

Division of Hydropower Administration and Compliance



Compliance Handbook

March 2002

Notice

The regulations cited in this publication are subject to change. The reader may identify any changes in Federal Energy Regulatory Commission (Commission or FERC) regulations that may affect any application by monitoring the formal documents issued by the Commission each business day using the Commission's website home page at www.ferc.gov or by using one or more of the services described below.

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Public Reference Room. The public also may visit the Public Reference Room at Room 2-A, Commission Headquarters, 888 First Street, NE, Washington, D.C. 20246. Filings and other official documents may be viewed free of charge. The free publication *A Guide to Public Information at the Federal Energy Regulatory Commission* is also available from the Public Reference Room, on the Internet, or through the mail. It may be ordered by contacting public.reference.room@ferc.gov, or by calling (202) 208-1371.

Federal Register. Published each business day, the Federal Register contains official notices of initial filings and applications, as well as the Commission's proposed and final rulemakings. Online access to the Federal Register can be found at www.access.gpo.gov/su_docs/index.htm or www.nara.gov/fedreg. To subscribe, contact the Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20402.

Federal Energy Guidelines. *FERC Reports* and *FERC Statutes and Regulations* are looseleaf, indexed services that contain proposed and final rulemakings, orders, notices, opinions, initial decisions, and final decisions. To subscribe, contact Commerce Clearing House, Inc., 4025 West Peterson Ave., Chicago, IL 60646, or call (800) 835-5224, or go to www.cch.com.

Other Electronic Databases. Several services provide access to Commission documents by computer. These include LEXIS and WESTLAW. For information, write or call the offices below.

LEXIS—Available from Mead Data Central, P.O. Box 933, Dayton, OH 45401.
Phone (800) 544-7390.

WESTLAW—Available from West Publishing Company, P.O. Box 64779, St. Paul, MN 55164. Phone (800) 328-9833.

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Acronyms and Abbreviations

Advisory Council	Advisory Council on Historic Preservation
APE	Area of Potential Effect
CIPS	Commission Issuance Posting System
Commission	Federal Energy Regulatory Commission
D2SI	Division of Dam Safety and Inspections
DEA	draft environmental assessment
DEIS	draft environmental impact statement
DHAC	Division of Hydropower Administration and Compliance
EPRI	Electric Power Research Institute
ESA	Endangered Species Act
FERC	Federal Energy Regulatory Commission
FPA	Federal Power Act
FWS	U.S. Fish and Wildlife Service
HCMP	Hydropower Compliance Management Program
HPMP	Historic Properties Management Plan
HWBEG	Headwater Benefits Energy Gains
ITF	Interagency Task Force
National Register	National Register of Historic Places
NEPA	National Environmental Policy Act
NRFC	National Recreational Fisheries Coordination Council
NRG	National Review Group
PA	Programmatic Agreement
PME	protection, mitigation, and enhancement
RIMS	Records and Information Management System
SHPO	State Historic Preservation Officer
SMP	Shoreline Management Plan
T&E	threatened and endangered
TPO	Tribal Preservation Officer
USDA	U.S. Department of Agriculture

SECTION I: PURPOSE, RESPONSIBILITIES, GENERAL PHILOSOPHY

1.0 Introduction

1.1 Purpose of the Compliance Handbook

The Compliance Handbook presents information and instruction on the full range of activities performed by the Division of Hydropower Administration and Compliance (DHAC) within the Federal Energy Regulatory Commission (FERC or Commission). Audiences include all DHAC staff, other Commission staff, existing licensees, potential licensees, and stakeholders in hydropower administration and compliance proceedings.

The Commission intends that the Compliance Handbook provide DHAC staff, and those who interact with the staff, comprehensive guidance and step-by-step instruction for implementing Commission rules, regulations, policies, and programs designed to ensure effective compliance with license conditions to protect and enhance beneficial public uses, both developmental and non-developmental, of waterways.

The Compliance Handbook contains four sections, including descriptions of DHAC (section I), DHAC reactive activities (section II), DHAC preventive strategies (section III), and DHAC proactive strategies (section IV). The appendices include the Federal Power Act (FPA; Appendix A), selected parts of FERC regulations (Appendix B), specific step-by-step guidance for completing applications, detailed descriptions of the contents of various filings, and completed examples of documents discussed in the handbook. Throughout the handbook, parts of the regulations are cited that apply to the discussion (**e.g., 18 CFR ...**). The publications cited are listed in Appendix C.

1.2 Overview of the Division of Hydropower Administration and Compliance

The Commission issues licenses or exemptions for the operation of hydropower projects under the provisions of the FPA. Licenses and exemptions issued by the Commission contain conditions, presented as a series of standard and special articles in a license or exemption order, with which licensees and exemptees must comply. DHAC reviews compliance by licensees and exemptees of hydropower projects with the conditions specified in their licenses or exemptions, and with Commission rules and regulations. DHAC also reacts to complaints from stakeholders alleging noncompliance with license conditions.

DHAC authorizes amendments to licenses and exemptions. Amendments take various forms. For example, environmental protection or enhancement measures filed with the Commission pursuant to license articles (article compliance filings) may constitute amendments to licenses. Amendments may result from resolution of environmental

conflicts that were not addressed during the licensing process. DHAC also processes amendments to licenses and exemptions that result from proposed changes in project operations, modifications to project structures, or changes in project boundary. We refer to filings required for article compliance filings as mandatory filings. We refer to requests for amendments that are not made pursuant to an article compliance filing as voluntary filings.

DHAC performs several other activities: (1) authorizing applications for license surrenders or transfers for unconstructed projects; (2) determining the jurisdiction of operating unlicensed projects to ensure full compliance with the Commission's regulations and the provisions of the FPA; (3) determining and assessing headwater benefit charges and evaluating non-waterpower interest on federal lands reserved for waterpower use; and (4) authorizing applications for preliminary permits and conduit exemptions.

DHAC consists of three branches with two teams each, including staff in Washington, D.C., and in regional offices in Atlanta, Chicago, New York, Portland (OR), and San Francisco. Major program responsibilities reflect the expertise of staff within each team, as shown below.

