. 4 Clark (Ed.) Waters and Water Rights, Secs. 330-337 (1970).
- b. Kerwin, Federal Water-Power Legislation (1926).
- c. Pinchot "The Long Struggle for Effective Federal Water Power Legislation," 14 Geo. Wash. L. Rev. 9 (1941).

2. Specific articles on hydropower.

- a. Wolfe, "Hydropower: FERC Licensing and

Emerging State-Federal Water Rights Conflicts", 29 Rocky Mt. Min. L. Inst. 851 (1984).

- b. Burke, "Small Scale Hydroelectric Development and Federal Environmental Law: A Guide for the Private Developer," 9 B.C. Env'tl. Aff. L. Rev. 815 (1981).
 - c. "Hydroelectric Power in New England -- Symposium," 5 Vt. L. Rev. 185 (1980).
 - d. Comment, "Regulation of Hydro-Electric Development: State v. Federal Control," 2 Pub. Land L. Rev. 109(1981).
 - e. Arnold, "Emerging Possibilities for State Control of Hydroelectric Development," 13 Env'tl. L. Rep. 10135(May 1983).
3. Statutes and Regulations

- a. The Federal Power Act (FPA), 49 Stat. 838 (1935), 16 U.S.C. Secs. 791(a)-828 ((1976) & Supp. V 1981), incorporated the Federal Water Power Act of 1920, 41 Stat. 1063(1920). Until 1977, the FPA was administered by the Federal Power Commis-

sion (FPC), when the name was changed to the Federal Energy Regulatory Commission (FERC). Pub. L. No. 95-91, 91 Stat. 565 (1977).

b. 18 C.F.R. Subchapter B, Part 4(1982) contains the major regulations dealing with hydropower licensing and exemptions. These regulations are in the process of being substantially revised. 49 Fed. Reg. 8009 (March 5, 1984).

c. FERC Blue Book (FERC-0100) entitled "Application Procedures for Hydropower Licenses, Exemptions and Preliminary Permits" (Sept. 1982). This book contains all the regulations, sample forms and state and federal contact agencies.

II. INCREASED HYDROPOWER DEVELOPMENT: REASONS

A. The oil crisis of the 1970's and the resultant almost 700% increase in the cost of imported oil sparked the search for alternative domestic sources of energy.

B. Congress enacted several laws to provide economic

incentives to develop small hydro projects and to ease the burden of the licensing process.

1. Public Utilities Regulatory Act of 1978 (PURPA), Pub. L. No. 95-617, 92 Stat 3117(1978), 16 U.S.C. Secs. 2601-2645. PURPA required utilities to purchase power from small power production facilities at a premium rate. See, 16 U.S.C. Sec. 824-3(a) and (d); 16 U.S.C. Sec. 796(17) (definition of small power production facility). The FERC regulations requiring utilities to pay "full avoided cost" and to interconnect with small power producers were upheld in American Paper Inst. Inc. v. American Electrical Power Service Corp., 103 S.Ct. 1921(1983).
2. PURPA also included an exemption for conduit hydro facilities under 15 MW (Sec. 213, 16 U.S.C. Sec. 823(a)-(d)), and provided loans for small hydro feasibility studies and project costs (Secs. 402 and 403, 16 U.S.C. Secs. 2702-2703).
3. Energy Security Act of 1980, Pub. L. No. 94 Stat, 96-294 Stat. 611. FERC is allowed to

exempt certain small hydroelectric projects of five MW or less from all of Part 1 of the FPA. See, 18 C.F.R. Secs. 4.102-4.113. (1982) and 49 Fed. Reg. 8009 (March 5, 1984).

4. Crude Oil Windfall Profits Tax Act of 1980, Pub. L. No. 96-223, 94 Stat. 229; see, 26 U.S.C. Sec. 46(a)(2)(C); 26 U.S.C. Sec. 48(1)(13)), enacted an 11% energy tax credit for hydroelectric generating property in addition to the existing 10% investment tax credit.

C. Result: Applications to FERC for preliminary permits increased from 76 in FY 1979 to 940 in FY 1982 (Applications for exemptions in FY 1982 totaled 475). In the State of Washington alone there are over 500 hydro projects in various states of planning.

III. CONFLICTS BETWEEN STATE AND FEDERAL LAW -- HISTORY

A. Appropriations System

1. Hydropower generation has always been an integral part of the appropriations system in the western states. Conflicts between western

water law and hydropower development have arisen because of the dual licensing authority of the state and federal governments. The increased interest in hydropower development comes at a time when western states are increasingly sensitive about the impact of Federal laws on the power of the states to control water development. The 1978 decision in California v. United States, (438 U.S. 645 (1978)) has given the states optimism that perhaps the federal preemption is not as pervasive as it may appear.

B. Preemption by the Federal Power Act:

1. History of FPA, 16 U.S.C. Sec. 791, et seq.

a. Basically an economic development statute that arose out of the need for a strong national water policy. In addition, the statute has a significant conservation aspect. See, FPC v. Union Electric Co., 381 U.S. 90 (1965); see generally, 4 Clark (Ed), Water and Water Rights, Sec. 330 (1970). For a recent opinion discussing the environmental aspects of FERC

licensing, see Friends of the River v. FERC, 720 F.2d 93 (D.C. Cir. 1983).

b. The jurisdiction of FERC is very broad. See, 16 U.S.C. Sec. 817 (appendix); U.S. v. Appalachian Electric Power Co., 311 U.S. 377 (1940). See also, FPC v. Union Electric Co., 381 U.S. 956 (1965), holding that the FPA involves the full exercise of Congress' Commerce Clause powers.

2. FPA includes sections intended to protect state water rights.

a. Section 27 (16 U.S.C. Sec. 821) - Savings Clause:

"Nothing herein contained shall be construed as affecting or intending to affect or in any way to interfere with the laws of the respective states relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses, or any vested rights acquired therein."

b. Section 9(b) (16 U.S.C. Sec. 802) - Information Clause:

"Each applicant for a license

hereunder shall submit to the Commission - (b) satisfactory evidence that the applicant has complied with the requirements of the laws of the state or states within which the proposed project is to be located with respect to bed and banks and to the appropriation, diversion, and use of water for power purposes and with respect to the right to engage in the business of developing, transmitting, and distributing power, and in any other business necessary to effect the purposes of a license under this act.

3. First Iowa and progeny have narrowly interpreted Sections 27 and 9(b).

a. For a history of the FPA as it relates to state water rights, see, Seifert, "Regulation of Hydro-Electric Development: State v. Federal Control", 2 Pub. Land L. Rev. 109 (1981).

b. First Iowa Hydro-Electric Coop. v. FPC, 328 U.S. 152 (1946). This case arose when the Cooperative sought a license from the FPC to build a dam and power plant. Iowa statutes required a state permit prior to construction of the dam. The FPC dismissed the application holding

that the Cooperative had not shown satisfactory compliance with Iowa law as required by Section 9(b). The Court of Appeals affirmed. The Supreme Court reversed and held:

(i) Section 27 (16 U.S.C. Section 821) does not allow veto by State or dual permit system. Merely established that compensation is required,

(ii) Section 9(b) (16 U.S.C. Section 802) requires only such compliance with state law as FERC shall determine necessary.

c. Cases following First Iowa - near total preemption of state laws that directly conflict with FERC jurisdiction: FPC v. Oregon, 349 U.S. 435 (1955); FPC v. Niagara Mohawk Power Corp., 347 U.S. 239 (1954); City of Tacoma v. Taxpayers of Tacoma, 357 U.S. 320 (1958); State v.

Idaho Power Co., 312 P.2d 583 (1957).

C. Federal Preemption - Current Status

1. State laws relating to appropriation and use of water that require a state license as a predicate to building a project are preempted by the FPA. Idaho Power Co. v. State, 661 P.2d 741 (Id. 1983).
2. State laws that are preempted include state land use laws and state utility laws. Town of Springfield, Vt. v. State of Vermont Env'tl Bd., 521 F. Supp. 243 (D. Vt. 1981); Town of Springfield Vt. v. McCarren, 549 F. Supp. 1134 (D. Vt. 1982), aff'd by order, 772 F.2d 728 (2nd Cir. 1983), cert. denied, 104 S. Ct. 360 (1983); Bd. of Elec. Light Com'rs., etc v. McCarren, 563 F.Supp. 374 (D.Vt. 1982), aff'd. 725 F.2d 176 (1983).
3. States retain significant control over some environmental decisions. E.G., 18 C.F.R. Secs. 4.94(b) and 4.107(e)(1982).
4. State laws that are "compatible" with the FPA are preserved. California v.

Oroville-Wyandotte Irrigation Dist., 411 F. Supp 361 (E.D. Cal. 1975), aff'd. 536 F.2d 304 (9th Cir 1976), cert. denied, 425 U.S. 922 (1976).

5. FERCs position is that an applicant does not need a state water right prior to filing for a license, and a license can be issued with a condition allowing the licensee time to acquire all state water rights. See Sunnyside Valley Irrigation Dist., Project No. 3257-000, 21 FERC Para. 61,308 (Dec. 17, 1982).

IV. FERC JURISDICTION AND PROCEDURE

A. Jurisdiction - The basic jurisdictional statement is found in Section 23(b) of the FPA, 16 U.S.C. 817. (see appendix). A license is required if the water power project:

1. Is located on navigable waters of the United States;
2. Occupies any part of the federal lands or reservations of the United States;
3. Uses the surplus water or water power from a government dam; or

4. If constructed after August 26, 1935 is located on any part of a non-navigable water subject to Congress' jurisdiction under the commerce clause and affect the interests of interstate or foreign commerce.

B. Main Categories of FERC Licenses:

1. Minor projects and major projects, 5MW or less. 18 C.F.R. Sec. 4.60 (1982) and 49 Fed. Reg. 8009 (March 5, 1984).

2. Major projects at existing dams - installed capacity greater than 5.0 MW. 18 C.F.R. Sec. 4.50 (1982) and 49 Fed. Reg. 8009 (March 5, 1984).

3. Major unconstructed projects - installed capacity over 5 MW. 18 C.F.R. Sec. 4.40 (1982) and 49 Fed. Reg. 8009 (March 5, 1982).

C. Preliminary Permits - Section 4(f) (16 U.S.C. Sec. 797(f) authorizes the commission to issue preliminary permits to secure data. See 18 C.F.R. Sec. 4.80 (1982). The main advantage of a preliminary permit is that it grants a priority to the applicant and almost assures that the applicant, if it

desires, will secure the license. Also municipalities and states can get a preference for receiving a permit and license. 16 U.S.C. Sec. 800. See 18 C.F.R. 4.33 (1982) and 49 Fed. Reg. 8009 (March 5, 1984).

D. Exemptions - estimates are that 20% to as much as 70% of developable small hydro falls into one of exemptions.

1. Section 213 of PURPA, allows small conduit hydroelectric facilities to be exempted from all or part of Part I of FPA. 16 U.S.C. Sec. 823a(a)-(d), 18 C.F.R. Secs. 4.90-4.94 (1982) and 49 Fed. Reg. 8009, 8030 (March 5, 1984).
2. Exemption for certain small projects of 5MW or less. 16 U.S.C. Sec. 2705(d); 18 C.F.R. Secs. 4.101-4.108, and 4.30-4.39 (1982), 49 Fed. Reg. 8009, 8032 (March 5, 1984). See, Hirschey v. FERC, 701 F.2d 215 (D.C.Cir. 1983) where the Court of Appeals reversed FERC's action vacating the issuance of an exemption.

V. EMERGING PROBLEMS

A. Priority of the application and conflict with state statutes.

1. Grant of a preliminary permit establishes priority for receiving a FERC license. The permit can be granted whether or not an applicant can obtain a state water right or other permits. 16 U.S.C. Sec. 798. 18 C.F.R. Sec. 4.30-4.35 (1982). FERC has held that existence of state water rights, per se, are not a dispositive factor at the preliminary permit stage. Cal. Dept. of Water Resources, 19 FERC Para. 61,098 (Feb. 10, 1982).
2. Conflict with state statutes. Idaho "Dietrich Drop" project where FERC granted a permit to an applicant who was not entitled to the statutory preference under Idaho law. Idaho Renewable Natural Resources, Inc. et al., 19 FERC Para. 62,335 (May 25, 1982). Idaho intervened unsuccessfully, to argue the state water law issues. 20 FERC Para. 62,118 (July 9, 1982). See also, 20 FERC Para. 61,230 (August 30, 1982).
3. Oregon (Ore. Res. Stat. Secs. 543.010-543.820

(1979)) has a comprehensive hydropower licensing statute. A state requirement that directly conflicted with a Federal license would be preempted. FPC v. Oregon, 349 U.S. 432 (1955).

4. Conflicts with other state statutes. A state might use its general public interest criteria, that must be considered when granting a water right, to deny or condition a hydropower application that it found not to be in the public interest. E.G. Wyo. Const. Art VIII, Sec. 3.

B. Imposition of Minimum Flows: By-Pass Requirements.

1. The most important issue in most hydroprojects is the impact on fish and wildlife resources, and the minimum flows that must be maintained to avoid adverse impact. Determination of flows can be very time consuming and expensive. See Philadelphia Electric Power Comp., et al., Docket No. EL 80-38-001, 26 FERC Para. 63,111 (March 30, 1984). See, 18 C.F.R. Sec. 4.94(b) and 4.107(e) (1982).
2. In granting an exemption FERC is required to

include any terms and conditions that the Fish and Wildlife Service and the State Agency determine are appropriate. Sec. 30(c) of the FPA (16 U.S.C. Sec. 823a(c)) was added by Sec. 213 of PURPA, 92 Stat. 3177, 3148-49. See Olympus Energy Corp., Project No. 6617-000, 26 FERC. Para. 61,407 (March 29, 1984) (granting exemption); (see appendix); Douglas Water Power Comp., Project No. 7172-000, 26 FERC Para. 61,409 (March 29, 1984) (Denying exemption because federal and state agencies believed that there were no terms and conditions that would adequately protect the fishery resource).

3. Montana Vermillion Creek Project. FERC imposed a 75 cfs. minimum flow despite Montana laws that require minimum stream flows to be set by state law.

C. Foreclosure of Upstream uses:

1. FERC will grant a power right without consideration for downstream needs for irrigation. This may directly conflict with state statutes such as Wyo. Stat. Sec. 41-3-102 which gives

a preferred right to irrigation over hydropower.

2. But, FERC can approve a subordination of the FERC power license to allow upstream depletions. See, Idaho Power Comp. v. Idaho, et al., 661 P.2d 741 (Id. 1983).

D. FERC May Not Examine Cumulative Impacts:

1. In several western states there may be as many as 20 to 30 projects on a single drainage basin. FERC's case-by-case examination does not generally take into account the cumulative effects of these projects. However, FERC has recently become involved in several basin wide cumulative environmental assesments, for instance in the Salmon River in Idaho. See F.O. Gotzinger, Project No. 5965-000, 20 FERC Para. 62,022 (July 6, 1982). (FERC carries the Salmon River controversy under this Project No.) FERC has recently said that where a "number of proposed projects are clustered in one geographical area, we intend to take a hard look at the potential cumulative impacts of these projects." City of Seattle, Wash.,

Project No. 2959-002, 26 FERC Para. 61,406 at p. 61,909 n. 4 (March 29, 1984).

2. In Washington, the State has requested FERC to stay consideration of FERC applications pending completion of state adjudications and environmental studies, for example in the Yakima River Basin, and Snohomish River Basin. See, City of Seattle, Wash., supra.

VI. POSSIBLE SOLUTIONS (Non-Litigation)

A. Encourage FERC to Decline Jurisdiction - Not Likely:

1. Public Service Co. of New Mexico, FERC Docket No. E1 79-18 (March 21, 1980). FERC decided that a project on a stream (arroyo) was not intended to be covered by the FPA. See, Debovoise, "The Role of the Federal Energy Regulatory Commission in Licensing Small Hydroelectric Projects," 5 Vt. L. Rev., 283 (1980).
2. Argue that the impact on interstate commerce is minimal. City of Centralia, Wash. v. FERC, 661 F.2d 787 (9th Cir. 1981).

B. Change the FPA to Accommodate State Interests:

1. Western States Water Council proposed amendments.

a. Amend Section 9(b) to require a state water right before issuance of a preliminary permit.

b. Amend Section 27 to make appropriation of water for hydropower subject to state substantive and procedural provisions. Also, eliminate the commerce clause argument if the state wanted to bar or severely limit a hydropower appropriation.

c. Add a paragraph to Section 6 (16 U.S.C. Section 799) to limit FERC to the establishment of conditions which are not inconsistent with state-imposed conditions.

2. Increase the exemptions and change the rules to give states greater authority to control hydropower development.

C. Redefine the powers of FERC over non-navigable

streams and/or limit the reach of the Commerce Clause. See, Sierra Pacific Power Comp. v. FERC, 681 F.2d 1134, cert. denied, sub. nom Pyramid Lake Paiute Tribe of Indians v. FERC, 103 S. Ct. 1769 (1983). In this case the Ninth Circuit held that Truckee river was not to be considered navigable because it lacked a navigable interstate connection. The decision is wrong and FERC has ignored it. See, Cook Electric Co., 22 FERC Para. 61,311, at 61,540 n.2 (March 17, 1983).

D. Administrative - Several of the states (e.g. Montana) have been working with FERC to develop a joint strategy, in which the states offer FERC savings in time and manpower.

E. Comprehensive Plans.

1. The state of Maine has enacted a comprehensive plan that identifies those rivers that have the highest public values for boating, fishing and natural resources, and it included a Governor's executive order that prohibited future development of hydropower on certain rivers. See, Arnold, "Emerging possibilities for State Control of Hydroelectric Development," 13

Envtl. L. Rep. 10135 (May 1983)

2. The Pacific Northwest Electric Power Planning Act, 16 U.S.C. Secs. 839 et seq. requires a coordinated approach to analyzing the impact of hydropower development on fish and wildlife resources. The Northwestern Power Planning Council has published its plan (April 27, 1983) that incorporates fish and wildlife plans for the Columbia River drainage, and requires consolidated review of all proposals for hydroelectric development in a river basin, and requires assesment of the cumulative effects of hydroelectric development on fish and wildlife. Lester Kelly, et. al. Project No. 6245-002, 27 FERC Para. 61,051 (April 6, 1984). (See Appendix).

VII. LITIGATION -- RETHINK FIRST IOWA IN LIGHT OF

CALIFORNIA V. UNITED STATES AND RECENT PREEMPTION DECISIONS.

- A. The Burger Court's approach to preemption cases reflects "a flexible conception of federal - state relations rather than one of absolute supremacy." Note, "The Preemption Doctrine: Shifting Perspectives on Federalism and the Burger Court,"

75 Colum. L. Rev. 623, 641 (1975); See, Silkwood v. Kerr-McGee, 104 S.Ct. 615 (1984); Pacific Gas and Electric Comp. v. State Energy Resources Conservation & Development Comm., 75 L. Ed.2d 752 (1983). Pacific Gas & Electric upheld state regulation of the nuclear power industry and showed great deference to state law. However, the final footnote in the majority opinion discussed First Iowa and indicated that a preemption analysis might still apply to supersede state laws that affect the construction and operation of federally approved hydropower plants. 75 L.Ed.2d 752, 777 n. 34 (1983).

B. The Supreme Court in California v. United States, 438 U.S. 645 (1978); on remand, 694 F.2d 1171 (9th Cir 1982), interpreted Section 8 of the Reclamation Act (43 USC Sec. 383), which is very similar to Section 27 of the FPA, to permit states to condition the granting of a water right permit for a federal project. Question that arises is whether the Supreme Court could be convinced to take a fresh look at Sections 27 and 9(b) of the FPA.