Table 1-1. Major Program Responsibilities by Branch	
Land Resources and Regulatory Compliance Branch	
Management Team	Land Resources Team
Schedule Amendments	Environmental Article Compliance
Project Amendments	Changes in Land Rights
Issuing and Monitoring	Non-Project Use of Project Lands
Preliminary Permits	
Conduit Exemptions	Investigations of Non-Compliance
Compliance Processing	
Schedule Compliance	
Civil Penalty Assessments	
Surrender of License or Exemption	
Transfer of License	
Engineering and Jurisdiction Branch	
Compliance Team	Jurisdiction Team
Compliance Monitoring	Jurisdictional Determinations
Pre-Filing Collaboration	Federal Lands Review
Engineering Amendments	
Engineering Resource Compliance	
Headwater Benefit Studies	
Biological Resources Branch	
Environmental Amendments	Environmental Compliance

1.3 Doing Business with the Division of Hydropower Administration and Compliance

DHAC welcomes contacts from all sources and encourages interaction between the staff and existing and potential licensees and exemptees, as well as stakeholders. We are located at 888 First Street, N.E., in Washington, D.C. Please see our organizational chart (Figure 1-1) for staff telephone numbers.

All filings with the Commission should include an original and eight copies of all information, unless indicated otherwise in a license or exemption. The filing should also include a cover letter that describes the information and notes in the upper right corner of the letter the name of the project and its FERC number. Under the electronic filing initiative, filings may be filed electronically via the Internet in lieu of paper. See **18 CFR 385.2001(a)(1)(iii)** and the instructions on the Commission's web site at www.ferc.gov.

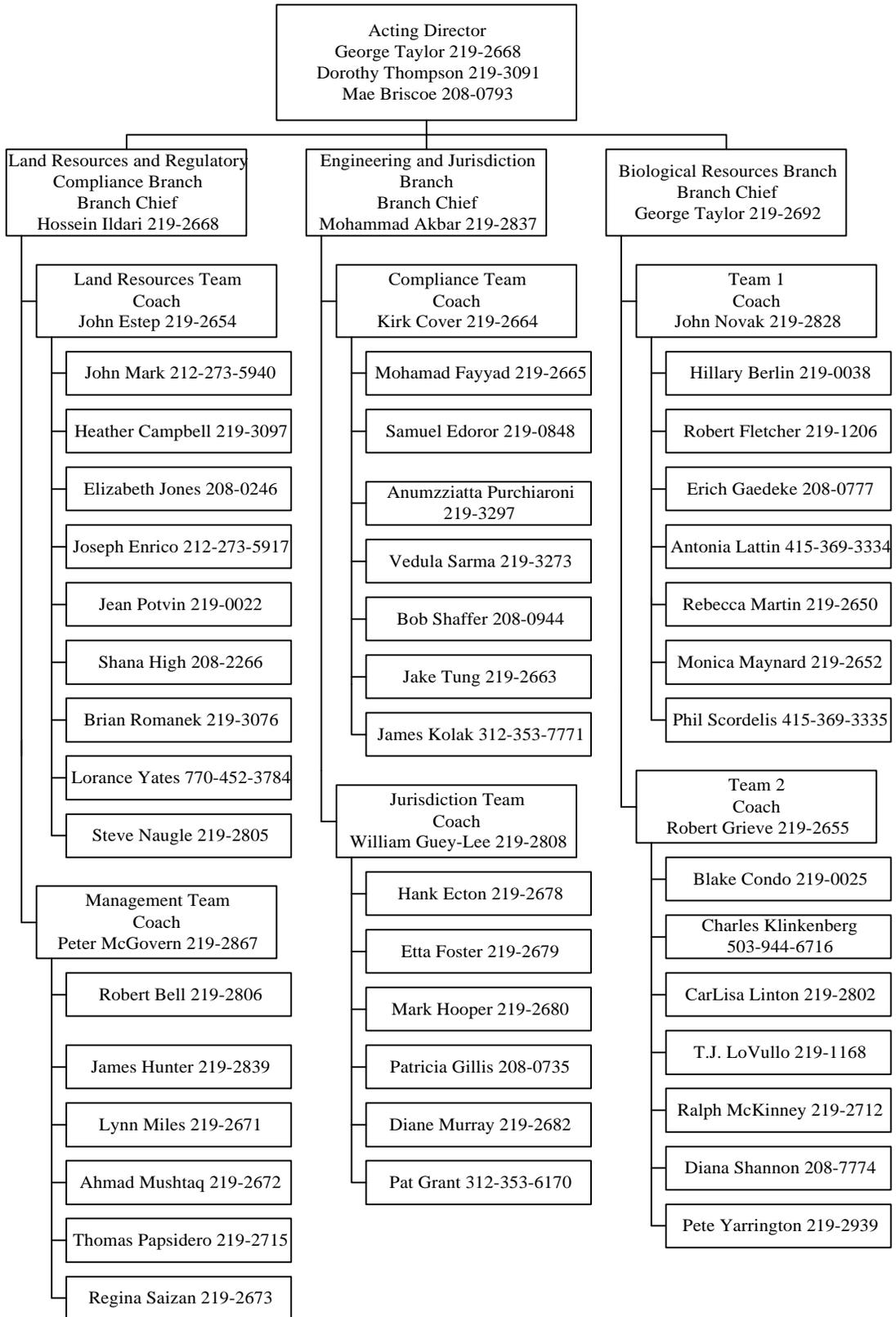
All filings should be addressed to the Secretary of the Commission. The Secretary's office will forward your filing to DHAC. The Secretary's address is:

The Secretary
Federal Energy Regulatory Commission
888 First Street, N.E.
Washington, D.C. 20426

For us to expedite the review of your applications, or any other filing, we encourage you to send an extra copy of your filings to us at the following address:

Division of Hydropower Administration and Compliance
Federal Energy Regulatory Commission
Mail Code DHAC, PJ-12
888 First Street, NE
Washington, D.C. 20426

**Figure 1-1
DHAC Organizational Chart with Telephone Numbers**



2.0 General Philosophy

DHAC focuses on compliance and post-licensing matters. We are mandated to ensure that licensees and exemptees comply with the requirements and conditions contained in licenses and exemptions issued by the Commission. Our mission is to ensure effective compliance with license and exemption conditions to protect and enhance beneficial public uses, both developmental and non-developmental. In carrying out this mandate, we recognize that ensuring compliance involves a mix of reactive, preventive, and proactive strategies.¹

Our regulatory practice involves administering laws, delivering services, building partnerships, solving problems, and delivering guidance. We handle the work that arrives to us on a daily basis, processing a wide variety of applications, requests, and complaints and providing information and determinations. We react to a varying case load, and these reactive strategies account for the greatest percentage of our time.

Preventive strategies are intended to reduce the number of non-compliance situations and complaints. Our monitoring programs employ preventive strategies that help us identify and deal with issues before they become complaints or non-compliance findings. The face-to-face communication with licensees and exemptees during environmental inspections and site visits allows us to build partnerships through collaborative problem solving. Routine environmental inspections and site visits involving high profile, complex projects help to reduce potential non-compliance complaints and findings over the term of a license. Pre-filing consultation with licensees and exemptees is another example of a preventive strategy that helps to generally facilitate compliance.

More recently, in an effort to assess the larger picture, DHAC has developed several proactive strategies to address emerging issues. Increasing residential and recreational use of the more than 55,000 miles of shoreline included in hydropower licensed projects, especially in the Southeast, pose new challenges for licensees and exemptees. Our shoreline management planning workshops and published guidance offer a means to facilitate discussion between licensees and stakeholders on how to address shoreline management. In addition, the Interagency Task Force (ITF)² has identified the need for

¹ We agree with Malcolm Sparrow's use of these terms in *The Regulatory Craft* published by the Brookings Institution (2000).

² The Interagency Task Force was formed among the Commission; the Departments of the Interior, Commerce, and Agriculture; and the Environmental Protection Agency in 1998 to address issues in hydropower licensing.

more trackable and enforceable license conditions and an increased use of adaptive management measures.³ In response, we are implementing a new initiative to track and assess the effectiveness of license conditions with the goal of improving these conditions in future licenses to ensure that they produce the intended results.

Implementation of these preventive and proactive strategies will allow DHAC to minimize the use of reactive measures, such as revoking exemptions or imposing civil penalties.

The success of these preventive and proactive strategies depends on active involvement of staff, licensees, and stakeholders. In 1992, we published a booklet entitled *Contact Us First*. The simple message was that interaction between DHAC staff, licensees, and stakeholders facilitates and improves compliance with license and exemption conditions. The message resonates even more today. We remain committed to identifying opportunities for working with stakeholders to improve our regulatory mission of ensuring effective compliance.

³ See *Anatomy of Trackable and Enforceable License Conditions*, prepared by Working Group 2 - Coordination of State Mandates, December 8, 2000.

SECTION II: REACTIVE ACTIVITIES

DHAC spends the majority of its time reacting to compliance filings and applications for amendment, surrender, transfer, or termination of licenses and exemptions.

3.0 Action on Environmental, Engineering, and Procedural Filings

DHAC classifies compliance filings and applications for amendments as environmental, engineering, or procedural, and assigns each filing to the group responsible for that type of filing (see Table 1-1).

3.1 Mandatory Compliance Filings

In any license or exemption, or in many subsequently issued orders, issued by the Commission, certain terms and conditions are included. These terms and conditions are referred to as “articles” and are usually assigned a number. Some conditions also are found in ordering paragraphs of Commission orders (for this discussion, these conditions also will be called “articles”). Articles require a licensee or exemptee to adhere to requirements that may govern project operations, conduct monitoring studies, or address a variety of issues related to environmental effects and engineering. License or exemption articles may require the licensee or exemptee to file study plans, mitigation plans, study schedules, or results with the Commission. Such filings are termed compliance filings.

In recent years, many license proceedings have involved settlements that include protection, mitigation, and enhancement (PM&E) measures that parties to the settlement agree are necessary to protect environmental resources. Some of these settlements include adaptive management strategies that require consultation among parties to the settlement during their implementation. Licensees need to factor in these consultation requirements in developing schedules for filing any studies, plans, or reports requiring Commission approval. See Section 5.0 for a discussion of voluntary amendment filings.

3.2 Compliance with Other Federal Laws Over the Terms of Licenses

The importance or status of some environmental resources may change over the term of a license, which can be issued for up to 50 years. For example, fish, wildlife, or plant species that are present at a jurisdictional project may be listed as threatened or endangered, or delisted, under the **Endangered Species Act (ESA) of 1973**. Historic resources may be listed or determined to be eligible for listing in the National Register of Historic Places (National Register) pursuant to the **National Historic Preservation Act of 1966, as amended**. River segments may be included in the national wild and scenic rivers system under the **Wild and Scenic Rivers Act**. Additional recreational facilities may be warranted at a licensed project if public use of the project area increases, and access for the physically disabled needs to be assessed under the **Americans with Disabilities Act of**

1980. Overall, DHAC must comply with federal laws for the protection of environmental resources and ensuring access to project lands and waters.

3.2.1 Endangered Species Act

The ESA was enacted to ensure the preservation of threatened and endangered plants and animals and their habitats. **Section 7(a)(2) of the ESA** requires the Commission to consult with the U.S. Fish and Wildlife Service (FWS) and the National Marine Fisheries Service, as appropriate, to ensure that its actions would not likely jeopardize the continued existence of any threatened or endangered species, or adversely modify critical habitat designated for those species.

The licenses and exemptions the Commission issues often contain conditions or articles that specify certain actions a licensee must take to protect threatened or endangered plants and animals. The Commission's responsibility for complying with the ESA does not end when a license or exemption is issued. The Commission has an ongoing duty to evaluate project effects on threatened and endangered species.