C. In Town of Springfield Vt. v. State Environmental Board, 521 F.Supp 243 (D Vt. 1981), Vermont tried to use California v. U.S. to argue that a

hydroproject had to obtain a state land use permit. District Court rejected the argument by holding that the land use authority was not within the narrow field reserved to the states by Section 27 of the FPA. The Court said that Section 27 only protected from preemption state laws that are directly related to control, appropriation, use or distribution of water.

- D. Idaho Supreme Court recently held that neither the FPA nor a license issued under the FPA had overridden Idaho's laws of abandonment and forfeiture of water rights, citing California v. U.S. and Section 27. Idaho Power Co., v. State of Idaho, 661 P.2d 741 (Id. 1983).

VIII. CONCLUSION

- A. For those projects that have only minimal impact on interstate commerce and where the impacts are very localized, the states should have greater regulatory authority.

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Unit packaging is packaging in which each dosage unit, e.g., a tablet or a capsule, is individually packaged in such a way as to protect the integrity of the product. A unit package may or may not be attached to other individual unit packages or packaged in an outer carton. The most common types of unit packaging used for physicians' samples are blister packaging or strip packaging.

The protocol for determining the child-resistance of special packaging (16 CFR 1700.20) contains special provisions for defining a package failure for unit packaging. For containers other than unit packaging, a failure occurs when any child opens the special packaging or gains access to its contents during the test. In the case of unit packaging, however, a test failure occurs when any child opens or gains access to the number of individual units which constitute the amount that may produce serious personal injury or serious illness to a 25-pound child, or to more than 8 individual units, whichever number is lower.

The Commission staff estimates that over 75% of physicians' samples are packaged in unit packaging and that most if not all of this unit packaging would contain not more than 8 individual units. The Commission's staff also believes that the majority of products distributed as physicians' samples would be of a low enough toxicity that more than 8 units would be required to cause serious injury or illness to a 25-pound child. Therefore, it seems likely that the majority of physicians' samples already comply.

After considering the comments and other available information, the Commission concluded that issuance of the proposed policy at this time is not appropriate because information currently available does not establish that there is a significant risk to young children as a result of present packaging practices for physicians' samples. Furthermore, the Commission lacks data on the costs and benefits of the proposed policy change. Since the Commission lacks data showing that the proposed policy change is needed, the Commission has decided to withdraw the proposal.¹ If information becomes available in the future showing risks to young children associated with physicians dispensing samples without child-resistant packaging, the Commission at that time could propose

¹ The withdrawal notice was approved by Chairman Nancy Harvey Steorts and Commissioners Stuart M. Statler and Terrence M. Scanlon. Commissioner Sandra B. Armstrong, who was not a member of the Commission when this matter was previously considered, abstained from voting on it.

an appropriate policy change based on the new information.

The Commission would also like to point out that, regardless of the type of packaging supplied to the practitioner by the sample manufacturer, the PPPA establishes that a dispensing practitioner is responsible for placing drugs they supply to consumers in child-resistant packaging unless the practitioner decides that child-resistant packaging is not appropriate in a particular case. The Commission believes that the purpose of 15 U.S.C. 1473(b), which allows medical practitioners to order that prescribed substances subject to PPPA requirements be dispensed in noncomplying packaging, is to allow practitioners to see that persons, such as the elderly and handicapped, who cannot use substances in complying packaging, can have these substances in non-complying packaging.

Conclusion

Therefore, for the reasons explained above, the Commission withdraws the proposal of March 23, 1978 (43 FR 12029) to issue a new § 1701.2 in title 16 of the CFR.

List of Subjects in 16 CFR Part 1701

Consumer protection, Hazardous materials, Infants and children, Packaging and containers, Poison prevention, and Prescription drugs.

Dated: February 28, 1984.

Sadye E. Dunn,
Secretary, Consumer Product Safety
Commission.

[FR Doc. 84-5772 Filed 3-2-84; 9:45 am]

BILLING CODE 6355-01-M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

18 CFR Parts 4 and 12

[Docket No. RM83-56-000]

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

Issued: February 24, 1984.

AGENCY: Federal Energy Regulatory
Commission, DOE.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Federal Energy Regulatory Commission (Commission) is proposing to amend its regulations governing applications for license, preliminary permit, and exemption from licensing for hydroelectric projects. This

rulemaking would: (1) Clarify and revise many of the Commission's regulations that govern hydroelectric applications; (2) amend 18 CFR Part 4 to incorporate Commission decisions into these regulations; and (3) reorganize several sections of 18 CFR Part 4 to integrate the regulations governing exemption applications into Subpart D of 18 CFR Part 4.

DATES: Comments must be in writing and received by the Secretary of the Commission by May 4, 1984.

ADDRESSES: All filings should refer to Docket No. RM83-56-000 and should be addressed to: Office of the Secretary, Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington, D.C. 20426.

FOR FURTHER INFORMATION CONTACT: Joseph H. Long, Division of Rulemaking and Legislative Analysis, Office of the General Counsel, Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington, D.C. 20426, (202) 357-8033.

SUPPLEMENTARY INFORMATION:

I. Introduction

The Federal Energy Regulatory Commission (Commission) proposes to amend its regulations governing applications for license, preliminary permit, and exemption from licensing for hydroelectric projects. This rulemaking would accomplish three major objectives. First, it would clarify and revise many of the Commission's regulations that govern hydroelectric applications, which are set forth in 18 CFR Part 4. Second, it would amend Part 4 to incorporate Commission decisions into the regulations. Third, it would reorganize several sections of Part 4 to integrate the regulations governing exemption applications into Subpart D of Part 4. Subpart D prescribes the general procedural rules for filing applications, the rules of competition, and the rules for selection among competing applications.

The rule would revise §§ 4.30 through 4.35, 4.40, 4.41, 4.50, 4.51, 4.60, 4.61, 4.70, 4.71, 4.80 through 4.83, 4.90 through 4.94, 4.101 through 4.107, and 4.201. It would add new §§ 4.36, 4.37, 4.38, 4.84, 4.95, and 4.96.

II. Background

During the past six years, the Commission has undertaken a broad program of promulgating new rules amending most of its regulations governing hydroelectric applications. The Commission did this (1) to implement new Congressionally mandated programs exempting certain

types of projects from part or all of Part I of the Federal Power Act (the "Act"); (2) to ease the compliance burden of applicants; (3) to make the rules of competition as fair as possible; and (4) to expedite the processing of applications.

A chronology of the key rulemakings implementing these objectives is as follows. On September 11, 1978, the Commission issued the so-called "short-form" application procedures¹ for all "minor" projects.²

On October 22, 1979, the Commission issued procedures applicable to both preliminary permit (permit) and license applications that simplify the procedures for application for a permit, amendment to a permit, and cancellation of a permit.³

On November 19, 1979, the Commission issued rules that established application procedures for licensing major projects that are located at existing dams.⁴

The Commission has also issued a series of rules to govern development of specialized kinds of hydroelectric facilities. The Commission established procedures to exempt from part or all of Part I of the Act any small conduit hydroelectric facility that has a generating capacity of 15 megawatts (MW) or less.⁵ Similarly, the Commission issued rules on November 7, 1980, setting forth procedures to exempt from licensing and other requirements of the Act any small hydroelectric power projects having a proposed generating capacity of 5 MW or less.⁶

On October 29, 1981, the Commission issued rules designed to expedite the

processing of applications for permits and licenses.⁷

Also, on November 8, 1981, the Commission issued additional rules that eased the burden on applicants for several types of licenses.⁸

On November 8, 1981, the Commission issued rules that adopted the "short-form" application procedures for major projects of 5 MW or less, and revised the "short-form" procedures.⁹

On February 18, 1982, the Commission issued rules that exempted two categories of small hydroelectric power projects from the licensing requirements of Part I of the Act.¹⁰

And finally, on August 27, 1982, the Commission issued rules that amended regulations governing case-by-case exemption of small hydroelectric power projects.¹¹

In the past three years, especially as a result of the new exemption provisions, the Commission has received hundreds of hydroelectric applications, far more than in any comparable period. In light of the experience of processing these applications, the Commission finds that it is necessary to revisit Part 4 regulations governing hydroelectric applications to make numerous amendments required as a result of implementing the new rules described above, to reflect more clearly Commission interpretations of specific regulations, and to reorganize several sections concerning exemption applications.

While there are some substantive changes proposed, this rule basically is not intended to institute any new program or implement any new Congressional mandate. Rather, it proposes to reexamine all of Part 4 in light of developments over the past three

or four years. This reexamination has led to the decision to propose comprehensive reorganization and revisions to almost every section in Part 4.¹²

III. Reorganization of Subpart D

Under the Commission's regulations governing hydroelectric applications, Subpart D (§§ 4.30-4.35) of Part 4 sets forth the general procedural rules for filing an application for a preliminary permit or a license. Subpart D prescribes: (1) Who may apply for a permit or a license (§ 4.30); (2) the general procedural requirements for a permit or a license application to be "accepted for filing" (§ 4.31); (3) the required specifications for maps and drawings to be submitted with an application (§ 4.32); (4) the requirements for filing a competing application for a permit or a license, or a notice of intent to file such a competing application (§ 4.33); (5) the rules of preference used by the Commission in selecting among competing applications for the same or mutually exclusive project (§ 4.33); (6) the conditions under which a hearing on a hydroelectric application will be held by the Commission (§ 4.34); and (7) the conditions under which an amendment to an application will result in the assignment of a new date of "acceptance for filing" of an application (§ 4.35).

Several sections of Subparts J and K of Part 4 direct exemption applicants to follow the procedural rules of Subpart D, usually with some modification of those rules. Subpart J (§§ 4.90-4.94) sets forth the rules governing application for exemption of a small conduit hydroelectric facility. Subpart K (§§ 4.101-4.113) sets forth the rules governing application for case-specific exemption of a small hydroelectric power project of 5 MW or less (§§ 4.100-4.108), and the rules governing categorical exemption of certain small hydroelectric power projects (§§ 4.109-4.113).

In order to reduce cross-referencing from Subparts J and K to Subpart D, this rule proposes to include applications for exemption from licensing under the procedural rules of Subpart D. Several sections of Subparts J and K would therefore be removed from the regulations since these provisions would

¹²To afford the Commission an opportunity to reconsider the categorical exemption rules, on June 15, 1983, the Commission stayed §§ 4.109-4.113 (49 FR 29474) (Order No. 202-C). Because of the stay, the Commission does not propose, at this time, to address regulations governing categorical exemptions. That will be done in a separate rulemaking docket.

¹ Regulations Governing Applications for Short-form License (Minor), 43 FR 40215 (Sept. 11, 1978) (Docket No. RM78-9-000, Order No. 11).

² Projects with installed capacity of 1.5 MW or less are considered to be "minor"; projects with installed capacity of greater than 1.5 MW are considered to be "major."

³ Regulations Prescribing General Provisions for Preliminary Permit and License Applications; and Regulations Governing Applications for Amendments to and Cancellation of Permits, 44 FR 61328 (Oct. 25, 1979) (Docket No. RM79-23-000, Order No. 54).

⁴ Regulations Governing Applications for License for Major Projects—Existing Dams, 44 FR 75383 (Dec. 20, 1979) (Docket No. RM79-36-000, Order No. 59).

⁵ Exemptions of Small Conduit Hydroelectric Facilities from Part I of the Federal Power Act, 45 FR 28085 (Apr. 28, 1980) (Docket No. RM79-35-000, Order No. 76).

⁶ Exemption from All or Part of Part I of the Federal Power Act of Small Hydroelectric Power Projects with an Installed Capacity of Five Megawatts or Less, 45 FR 76115 (Nov. 18, 1980) (Docket No. RM80-25-000, Order No. 106).

⁷ Revisions to Certain Regulations Governing Applications for Preliminary Permit and License for Water Power Projects, 46 FR 55245 (Nov. 9, 1981) (Docket No. RM81-10-000, Order No. 183).

⁸ Application for License for Major Unconstructed Projects and Major Modified Projects; Application for License for Transmission Lines Only; and Application for Amendment to License, 46 FR 55928 (Nov. 13, 1981) (Docket No. RM80-39-000, Order No. 184).

⁹ Application for License for Minor Water Power Projects and Major Water Power Projects 5 Megawatts or Less, 46 FR 55944 (Nov. 13, 1981) (Docket No. RM81-10-000, Order No. 185).

¹⁰ Exemption from the Licensing Requirements of Part I of the Federal Power Act of Certain Categories of Small Hydroelectric Power Projects With an Installed Capacity of 5 Megawatts or Less, 47 FR 4232 (Jan. 29, 1982) (Docket No. RM81-7-000, Order No. 202).

¹¹ Amendments to Regulations Governing Case-by-Case Exemption From All or Part of Part I of the Federal Power Act for Small Hydroelectric Power Projects With an Installed Capacity of 5 Megawatts or Less, 47 FR 38506 (Sept. 1, 1982), amended 47 FR 42720 (Sept. 29, 1982) (Docket No. RM82-2-000, Order No. 255).

now be covered in Subpart D. The Commission believes that this reorganization will clarify both the procedural rules for filing exemption applications and the rules of competition for authority to develop and operate projects at the same or mutually exclusive sites.

Subpart D would be reorganized as follows:

Proposed § 4.30 would state that Subpart D applies to applications for a permit, a license, and an exemption from licensing. Proposed § 4.30 also would contain definitions for Part 4.

Proposed § 4.31 would state who may file an initial or a competing application for a permit, a license, or an exemption.

Proposed § 4.32 would state the conditions under which the Commission would not accept an initial or competing application for a permit, license, or exemption from licensing.

Proposed § 4.33 would state certain limitations under which the Commission would not accept a permit, license, or exemption application filing.

Proposed § 4.34 would state the conditions under which an applicant could petition the Commission for a hearing concerning an application, or under which the Commission would order such a hearing on its own accord.

Proposed § 4.35 would state the rules for assigning a new "acceptance for filing" date to an application for a permit, license, or exemption from licensing when certain types of amendments are made to these applications.

Proposed § 4.36 would state the special filing requirements and deadlines for filing competing applications, and would state the requirements governing the comparisons of plans of development that applicants for license or exemption from licensing must make.

Proposed § 4.37 would state the rules that the Commission uses to select one application from among all those competing for the same or mutually exclusive project.

Proposed § 4.38 would state the requirements for pre-filing consultation with other agencies.

Proposed § 4.39 would state the requirements for preparing and submitting maps and plans.

IV. Derivation and Distribution Tables

The derivation table indicates how the proposed regulations are derived from the existing regulations. The distribution table indicates where the existing regulations are located in the proposed regulations.

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

Current section	Proposed section
§ 4.30:	
(a).....	§ 4.31(a)
(b).....	§ 4.33(a)
(c).....	§ 4.33(b)
(d).....	§ 4.32(a)
§ 4.31:	
(a)(1).....	N/A

Current section	Proposed section
(a)(2).....	§ 4.32(a)(4)
(b).....	§ 4.32(b)
(c).....	§ 4.32(c)
(d).....	§ 4.32(d)
(e).....	§ 4.32(e)
(f).....	§ 4.32(f)
(g).....	§ 4.32(g)
(h).....	§ 4.32(h)
§ 4.32.....	§ 4.39
§ 4.33:	
(a).....	§ 4.30(b) (1) and (9)
(a)(1)-(e).....	§ 4.36
(f).....	§ 4.37(a)
(g).....	§ 4.37(b)
(h).....	§ 4.37(c)
(i).....	§ 4.37(e)
§ 4.34.....	§ 4.34
§ 4.35.....	§ 4.35
§ 4.40:	
(a).....	§ 4.40(a)
(b).....	§ 4.30(b)
(c).....	§ 4.40(b)
(d).....	§ 4.38
§ 4.41.....	§ 4.41
§ 4.50:	
(a).....	§ 4.50(a)
(b).....	§ 4.30(b)
(c).....	§ 4.50(b)
§ 4.51.....	§ 4.51
§ 4.60:	
(a).....	§ 4.60(a)
(b).....	§ 4.30(b)
(c).....	§ 4.60(b)
§ 4.61:	
(a)(1).....	§ 4.38
(a)(2)(i).....	§ 4.32(b)
(b)-(f).....	§ 4.61(b)-(f)
§ 4.70.....	§ 4.70
§ 4.71.....	§ 4.71
§ 4.80.....	§ 4.80
§ 4.91.....	§ 4.81
§ 4.82.....	§ 4.82
§ 4.83.....	§ 4.83
§ 4.90.....	§ 4.90
§ 4.91.....	§ 4.30(b)
§ 4.92:	
(a).....	§ 4.31(b)
(b).....	§ 4.32(b)(2)
(c)(1)-(c)(6).....	§ 4.92(a)-(f)
§ 4.83:	
(a)(1).....	§ 4.32
(b)(2).....	§ 4.93(a)
(b).....	§ 4.34
(c).....	§ 4.93(b)
(d).....	§ 4.93(c)
(e).....	§ 4.93(d)
(f).....	§ 4.93(a)
(g).....	§ 4.93(f)
§ 4.94.....	§ 4.94
§ 4.101.....	§ 4.101
§ 4.102.....	§ 4.30(b)
§ 4.103:	
(a).....	§ 4.103(a)
(b).....	§ 4.31(c)
(c).....	§ 4.103(b)
(d).....	§ 4.103(c)
§ 4.104:	
1st paragraph.....	Deleted
(e).....	§ 4.33(d)
(b).....	§ 4.33(e)
(c).....	§§ 4.33(c) and 4.36(b)
(d).....	§ 4.36(c)
(e).....	§ 4.37(d)
§ 4.105:	
(a).....	Deleted
(b)(1).....	§ 4.32
(b)(2).....	§ 4.34
(b)(3).....	§ 4.105(b)(1)
(b)(4).....	(b)(2)
(b)(5).....	(b)(3)
(b)(6).....	(b)(4)
§ 4.106.....	§ 4.106
§ 4.107:	
(a)(1).....	§ 4.107(a)
(a)(2).....	§ 4.32
(b).....	§ 4.107(b)

V. Filing of Competing Applications

A. Elimination of Notices of Intent

The Commission normally allows approximately 60 days after the first public notice of an initial application for a prospective applicant to file a competing application for the same or mutually exclusive site.¹³ If a prospective applicant needs additional time to prepare and submit its application, except for a competing application for a permit for three types of projects,¹⁴ it can file a notice of intent to submit a competing application.¹⁵ A notice of intent informs the Commission that the prospective applicant needs additional time to prepare and file a competing application before the Commission examines, compares, and acts on all the applications competing for the same project. Upon submitting an acceptable notice of intent, a prospective applicant is granted an additional period of time beyond the last date for the filing of protests or motions to intervene prescribed in the public notice of the initial application¹⁶ to prepare and submit its competing application. For a competing permit application, an applicant is allowed an additional 60 days.¹⁷ For a competing license or a competing exemption application, an applicant is allowed an additional 120 days.¹⁸

The provisions allowing additional time to file a competing application pursuant to a notice of intent were promulgated to balance two countervailing objectives: expeditious processing of initial applications after giving notice of their acceptance for filing and allowance of a reasonable opportunity for prospective competitors to file competing applications. Under the notice of intent provisions, the Commission delays consideration of the initial application only when, within approximately 60 days of noticing its acceptance, the Commission is informed that a competing applicant intends to file an application for the same site.