For example, DHAC may need to re-evaluate a project's effect on threatened and endangered species when there is a request for a license amendment, there is a change in the status or distribution of listed species, or new species are listed under the ESA. Ultimately, the Commission may require that the licensee change the way its project is constructed or operated if studies indicate that a project's existing measures for protecting threatened and endangered species are inadequate.

The Commission's document entitled *Hydropower Licensing and Endangered Species - Procedures for Complying with the Endangered Species Act* describes the procedures Commission staff follow to evaluate the effects of hydropower development on threatened and endangered species and to comply with the ESA.

More recently, the ITF published *Improving Coordination of ESA Section 7 Consultation with the FERC Licensing Process* (December 8, 2000). In this report, the Commission and the FWS outlined a means of addressing ESA issues in the post-licensing context. Figure 3-1 illustrates the post-licensing process and procedural framework for identifying issues; consulting among DHAC, the applicant, and the FWS; and determining the need for measures to protect listed species and critical habitat. DHAC complies with these procedures when processing applications for amendments or other actions requiring DHAC's approval. However, not all DHAC's actions require ESA coordination. For example, DHAC does not consider an application for a transfer of license to be an action requiring ESA consultation because it involves merely a substitution of licensees without any

substantive changes in the license. Also, not all of DHAC's actions require all the steps shown in Figure 3-1, 3-2, and 3-3.

The post-licensing procedures developed by the ITF provide a procedural framework for identifying ESA issues, consultation, and determining the need for measures to protect listed species and critical habitat. Figure 3-4 shows the post-licensing steps developed by the ITF and how ESA issues are integrated in the process. Contact DHAC to determine which steps might apply to your application, prior to filing the application with DHAC.

Figure 3-1
Pre-Application Consultation Process Related to
Threatened and Endangered (T&E) Species

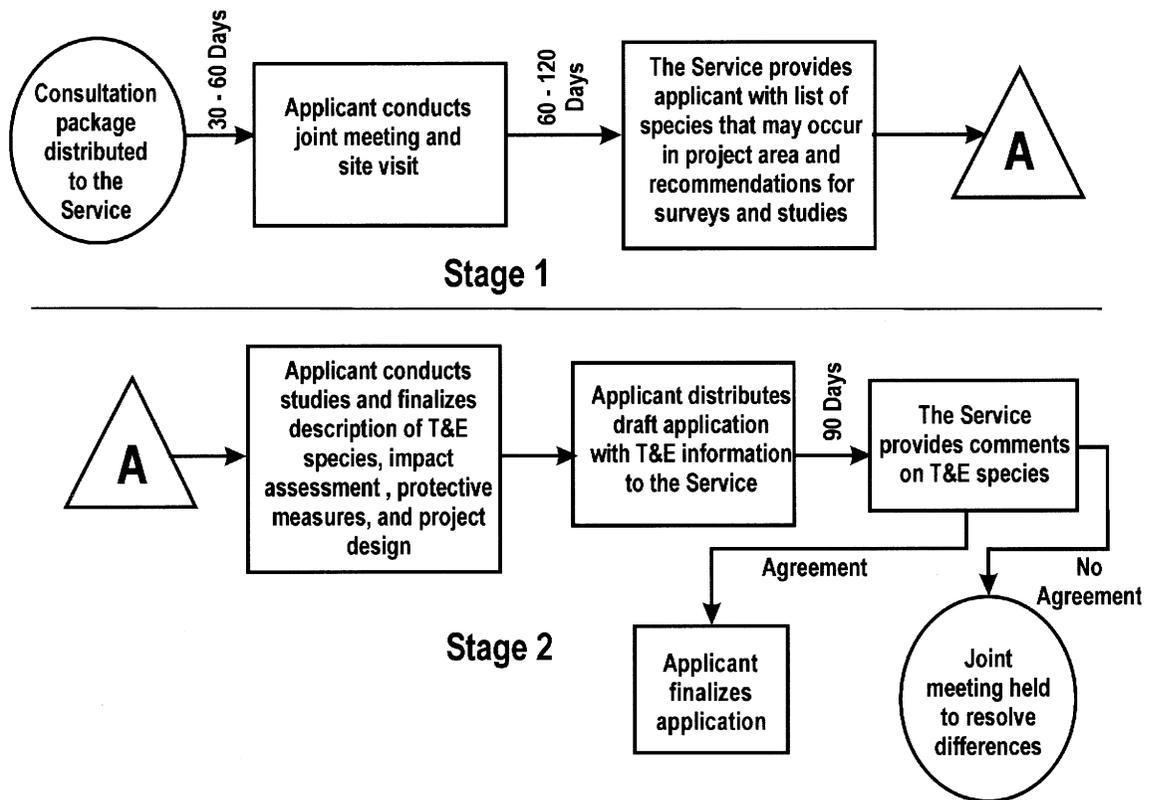


Figure 3-2
Section 7 Consultation Process for Species Listed as Threatened or Endangered or Designated Critical Habitat (CH)

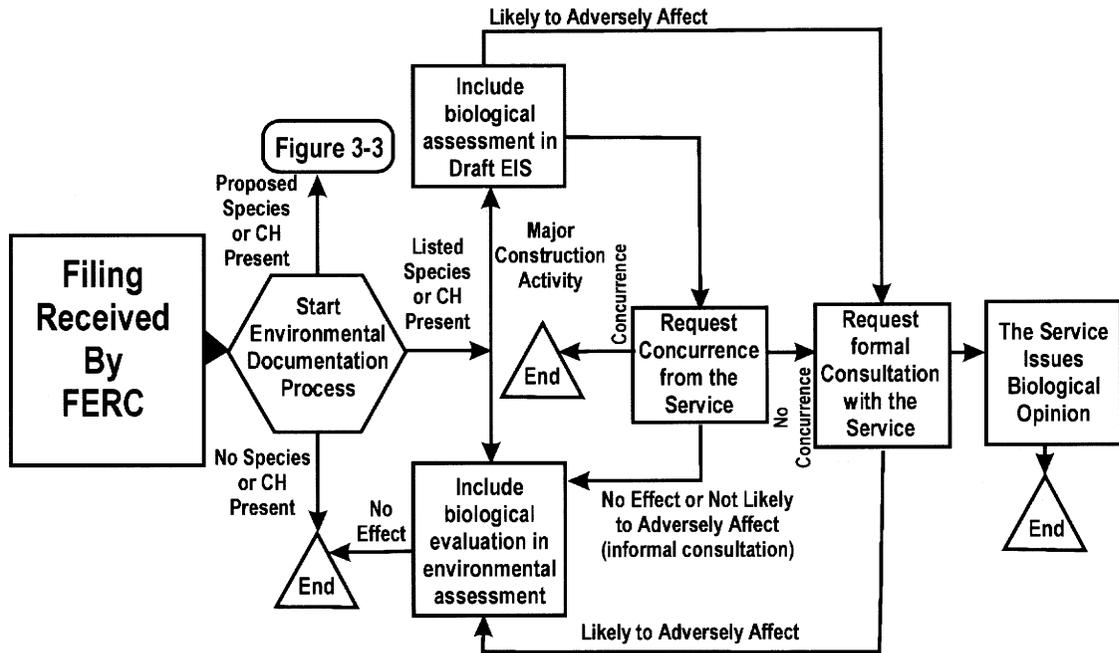


Figure 3-3
Section 7 Consultation Process for Species Proposed for Listing as Threatened or Endangered or Proposed Critical Habitat

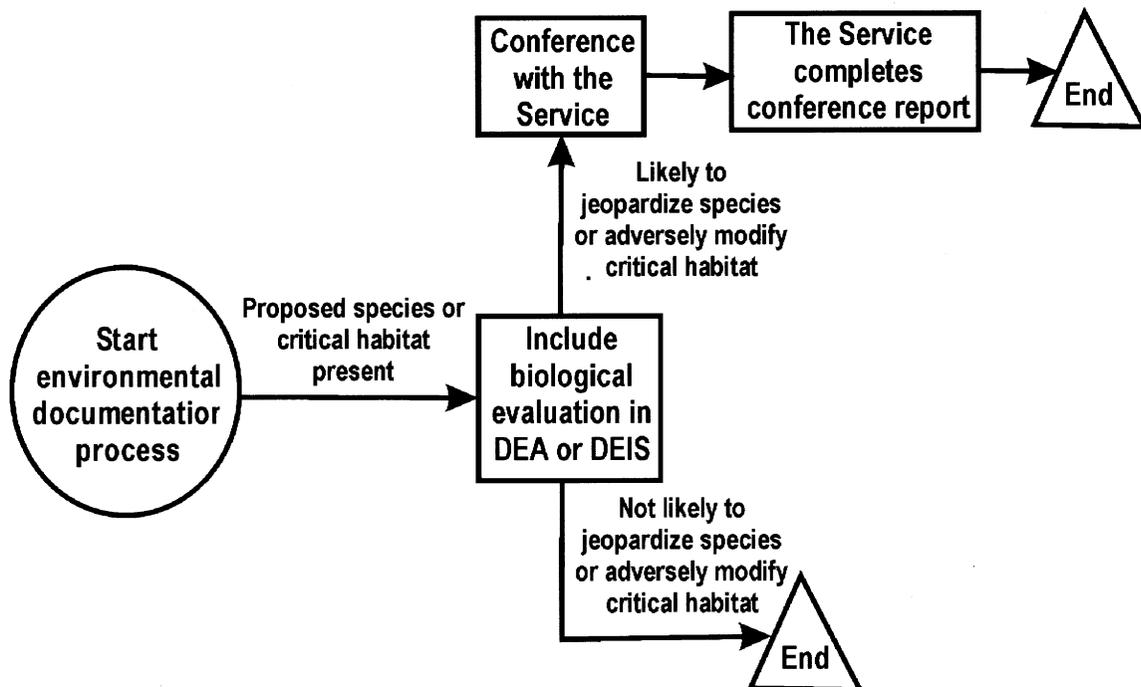
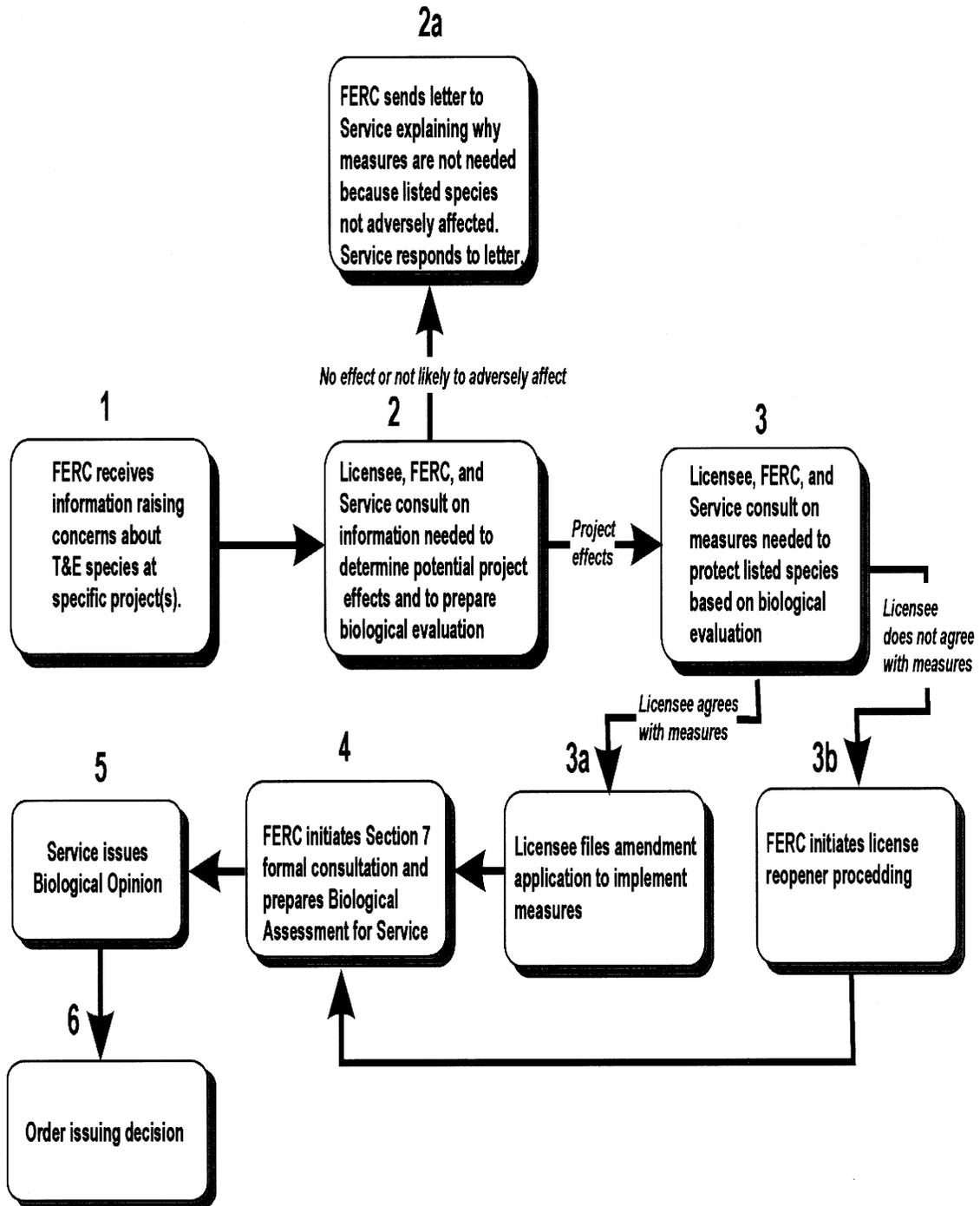