In theory, these provisions should simplify and expedite the processing of applications. In their execution,

¹³ Section 4.33(a)(1). (All sections cited are in 18 CFR Part 4. If a citation refers to a current regulation, only the section number is given. If a citation refers to a proposed new regulation, "proposed" precedes the section number.)

¹⁴ Section 4.33(a)(2) excludes notices of intent for permits for a major project—existing dam, minor water power project 5 MW or less, and natural water feature project 5 MW or less.

¹⁵ Section 4.33(a)(1) and (b).

¹⁶ Section 4.31(c)(2).

¹⁷ Section 4.33(c).

¹⁸ Sections 4.33(c) and 4.104(d).

however, these provisions have resulted in numerous disputes¹⁹ and misuse.²⁰

Therefore, the Commission proposes to eliminate notices of intent entirely because they have not proven to expedite and simplify the processing of applications, as they were intended to do. Under the proposed rule, a prospective competitor could file its application not later than the last date for filing protests and motions to intervene prescribed in the public notice issued for the initial application.²¹ This approach should also simplify the regulations and reduce the number of disputes arising concerning the appropriate deadline for filing a competing application. The Commission specifically invites public comment on the time that should be allowed for the filing of competing applications and the strengths and weaknesses of the notice of intent mechanism.

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

The Commission's regulations require competing permit and license applications for a project to be filed no later than the deadline for filing protests and motions to intervene prescribed in the public notice of the "initial application" for the project.²² In the *Georgia Pacific* decision in 1981, the Commission determined that the term "initial application" in § 4.33(a)(1) encompasses two initial applications—one for a permit and one for a license—for any one project.²³ The Commission reasoned that competition at the license level constitutes a phase of the competitive proceeding that is distinct from competition at the permit level. Thus, when an applicant files a license application in a preliminary permit proceeding, it starts a new round of competition at the license level.

The rule proposes to incorporate more clearly the Commission's decision in *Georgia Pacific* that a license application may be filed in competition with a preliminary permit application at

¹⁹ See *Energenics Systems, Inc.*, 17 FERC ¶61,110 (1981) (in which the Commission interpreted its regulations to allow a rejected competing permit application to be treated as a notice of intent); *Long Lake Energy Corp.*, 20 FERC ¶61,130 (1982) (in which the Commission determined that a notice of intent to file a license or an exemption from licensing application could be used to file either type of application).

²⁰ Some notices of intent are apparently filed only to delay the initial applicant or as bargaining leverage against the initial applicant. Other notices of intent are filed without any realistic expectation of filing a competing application.

²¹ Proposed § 4.36.

²² Section 4.33(a)(1).

²³ *Georgia Pacific Corp.*, 17 FERC ¶61,174 (1981).

any time before the permit is actually issued.²⁴ In addition, the rule would clarify that this opportunity ends if an initial development application (*i.e.* an application for a license or exemption from licensing) is accepted. After an initial development application is accepted, any competing development application must be filed not later than the deadline for filing protests and motions to intervene prescribed in the public notice of the initial development application.²⁵

This proposal extends beyond the precise holding in *Georgia Pacific* because, to date, the Commission's rules and decisions have not fully addressed how exemption applications fit into this two-phase process. In the final rule in Docket No. RM80-65-000,²⁶ in which the Commission promulgated its regulations governing exemption applications for small hydroelectric power projects, the Commission declined to allow an exemption application, or a notice of intent to submit such an application, to be filed after the last date for filing protests and motions to intervene prescribed in the public notice of an already pending permit application.²⁷ At that time, the Commission was concerned that if it allowed exemption applicants to do this, an unreasonable burden would be imposed upon efficient administration of the permit, license, and exemption programs. The Commission also was concerned that the Commission itself, its staff, and other interested agencies and persons needed greater certainty of the nature of the proceeding and the participants at a relatively early point.

Since *Georgia Pacific*, the Commission has found that acceptance for filing of a license application to develop projects during the pendency of a permit application proceeding does not unduly burden the Commission, any of the interested entities, or the process itself. Because an application for exemption is similar to an application for a license in the applicants for either are ready to build, the Commission believes that allowing an initial exemption application, and applications in competition therewith, to be accepted for filing up until a pending permit application is granted will also cause no undue burden. Rather, allowing exemption applications to be filed during this period of time should expedite development of hydroelectric sites because an exemption applicant,

²⁴ Proposed § 4.36(a)(2)(i).

²⁵ Proposed § 4.36(b)(2).

²⁶ 45 FR 76115 (Nov. 18, 1980) (Order No. 106).

²⁷ Section 4.104(a)(2)(i).

unlike a permit applicant, is prepared to proceed with construction immediately.

The rule would therefore treat exemption applications the same as license applications.²⁸ An application for exemption from licensing would be accepted against a pending permit application at any time before the Commission grants or denies a permit or not later than the last date for filing protests and motions to intervene prescribed in the public notice of the initial development application for the site, whichever occurs first.²⁹

These amendments would clarify that, among the different types of applications that may be filed for any project, there can be two distinct phases of competition: competition among applicants proposing to study the project (*i.e.*, permit applicants) and competition among applicants proposing to develop the project (*i.e.*, license and exemption applicants).³⁰

Once an initial development application is filed in a permit proceeding, a new phase of competition begins. Of course the Commission ultimately considers and compares in the same proceeding all of the applications filed for the site.

C. Exemptions

(1) *Competing Exemption Applications.* There are circumstances in which more than one potential applicant could qualify for an exemption.³¹ The rule would clarify that the Commission does allow competition for an exemption.³²

The Commission's current regulations are silent on how it selects from among two or more competing exemption applications for the same project. In comparing competing permit or competing license applications, when either both applicants have municipal preference or neither applicant has municipal preference, the Commission favors the applicant with plans of development that are better adapted to develop, conserve, and utilize in the public interest the water resources of

the region.³³ If the plans of development of the competing applicants are equally well adapted and neither applicant alone has municipal preference and neither applicant is the permittee, the Commission favors the applicant with the earliest application acceptance date.³⁴

The Commission believes that it should apply these same rules of preference to competing applications for exemption from licensing of a small hydroelectric power project or a small conduit hydroelectric facility. The proposed rule would therefore amend the Commission's regulations to expressly state that the Commission would apply these rules of preference in selecting among competing exemption applications.³⁵

(2) *Permit Applications Submitted After an Exemption Application.* The Commission's regulations state that, with certain exceptions, it will not accept for filing an application for a permit for a small hydroelectric power project if the Commission has accepted a previously filed exemption application for that project and has not yet granted or denied that exemption application.³⁶ The proposed rule would clarify the Commission's application of this restriction.³⁷ If an initial application for a project is for a permit and then an exemption application is filed that is the initial development application, the Commission only accepts permit applications filed until the last date for filing applications in competition against the initial permit application (as would be determined by proposed § 4.36(a)).³⁸ This avoids penalizing a competing permit applicant that is responding to the public notice issued for the initial permit application. However, after the deadline for filing applications competing against the initial permit application, the Commission does not accept additional permit applications that compete against an exemption application.³⁹

²⁸ Section 4.33(g)(1). See also section 10(a) of the Federal Power Act, 16 U.S.C. 803(a) (1976).

²⁹ Section 4.33(g)(2).

³⁰ Proposed § 4.37(d)(2).

³¹ Section 4.104(c)(1).

³² See *City of Tenino*, 18 F. 81,075 (1982).

³³ Proposed § 4.33(a)(3).

³⁴ Because the Commission favors applications that propose immediate development of a site (*i.e.*, applications for either a license or an exemption from licensing) over applications that propose studies (*i.e.*, applications for permits), the Commission generally does not accept permit applications for filing after either an acceptable license or exemption application has been filed. See §§ 4.30(b)(2) and 4.104(c)(1)(ii). However, the Commission does not want to preclude an opportunity to compete by a prospective competing applicant that submits an application in response to a public notice issued by the Commission soliciting

(3) *Competing Exemption and License Applications.* The Commission's regulations state that if an application for a license and an application for exemption from licensing are both accepted for filing and each proposes to develop the same or mutually exclusive projects, the Commission will favor the application filed first *unless* the Commission determines that the plans of the subsequent applicant would better develop the water power potential of the affected resources.⁴⁰ The regulations do not state expressly that the Commission *will* make this comparison. The rule would clarify that the Commission will make the comparison, will favor the applicant with the better adapted plans, and that, if the plans of the competing applicants are equally well adapted, will favor the applicant that filed first.⁴¹

(4) *Competing Exemption and Permit Applications.* The Commission's regulations state that the Commission will favor an application for exemption from licensing over an application for a permit.⁴² This regulation reflects the rebuttable presumption that preliminary permit applications are usually less concrete in nature and rarely offer substantiated information, whereas accepted exemption applications are fully developed proposals that are to be put into effect soon after approval. However, Commission practice is to compare plans of a permit applicant against those of an exemption applicant. If the permit applicant's plans are better adapted to develop the region's water resources and are substantiated in the application, the Commission will favor the permit applicant.⁴³ Where the permit applicant's plans are not substantiated or, if substantiated, are not better adapted, the Commission favors the exemption applicant. The proposed rule would codify this Commission practice.⁴⁴

(5) *Threshold Capacity Required To Compete Against an Exemption Application for a Small Hydroelectric Power Project.* The Commission's

the filing of competing applications. Therefore, for parallel reasons to those discussed above, even after an initial development application has been filed, the rule would allow a prospective preliminary permit applicant to submit an application in competition against an initial preliminary permit application, provided that the competing permit application is filed within the initial permit application's published deadline for competition as determined by proposed § 4.36(a). See proposed § 4.33(a)(3).

⁴⁰ Section 4.104(e)(2).

⁴¹ Proposed § 4.37(d)(2).

⁴² Section 4.104(e)(1).

⁴³ See *Western Power, Inc.*, 23 FERC ¶61,343 (1983).

⁴⁴ Proposed § 4.37(d)(1).

²⁸ Proposed § 4.30(a)(2)(i).

²⁹ Cf. *Milton and Morris Zack*, 23 FERC 61,121 (1983) (noting that the current regulations prescribe different deadlines for filing license and exemption applications in competition with a permit application).

³⁰ Proposed §§ 4.30(b)(1) and 4.36(a)-(b). For any project, there can be one initial permit application and one initial development application. See proposed § 4.30(b)(10).

³¹ For example, this can occur where only Federal lands would be used or occupied (see *Douglas Pagar*, 23 FERC ¶ 61,110 (1983)) or where more than one potential applicant has all the necessary property interests.

³² Proposed § 4.36(b).

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

The proposed rule would eliminate this threshold capacity requirement.⁴⁶ Under the proposed rule, prospective license applicants would not have to propose a project with greater installed capacity in order to compete against an initial exemption application.

The Commission no longer believes that prospective exemption applicants need this favored treatment. The favored treatment is given only if the exemption applicant files the initial development application. If such an exemption applicant proposes plans of development best adapted to develop the region's water resources, the Commission favors its application as the first filed application.⁴⁷ If a prospective license applicant can better develop the region's water resources, the Commission believes that it should favor the license applicant.

(6) *Competition Against a Small Conduit Hydroelectric Facility Exemption Application.* The Commission's regulations do not currently provide rules for competition against an application for exemption of a small conduit hydroelectric facility. This proposed rule would extend the general rules for competition against an application for exemption of a small hydroelectric power project to competition against an application for exemption of a small conduit hydroelectric facility.⁴⁸ The rule also would codify the Commission's current practice⁴⁹ of allowing more than one application for a small conduit hydroelectric facility to be filed in competition for the same site, and allowing conduit exemption applications and small hydroelectric power exemption applications to be filed in competition with each other.⁵⁰

⁴⁵ Section 4.104(c)(2)(i).

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

⁴⁷ Section 4.104(e)(2).

⁴⁸ Proposed §§ 4.33, 4.36 and 4.37.

⁴⁹ City of Gridley, Cal., 22 FERC ¶ 61,256 (1983).

⁵⁰ Proposed § 4.35(b)(2).

VI. Evaluation of Competing Applications

A. Applicants' Comparisons of Plans of Development

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

In the competition phase for a license or exemption from licensing, competitors' plans are much more fully developed and can more readily be compared. At this stage of competition, the Commission could use the assistance of the applicants in comparing the various plans of development to determine which ones are best adapted. However, the Commission believes that this comparison would be more useful if, after all applications have been submitted, applicants compared their plans to those of all the other applicants. Under the present regulations, competing applicants must compare their plans only with those of the initial applicant.⁵²

Thus, the proposed rule would require that all license and exemption applicants competing for the same or mutually exclusive sites compare their plans to the plans of all other applicants to show the Commission how their own plans are better adapted to develop, conserve, and utilize in the public interest the water resources of the

⁵¹ This assumes that municipal preference does not apply.

⁵² Section 4.33(d).

region.⁵³ The rule would also change the Commission's practice of automatically finding to be patently deficient an application that at the time of filing fails to include comparisons of plans of development.⁵⁴ License and exemption applicants would be required to compare their plans with those of other applicants, but failure to do so would not automatically cause an application to be rejected as patently deficient.⁵⁵

B. Special Limitations on Submission of Applications

The rule would add a new provision to allow the Commission to refuse to accept all applications for a project or to accept applications but not to treat any one as the first to be filed.⁵⁶ The Commission would use this power only rarely to handle certain extreme situations where the normal rules governing acceptance of applications and competitions among applicants have not resulted in one development plan for the water resource that fully satisfies the public interest in responsible hydropower development, such as where the development would be clearly undersized or where an abuse of the hidden hybrid doctrine has occurred.⁵⁷

VII. Consultation

In the final rule in Docket No. RM82-2-000,⁵⁸ the Commission clarified in great detail the different steps that a prospective exemption applicant must take during consultation with state and Federal fish and wildlife agencies before filing an exemption application with the Commission. However, developers too often submit exemption applications to the Commission without having consulted *adequately* with the appropriate fish and wildlife agencies.⁵⁹ The Commission has had to reject many of these applications as patently deficient. The applicants have then had to reconsult with the fish and wildlife agencies and resubmit their applications.

This process of inadequate initial consultation, rejection, reconsultation, and resubmittal of an application is a waste of the time and resources of the applicants, the fish and wildlife agencies, and the Commission. The rule

⁵³ Proposed § 4.36(c)(2).

⁵⁴ Sections 4.31(d)(2)(i) and 4.33(d)(2).

⁵⁵ Proposed § 4.32(d)(2)(i).

⁵⁶ Proposed § 4.33(f).

⁵⁷ Gregory Wilcox, 24 FERC ¶ 61,317 (1983) and 26 FERC ¶ 61,113 (1984).

⁵⁸ 47 FR 38506 (Sept. 1, 1982) (Order No. 255).

⁵⁹ See, e.g., Eastern Sierra Energy Development, 20 FERC ¶ 61,348 (1982); Potter Instrument Co., 19 FERC ¶ 61,299 (1982).

would add a new section to the regulations to consolidate the Commission's consultation requirements for applicants for licenses and exemption⁶⁰ and to clarify the minimum steps that must be taken to consult adequately with appropriate agencies, including the fish and wildlife agencies. Applicants that persist in failing to consult adequately with these agencies will continue to have their applications rejected by the Commission as deficient.⁶¹

Under the proposed rule, applicants would be required initially to contact all the appropriate agencies and provide them with details with respect to their planned projects.⁶² During this initial phase, applicants should not restrict themselves merely to providing information to agencies. An effort should be made to determine the types of studies agencies consider necessary, the information they have in hand, their concerns about the environmental consequences of the proposed project and their ideas about mitigation of adverse impacts or enhancement of resources. Areas of disagreement between applicants and agencies should be isolated, and an attempt to resolve conflicts should be made. Applicants should be aware that if they and the agencies cannot resolve their conflicts, the Commission will give weight to the agencies expertise in deciding whether the applicants performed adequate studies to properly consult. Therefore, consultation does not consist merely of a transfer of information; ideally, it is a period of extensive communications in which agencies and applicants are fully acquainted with one another's assessment and priorities regarding the environmental dimensions of the project.

VIII. Other Aspects of the Exemption Process

A. Real Property Interests for Exempt Projects

When the Commission adopted Subpart J of Part 4 governing application for exemption of small conduit hydroelectric facilities, it anticipated that only property owners having all the real property interest necessary to develop and operate a small conduit hydroelectric facility would apply for such an exemption. In recent months,

⁶⁰ Proposed § 4.36. Because the same problems with respect to inadequate pre-filing consultation occur in license applications, and in order to consolidate the Commission's regulations governing consultation, this section would apply also to license applicants.

⁶¹ Proposed § 4.32(d)(2).

⁶² Proposed § 4.38(a).

the Commission has received applications for exemption of small conduit hydroelectric facilities from entities that do not own all the real property interests necessary to develop and operate their proposed projects.⁶³ An exemption holder does not have the power of eminent domain provided under section 21 of the Federal Power Act. If the exemption holder does not possess all the necessary real property interests, it cannot immediately develop and operate the project. Therefore, this rule⁶⁴ would require an applicant for exemption of a small conduit hydroelectric facility to have either all the real property in the lands necessary to develop and operate its project or an option to obtain those necessary interests.⁶⁵

The Commission also reminds exemption applicants for projects that require proof of ownership of all the necessary non-Federal real property interests that their applications will be considered to be patently deficient and rejected if documentary evidence of ownership is not submitted with their applications. Adequate documentation of ownership can include a deed, a written option to purchase, or a written lease. Also, the Commission advises applicants that if there is a significant dispute over the requisite ownership of real property interests for a project, the Commission might deny an exemption application for such a project.⁶⁶ The Commission believes that disputes over ownership of property rights should be resolved before filing an exemption application. A court, not the Commission, is the proper forum to resolve these disputes. One of the main underlying purposes of the Commission's exemption rules is to expedite hydropower development. When there is a significant dispute over ownership of the requisite real property interests for a project, that project cannot proceed expeditiously and an exemption application for that project should be rejected or denied.

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

Current regulations require the Commission to take an affirmative act to

⁶³ See, e.g., city of Gridley, Cal., 22 FERC ¶ 61,256 (1983).

⁶⁴ Proposed § 4.31(b).

⁶⁵ The proposed rule also would clarify that, while only a citizen, association of citizens, domestic corporation, municipality, or state may apply for exemption from provisions other than licensing, there are no such status restrictions on applicants for an exemption from licensing.

⁶⁶ See, e.g., Ted Lance Slater, 21 FERC ¶ 61,234 (1982).

suspend the running of the time periods after which exemptions are issued automatically.⁶⁷ When an acceptable competing application is filed within these time periods, the Commission now compares the competing applications and grants the exemption, license, or permit to the applicant with the best adapted plans of development or, if the plans are equally well adapted, to the applicant that filed first. To do this, the Commission usually must suspend the running of the time periods. However, if the Commission should inadvertently fail to suspend the running of the time periods, an exemption could be automatically but incorrectly granted to the initial exemption applicant.⁶⁸ The rule would amend the Commission's regulations to provide that, upon the filing of a competing application, the mandatory time periods for Commission action on an application for exemption of a small conduit hydroelectric facility and an application for exemption of a small hydroelectric power project would cease to run. The Commission would then consider all the filed competing applications.⁶⁹

The Commission's current regulations allow a qualified applicant for exemption of a small hydroelectric power project to petition for a waiver of any specific provision of §§ 4.102 through 4.107.⁷⁰ The Commission usually needs to suspend the running of the mandatory time period to consider these petitions. Therefore, the proposed rule also would automatically suspend the running of the mandatory time period if an application for exemption of a small hydroelectric power project is accompanied or supplemented by a petition for waiver.⁷¹

C. Waiver of Conduit Exemption Regulation

Under the Commission's current regulations, an applicant for exemption of a small conduit hydroelectric facility may request a waiver of discharge requirements⁷² for that type of exemption when it files its application.⁷³ The Commission must now rule on such a request before accepting the application.⁷⁴ The

⁶⁷ The Commission must act within 90 days for applications for small conduit hydroelectric facilities or within 120 days for applications for small hydroelectric power projects. See §§ 4.93(e) and 4.105(b)(5).