Figure 3-4
Post-Licensing Process and Endangered Species Consultation
in Response to Concerns



3.2.2 Historic and Archaeological Resources

Section 106 of the National Historic Preservation Act requires that a federal agency take into account the effects of its activities and programs on historic properties (36 CFR 800) and afford the Advisory Council on Historic Preservation (Advisory Council) the opportunity to comment. An historic property is a prehistoric or historic district, site, building, structure, or object included in or eligible for inclusion in the National Register. The Commission is charged with ensuring protection of historic properties at its licensed projects. In many cases, the Commission has executed a Programmatic Agreement (PA) with the State Historic Preservation Officer (SHPO), the Advisory Council, and other agencies, as appropriate, including the U.S. Department of Agriculture (USDA), Forest Service, or Indian tribes. The PA, once incorporated into a license or amendment, binds the licensee to follow specific procedures to protect known and as yet unknown historic properties over the term of the license.

To determine the potential effects on these historic properties that might result from approval of an application for an amendment to a license or exemption, DHAC:

- (1) Determines the Area of Potential Effect (APE).
- (2) Reviews any available information to determine if there are any historic resources within the APE eligible for listing in the National Register (historic properties). If no information is available, DHAC requires the licensee to determine what eligible properties are located within the APE. This is usually done through surveys.
- (3) Determines what effect, if any, the project (or action) would have on the historic properties.
- (4) Follows the appropriate procedures (consistent with the PA and/or approved Historic Properties Management Plan [HPMP⁴]) to protect or mitigate the effects on the historic properties. These procedures could include avoidance of the historic properties, data recovery, or other measures.

During this review, DHAC consults with the SHPO, or Tribal Preservation Officer (TPO) in the case of a project that might be located on an Indian reservation, and any other federal agency that manages land within the APE. We also consult with appropriate Indian groups that may have traditional or cultural interests in the project area.

4

Most existing licenses or exemptions refer to these plans as cultural resource management plans.

If we determine that the project would affect historic properties, then DHAC consults with the SHPO and, if appropriate, the Advisory Council to discuss methods for minimizing adverse effects on these properties. The licensee is responsible for implementing the appropriate mitigation measures in consultation with appropriate agencies and the SHPO or TPO.

DHAC also evaluates the effects on historic properties when a licensee proposes changes to its project and if the changes affect those properties beyond what was contemplated at licensing. Protection of historic properties must be considered prior to the Commission approving any changes in the project.

3.2.3 *Wild and Scenic Rivers*

The **Wild and Scenic Rivers Act** provides for the protection and preservation of certain rivers and their immediate environments through inclusion in the national wild and scenic rivers system. Section 7(a) of the **Wild and Scenic Rivers Act** prohibits the Commission from licensing construction of any project under the FPA “on or directly affecting” a wild or scenic river and limits the power of any federal agency to assist in the construction of any water resources project that would have “a direct and adverse effect on the values for which such a river was established.”

The licenses and exemptions the Commission issues may contain conditions or articles that specify certain actions a licensee must take to protect the aesthetic qualities of a river segment in the vicinity of a wild and scenic river.

3.2.4 *Americans with Disabilities Act*

Licensees are expected to develop suitable recreation facilities upon project lands and waters and make provisions for adequate public access. See **18 CFR 2.7**. The Commission further expects licensees to consider the needs of persons with disabilities when designing and constructing project-related recreational facilities or public access routes. See **18 CFR 2.7(b)**.

When reviewing amendment applications, DHAC staff evaluate whether a project’s recreational facilities and public access routes consider the needs of persons with disabilities.

Other laws that pertain to providing access for persons with disabilities include **Section 504 of the Rehabilitation Act of 1973** and the **Americans with Disabilities Act of 1990**. In addition to complying with Commission regulations, we recommend that our licensees take into account these other applicable laws when developing plans and amendment applications for our approval.

3.3 Reopener Requests

Hydropower licenses and exemptions may contain standard articles that reserve the Commission's authority to require the licensee to make reasonable modifications to project structures and operations for, among other things, the development and conservation of fish and wildlife resources and the construction, operation, and maintenance of recreational facilities.