⁶⁸ See *Hirshey v. FERC*, 701 F.2d 215 (D.C. Cir. 1983).

⁶⁹ Proposed §§ 4.93(c)(2) and 4.105(b)(2).

⁷⁰ Section 4.103(d)(1).

⁷¹ Proposed § 4.103(b)(2)(iii).

⁷² Section 4.91(f)(5) and proposed § 4.30(b)(26)(v).

⁷³ Section 4.92(c)(1)(i).

⁷⁴ Section 4.93(a)(2).

Commission believes that it should have the flexibility to rule on the waiver request either when it considers the application on its merits or at any other appropriate time. The proposed rule ⁷⁵ would allow the Commission this flexibility and would clarify that the acceptance, by itself, of a conduit exemption application does not constitute a ruling on any request for waiver of the discharge requirements.

D. Revocation of an Exemption to Allow More Substantial Development

The Commission is responsible for regulating the non-Federal development of water resources to provide for the most comprehensive development of hydroelectric power.⁷⁶ If in order to fulfill this mandate exempted projects must be altered or are determined to be obsolete, the Commission may revoke an exemption even after the project has been authorized and is fully operational.⁷⁷ This is in part a necessary consequence of the indefinite term for an exemption as opposed to the finite term for a license. Of course, the circumstances are very rare in which the Commission would revoke an exemption. The Commission recognizes that exemption holders must be assured of the continuing validity of their exemptions to the maximum extent permitted by law.

To clarify the Commission's responsibilities, the proposed rule would add a new article to the standard terms and conditions of both an exemption of a small conduit hydroelectric facility and an exemption of a small hydroelectric power project. This standard article ⁷⁸ would reserve expressly the Commission's right to (1) require modifications in the structure or operation of an exempted project, or (2) revoke an exemption if the most comprehensive development of a region's water resources so requires. If in deciding upon a particular license application the Commission determines that, in the interest of promoting more comprehensive development of the water resources under section 10(a) of the Federal Power Act, it should revoke an exemption and issue instead a license for a given site, the licensee would be required to pay compensation to the exemption holder pursuant to section 21 of the Act.

E. Amendments to an Issued Exemption

The Commission expects an exempted project to be constructed and operated as described in the exemption application that was approved by the Commission. The rule ⁷⁹ would establish a procedure through which an exemption holder desiring to change the design, location, or method of construction of its project works or the operation of its project could request from the Commission a determination whether its proposed changes would be allowed under its issued exemption.⁸⁰ Under this procedure, an exemption holder would notify the Commission and appropriate Federal and state fish and wildlife agencies of its proposed changes. The Commission would then review the proposed changes and determine whether the changes would be consistent with the exemption holder's issued exemption or whether the changes would constitute a material change of the exemption and therefore not be allowed under the issued exemption.

Within 45 days of receipt of the exemption holder's request for a determination, the Commission would notify the exemption holder whether its proposed changes were consistent with its issued exemption. If the Commission does not respond within 45 days of receiving the exemption holder's request, the exemption holder would be allowed to proceed with its proposed changes.

In reviewing an exemption holder's proposed changes to determine whether the changes were consistent with its exemption, the Commission would consider, among other things: the continuing applicability of the terms and conditions of the issued exemption; changes in the flow regime associated with the project; any adverse environmental impacts that had not been assessed previously by the Commission or the interested Federal and state fish and wildlife agencies; and whether the project, as modified, would continue to qualify for exemption.

If the Commission were to determine that the proposed changes were material, the exemption holder would be required to apply for an amendment to its exemption or apply for a license. An application for an amendment to an exemption would be prepared, filed, and processed identically to an application

for exemption from licensing, with one difference. The Commission would not accept applications in competition against an application for an amendment of an exemption. This is necessary to encourage an exemption holder to notify the Commission of any planned changes to its project and to give adequate assurances to an exemption holder that such notifications will not ultimately result in the loss of its exemption.

F. Additional Standard Terms and Conditions for Exemptions

First, to prevent an exemption holder from owning a project site for an unreasonable time without developing it, the rule would add a new article to the standard terms and conditions for exemptions of small conduit hydroelectric facilities. That article would reserve to the Commission the right to revoke an exemption if actual construction of any proposed generating facility has not begun within two years or if construction has not been completed within four years of the effective date of the exemption.⁸¹ That article also would provide that, if an exemption is revoked under these conditions, the Commission would not accept any subsequent application for exemption from licensing, or a notice of exemption from licensing, from the prior exemption holder within two years of the revocation.⁸²

Second, exempting a project from licensing does not relieve the Commission of its responsibilities over dam safety. The rule would add a new article⁸³ to the standard terms and conditions of all exemptions of small hydroelectric power projects. That article would require that if a dam is more than 33 feet in height above streambed, impounds more than 2.5 million cubic feet of water, or is

⁸¹ Proposed § 4.94(c).

⁸² A parallel article conditions exemptions for small hydroelectric power projects. See § 4.106(c). The rule would amend this standard article to lengthen the time period in which to begin construction from 18 months to 2 years. This change is in response to several requests received by the Commission seeking an extension of the current time period. The rule would also amend this standard article to restrict only the prior exemption holder that lost its exemption under this article from reapplying within two years of the exemption being revoked. The article currently restricts *anyone* from applying for an exemption for that site within two years. The Commission sees no reason to restrict persons other than the prior exemption holder from applying for an exemption for the site since the primary purpose of this restriction is to prevent persons from obtaining exemptions for the purpose of excluding others from developing the site (e.g., a property owner that does not want to develop its site, but does not want others developing it either).

⁸³ Proposed § 4.106(h).

⁷⁵ Proposed § 4.93(a).

⁷⁶ Section 10(a) of the Federal Power Act, 16 U.S.C. 803(a) (1976).

⁷⁷ See Final Rule, *supra* note 8; Metro. Dist. of Hartford, 18 FERC ¶ 61,254 (1981); Wells River Hydro Assocs., 18 FERC ¶ 61,157 (1982).

⁷⁸ Proposed §§ 4.94(d) and 4.106(f).

⁷⁹ Proposed §§ 4.96 and 4.104.

⁸⁰ Because the Commission has only limited experience with changes to exempted projects and because any changes would be very site-specific, the Commission cannot, at this time, issue generic guidelines for determining what changes in an exempted project would be allowed under an issued exemption.

determined to have a significant or high hazard potential, the project must have periodic safety inspections by an independent consultant and is subject to safety inspections, remedial measures, and other requirements that may be imposed by the Commission's Regional Engineer or other authorized representative under the Commission's safety regulations.⁸⁴

G. Federal Lands

The Commission's regulations now allow any person to apply for exemption of a small hydroelectric power project located on Federal lands if the rights to use or occupy those lands held by the Federal government are the only rights necessary to develop and operate the proposed project.⁸⁵ The regulations define Federal lands to be any lands to which the United States hold fee title.⁸⁶ Under this provision, some applicants have applied for exemption from licensing of projects that could not be developed and operated because non-Federal entities held or controlled certain necessary real property interests (e.g., easements, leases, or surface or subsurface rights). The Commission reminds prospective applicants that, in order to apply for an exemption under this provision, "Federal lands" means any lands for which the United States owns all the real property interests necessary to develop and operate the project.⁸⁷

H. Surrender of an Exemption

The Commission currently has no rules governing the surrender of an exemption. Under the proposed rule,⁸⁸ the Commission would require an exemption holder to file a petition with the Commission requesting surrender of its exemption. Public notice of the petition would be given at least 30 days before the Commission acted. These proposed regulations are similar to the Commission's existing regulations governing surrender of a license.⁸⁹

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

state fish and wildlife agencies of its surrender plans.

If a project occupies Federal lands under a permit from a Federal agency having supervision over such lands, the exemption holder would also be required concurrently to notify that agency of the exemption holder's surrender plans. The Commission expects these agencies to take appropriate action to require an exemption holder to restore affected Federal lands.

In approving a petition for surrender, the Commission would prescribe any necessary terms and conditions concerning disposition of the project works and restoration of the affected environment. In considering conditions for the surrender of an exemption, the Commission will be most concerned with life and property both downstream and in the immediate vicinity of the project works.

I. National Marine Fisheries Service Exemption Conditioning Authority

Under the Commission's current regulations, the National Marine Fisheries Service (NMFS), the United States Fish and Wildlife Service (USFWS), and the appropriate state fish and wildlife agencies may impose conditions on all conduit and case-specific small power project exemptions that the Commission issues.⁹⁰ The USFWS's and the state fish and wildlife agencies' authority to condition exemptions emanates from the Public Utility Regulatory Policies Act of 1978⁹¹ and the Energy Security Act of 1980.⁹²

On the other hand, the NMFS's authority to impose exemption conditions does not rest on any statutory authority.⁹³ Rather, Congress contemplated that only "two agencies"—the USFWS and the appropriate state fish and wildlife agency—could impose binding conditions to exemptions.⁹⁴ Apart from these two agencies, the statutes vest exclusive authority over exemption conditions with the Commission.

The Commission believes that its regulations should more clearly reflect the regulatory scheme that Congress envisioned. Accordingly, under the proposed rule,⁹⁵ exemption conditions

provided to the Commission by the NMFS would be considered advisory, not mandatory. Any conditions submitted by the NMFS would become part of an exemption only if the Commission determines that the inclusion of the condition is in the public interest. To assist the Commission in its exemption program, the Commission will continue to require applicants to consult with the NMFS on anadromous fish matters.⁹⁶

J. Stream Flow Guidelines

As a guideline for determining whether a small hydroelectric power project would adequately use the available stream flow, the Commission's staff determines whether the instantaneous flow that a proposed project would be capable of using would be exceeded less than 25 percent of the time, (i.e., the 25 percent exceedance point on the flow duration curve). If in using this guideline it appears to staff that the applicant would not be adequately developing the site, the applicant must demonstrate why a lesser use is nevertheless appropriate. The rule would reflect this current Commission practice by requiring an applicant for a case-specific exemption of a small hydroelectric power project to submit a flow duration curve.⁹⁷

IX. Other Changes Regarding Permits

The rule proposes to give a permittee prior notice that the Commission intends to cancel its permit for its failure to comply with the specific terms and conditions of its permit. The rule would allow a permittee an opportunity to petition for a hearing before the Commission in order to contest the proposed cancellation order.⁹⁸

The rule would also formalize the procedure by which a permittee surrenders an unexpired permit.⁹⁹ Under the proposed rule, a permittee would be required to file a petition to surrender its permit. Unless the Commission issues an order to the contrary, the surrender would take effect 30 days after the Commission issues a public notice of receipt of the petition. The 30-day period is being included to minimize unfair competitive advantages obtained by orchestration of a surrender petition and a subsequent application for the surrendered site. Applications for the surrendered site that are filed before the effective date of the surrender will be rejected.

⁸⁴ This article already is a standard term in all categorical exemptions. See § 4.111(a)(6).

⁸⁵ Section 4.103(b)(2)(i).

⁸⁶ Section 4.102(d).

⁸⁷ Proposed § 4.30(b)(8).

⁸⁸ Proposed §§ 4.95 and 4.102 would govern surrender of an exemption of a small conduit hydroelectric facility and a small hydroelectric power project, respectively.

⁸⁹ See §§ 6.1 and 6.2.

⁹⁰ Sections 4.94(b) and 4.106(b).

⁹¹ Public Utility Regulatory Policies Act of 1978 § 213, 16 U.S.C. 823a (Supp. II 1978).

⁹² Energy Security Act of 1980 408, 16 U.S.C. 2705(d) (Supp. IV 1980).

⁹³ See Winchester Water Control Dist., 24 FERC § 61,060 at 61,207-08 (1983).

⁹⁴ Report of the House Ad Hoc Committee on Energy, H.R. Rep. No. 543, 95th Cong., 1st Sess. 49-50 (1977).

⁹⁵ Proposed §§ 4.94(b) and 4.106(b).

⁹⁶ Proposed § 4.39(a).

⁹⁷ Proposed § 4.107(c)(5).

⁹⁸ Proposed § 4.83(a).

⁹⁹ Proposed § 4.84.

Third, the rule would clarify that failure of a permittee to file an *acceptable* license application before its permit expires will result in loss of the permittee's priority of application for a license for a proposed project.¹⁰⁰

Finally, section 4 of the Federal Power Act authorizes the Commission to issue a preliminary permit to a prospective license applicant to perform studies and tests (for up to three years) for the purpose of preparing and submitting a license application. Neither the Federal Power Act nor any other act authorizes the Commission to issue a preliminary permit to perform studies and tests for the purpose of preparing and submitting an exemption application. Therefore, a permittee is not accorded any permit-based priority as a permittee when it files an exemption application. However, during the term of the permit, no one can file a license application unless and until a permittee first files a license application.¹⁰¹ Hence, within the term of the permit, no prospective license applicant can compete against a permittee that has filed an exemption application. This is in essence a form of permit-based priority that is not intended and would not be beneficial to the public interest. Therefore, the proposed rule would provide for a permit to expire upon acceptance for filing of the permittee's exemption application.¹⁰²

X. Veracity of Applications

The Commission relies on the accuracy and truthfulness of the statements and information contained in hydroelectric project applications. Based in large part on these statements and information, the Commission grants permits, licenses, and exemptions. Therefore, the Commission needs written assurance that persons submitting an application and making statements therein have knowledge of the contents of the application and can vouch for its accuracy. All hydroelectric applications should be subscribed and verified by the persons submitting them. Prior to the adoption of the Commission's new Rules of Practice and Procedure,¹⁰³ under former § 1.16 of the Commission's regulations, the Commission required that all hydroelectric applications and exemption notices be subscribed and verified. The proposed rule would reinstate this requirement.¹⁰⁴

¹⁰⁰ Proposed § 4.83(b).

¹⁰¹ Section 4.30(c).

¹⁰² Proposed § 4.33(d)(1).

¹⁰³ 18 CFR Part 385 (1984).

¹⁰⁴ Proposed § 4.32(a)(3).

The rule would add a new article to the standard terms and conditions of all exemptions¹⁰⁵ and a special article to all permits and licenses that would explicitly recite the Commission's right to revoke any of these authorizations if any inaccurate material information was presented by or on behalf of the applicant during the application process.

XI. Amendments to Applications and New Filing Dates

The rule would amend § 4.35 in three ways. First, a new filing date would be assigned to a permit, exemption, or license application (or an application to amend a license when the amendment would increase installed capacity) when such an application is materially changed. This is the general rule of § 4.35. However, it has previously been applied only to license and permit applications. This rule would apply § 4.35, for the first time, to exemption applications. Fairness among competing applicants and the orderly processing of competing applications require that a new filing date be assigned to an application when it is materially changed. Other applicants should be availed the opportunity to know the entities and the plans of development against which they are competing. Also, the Commission should receive the best possible plans as early as possible.

A material amendment would be defined to be: (1) A change in generating units that would significantly modify the flow regime associated with the project; (2) a change in design or location of project works that would increase or decrease the reach of the stream affected by the project or would cause additional adverse environmental impacts; or (3) a change in the number of discrete units of development of the project. Under the proposed rule, if an application were materially amended, the Commission would consider any acceptance letter that may have been issued for that application to be automatically rescinded upon acceptance of the amendment to the application.

The staff would review an amended license or exemption application to determine whether the application, as revised, complies with applicable regulations as to content of the application. Acceptance, deficiency, or rejection letters would be prepared pursuant to the Commission's normal practice in reviewing applications.

Second, a change in "status," one of the material changes to an application that triggers § 4.35, would be defined to mean a change that causes a

preliminary permit or license applicant to gain or lose municipal preference under section 7(a) of the Act; or causes a permittee to lose its priority status under section 5 of the Act. Prospective applicants should know at the time another applicant files whether that applicant has municipal preference or priority status as a permittee. This knowledge could affect a prospective applicant's decision whether to compete and may help the Commission to streamline its processing of hydro project applications.¹⁰⁶

Third, a change in "identity," another of the material changes to an application that triggers § 4.35, would be defined more clearly to be a change that substitutes new applicants for *all* the original applicants.¹⁰⁷ This total substitution can be made in one or more amendments to an application. The amendment that substitutes for the last remaining original applicant would trigger § 4.35, resulting in the assignment of a new date of "acceptance for filing." Future total substitutions of the new set of applicants could again trigger § 4.35. Again, prospective and competing applicants should know against whom they are competing. The rule bars transfers of applications both out of fairness to competing applicants and to allow orderly administration of the licensing program.

XII. Municipal Preference

Section 7(a) of the Federal Power Act directs the Commission "[i]n issuing preliminary permits hereunder or licenses where no preliminary permit has been issued" to give preference to applications by state and municipalities. In the *City of Fayetteville* decision,¹⁰⁸ the Commission concluded that the legislative design of the Act precluded giving municipal preference to "hybrid" applications filed jointly by private developers and municipalities. In that case, the Commission expressed its concern that a municipality's participation in power development should represent more than tokenism to receive this statutory preference. Therefore, in *Fayetteville*, the Commission stated that, in order to retain its entitlement to municipal preference as the party who intends to be the licensee, a municipality must

¹⁰⁶ Because municipal status is irrelevant to an exemption application under the applicable statutes, a change in "status" would not be a material change to an exemption application and, therefore, would not trigger § 4.35.

¹⁰⁷ See *Noah Corp.*, 19 FERC ¶ 61,276 and 20 FERC ¶ 61,156 (1982).

¹⁰⁸ *City of Fayetteville Public Works Comm.*, 16 FERC ¶ 61,209 (1981).

¹⁰⁵ Proposed §§ 4.94(e) and 4.100(g).

retain in its contractual relationships with private entities, the *requisite control over the operation of a project, and it may not relinquish any property or other rights necessary for project purposes.* However, at the same time, the Commission emphasized that municipal preference need not be jeopardized by contractual arrangements that a municipality may make with private entities for assistance in financing, studying, constructing or operating a project; provided that such arrangements are consistent with license ownership and control requirements.

Since *Fayetteville*, the Commission has applied this rule on a case-by-case basis.¹⁰⁹ However, the Commission would prefer to promulgate guidelines to help prospective applicants more easily determine the range of contractual relationships between a private entity and a municipality that would be allowed without jeopardizing the right to municipal preference. Therefore, the Commission specifically invites public comment and suggestions with respect to the formulation of generic guidelines to distinguish between (a) those types of contractual relations between private entities and municipalities that should not disqualify an applicant from receiving municipal preference under section 7(a) of the Federal Power Act, and (b) those contractual relationships that should preclude municipal preference.

The Commission's regulations¹¹⁰ require applicants to identify in their applications "any citizen, association of citizens, domestic corporation, municipality, or state which has or intends to obtain, and will maintain, any proprietary right necessary to construct, operate or maintain a water power project for which an application for a preliminary permit or license is filed * * *." The Commission needs this information in determining whether an applicant should be given municipal preference. The Commission has declined to investigate allegations of "hidden hybrids" at the permit application stage, for the following reasons. First, it is self-defeating for a hybrid applicant to obtain a permit because, unless a permittee holds or intends to acquire all the proprietary rights necessary for construction, maintenance and operation of the project, it will not qualify for a license. Because the permit-based priority is not transferable, my license application filed jointly by a permittee and a non-

municipal partner would not be given permit-priority over any other application. Second, if the Commission finds that a partner in a hybrid venture is being unfairly advantaged at the license application stage (e.g., because it has used the permit's protection to perform all the requisite studies while discouraging other prospective applicants from performing studies), the Commission can dismiss that license application for a period of time and allow other prospective applicants adequate time to compete.¹¹¹ Finally, the Commission has limited resources. Because it has remedies available at the license application stage, it has declined to use its limited resources to investigate allegations at the permit stage.