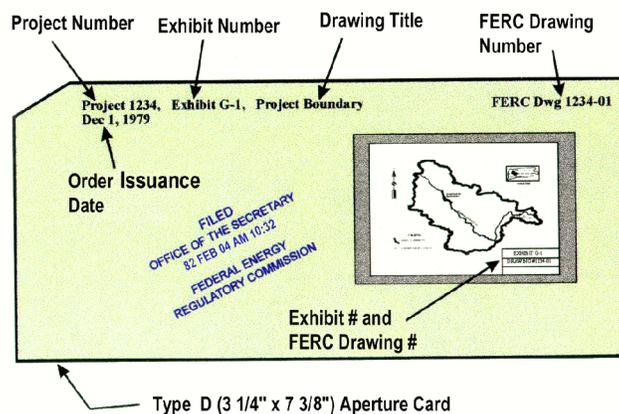
The Commission may order these modifications for the protection and enhancement of environmental resources upon its own motion, or upon the recommendation of the Secretary of the Interior or other interested federal or state agencies, after notice and opportunity for hearing. DHAC processes requests for "reopeners" made by the Secretary of the Interior or other interested federal or state agencies.

3.4 Exhibit Drawings

The Commission keeps on file exhibit drawings for every hydropower project under its jurisdiction. Because paper copies of drawings are bulky and deteriorate over time, the Commission requires that exhibit drawings be microfilmed onto aperture cards. See **18 CFR 4.39**. Aperture cards are 3-1/4-inch by 7-3/8-inch rectangular cards that hold a microfilmed image of the exhibit drawing. These cards can be stored for a considerable time, are easy to handle, and save on storage space. When an exhibit drawing needs to be reviewed, the microfilmed image is easily viewed on a screen or enlarged and printed.

There are three categories of exhibit drawings microfilmed on aperture cards (formerly identified as K, L, and R), which the Commission currently identifies with the prefix F, G, and R. These drawings show project works (F or K), maps and project boundaries (G or L), and recreational facilities (R). Each aperture card is labeled with project-specific information, such as project number and drawing category, to allow for ease in filing and retrieval. Figure 3-5 shows a typical aperture card and the information it should contain.

Figure 3-5
Aperture Card



4.0 Non-compliance Procedures

DHAC groups all non-compliance matters into two general categories: overdue filings and construction and operation requirements.

4.1 Overdue Filings

DHAC takes these actions when a licensee fails to submit required information on time. Requirements and schedules for submitting information are usually contained in license articles and subsequent Commission orders. License articles may require information such as fishway design drawings, effectiveness studies, erosion and soil control plans, water quality monitoring plans or reports, final recreation plans, and HPMPs. DHAC monitors compliance with more than 10,000 license conditions.

When a licensee does not submit information on time, DHAC contacts the licensee by phone. If the licensee cannot be contacted, DHAC sends a letter notifying the licensee that a filing is overdue. The licensee may either submit the overdue information or request an extension of time. Any extension request must include appropriate justification. If the licensee does not respond to the overdue notice, DHAC may issue a compliance order. A compliance order specifies actions the licensee must take to regain compliance and the date by which each action must be completed. A compliance order is a significant milestone that may lead to assessment of penalties.

4.2 Construction and Operations Requirements

DHAC monitors the construction and operational compliance of more than 1,600 licensed and exempted hydropower facilities. The public and state and federal agencies also play an important role in this process. In fact, approximately 20 percent of non-compliance activities are reported by federal or state agencies or the public. As more licenses expire and receive new licenses, DHAC's work continues to grow. The following table shows the number of licenses expiring between the years 2000 and 2012, and the corresponding capacities:

Licenses Expiring Between 10/01/2000 and 09/30/2012		
FY	Number Expiring	Capacity (kW)
2001	26	877,217
2002	14	1,322,757
2003	20	307,940
2004	18	1,398,883
2005	30	2,368,660
2006	20	4,439,400
2007	20	6,938,669
2008	11	1,341,187
2009	11	986,555
2010	12	1,147,955
2011	8	1,638,412
2012	9	809,601
	199	23,577,236

4.2.1 Typical Process Relating to Operational Compliance

The typical process that DHAC staff use to address a non-compliance allegation involves three steps.

Allegation: Some incident, perceived as unauthorized or inconsistent with Commission regulations, or with the terms of a license, is reported to DHAC by the public, a state resource agency, or a Commission staff inspector. DHAC calls such an incident an allegation and, in response, opens an investigation.

Investigation: To begin the review, DHAC staff determine whether the allegation is part of a pattern of non-compliance. Next, DHAC contacts the party who made the allegation to obtain all available information on the incident. DHAC then contacts the licensee or exemptee to obtain its perspective and any pertinent records, and typically requires the licensee or exemptee to respond within 30 days. Other agencies, experts, and private citizens are also contacted, as appropriate. The Commission uses all the information it gathers to decide whether the incident is, in fact, a violation, and whether immediate action should be taken.

Finding: Once DHAC determines whether a violation occurred, it notifies interested parties that either no violation occurred, or that a violation occurred and the licensee must take certain steps to regain compliance. A violation is not resolved until the

licensee or exemptee is once again in compliance and has adopted measures to minimize the likelihood that the violation will recur.

In summary, when DHAC receives an allegation of non-compliance, it seeks “both sides” of the story before reaching a conclusion and pursuing a follow-up action. DHAC is flexible and responds to a variety of allegations with the appropriate resources. No allegation is taken for granted or dismissed as minor, and all violations are investigated thoroughly. The goal is to achieve compliance through communication and interaction.