While, for the reasons stated above, the Commission in the past has declined to investigate allegations of hidden-hybrids at the permit application stage, the Commission reminds prospective applicants that the Commission is not precluded from doing so in the future. In cases where the Commission believes the situation merits investigation at the permit application stage (e.g., when the Commission has sufficient evidence at hand, or when the remedies available at the license application stage appear to be insufficient or less desirable),¹¹² the Commission may investigate allegations of hidden-hybrids at the permit application stage.¹¹³

XIII. Other Amendments

(1) The rule would clarify that, although an applicant may not apply for a preliminary permit or license for project works that are authorized for Federal development exclusively, an applicant may submit a preliminary permit or license application for project works authorized for both Federal and private development.¹¹⁴

¹¹¹ Gregory Wilcox, 24 FERC ¶ 61,317 (1982) and 26 FERC ¶ 61,113 (1984).

¹¹² It has been argued that the failure to investigate hidden-hybrids at the permit application stage discourages legitimate competition at the license application stage. Legitimate developers are reluctant to compete with a hidden-hybrid license application that has the permit and first-in-time preferences.

¹¹³ Because of the importance of municipal preference and because hybrid-applicants might prefer not to claim municipal preference, under the proposed rule, applicants would state in their applications whether they were claiming municipal preference. See proposed §§ 4.41(a)(4), 4.51(a)(4), 4.61(b)(5), 4.71(a)(5), and 4.81(a)(4).

¹¹⁴ See §§ 4.30(b) and (c); proposed § 4.33(a) and (b); Guadalupe Blanco River Authority, 21 FERC ¶ 61,131 (1980). The Flood Control Act of 1954 authorized the Corps of Engineers to develop hydroelectric power at Canyon Dam and Reservoir. It also authorized local interests to develop hydroelectric power pursuant to the Federal Power Act. In *Guadalupe*, it was argued that when both Federal and non-Federal development is authorized,

(2) The rule would codify current Commission practice of rejecting any application as patently deficient if its effectiveness is conditioned upon the occurrence of some future event or circumstance.¹¹⁵ The orderly administration of the hydroelectric licensing program requires that the Commission accept only nonconditional applications. The Commission cannot allow an applicant to make its application contingent upon extrinsic, future events.

(3) The rule would reflect the Commission's practice of not finding a competing application to be patently deficient merely because it does not include proof of service on other applicants.¹¹⁶ When an application fails to include proof of service, the Commission allows a competing applicant to correct this deficiency, provided other deficiencies in the application do not singly or cumulatively cause the application to be determined to be patently deficient.¹¹⁷ This treatment assures adequate notice to competitors while not unduly penalizing applicants that fail to make timely notifications.

(4) Rule 214 of the Commission's Rules of Practice and Procedure (18 CFR 365.214) governs the processing of motions to intervene in all Commission proceedings, including hydroelectric matters. Therefore, the rule would remove the redundant part of § 4.31(h) that describes the intervention procedure.¹¹⁸

(5) The Commission can require any applicant to submit additional copies of an application or any additional information or documents that the Commission considers relevant. The regulations do not provide a time limit for compliance with such a request. To ensure the timely processing of applications and the sound administration of the hydroelectric licensing program, applicants should submit additional material within the time specified in the Commission's request. The rule would codify the Commission's current requirement that, when an applicant is ordered to submit additional copies, it must do so within the time specified in the Commission's request. This rule would apply to information that the Commission seeks

§ 4.30 bars the Commission from accepting applications for non-Federal development. The Commission rejects this interpretation of its regulations.

¹¹⁵ Proposed § 4.32(i). See *Niagara Mohawk Power Corp.*, 20 FERC ¶ 61,454 (1982).

¹¹⁶ Section 4.31(d)(2)(i) and 4.33(d)(2).

¹¹⁷ Proposed § 4.32(d)(2).

¹¹⁸ Proposed § 4.32(h).

¹⁰⁹ See *Linweave, Inc.*, 23 FERC ¶ 61,391 (1983); *Douff Mills*, 25 FERC ¶ 61,386 (1984).

¹¹⁰ § 4.30(d).

for itself, or that the Commission orders to be furnished to other persons, agencies or entities.¹¹⁹

(6) The rule would codify more clearly the Commission's current practice of requiring permit and license applicants to identify all co-applicants.

(7) Under section 4(f) of the Federal Power Act, the Commission gives written notice to any municipality that it believes likely to be interested in, or affected by, a pending preliminary permit or license application.¹²⁰ The Commission gathers available information about political subdivisions in the project area, and determines which of them should be given written notice of a particular pending application.¹²¹

The Commission could better implement section 4(f) if permit and license applicants provided the Commission with a list of local political subdivisions in their areas. Therefore, the proposed rule would require a permit or license applicant to identify those political subdivisions that meet certain criteria related to whether those local political subdivisions would likely be interested in, or affected by, the application. An applicant also would be required to identify any other political subdivisions that it believes would be interested in, or affected by, the application. Consistent with the Commission's policy in issuing the section 4(f) notices,¹²² a political subdivision's ability to "engage in the business of developing, transmitting, utilizing, or distributing power . . .," which determines whether it qualifies as a "municipality" under section 3(7) of the Act,¹²³ would have no bearing on whether it should be identified by an applicant under § 4.32(b). The Commission would determine which of those political subdivisions identified by the applicant should receive a section 4(f) notice and whether any additional political subdivisions also should receive a section 4(f) notice.

(8) Often, applicants omit information required to be included in an application. These applications are usually rejected as deficient. However, there are cases in which the information is unavailable or the requirement is inapplicable, and a detailed explanation to that effect would suffice. The rule would remind applicants to explain in detail any omissions or blank spaces in their applications.¹²⁴ If the Commission

finds that the information is necessary, the application would still be rejected.

(9) The rule also would remind applicants that amendments to cure deficient applications must be timely submitted. Also, the rule would provide that the Director of the Office of Electric Power, under delegated authority, would reject applications as patently deficient only within 45 days of filing. Thereafter, such applications could be treated as deficient under § 4.32(d)(1), which allows the applicant an opportunity to cure the deficiencies. The Commission (but not the Director of the Office of Electric Power) could reject such applications as patently deficient after the 45 day period.¹²⁵

(10) The proposed rule¹²⁶ would conform the requirements for describing project boundaries in an application for license for either a major unconstructed project or major modified project or a major project—existing dam.

(11) Due to a reorganization of the Commissioner's staff, § 12.3(b)(3) would be amended to include the Director of the Division of Inspections and Hydro-License Administration as an "authorized Commission representative."

XIV. Regulatory Flexibility Act Certification

The Regulatory Flexibility Act of 1980 (RFA), 5 U.S.C. 601-612, requires certain analyses of proposed agency rules that will have a "significant economic impact on a substantial number of small entities." Pursuant to section 605(b) of the RFA, the Commission hereby certifies that this rulemaking, if promulgated, will not have a significant economic impact on a substantial number of small entities.

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

substantial economic impact on any entity, large or small.

XV. Declaration of No Environmental Impact

The Commission has determined that this proposed codification of Commission decisions, clarification, and reorganization of the regulations would not be a major Federal action significantly affecting the quality of the human environment. Therefore, under the National Environment Policy Act of 1969, neither an environmental assessment nor an environmental impact statement is necessary.

XVI. Paperwork Reduction Act Statement

The information collection provisions in this proposed rule are being submitted to the Office of Management and Budget (OMB) for its approval under the Paperwork Reduction Act, 44 U.S.C. 3501-3520 (Supp. V 1981), and OMB's regulations, 5 CFR 1320.13 (1983). Interested persons can obtain information on the proposed information collection provisions by contacting the Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington, D.C. 20426 (Attention: Joseph H. Long, (202) 357-8033). Comments on the information collection provisions can be sent to the Office of Information and Regulatory Affairs of OMB (Attention: Desk Officer for the Federal Energy Regulatory Commission).

XVII. Comment Procedure

The Commission invites interested persons to submit written comments on the matters proposed in this notice. An original and 14 copies of such comments must be filed with the Commission not later than May 4, 1984. Comments submitted by mail should be addressed to the Secretary, Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington, D.C. 20426. Comments should indicate the name, title, mailing address and telephone number of the person to whom communications concerning the proposals should be addressed. Comments should reference Docket No. RM83-56-000 on the outside of the envelope and on all documents therein.

Written comments will be placed in the public files of the Commission and will be available for inspection at the Commission's Division of Public Information, Room 1000, address above, during regular business hours.

List of Subjects

18 CFR Part 4

Electric power.

¹¹⁹ Proposed § 4.32(f).

¹²⁰ 16 U.S.C. 797(f) (1976).

¹²¹ City of Idaho Falls, 20 FERC § 61.066 (1982).

¹²² *Id.*

¹²³ 16 U.S.C. § 796(7) (1976).

¹²⁴ Proposed § 4.32(d).

¹²⁵ Proposed § 4.32(d)(2).

¹²⁶ Proposed §§ 4.41 and 4.51.

18 CFR Part 12

Electric power. Reporting and recordkeeping requirements. Safety.

In consideration of the foregoing, the Commission proposes to amend Parts 4 and 12 of Chapter I, Title 18, Code of Federal Regulations, as set forth below.

By direction of the Commission.

Kenneth F. Plumb,

Secretary.

1. In Subparts D-K of Part 4 the respective table of contents are revised to read as follows:

SUBCHAPTER B—REGULATIONS UNDER THE FEDERAL POWER ACT

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

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

- Sec.
- 4.30 Applicability and definitions.
- 4.31 Initial or competing application: who may file.
- 4.32 Acceptance for filing or rejection.
- 4.33 Limitations on submitting applications.
- 4.34 Hearings on applications.
- 4.35 Amendment of application; change of date of acceptance.
- 4.36 Competing applications: deadlines for filing; comparison of plans of development.
- 4.37 Rules of preference among competing applications.
- 4.38 Pre-filing consultation requirements.
- 4.39 Specifications for maps and drawings.

Subpart E—Application for License for Major Unconstructed Project and Major Modified Project

- 4.40 Applicability.
- 4.41 Contents of application.

Subpart F—Application for License for Major Project—Existing Dam

- 4.50 Applicability.
- 4.51 Contents of application.

Subpart G—Application for License for Minor Water Power Projects and Major Water Power Projects 5 Megawatts or Less

- 4.60 Applicability and notice to agencies.
- 4.61 Contents of application.

Subpart H—Application for License for Transmission Line Only

- 4.70 Applicability.
- 4.71 Contents of application.

Subpart I—Application for Preliminary Permit, Amendment and Cancellation of Preliminary Permit

- 4.80 Applicability and purpose.
- 4.81 Contents of application.
- 4.82 Amendments.
- 4.83 Cancellation and loss of priority.
- 4.84 Surrender of permit.

Subpart J—Exemption of Small Conduit Hydroelectric Facilities

- 4.90 Applicability and purpose.
- 4.92 Exemption applications.
- 4.93 Action on exemption applications.
- 4.94 Standard terms and conditions of exemption.
- 4.95 Surrender of exemption.
- 4.96 Amendment of exemption.

Subpart K—Exemption of Small Hydroelectric Power Projects of 5 Megawatts or Less

- 4.101 Applicability.
- 4.102 Surrender of exemption.
- 4.103 General provisions for case-specific exemption.
- 4.104 Amendment of exemption.
- 4.105 Action on exemption applications.
- 4.106 Standard terms and conditions of case-specific exemption from licensing.
- 4.107 Contents of application for exemption from licensing.
- 4.108 Contents of application for exemption from provisions other than licensing.
- 4.109 General provisions for exemption from licensing for certain categories of small hydroelectric power projects.
- 4.110 Categorical exemption from licensing for small hydroelectric power projects: relationships among applications, exemptions, permits, licenses, and notices of exemption.
- 4.111 Standard terms and conditions of exemption from licensing for certain categories of small hydroelectric power projects.
- 4.112 Notice of exemption from licensing for projects with installed capacity of more than 100 kilowatts.
- 4.113 Notice of exemption from licensing for projects with installed capacity of 100 kilowatts or less.

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

Authority: Federal Power Act, 16 U.S.C. 792-826c (1976 and Supp. V 1981); Public Utility Regulatory Policies Act of 1978, Pub. L. 95-617, 92 Stat. 3117 (1978); Department of Energy Organization Act, 42 U.S.C. 7101-7352 (Supp. V 1981); E. O. 12009, 3 CFR Part 1142 (1978), unless otherwise noted.

3. The heading for Subpart B is revised to read as follows:

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

4. Section 4.30 is revised to read as follows:

§ 4.30 Applicability and definitions.

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

(b) For the purposes of this part—

(1)(i) "Competing development application" means any application for a license or exemption from licensing for a proposed water power project that would develop, conserve, and utilize, in whole or in part, the same or mutually

exclusive water resources that would be developed, conserved, and utilized by a proposed water power project for which an initial preliminary permit or initial development application has been filed and is pending before the Commission.

(ii) "Competing preliminary permit application" means any application for a preliminary permit for a proposed water power project that would develop, conserve, and utilize, in whole or in part, the same or mutually exclusive water resources that would be developed, conserved and utilized by a proposed water power project for which an initial preliminary permit or initial development application has been filed and is pending before the Commission.

(2) "Conduit" means any tunnel, canal, pipeline, aqueduct, flume, ditch, or similar man-made water conveyance that is operated for the distribution of water for agricultural, municipal, or industrial consumption and not primarily for the generation of electricity. The term "not primarily for the generation of electricity" includes but is not limited to a conduit:

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

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

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

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

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

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

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

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

(ii) "Existing dam" for the purposes of provisions governing application for exemption of a small hydroelectric power project means any dam, the construction of which was completed on or before April 20, 1977, and which does not require any construction or enlargement of impoundment structures (other than repairs or reconstruction) in connection with the installation of any small hydroelectric power project.

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

(8) "Federal lands" for the purposes of provisions governing application for exemption of a small hydroelectric power project means any lands to which the United States holds fee title.

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

(10)(i) "Initial development application" means any acceptable application for either a license or exemption from licensing for a proposed water power project that would develop, conserve, and utilize, in whole or in part, water resources for which no other acceptable application for a license or exemption from licensing has been submitted for filing and is pending before the Commission.

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

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

(12) "Install or increase" for the purposes of provisions governing application for exemption of a small hydroelectric power project means to add new generating capacity at a site that has no existing generating units, to

replace or rehabilitate an abandoned or unused existing generating unit, or to increase the generating capacity of any existing power plant by installing an additional generating unit or by rehabilitating an operable generating unit in a way that increases its rated electric power output.

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

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

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

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

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

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

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

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

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

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

(17) "Minor water power project" means any licensed or unlicensed, existing or proposed water power project that would have a total installed generation capacity of 2,000 horsepower (1.5MW), or less.

(18) "New development" for the purposes of provisions governing application for license of a major project—existing dam means any construction, installation, repair, reconstruction, or other change in the existing state of project works or appurtenant facilities, including any dredging and filling in project waters.

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

(20)(i) "Non-Federal lands" for the purposes of provisions governing application for exemption of a small

conduit hydroelectric facility means any lands except lands to which the United States holds fee title.

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

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

(22) "Project" for the purposes of provisions governing application for exemption of a small hydroelectric power project means: (i) The impoundment and any associated dam, intake, water conveyance facility, power plant, primary transmission line, and other appurtenant facility if a lake or similar natural impoundment or a man-made impoundment is used for power generation; or

(ii) Any diversion structure other than a dam and any associated water conveyance facility, power plant, primary transmission line, and other appurtenant facility if a natural water feature other than a lake or similar natural impoundment is used for power generation.

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

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

(25) "Real property interests" for the purposes of provisions governing application for exemption of a small conduit hydroelectric facility or a small hydroelectric power project includes ownership in fee, rights-of-way, easements, or leaseholds.

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

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

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

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

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

(v) Discharges the water it uses for power generation either:
(A) Into a conduit;
(B) Directly to a point of agricultural, municipal, or industrial consumption; or
(C) Into a natural water body if a quantity of water equal to or greater than the quantity discharged from the hydroelectric facility is withdrawn from that water body downstream into a conduit that is part of the same water supply system as the conduit on which the hydroelectric facility is located; and

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

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

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

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

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

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

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

(2) Does not retain more than two acre-feet (2467 cubic meters) of water behind the diversion or intake structure; and

(3) Does not increase the existing, naturally occurring hydraulic head of

the natural water feature more than five (5) percent.

5. Section 4.31 is revised to read as follows:

§ 4.31 Initial or competing application: Who may file.

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

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

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

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

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

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

§ 4.32 [Redesignated as § 4.39]

6. Section 4.32 is redesignated as § 4.39.

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

§ 4.32 Acceptance for filing or rejection.

(a) Each application must:

(1) For a preliminary permit or a 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:

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

(ii) Every city, town, borough, township, or similar local political entity:

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

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

(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 utilized by the project, would be located; or

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

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

(3) As to any facts alleged in the application or other materials filed, be subscribed and verified under oath in the form set forth in 18 CFR 131.60 by the person filing, an officer thereof, or other person having knowledge of the matters set 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 therefore; and

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

(i) Preliminary permit: § 4.81;

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

(iii) License for a major unconstructed project and a major modified project: § 4.53;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(2) *Patently deficient applications.* (i) If, within 45 days of its filing date, the Director of the Office of Electric Power Regulation determines that an

application patently fails to meet the requirements of either paragraphs (a) or (b) of this section or of § 4.38, the application will be rejected as patently deficient with a specification of deficiencies that render the application patently deficient.

(ii) If, after 45 days of its filing date, the Director of the Office of Electric Power Regulation, determines that an application patently fails to meet the requirements of either paragraphs (a) or (b) of this section or of § 4.38:

(A) The application will be rejected as patently deficient by order of the Commission; or

(B) The application will be considered deficient under paragraph (d)(1) of this section.

(iii) Any application that is rejected may be resubmitted if the deficiencies are corrected and if, in the case of a competing application, the resubmittal is timely. The date the rejected application is resubmitted will be considered the new filing date for purposes of determining its timeliness under § 4.36 and the disposition of competing applications under § 4.37. The cover page of the resubmitted application must prominently display the FERC project number, the word "Revised", and the date of the revision.

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

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

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

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

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

8. Section 4.33 is revised to read as follows:

§ 4.33 Limitations on submitting applications.

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

(1) Are licensed at the time of the application or are authorized by law exclusively for Federal development; or

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

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

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

(1) Are licensed at the time of the application or are authorized by law exclusively for Federal development; or

(2) Would develop, conserve, and utilize, in whole or in part, the same

water resources that would be developed, conserved, and utilized by a project for which there is an unexpired preliminary permit, unless the permittee has submitted an application for license.

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

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

(d) *Limitations on submission and acceptance of exemption application—*

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

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

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

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

intervene prescribed in the public notice issued for its license application under § 4.32(c)(2).

(e) *Priority of exemption applicant's earlier permit or license application.*

Any accepted preliminary permit or license application submitted by a person who later applies for exemption of the project from licensing will retain its validity and priority under this subpart until the preliminary permit or license application is withdrawn or the project is exempted from licensing.

(f) *Special limitations on submission and acceptance of applications.* Where appropriate and in the public interest, the Commission may refuse to accept any applications for a given project, or the Commission may accept applications for a given project but not consider any application to be the first filed for the purpose of favoring one application over another.

9. Section 4.34 is revised to read as follows:

§ 4.34 Hearings on applications.

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

10. Section 4.35 is revised to read as follows:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

§ 4.36 Competing applications: deadlines for filing; comparison of plans of development.

(a) *Deadlines for filing applications competing against an initial preliminary permit application.* An application filed in competition against an initial application for a preliminary permit must be submitted for filing within the following deadlines:

(1) *Competing preliminary permit application.* Any competing application for preliminary permit must be submitted for filing not later than the last date for filing protests and motions to intervene specified in the public notice of the initial preliminary permit application.

(2) *Competing development application.* (i) If, for a mutually exclusive project, no initial development application has been filed, a development application may be submitted in competition against an initial preliminary permit application at any time before the Commission approves any pending preliminary permit application.

(ii) If, for a mutually exclusive project, an initial development application has been filed, any other development application must be submitted in competition against an initial preliminary permit application not later than the last date for filing protests and motions to intervene specified in the public notice of the initial preliminary permit application.

(b) *Deadlines for filing applications in competition against an initial development application.* An application competing against an initial development application must be submitted for filing within the following deadlines:

(1) *Competing preliminary permit application.* A competing preliminary permit application may not be filed in competition against an initial development application.

(2) *Competing development application.* (i) Except as provided in paragraph (b)(2)(ii) of this section, a competing development application must be submitted for filing not later than the last date for filing protests and

motions to intervene specified in the public notice of the initial development application.

(ii) If the Commission has accepted an application for exemption of a project from licensing and the application has not yet been granted or denied, the applicant for exemption may submit a license application for the project if it is a qualified license applicant. The pending application for exemption from licensing will be considered withdrawn as of the date that the Commission accepts the license application for filing. If a license application is accepted for filing under this provision, any qualified license applicant may submit a competing license application not later than the last date for filing protests and motions to intervene specified in the public notice of such license application.

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

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

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

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

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

(iii) Not later than 40 days after the Commission serves the notification described in paragraph (c)(2)(i) of this section, each license and exemption applicant must file with the Commission a detailed and complete statement of how its plans are as well or better adapted than are the plans of each of the other license and exemption applicants to develop, conserve, and utilize in the public interest the water resources of the region. These statements should be supported by any technical analyses that the applicant deems appropriate to support its proposed plans of development.

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

§ 4.37 Rules of preference among competing applications.

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

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

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

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

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

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

(4) If one of two applicants is a municipality or a state, and the other is not, and the plans of the applicant who is not a municipality or a state are better adapted to develop, conserve, and

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

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

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

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

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

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

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

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

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

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

§ 4.38 Pre-filing consultation requirements.

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

(b) Consultation consists of the following:

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

(i) Detailed maps with proper land descriptions of the entire project area by

township, range and section as well as by state, county, river, river mile, and the closest town. Show the specific location of all proposed project facilities, including roads, transmission lines, and any other appurtenant facilities.

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

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

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

(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 proposed point of diversion or impoundment with location of the stream gauging station, the method used to generate the streamflow data provided, and copies of all records used to derive the flow data used in the applicant's engineering calculations.

(vi) A preliminary schedule of dates for filing an application, beginning and completion of construction, and initiation of operation.

(2) *Second stage of consultation.* A potential applicant must perform any reasonable studies necessary to assess potential impacts of the proposed project on the environment and to determine adequate mitigative measures for the proposed project. A potential applicant must provide each agency with a copy of its draft application, any studies and a written request for review and comment. The draft application must clearly indicate the type of application the applicant expects to file with the Commission. From the date that an agency receives the applicant's draft application, an applicant must allow each agency the following lengths of time to comment on the draft application prior to filing the application with the Commission:

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

(ii) Sixty days for an application to be filed under §§ 4.40 and 4.41, 4.50 and 4.51, 4.60 and 4.61(d)(1), or 4.200 and 4.201(b) (1) and (5).

A potential applicant must also provide each agency with a copy of reports discussing the results of any studies

performed after the initial stage of consultation and, to the extent possible, must respond in the draft application to any comments and recommendations made by agencies during the initial stage of consultation.

(3) *Third state of consultation.* When an applicant files an application with the Commission for an exemption, minor license, or major license less than 5 MW, it must serve a copy of its application on each of the agencies consulted. When an applicant revises, supplements, or amends an application on file with the Commission, the applicant must serve a copy of the revision, supplement, or amendment upon each consulted agency upon which it had served a copy of the original application. Applications for major license for 5 MW or more must be provided by applicant to the agencies after receipt of notification by the Commission that the application has been accepted.

(c) An applicant must document to the Commission that the requirements of all three stages of the consultation process have been fully satisfied and include any agency letters containing agency comments and recommendations.

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

§ 4.40 [Amended]

14. Section 4.40 is amended as follows:

a. The title is revised to read: § 4.40

Applicability.

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

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

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

15. Section 4.41 is amended as follows:

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

§ 4.41 Contents of application.

(a) * * *

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

(f) *Exhibit E* is an Environmental Report. Information provided in the

report must be organized and referenced according to the itemized subparagraphs below. See § 4.38 for consultation requirements. The Environmental Report must contain the following information, *commensurate with the scope of the project:*

(h) * * *

(2) *Project boundary.* The map must show a project boundary enclosing all project works and other features described under paragraph (b) of this section (Exhibit A) that are to be licensed. 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 may be described by any 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 may be described by:

(1) Contour lines;

(2) Specified courses and distances;

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

(4) Any combination of the above methods.

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

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

c. Paragraph (f)(6)(iv) is amended by removing the word "§ 4.32" and inserting, in its place, the word "§ 4.39".

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

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

§ 4.50 [Amended]

15. Section 4.50 is amended as follows:

a. The title is revised to read: § 4.50

Applicability.

b. Paragraph (b) is removed.

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

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

17. Section 4.51 is amended as follows:

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

§ 4.51 Contents of application.

(a) * * *

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

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

(h) * * *

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

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

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

18. Section 4.60 is revised to read as follows:

§ 4.60 Applicability and notice to agencies.

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

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

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

(3) Any major unconstructed project or major modified project, as defined in

§ 4.30(b) (15) and (14) respectively, that has a total installed capacity of 5 MW or less.

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

19. Section 4.61 is amended as follows:

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

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

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

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

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

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

g. Paragraph (b)(5) and the introductory text in subparagraph (d)(2) are revised to read as follows:

§ 4.61 Contents of application.

(b) * * *

(5) The applicant is a ——— (citizen of the United States, association of citizens of the United States, domestic corporation, municipality, or State, as appropriate) and (is/is not) claiming preference under section 7(a) of the Federal Power Act.

(d) * * *

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

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

§ 4.71 Contents of applications.

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

(a) * * *

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

§ 4.80 [Amended]

21. Section 4.80 is amended by revising the title to read: **§ 4.80 Applicability.**

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

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

§ 4.81 Contents of application.

(a) * * *

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

24. Section 4.82 is revised to read as follows:

§ 4.82 Amendments.

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

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

(c) If an application to extend the term of a permit is submitted not less than 30 days prior to the termination of the

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

25. Section 4.83 is revised to read as follows:

§ 4.83 Cancellation and loss of priority.

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

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

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

§ 4.84 Surrender of permit.

A permittee must submit a petition to the Commission before the permittee may voluntarily surrender its permit. Unless the Commission issues an order to the contrary, the surrender will take effect 30 days after the Commission issues a public notice of receipt of the petition.

§ 4.90 [Amended]

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

§ 4.91 [Removed]

28. Section 4.91 is removed.

29. Section 4.92 is amended as follows:

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

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

Old	New
Designation "(1)" following "(c) Contents of Application."	Removed.
(c)(1)(i).....	(a)(1).
(c)(1)(ii).....	(a)(2).
(c)(2).....	(b).
The introductory text of (c)(3).	The introductory text of (c)(3)(i) through the introductory text of (c)(7).
(c)(3)(i) through the introductory text of (c)(3)(vii).	(c)(7)(i) through (c)(7)(v).
(c)(3)(viii)(A) through (c)(3)(viii)(E).	(c)(8) through (c)(11).
(c)(3)(viii) through (c)(3)(xi).....	

Old	New
The introductory text of (c)(4).	The introductory text of (d)(1) through (d)(3).
(c)(4)(i) through (c)(4)(iii).....	The introductory text of (e)(1) through (e)(3).
The introductory text of (c)(5).	Removed.
(c)(5)(i) through (c)(5)(iii).....	(e)(4).
(c)(5)(iv).....	(f).
(c)(5)(v).....	
(c)(6).....	

30. The reference in newly redesignated paragraph (c)(7)(v) to "clause (D)" is revised to read "paragraph (c)(7)(iv) of this section".

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

§ 4.92 Contents of exemption application.

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

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

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

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

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

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

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

The location of the facility is:

State or Territory: _____

County: _____

Township or nearby town: _____

The exact name and business address of each applicant are: _____

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

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

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

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

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

(c) * * *

(7) * * *

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

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

(d) * * *

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

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

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

32. Section 4.93 is amended as follows:
a. Paragraph (b) is removed.

b. Paragraphs (c) through (g) are redesignated as paragraphs (b) through (f) respectively.

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

33. Newly redesignated § 4.93 is amended by revising paragraphs (a) and (c) to read as follows:

§ 4.93 Action on exemption applications.

(a) An application for exemption that does not meet the eligibility requirements of § 4.30(b)(26)(v) may be accepted, provided the application has been accompanied by a request for waiver under § 4.92(a)(1) and the waiver request has not been denied. Acceptance of an application that has been accompanied by a request for waiver under § 4.92(a)(1) does not constitute a ruling on the waiver request, unless expressly stated in the acceptance.

(c)(1) *General rule*. Except as provided in paragraph (c)(2) of this section, if the Commission has not taken one of the actions set forth in paragraph (d) of this section within 90 days after notifying the applicant that its application for exemption is accepted for filing, then at the expiration of that period the application will be considered granted as requested in the standard terms and conditions set forth in § 4.94.

(2) *Exceptions*. Paragraph (c)(1) will not apply and the 90-day period is automatically suspended if:

- (i) An acceptable competing application is filed; or
- (ii) The exemption application is accompanied by a request for a waiver of § 4.30(b)(26)(v).

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

§ 4.94 Standard terms and conditions of exemption.

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

in response to the notice of the exemption application.

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

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

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

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

§ 4.95 Surrender of exemption.

(a) To voluntarily surrender its exemption, a holder of an exemption for a small conduit hydroelectric facility must file a petition with the Commission. The petition must set forth the exemption holder's plans with respect to disposition and restoration of the project works and lands. If no significant construction has taken place, unless the Commission issues an order to the contrary, the surrender will take effect 30 days after the Commission issues a public notice of receipt of the petition. If significant construction has taken place, public notice of the petition will be given and at least 30 days thereafter the Commission will act upon the petition. The exemption holder must serve a copy of its petition on each of the interested Federal and state fish and wildlife agencies.

(b) Exemptions may be surrendered only upon fulfillment by the exemption holder of such obligations under the exemption as the Commission may prescribe and, if the project works described in the exemption have been constructed in whole or in part, upon such conditions with respect to the disposition of such project works and restoration of project lands as may be determined by the Commission.

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

§ 4.96 Amendment of exemption.

(a) An exemption holder must construct and operate its project as described in the exemption application approved by the Commission or its delegate. An exemption holder must notify the Commission and appropriate Federal and state fish and wildlife agencies in writing of any proposed changes in the design, location and method of construction of the project works or in the operation of the project. If the Director of the Office of Electric Power Regulation has not taken one of the actions set forth in paragraph (b) of this section within 45 days of the filing date of the notification required by this paragraph, the exemption holder may proceed with the project changes as proposed.

(b) Within 45 days after the filing date of the notification required by paragraph (a) of this section, the Director of the Office of Electric Power Regulation may take any of the following affirmative actions. The Director may:

- (1) Approve the changes;
- (2) Determine that the changes are consistent with the exemption as issued and that no amendment of the exemption is necessary;
- (3) Determine that the changes would constitute a material amendment of the exemption and deny the request to make the changes. If the changes are determined to constitute a material amendment of the exemption, the exemption holder may apply for an amendment of its exemption or apply for a license in order to acquire authorization to construct and operate the project with the requested changes; or

(4) Request the exemption holder to file additional information. After the additional information is received, the Commission may take one of the actions specified in this paragraph.

(c) If an exemption holder is required to apply for an amendment of its exemption, it must follow the same procedures of this Part for applying for an exemption. The Commission will not accept applications in competition against an application for amendment of an exemption.

§ 4.101 [Amended]

37. Section 4.101 is amended by removing the word "§ 4.102" and inserting, in its place, the word "§ 4.30(b)(26)".

38. Section 4.102 is revised to read as follows:

§ 4.102 Surrender of exemption.

(a) To voluntarily surrender its exemption, a holder of an exemption for a small hydroelectric power project

must file a petition with the Commission. The petition must set forth the exemption holder's plans with respect to disposition and restoration of the project works and lands. If no significant construction has taken place, unless the Commission issues an order to the contrary, the surrender will take effect 30 days after the Commission issues a public notice of receipt of the petition. If significant construction has taken place, public notice of the petition will be given and at least 30 days thereafter the Commission will act upon the petition. The exemption holder must serve a copy of its petition on each of the interested Federal and state fish and wildlife agencies.

(b) Exemptions may be surrendered only upon fulfillment by the exemption holder of such obligations under the exemption as the Commission may prescribe and, if the project works described in the exemption have been constructed in whole or in part, upon such conditions with respect to the disposition of such project works and restoration of project lands as may be determined by the Commission.

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

39. Section 4.103 is revised to read as follows:

§ 4.103 General provisions for case-specific exemption.

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

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

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

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

40. Section 4.104 is revised to read as follows:

§ 4.104 Amendment of exemption.

(a) An exemption holder must construct and operate its project as described in the exemption application approved by the Commission or its delegate. An exemption holder must notify the Commission and appropriate Federal and state fish and wildlife agencies in writing of any proposed changes in the design, location, and method of construction of the project works or in the operation of the project. If the Director of the Office of Electric Power Regulation has not taken one of the actions set forth in paragraph (b) of this section within 45 days of the filing date of the notification required by this paragraph, the exemption holder may proceed with the project changes as proposed.

(b) Within 45 days after the filing date of the notification required by paragraph (a) of this section, the Director of the Office of Electric Power Regulation may take any of the following affirmative actions. The Director may:

- (1) Approve the changes;
- (2) Determine that the changes are consistent with the exemption as issued and that no amendment of the exemption is necessary;
- (3) Determine that the changes would constitute a material amendment of the exemption and deny the request to make the changes. If the changes are determined to constitute a material amendment of the exemption, the exemption holder may apply for an amendment of its exemption or apply for a license in order to acquire authorization to construct and operate the project with the requested changes; or

(4) Request the exemption holder to file additional information. After the additional information is received, the Commission may take one of the actions specified in this paragraph.

(c) If an exemption holder is required to apply for an amendment of its exemption, it must follow the procedures of this Part for applying for an exemption. The Commission will not accept applications in competition against the application for amendment of the exemption.

41. Section 4.105 is amended as follows:

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

b. Paragraphs (b)(1) and (b)(2) are removed.

c. Paragraphs (b)(3) through (b)(6) are redesignated as (b)(1) through (b)(4), respectively.

d. Newly redesignated paragraphs (b)(2) of § 4.105 are revised to read as follows:

§ 4.105 Action on exemption applications.

(b) *Automatic exemption.* (i) If the Commission has not taken one of the actions set forth in subparagraph (b)(3) within 120 days after notifying the applicant that its application for exemption from licensing is accepted for filing and if the 120-day period for action has not been automatically suspended pursuant to subparagraph (b)(2) (ii) or (iii), exemption of the project as proposed will be deemed to be found consistent with the public interest and granted, subject to the standard terms and conditions set forth in § 4.106.

(ii) If an acceptable competing application for a license or for exemption from licensing is filed, the 120-day period of time for action on the initial application for exemption from licensing or for any competing applications for exemption from licensing is automatically suspended.

(iii) If an initial application for exemption from licensing requests a waiver under § 4.103, the 120-day period for action on the initial application for exemption is automatically suspended.

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

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

(b) *Article 2.* The construction, operation, and maintenance of the exempt project must comply with any terms and conditions that the United States Fish and Wildlife Service and any state fish and wildlife agencies have

determined are appropriate to prevent loss of, or damage to, fish or wildlife resources or to otherwise carry out the purposes of the Fish and Wildlife Coordination Act, as specified in Exhibit F of the application for exemption from licensing or in the comments submitted in response to the notice of the exemption application.

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

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

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

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

- (i) Section 12.4(b)(1) (i) and (ii), (b)(2) (i) and (iii), (b)(iv), and (b)(v);
- (ii) Section 12.4(c);
- (iii) Section 12.5;
- (iv) Subpart C; and
- (v) Subpart D.

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

43. Section 4.107 is amended as follows:

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

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

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

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

e. Paragraph (c)(5) of § 4.107 is revised and a new subparagraph (d)(4) is added to read as follows:

§ 4.107 Contents of application for exemption from licensing.

(c) * * *

(5) A graph showing a flow duration curve for the project. Identify steam gauge(s) and period of record used. If a synthetic record is utilized, provide details concerning its derivation. Furnish justification for selection of installed capacity if the hydraulic capacity of proposed generating unit(s) is less than the stream flow that is available 25 percent of the time.

(d) * * *

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

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

§ 4.201 Contents of application.

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

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

PART 12—(AMENDED)

45. Section 12.3(b)(3) is revised to read as follows:

§ 12.3 Definitions.

(b) * * *

(3) "Authorized Commission representative" means the Director of the Office of Electric Power Regulation, the Director of the Division of Inspections and Hydro-License Administration, the Director of the Division of Hydropower Licensing, the Regional Engineer, or any other member

of the Commission staff whom the Commission may specifically designate.

FR Doc. 84-1501 Filed 3-2-84; 8:45 am
BILLING CODE 6717-01-M

18 CFR Part 271

[Docket No. RM79-76-225 (Kentucky-3)]

High-Cost Gas Produced From Tight Formations; Proposed Rulemaking

AGENCY: Federal Energy Regulatory Commission, DOE.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Federal Energy Regulatory Commission is authorized by section 107(c)(5) of the Natural Gas Policy Act of 1978, 15 U.S.C. 3301-3432 (Supp. V. 1981), to designate certain types of natural gas as high-cost gas where the Commission determines that the gas is produced under conditions which present extraordinary risks or costs. Under section 107(c)(5), the Commission issued a final regulation designating natural gas produced from tight formations as high-cost gas which may receive an incentive price (18 CFR 271.703 (1983)). This rule established procedures for jurisdictional agencies to submit to the Commission recommendations of areas for designation as tight formations. This Notice of Proposed Rulemaking by the Director of the Office of Pipeline and Producer Regulation contains the recommendation of the Commonwealth of Kentucky that the "Big Lime" Formation of the Newman Group be designated as a tight formation under § 271.703(d).

DATE: Comments on the proposed rule are due on April 16, 1984.

Public Hearing: No public hearing is scheduled in this docket as yet. Written requests for a public hearing are due on March 15, 1984.

ADDRESS: Comments and requests for hearing must be filed with the Office of the Secretary, 825 North Capitol Street, N.E., Washington, D.C. 20426.

FOR FURTHER INFORMATION CONTACT: Leslie Lawner, (202) 357-8581, or

C. W. Gray, Jr., (202) 357-8731.

SUPPLEMENTARY INFORMATION:

I. Background

On January 16, 1984, the Commonwealth of Kentucky (Kentucky) submitted to the Commission a recommendation, in accordance with § 271.703 of the Commission's regulations (18 CFR 271.703 (1983)), that the "Big Lime" Formation of the

Newman Group located in Harlan, Leslie, Letcher and Perry Counties, Kentucky, be designated as a tight formation. This Notice of Proposed Rulemaking is issued under § 271.703(c)(4) to determine whether Kentucky's recommendation that the "Big Lime" Formation of the Newman Group be designated a tight formation should be adopted. Kentucky's recommendation and supporting data are on file with the Commission and are available for public inspection.

II. Description of Recommendation

Kentucky recommends that the "Big Lime" Formation of the Newman Group in Harlan, Leslie, Letcher, and Perry Counties in southeastern Kentucky, except for several irregularly shaped excluded areas as shown on maps on file with the Commission, be designated as a tight formation. The "Big Lime" Formation is a late Mississippian shallow marine deposit with interbedded layers of clastic and nonclastic limestone with interbedded thin shales in the upper portions of the formation. The "Big Lime" Formation consists of the Haney-Paoli Limestone, the Ste. Genevieve Limestone and St. Louis Limestone. The recommended tight formation is overlain by the "Pencil Cave" Shale and underlain by the "Big Injun" Sandstone.

The thickness of the "Big Lime" Formation in the four county area ranges from 174 to 303 feet. The average depth to the top of the "Big Lime" Formation is 1848 feet in western Leslie County and increases to 3403 feet to the south in Harlan County.

III. Discussion of Recommendation

Kentucky claims in its submission that evidence gathered through information and testimony presented at a public hearing in Frankfort, Kentucky, convened by Kentucky on this matter demonstrates that:

(1) The average *in situ* gas permeability throughout the pay section of the proposed area is not expected to exceed 0.1 millidarcy;

(2) The stabilized production rate, against atmospheric pressure, of wells completed for production in the recommended formation, without stimulation, is not expected to exceed the maximum allowable production rate set out in § 271.703(c)(2)(i)(B); and

(3) No well drilled into the recommended formation is expected to produce more than five (5) barrels of oil per day.

Kentucky further asserts that existing State and Federal Regulations assure that development of this formation will

not adversely affect any fresh water aquifers.

Accordingly, pursuant to the authority delegated to the Director of the Office of Pipeline and Producer Regulation by Commission Order No. 97 [Reg. Preambles 1977-1981] FERC Stats. and Regs. ¶ 30,180 (1980), the Director gives notice of the proposal submitted by Kentucky that the "Big Lime" Formation of the Newman Group as described and delineated in Kentucky's recommendation as filed with the Commission, be designated as a tight formation under § 271.703.

IV. Public Comment Procedures

Interested persons may comment on this proposed rulemaking by submitting written data, views or arguments to the Office of the Secretary, Federal Energy Regulatory Commission, 825 North Capitol Street, N.W., Washington, D.C. 20426, on or before April 16, 1984. Each person submitting a comment should indicate that the comment is being submitted in Docket No. RM79-76-225 (Kentucky-3) and should give reasons including supporting data for any recommendations. Comments should include the name, title, mailing address, and telephone number of one person to whom communication concerning the proposal may be addressed. An original and 14 conformed copies should be filed with the Secretary of the Commission. Written comments will be available for public inspection at the Commission's Division of Public Information, Room 1000, 825 North Capitol Street, N.E., Washington, D.C., during business hours.

Any persons wishing to present testimony, views, data, or otherwise participate at a public hearing should notify the Commission in writing that they want to make an oral presentation and so request a public hearing. The person shall specify the amount of time requested at the hearing, and should file the request with the Secretary of the Commission no later than March 15, 1984.

List of Subjects in 18 CFR Part 271

Natural gas. Incentive price, Tight formations.

Accordingly, the Commission proposes to amend the regulations in Part 271, Subchapter H, Chapter I, Title 18, Code of Federal Regulations, will be amended as set forth below, in the event

operate to permit builder and its successors to continue operation and maintenance of dam which had been twice reconstructed without license from Federal Power Commission. Northwest Paper Co. v Federal Power Com. (1965, CA8) 344 F2d 47; Minnesota Power & Light Co. v Federal Power Com. (1965, CA8) 344 F2d 53.

Where appropriator under Act of Mar. 3, 1905 (33 Stat. 1006), providing for acquirement of water rights in Spokane River along southern boundary of Spokane Indian Reservation had acquired valid and existing right-of-way and claim of authority theretofore given pursuant to law, said grant or authority was not affected by any of provisions of 16 USCS § 816. United States v Big Bend Transit Co. (1941, DC Wash) 42 F Supp 459.

4. Fair value

Applicant is not entitled to fair value of its project as of beginning of license period because

fair value may be allowed by Federal Power Commission only when, as provided in 16 USCS § 816, applicant possesses other valid federal authority for which it desires to substitute license under Act. Metropolitan Edison Co. (1947) 6 FPC 189.

Under 16 USCS § 816 "fair value" as applied to projects already constructed is deemed to be "net investment" of licensee in project as of date of license. Niagara Falls Power Co. (1950) 9 FPC 228.

16 USCS § 816 was not intended to permit person who, for almost 50 years, had operated project under federal permit to receive new, long-term license under conditions markedly superior to those which would apply either to licensee of new project or licensee of old project seeking renewal thereof at end of original term. Southern California Edison Co. (1964) 32 FPC 553.

§ 817. Projects not affecting navigable waters; necessity for Federal license

It shall be unlawful for any person, State, or municipality, for the purpose of developing electric power, to construct, operate, or maintain any dam, water conduit, reservoir, power house, or other works incidental thereto across, along, or in any of the navigable waters of the United States, or upon any part of the public lands or reservations of the United States (including the Territories), or utilize the surplus water or water power from any Government dam, except under and in accordance with the terms of a permit or valid existing right-of-way granted prior to June 10, 1920, or a license granted pursuant to this Act [16 USCS §§ 791a et seq.]. Any person, association, corporation, State, or municipality intending to construct a dam or other project works across, along, over, or in any stream or part thereof, other than those defined herein as navigable waters, and over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States shall before such construction file declaration of such intention with the Commission, whereupon the Commission shall cause immediate investigation of such proposed construction to be made, and if upon investigation it shall find that the interests of interstate or foreign commerce would be affected by such proposed construction, such person, association, corporation, State, or municipality shall not construct, maintain, or operate such dam or other project works until it shall have applied for and shall have received a license under the provisions of this Act [16 USCS §§ 791a et seq.]. If the Commission shall not so find, and if no public lands or reservations are affected, permission is hereby granted to construct such dam or other project works in such stream upon compliance with State laws.

(June 10, 1920, c. 285, § 23, 41 Stat. 1075; Aug. 26, 1935, c. 687, Title II, § 210(b), 49 Stat. 846.)

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any other date specified in this order, except as specifically ordered by the Commission. The Licensee's failure to file an application for rehearing shall constitute acceptance of this license. In acknowledgment of acceptance of this license and its terms and conditions, it shall be signed for the Licensee and returned to the Commission within 60 days from the date this order is issued.

— Footnotes —

¹ Although Fisheries, Game and NMFS have requested that a cumulative environmental assessment be conducted for the Snohomish River Basin, they have excluded Project No. 2959 from their request for a cumulative assessment.

² The constructed Project No. 2493 is located at Snoqualmie Falls.

³ The site-specific environmental impacts from construction of the project are discussed below.

⁴ Where a number of proposed projects are clustered in one geographical area, we intend to take a hard look at the potential cumulative impacts of these projects.

⁵ See 53 FPC 1657 (May 13, 1975).

⁶ The proposed project with this average generation will utilize a renewable resource that will save the equivalent of approximately 105,000 barrels of oil or 34,000 tons of coal per year.

⁷ See 18 C.F.R. § 4.51(f) (1982).

⁸ The Washington Department of Ecology has issued a water quality certificate in accordance with Section 401 of the Federal Water Pollution Control Act.

⁹ QE is defined as the flows which most effectively maximize stream habitat.

¹⁰ Two historic sites were discovered during the survey, however neither site appears to be eligible for the National Register of Historical Places.

¹¹ Environmental Assessment, South Fork Tolt River Project, FERC Project No. 2959-Washington, Division of Hydropower Licensing, Office of Electric Power Regulation, Federal Energy Regulatory Commission (March 8, 1984). This document is available in the Commission's public files associated with this proceeding.

[¶ 61,407]

Olympus Energy Corporation, Project No. 6617-000

Order Granting Exemption and Denying Motions for Coordinated Proceeding, Development of Data, and Hearing

(Issued March 29, 1984)

Before Commissioners: Raymond J. O'Connor, Chairman; Georgiana Sheldon, J. David Hughes and Oliver G. Richard III.

Olympus Energy Corporation ("Applicant" or "OEC") filed an application for exemption from licensing for the proposed Silver Creek Project No. 6617, to be located on Silver Creek and the Dungeness River in Clallam County, Washington. ¹ The project would be located on lands of the United States within the Olympic National Forest.

Notice of the application has been given, and comments were requested from interested federal and state agencies. The U.S. Fish and Wildlife Service and the Washington Departments of Fisheries and Game have filed terms and conditions to be included in the exemption. Intervention has been granted to the Olympic Park Associates, and the Washington Departments of Fisheries and Game. The intervenors argue that the construction of this project, along with the construction of other proposals ² for the Dungeness River Basin, would result in cumulative adverse environmental impacts and that the Commission must prepare a cumulative environmental impact statement

prior to action on applications in the basin. For the reasons stated below, we conclude that the Commission can and should grant the exemption application, as conditioned.

Discussion

Section 30 of the Federal Power Act ("FPA") ³ empowers the Commission to exempt from licensing certain conduit hydroelectric facilities, and Section 405(d) of the Public Utility Regulatory Policies Act of 1978 ("PURPA") ⁴ empowers the Commission to exempt from licensing certain small hydropower projects under 5 MW. Both exemption authorities are subject to Section 30(c) of the FPA: ⁵

In making the determination under subsection (a) the Commission shall consult with the United States Fish and Wildlife Service and the State agency exercising administration over the fish and wildlife resources of the State in which the facility is or will be located, in the manner provided by the Fish and Wildlife Coordination Act (16

U.S.C. 661, et seq.), and shall include in any such exemption—

(1) such terms and conditions as the Fish and Wildlife Service and the State agency each determine are appropriate to prevent loss of, or damage to, such resources and to otherwise carry out the purposes of such Act, and

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

By giving the Fish and Wildlife Service ("FWS") and comparable state agencies the power to impose mandatory conditions to protect fish and wildlife resources, Congress provided that, "under an exemption, the focal point of the protective efforts [regarding these resources] becomes the jurisdictional fish and wildlife agencies, rather than the procedures of the Commission." ⁶ Moreover, the Commission is obliged to defer to these fish and wildlife agencies with respect to fish and wildlife protection. ⁷ Section 30(c)(2) requires the Commission to include conditions to allow it to carry out its enforcement responsibilities (under Section 30(d)) with respect to the fish and wildlife agencies' mandatory terms as well as with the statute's technical standards (contained in Section 30(a) and (b)).

This scheme of regulation reflects the legislative goal of PURPA and the Energy Security Act ("ESA") ⁸ to expedite hydropower development. The pertinent provisions of those acts were in part Congress' response to the frequently cumbersome procedures and slow pace of the Commission's licensing program. PURPA, besides authorizing exemption of certain conduit hydroelectric facilities, also directed the Commission to establish simplified and expeditious licensing procedures, consistent with applicable laws, for small hydropower projects at existing dams (16 U.S.C. § 2705). The Commission has therefore considered itself under a mandate to simplify and accelerate its hydropower authorization process.

The desired streamlining would not be achieved if the Commission were required to review and supplement the agencies' assessment of fish and wildlife impacts. Whereas in licensing cases the Commission is responsible for balancing every consideration in determining that a project is best adapted to a comprehensive development plan, for the narrow category of projects which qualify for exemption, Congress has already made key public interest judgments on their behalf. It has established the need for their power by declaring, in ESA, a national policy of reducing

America's dependence on imported oil by encouraging alternative energy sources, such as small hydropower. It has virtually assured the economic feasibility of exempted projects qualifying as small power producers under PURPA by requiring utilities to purchase their output and to pay favorable rates.

Congress required the fish and wildlife agencies to make the judgments on the presumed major environmental issues attending such projects: their effect on fish and wildlife resources. The Commission's function is to determine whether a proposed project meets the exemption criteria, to attach the necessary enforcement terms, and to decide whether there are any conditions other than those dealing with fish and wildlife resources which are necessary to ensure that the exemption is in the public interest. For example, the Commission may attach terms addressing issues of dam safety, historic sites, and so forth.

Our experience with the exemption program has borne out the apparent expectations of the legislators that the primary environmental issue raised by those proposed projects which meet the carefully circumscribed criteria for exemption is the impact of such projects on fish and wildlife resources. Inasmuch as the environmental effects on fish and wildlife resources of projects proposed for exemption are within the exclusive purview of the fish and wildlife agencies, we conclude that it is the role of these agencies to analyze any such environmental effects, individually or cumulatively. Pursuant to their analysis, these agencies develop the mitigation measures to be included as mandatory conditions to the exemption. Where these agencies determine that the environmental effects of one or more proposed projects would, even with mitigation, constitute an unacceptably adverse impact on fish and wildlife resources in the region, then this Commission will not grant the application for exemption of such project or projects. Indeed, today we are for this reason denying an application for exemption in *Douglas Water Power Company*, Project No. 7172-000 (26 FERC ¶ 61,409).

In the instant case, the FWS, the Washington Department of Game ("WDG"), and the Washington Department of Fisheries ("WDF") all submitted mandatory terms and conditions for inclusion in any exemption issued for the proposed project. The FWS included terms it had determined were necessary to protect the threatened bald eagle based on worst-case conditions. The WDF submitted terms it considered "necessary . . . to protect the salmon resources of the Dungeness

River." ⁹ The WDG submitted "conditions developed to protect fish and wildlife from" the proposed project. ¹⁰ Both the WDG and the WDF included terms reserving the right to alter their terms and conditions during the life of the project, as appropriate to fulfill their responsibilities. In pleadings filed nearly ten months later, ¹¹ the WDG and the WDF asserted that they did not consider cumulative environmental impacts in the river basin when they submitted mandatory terms and conditions for Project No. 6617. They (and other parties) now seek a stay of Commission action on the exemption application until comprehensive studies can be completed on certain alleged cumulative impacts on fish and wildlife in the basin.

As we have discussed, analysis of fish and wildlife issues in the context of exemption applications is within the exclusive purview of the fish and wildlife agencies. Here, the state agencies submitted mandatory terms and conditions to protect these resources. As time went on, the agencies became concerned with potential cumulative impacts on those resources of the several projects proposed for the basin. In this case the agencies' mandatory conditions reserve their authority to impose on an exempted project any additional terms they may subsequently determine are necessary to mitigate whatever cumulative impacts on the fish and wildlife resources of the area may be identified. ¹²

Therefore, since those agencies have already imposed adequate site-specific mitigative conditions, and since they are empowered to add conditions pursuant to reserved authority and as a result of any further studies they may undertake, the Commission concludes that it is appropriate to issue the exemption at this time.

As noted, the Commission's role with respect to exemption applications is to investigate any environmental (and non-environmental) issues other than fish and wildlife to determine whether, if the exemption were issued, they would significantly affect the human environment. ¹³ In this case we have determined that no such effects would occur. We therefore deny the motions for consolidation, development of data and a hearing filed by Olympic Park Associates and Washington Departments of Fisheries and Game.

Exemption Conditions

Standard Article 2, included in this exemption, requires compliance with any terms and conditions that federal or state fish and wildlife agencies have determined appropriate to prevent loss of, or damage to, fish and

wildlife resources. The terms and conditions referred to in Article 2 are contained in any letters of comment by these agencies which have been forwarded to the Applicant in conjunction with this exemption.

Should the Applicant contest any terms or conditions that were proposed by federal or state agencies in their letters of comment as being outside the scope of Article 2, the Commission shall determine whether the disputed terms or conditions are outside the scope of Article 2.

The impacts from construction of the project would be short-term and minor in nature. However, because of soil conditions in the project area, stringent construction measures will be necessary to protect water quality for municipal water supplies. Articles 8 and 9 require OEC to monitor project construction and to develop measures to protect water quality. ¹⁴ Based on the terms and conditions required by federal and state fish and wildlife agencies, the environmental information in the application for exemption, other public comments, and our analysis, we find that the issuance of the exemption as conditioned would not be a major federal action significantly affecting the quality of the human environment.

The Commission orders:

(A) The Silver Creek Project No. 6617 as described and designated in Olympus Energy Corporation's application filed on August 19, 1982, is exempted from all of the requirements of Part I of the Federal Power Act, including licensing, subject to the standard articles in § 4.106 of the Commission's regulations, 18 C.F.R. § 4.106 (1983) and the following Special Articles:

Article 6. Any exempted small hydroelectric power project that uses a dam which is more than 33 feet in height above stream, as defined in 18 C.F.R. § 12.319(c) of this chapter, impounds more than 2,000 acre-feet of water, or has a significant or high hazard potential, as defined in 33 C.F.R. Part 222, is subject to the following provisions of 18 C.F.R. Part 12:

- (i) Section 12.4(b)(1)(i) and (ii), (2)(i), (iii) (A) and (B), (iv), and (v);
- (ii) Section 12.4(c); and
- (iii) Section 12.5.
- (iv) Subpart C; and
- (v) Subpart D.

Article 7. The Exemptee shall, prior to the commencement of any construction, consult with the Washington State Historic Preservation Officer (SHPO), to: (1) determine the scope of any necessary cultural resource

survey; (2) conduct such a survey; and (3) prepare a report to be filed with the SHPO describing the results of its survey work, providing an assessment of the significance of the cultural resources inventoried, including possible eligibility for the National Register of Historic Places, and setting forth recommendations for avoidance of, or mitigation of damage to, significant properties at the project. Any necessary mitigation work should be undertaken by the Exemptee in cooperation with the SHPO and in accordance with a schedule and plan negotiated between the Exemptee and the SHPO. The Exemptee shall make available funds in a reasonable amount for any survey and mitigation work as required. If any previously unrecorded archeological or historical sites are discovered during the course of construction or development of any project works or other facilities at the project, construction activity shall be halted, a qualified archeologist shall be consulted to determine the significance of the sites, and the Exemptee shall consult with the SHPO to develop and implement a mitigation plan for the protection of significant archeological or historical resources.

Article 8. The Exemptee shall, after consultation with the Washington Department of Ecology, monitor the effects of project construction and initial operation on the turbidity and suspended sediment regime of Silver Creek and the Dungeness River. The Exemptee shall provide such measures as are necessary and are agreed to with the consulted agency to protect the water quality of Silver Creek and the Dungeness River, should the monitoring program indicate that turbidity and suspended sediments have reached levels considered detrimental to downstream water users. Maximum acceptable levels of turbidity and suspended sediment should be agreed to by the consulted agency and the Exemptee prior to any ground-disturbing activity.

The Exemptee shall institute the monitoring of turbidity and suspended sediment at least 60 days prior to any ground-disturbing activity at the project. The results of the monitoring program shall be provided to the agency consulted.

Article 9. The Exemptee shall, in cooperation with the Washington Department of Ecology, coordinate construction activities of the Silver Creek Project with those of closely associated other projects in the area in order to minimize the impact of suspended sediment on the water quality of the lower Dungeness River and as is consistent with Article 3 of this exemption.

(B) The petitions for consolidation, development of data, and hearing filed by

¶ 61,407

Olympic Park Associates and Washington Departments of Fisheries and Game are denied.

(C) All motions and petitions not specifically granted are denied.

(D) The order is final unless an application for rehearing is filed within 30 days from the date of its issuance, as provided in Section 313(a) of the Federal Power Act. The filing of an application for rehearing does not operate as a stay of the effective date of this order, except as specifically ordered by the Commission. Failure to file an application for rehearing shall constitute acceptance of this order.

— Footnotes —

¹ The project would consist of: (1) a 5-foot-high diversion structure on Silver Creek; (2) a 2040-foot-long pipeline; (3) an 800-foot-long-penstock; (4) a powerhouse containing a 3.45 MW generating unit; and (5) a 6.5-mile-long transmission line.

² Other proposals for hydropower projects in the Dungeness River Basin are currently in the form of: a preliminary permit issued to Hydro Resource Company to study Project No. 5495, to be located on the Dungeness River; a pending application for exemption filed by Olympus Energy Corporation for Project No. 6840, to be located on the Dungeness River; a pending application for preliminary permit filed by WP, Incorporated, to study Project No. 7617, to be located on Canyon Creek and the Dungeness River.

³ 16 U.S.C. § 823a(c). Section 30 of the FPA was added by Section 213 of PURPA, Pub. L. No. 95-617, 92 Stat. 3117, 3148-49.

⁴ 16 U.S.C. § 2705(d). Section 405(d) of PURPA was added by Section 408(b) of the Energy Security Act of 1980, Pub. L. No. 96-294, 94 Stat. 611, 718.

⁵ Section 408 of ESA incorporates by reference Sections 30(c) and (d) of the Federal Power Act.

⁶ *FERC Regulations Preambles* ¶ 30,329 at p. 30,083 (Order No. 202, Exemption from the Licensing Requirements of Part I of the Federal Power Act of Certain Categories of Small Hydroelectric Power Projects with an Installed Capacity of 5 Megawatts or Less (Jan. 19, 1982)).

⁷ *Id.* at p. 30,091.

⁸ See n. 5, *supra*.

⁹ Letter from Rolland A. Schmitt, Director, WDF, to Kenneth F. Plumb, Secretary, FERC, filed December 6, 1982, in Project No. 6617-000.

¹⁰ Letter from Arthur G. Stendal, WDG, to Kenneth F. Plumb, Secretary, FERC, filed December 13, 1982, in Project No. 6617-000.

¹¹ WDG's motion for intervention out of time and motion for suspension and stay of proceedings; WDF and WDG's motion to intervene and for coordination of proceedings, for development of data.

and for hearing (filed October 14, 1983, in Project Nos. 5495, 6617, and 6840).

¹² The Commission has acknowledged the validity of open-ended conditions in exemptions. *FERC Regulations Preambles* ¶ 30,146 at p. 31,004 (1980) (Order No. 76).

The WDF and WDG purported to add, by their October 14, 1983, motion, terms and conditions for issuance of exemptions, preliminary permits and licenses, and modified terms and conditions for all projects which have been issued exemptions, permits, or licenses, but which have not begun construction. These agencies are not empowered to impose mandatory terms on Commission licenses and permits. The agencies can modify the terms of any issued exemptions pursuant to authority reserved in open-ended conditions; any other new conditions would be barred (absent the exemptee's agreement) under *Hirschey v. F.E.R.C.*, 701 F.2d 215 (D.C. Cir. 1983). However, these amended conditions purport to require the Commission to undertake specified consolidated and cumulative fish and wildlife studies in the river basin. Inasmuch as these agencies have the exclusive jurisdiction over fish and wildlife matters with respect to exemption applications, the Commission will not undertake such studies. In any event, the

Commission reads Section 30 of PURPA as authorizing fish and wildlife agencies to impose mandatory conditions on exemption applicants, not on the Commission.

¹³ Thus, we do not argue that NEPA is in any way limited or waived by PURPA or ESA; indeed, subsections 405(b) and (d) of PURPA explicitly provide that projects proposed for exemption are subject to NEPA, the Fish and Wildlife Coordination Act, the Endangered Species Act, and any other provision of federal law. Rather, the statutory scheme for exemptions allocates NEPA responsibilities among the federal agencies according to their exclusive purviews. Similarly, arguments that the Pacific Northwest Electric Power Planning Act, 16 U.S.C. §§ 839 *et seq.*, requires a coordinated approach to fish and wildlife resources should also be directed to the fish and wildlife agencies.

¹⁴ Interior recommended that a condition be included in the exemption to limit the use of mechanical equipment at the project, because of the potential for noise impact on users of an access trail to the Royal Basin area of the Olympic National Park. We believe that such a condition is not needed. The construction of the diversion structure, which is the structure nearest the trail, will require only a few months and will be minor.

[¶ 61,408]

Robert W. Shaw, Project No. 2861-004

Order Denying Rehearing and Motion for Hearing and Approving Interim Water Release Schedule

(Issued March 29, 1984)

Before Commissioners: Raymond J. O'Connor, Chairman; Georgiana Sheldon, J. David Hughes and Oliver G. Richard III.

On June 17, 1982, the Appalachian Mountain Club and the Society for the Protection of New Hampshire Forests ("Intervenors") applied for rehearing of our decision ¹ to issue a license for the Pontook Project No. 2861. Shortly after we issued an order ² allowing more time to consider the Intervenors' rehearing application, Robert W. Shaw ("Licensee") informed the Commission Staff that settlement discussions had commenced. On December 1, 1982, the Licensee asked that no action be taken on the Intervenors' rehearing request ³ because the parties were very close to an agreement and a decision by the Commission could hinder the negotiations.

On August 17, 1983, the Licensee filed a motion requesting the Commission to act on his proposal to accept the Intervenors' proposed interim water release schedule for white-water boating and to rule on the Intervenors' application for rehearing. In response, the Intervenors contend that unresolved issues still remain, and that their rehearing application

should be granted. The Intervenors' principal concerns are that the Commission should examine alternatives to the project, prepare an environmental impact statement, and conduct an evidentiary hearing. For the reasons discussed below, we are approving the Intervenors' proposed interim water release schedule for white-water boating, and are denying their application for rehearing in all other respects.

Background

On October 2, 1981, the Director of the Office of Electric Power Regulation ("Director") issued a license for the Pontook Project. ⁴ On appeal, the Intervenors asked the Commission to: (1) revoke the license; (2) prepare an environmental impact statement ("EIS"); (3) give the Intervenors' an opportunity to present evidence during a hearing; and (4) require Mr. Shaw to complete studies prior to the issuance of a license to ensure meaningful mitigation measures.

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UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Raymond J. O'Connor, Chairman;
Georgiana Sheldon, J. David Hughes,
A. G. Sousa and Oliver G. Richard III.

Lester Kelly, Vernon Ravenscroft) Project No. 6245-002
and Helen Chenoweth

ORDER GRANTING EXEMPTION FROM LICENSING OF A
SMALL HYDROELECTRIC PROJECT OF 5 MW OR LESS

(Issued April 6, 1984)

The Applicant 1/ filed an application for exemption from all or part of Part I of the Federal Power Act (Act) pursuant to 18 C.F.R. Part 4 Subpart K (1980) implementing in part Section 408 of the Energy Security Act (ESA) of 1980 for a project as described in the attached public notice. 2/

Notice of the application was published in accordance with Section 408 of the ESA and the Commission's regulations and comments were requested from interested Federal and State agencies including the U.S. Fish and Wildlife Service and the State Fish and Wildlife Agency. All comments, protests and petitions to intervene that were filed have been considered.

Standard Article 2, included in this exemption, requires compliance with any terms and conditions that Federal or State fish and wildlife agencies have determined appropriate to prevent loss of, or damage to, fish and wildlife resources. The terms and conditions referred to in Article 2 are contained in any letters of comment by these agencies which have been forwarded to the Applicant in conjunction with this exemption.

Should the Applicant contest any terms or conditions that were proposed by Federal or State agencies in their letters of comment as being outside the scope of Article 2, the Commission shall determine whether the disputed terms or conditions are outside the scope of Article 2.

- 1/ Lester Kelley, et al Project No. 6245-002, filed on June 21, 1982
- 2/ Pub. Law 96-294, 94 Stat. 611. Section 408 of the ESA amends *inter alia*, Sections 405 and 408 of the Public Utility Regulatory Policies Act of 1978 (16 U.S.C. §§2705 and 2708).

This order is consistent with the Commission's decision in Olympus Energy Corporation, Project No. 6617-000, 26 FERC ¶ (March 29, 1984), where the Commission indicated that the statutory scheme for exemptions allocates the exclusive responsibility for protecting, as well as analyzing any adverse impacts on, fish and wildlife resources to the fish and wildlife agencies empowered to impose mandatory terms and conditions on exemptions. Thus, the decision on whether to perform an assessment of cumulative environmental impacts on fish and wildlife resources rests with the fish and wildlife agencies. Issuance of an exemption does not interfere with their decision in any case where such agencies have not raised cumulative impacts concerns, or where they, or the Commission or its delegate, have included in the exemption an open-ended condition allowing these agencies to add or modify whatever terms they may subsequently determine are necessary and appropriate to mitigate any project impacts, including cumulative, on fish and wildlife. Consequently, it is appropriate to grant the exemption application in this case.

The proposed project would be located on a river which is part of the Columbia River Basin. The Pacific Northwest Electric Power Planning and Conservation Act, 16 U.S.C. §839 et seq. ("Planning Act"), requires that, in their decision making process, Federal agencies responsible for regulating hydro facilities on the Columbia River or its tributaries provide equitable treatment for fish and wildlife with the other purposes for which hydropower facilities are operated. Section 4(h)(ii)(A)(i) of the Planning Act. As explained in Olympus Energy Corporation, *supra*, Congress has established the need for power from projects that qualify for exemption by declaring, in the Energy Security Act, a national policy of reducing America's dependence on imported oil by encouraging small hydroelectric projects. Also, Congress has required the Commission to include in any exemption granted those conditions required by the U.S. Fish and Wildlife Service and the state fish and wildlife agency as necessary for the protection of fish and wildlife resources. Congress has thus built into the exemption program the balancing of energy generation and fish and wildlife resources required by the Planning Act.

The Fish and Wildlife Program, developed pursuant to the Planning Act, requires consolidated review of all proposals for hydroelectric development in a river basin, and requires the assessment of cumulative effects of hydroelectric development on fish and wildlife. Provision 1204 of the Fish and Wildlife Program of the Northwest Power Planning Council. While the Program is not binding on it, the Commission must take it into account, "to the

fullest extent practicable", at each relevant stage of the decision-making process. Section 4(h)(11)(A)(ii) of the Planning Act. As we have noted, assessment and mitigation of environmental impacts, site-specific or cumulative, on fish and wildlife resources of projects proposed for exemption are within the exclusive purview of the fish and wildlife agencies. Our exemption process accommodates these agencies' decisions on these matters. Therefore, there is no conflict between our action here and the provisions of the Planning Act.

The Nez Perce Tribe and the Department of the Interior argue that the issuance of the exemption and construction of the project would interfere with treaty-protected fishing rights. As found in Olympus Energy Corp., supra, in exemption proceedings it is the exclusive responsibility of the fish and wildlife agencies to evaluate impacts on fish and wildlife resources and to submit terms and conditions to minimize or eliminate impacts to these resources. To the extent that any treaty fishing rights would be affected by an exemption, it is for the U.S. Fish and Wildlife Service to either submit terms and conditions to avoid the impacts or state that the exemption cannot be issued because of unavoidable impacts.

Based on the terms and conditions required by Federal and State fish and wildlife agencies, the environmental information in the application for exemption, other public comments, and our analysis, we find that the issuance of this order is not a major Federal action significantly affecting the quality of the human environment.

The Commission orders:

(A) Bear Creek Hydro Project No. 6245-002 as described and designated in Lester Kelly, Vernon Ravenscroft and Helen Chenoweth's application filed on June 21, 1982, is exempted from all of the requirements of Part I of the Federal Power Act, including licensing, subject to the standard articles in §4.106 of the Commission's regulations attached hereto as Form E-2, 18 C.F.R. §4.106, 45 Fed. Reg. 76115 (November 18, 1980), (November 18, 1980), and the following special articles.

Article 6. Any exempted small hydroelectric power project that utilizes a dam which is more than 33 feet in height above streambed, as defined in 18 CFR 12.31(c) of this chapter, impounds more than 2,000 acre-feet of water, or has a significant or high hazard potential, as defined in 33 CFR Part 222, is subject to the following provisions of 18 CFR Part 12:

- (i) Section 12.4(b)(1)(i) and (ii), (2)(i), (iii)(A) and (B), (iv), and (v);
- (ii) Section 12.4(c);
- (iii) Section 12.5;
- (iv) Subpart C; and
- (v) Subpart D.

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

Article 7. The construction, operation, and maintenance of the exempt project may be reviewed by the Commission and subjected to further requirements for consistency with the terms and conditions of the regional fish and wildlife program developed pursuant to the Pacific Northwest Electric Power Planning and Conservation Act.

Article 8. The Exemptee shall, prior to the commencement of any construction, consult with the Washington State Historic Preservation Officer (SHPO) to: (1) determine the scope of any necessary cultural resource survey; (2) conduct such a survey; and (3) prepare a report to be filed with the SHPO describing the results of its survey work, providing an assessment of the significance of the cultural resources inventoried, including possible eligibility for the National Register of Historic Places, and setting forth recommendations for the avoidance of, or mitigation of damage to, significant properties at the project. Any necessary mitigation work should be undertaken by the Exemptee in cooperation with the SHPO and in accordance with a schedule and plan negotiated between the Exemptee and the SHPO. The Exemptee shall make available funds in a reasonable amount for any survey and mitigation work as required. If any previously unrecorded archeological or historical sites are discovered during the course of construction or development of any project works or other facilities at the project, construction activity shall be halted, a qualified archeologist shall be consulted to determine the significance of the sites, and the Exemptee shall consult with the SHPO to develop and implement a mitigation plan for the protection of significant archeological or historical resources.

Project No. 6245-002

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Article 9. The Fish and Wildlife Service of the U. S. Department of the Interior is reserved the right to add and alter terms and conditions as appropriate to carry out its responsibilities during the life of the project with respect to fish and wildlife resources. The Exemptee shall, within 30 days of receipt, file with the Commission any additional terms and conditions imposed by the above agency.

(B) The order is final unless an application for rehearing is filed within 30 days from the date of its issuance, as provided in Section 313(a) of the Federal Power Act. The filing of an application for rehearing does not operate as a stay of the effective date of this order, except as specifically ordered by the Commission. Failure to file an application for rehearing shall constitute acceptance of this order.

By the Commission. Commissioner Sousa concurred for the reasons to be set forth in his separate statement to the order issued April 6, 1984, in Project No. 4458-002, Middle Fork Irrigation District and Project No. 6645-000, General Energy Development, Inc.

(S E A L)

Lois A. Cashell

Lois D. Cashell,
Acting Secretary.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Mr. Lester Kelley, Mr. Vernon Ravenscroft) Project No. 6245-002
and Mrs. Helen Chenoweth

NOTICE OF APPLICATION FOR EXEMPTION FOR SMALL
HYDROELECTRIC POWER PROJECT UNDER 5 MW CAPACITY
(July 28, 1982)

Take notice that on June 21, 1982, Mr. Lester Kelley, Mr. Vernon Ravenscroft and Mrs. Helen Chenoweth (Applicant) filed an application, under Section 408 of the Energy Security Act of 1980 (Act) (16 U.S.C. 542705, and 2708 as amended), for exemption of a proposed hydroelectric project from licensing under part 1 of the Federal Power Act. The proposed small hydroelectric project (No. 6245) would be located on Bear Creek, within the Boise National Preserve, in Blaine County, Idaho. In Valley County, Idaho. Correspondence with the Applicant, Inc., P.O. Box 893, Boise, Idaho 83701

Project Description - The proposed project would consist of (1) an intake structure with three turbines at Bear Creek (2) a 7,000-foot-long, 14-inch-diameter penstock (3) a powerhouse containing a single generating unit with a rated capacity of 623 kW, operating under a head of 1,200-feet; and (4) a 1/4-mile-long, 34.5-kV transmission line to tie into an existing line. The average annual energy production is estimated at 2,423,000 kWh.

Purpose of Exemption - An exemption, if issued, gives the Exemptee the right to develop, construct, operate, and maintain the project under the terms of the exemption from licensing, and not subject the Exemptee from permit or license applications that would seek to take or develop the project.

Agency Comments - The U.S. Fish and Wildlife Service, The National Park Service, and the Idaho Department of Fish and Game are requested to submit comments on the project under Section 408 of the Act, to submit within 60 days from the date of publication of this notice appropriate terms and conditions to protect any fish and wildlife resources or to otherwise carry out the provisions of the Fish and Wildlife Coordination Act. General comments concerning the project and its resources are requested; however, specific comments on the project should be submitted. The condition of exemption must be clearly identified and the agency must specify the time period the agency will be presumed to have made. Other Federal, State, and local agencies are requested to provide any comments they may have in accordance with their duties and responsibilities. No other formal requests for comments will be made. Comments should

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be confined to substantive issues relevant to the granting of an exemption. If an agency does not file comments within 60 days from the date of issuance of this notice, it will be presumed to have no comments. One copy of an agency's comments must also be sent to the Applicant's representatives.

Competing Applications - Any qualified license applicant desiring to file a competing application must submit either the competing application on or before the date that the competing license application is filed, or a notice of intent to file such a license application. Submission of a timely notice of intent allows an interested person to file the competing license application within 120 days from the date that comments, protests, or objections are filed, but only those who file a petition to intervene in accordance with the Commission's Rules may become a party to the proceedings. Any competing applications to intervene must be received on or before

A notice of intent must conform with the requirements of 18 C.F.R. 44.31(b) and (c) (1980). A competing license application must conform with the requirements of 18 C.F.R. 44.31(a) and (d) (1980).

Comments, Protests, or Petitions to Intervene - Anyone may submit comments, a protest, or a petition to intervene in accordance with the requirements of the Rules of Practice and Procedure, 18 C.F.R. 81.8 or 81.10 (1980). In determining the appropriate action to take, the Commission will consider all protests or petitions to intervene in order, but only those who file a petition to intervene in accordance with the Commission's Rules may become a party to the proceedings. Any competing applications to intervene must be received on or before

Filing and Service of Responsive Documents - Any filings must bear in all capital letters the title "COMMENTS", "NOTICE OF INTENT TO FILE COMPETING APPLICATION", "COMPETING APPLICATION", "PETITION TO INTERVENE", "PROTEST", or "PETITION TO INTERVENE", as applicable, and the project name. The responsive documents must be filed with the Commission by providing the original and two copies to the Federal Energy Regulatory Commission, 825 North Capitol Street, N.E., Washington, D.C. 20426. An additional copy must be sent to Fred E. Sprimner, Chief, Applications Branch, Division of Power Licensing, Federal Energy Regulatory Commission, Room 208-B, 1000 Pennsylvania Avenue, N.W., Washington, D.C. 20004. A copy of any notice of intent, competing application, protest, or petition to intervene must be served upon each representative of the Applicant specified in the first paragraph of this notice.

Kenneth F. Plumb
Secretary

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