In the majority of cases, the licensee or exemptee responds to an initial contact letter with a detailed explanation of why the alleged violation occurred and a statement that corrective action has been implemented. Depending on the nature of violation, DHAC may require documentation or may inspect a site to verify that corrective action has been taken. If corrective action has been taken, then DHAC sends a letter stating that the investigation has been completed. Letters or orders finding that violations have occurred may or may not require subsequent actions. The determination that a violation has occurred is kept in the file and used, among other things, to determine the licensee’s compliance history as part of a relicensing proceeding. Staff also consider prior violations in determining the action to take on subsequent violations. If a licensee fails to respond to an initial contact letter or a site visit shows the project owner has not started corrective action, DHAC issues a compliance order. Issuance and violation of a compliance order may result in civil penalty proceedings. Staff consider the extent of the violation when determining the amount of any penalties proposed to be assessed.

4.2.2 Common Non-compliance Situations

Project-related allegations of non-compliance received by DHAC frequently involve flooding and shoreline erosion problems. These problems usually occur during times of high river flow and are often aggravated by other contributing factors such as ice jams and wind and wave effects. Allegations of non-compliance received by DHAC frequently concern a project’s minimum flow and water level requirements. Non-compliance with these requirements may have an adverse effect on aquatic-habitat and wetland conditions, recreational opportunities, and landscape. Sections 4.2.2.1 through 4.2.2.5 provide further background information on these common problems and concerns.

4.2.2.1 Flooding Issues

Flooding issues may arise as a result of the construction of enhancement measures. For example, an adjacent property owner alleged that the construction of a wetland mitigation project increased the runoff near his property. He further alleged that two culverts installed downstream of the wetlands mitigation project were too small, constricting flow and creating a backwater effect contributing to the

flooding of his property. The licensee contended that the flooding resulted from the location of the property in a natural lowland area. DHAC investigated the allegation and found no evidence that project operations or the wetlands mitigation project were causing the drainage backup in the vicinity of the property being flooded. DHAC further found that the drainage problem was due to natural topographic conditions and that the licensee's scheduled removal of a nearby parking lot and the two culverts would alleviate the problem by eliminating possible constriction in water flow.

4.2.2.2 Erosion and Water Quality

Many hydropower projects in the West have extensive conduits, often constructed of wood stave, or open flumes. Failure of a conduit may release a high volume of water that can carry sediments into nearby streams and degrade water quality in the streams. Lack of maintenance of these conduits is non-compliance with license conditions. In some instances, DHAC has required licensees to file specific measures that would prevent future occurrences of conduit failure.

4.2.2.3 Minimum Flows

Modification of minimum flow releases may adversely affect fisheries resources. In one instance, high, warmer flows released from a project inundated a thermal refuge of cool water near the inflow of a spring-fed tributary, resulting in thermal shock and some mortality of the trout that had congregated in the refuge. DHAC required the licensee to modify its project operations to adjust flows during warm-weather periods so that thermal refuges would not be affected in the future.

4.2.2.4 Lake Levels

Many project licenses contain conditions that require specific reservoir water levels to be continuously maintained, or maintained during specified periods of time. Project licenses also may specify minimum and maximum water-level requirements or target elevations within required reservoir operating bands. The purpose of these water-level requirements is to protect and enhance the recreational, scenic, and other environmental resource values of a project.

Non-compliance with the water-level requirements of a project reservoir could adversely affect the project's environmental integrity and quality. For example, water levels that are lower or higher than required may render important fish spawning and rearing areas unusable and may diminish the beneficial functions and values of wetlands. Also, docks and piers designed for specific water levels may be rendered inaccessible for boating, and shoreline beach areas may be unusable for swimming. In addition, lower than required water levels may cause visual impairments and offensive odors from the exposure of littoral-zone substrates

along the shoreline. Further, higher than required water levels may cause excessive amounts of woody debris to accumulate near or along a shoreline.

4.2.2.5 Fees under Licensee Permit Program

The **Standard Land Use Article** (see Appendix H) included in most licenses allows licensees to establish a program for issuing permits for specified types of use and occupancy of project lands and waters. Licensees may charge a reasonable fee to cover the costs of administering the permit program. Landowners may challenge both the right to assess the fee and the amount of the fee. In one case, a coalition of lakeshore property owners filed a complaint with DHAC alleging that fees were excessive and included costs not related to the licensee's permit program. The Commission confirmed the licensee's right to create a permit program and to charge reasonable fees, but ordered the licensee to remove from its fee calculations several activities, including fish stocking, mosquito spraying, and an adopt-a-shoreline program, which were not directly related to the permit program and should not be supported by dock fees. See **90 FERC ¶ 61,246** (March 16, 2000).

4.2.3 Non-compliance with Construction Requirements

Section 13 of the FPA sets the initial deadlines for the commencement and completion of construction of project works. These initial deadlines apply to new, unconstructed projects and to the redevelopment of existing sites that were previously used for non-power purposes or that had been previously abandoned.

A licensee is allowed 2 years to commence construction and 2 more years to complete construction. Generally, construction shall begin within 2 years after the issuance date of the license, and construction shall be completed within 4 years after the issuance date of the license. The periods for commencement of construction may be extended once, but not longer than 2 years, and the period for the completion of construction, carried on in good faith and with reasonable diligence, may be extended by the Commission when not incompatible with the public interests.

Because of the wide variety of projects constructed since Section 13 was enacted, the criteria used to determine if the requirements of Section 13 have been met have been defined and refined over time. Additional time has been allowed for commencement of construction as the result of stays of the license terms and conditions granted by the Commission, where justified. In some cases, projects have been allowed more time as the result of federal legislation. Congress, on a case-by-case basis, has allowed up to three additional 2-year extensions, subject to Commission approval.

Typically, the license articles that apply to start of construction cases are for the construction of new dams, water conveyances, powerhouses, or generating units or to the modifications of existing structures to accommodate increased generating capacity. It is important to note that often several license articles are inter-related. An example of inter-related license articles are articles that require the filing of and FERC or agency approval of a sediment and erosion control plan prior to the actual commencement of site construction that requires excavation or grading of existing soils. In such cases, the licensee is precluded from start of construction until the requirements of the related license article are met.

Upon issuance of a license that authorizes construction, DHAC sends the licensee an introductory letter that discusses compliance with the license articles; procedures for requests for extensions of time to complete analyses, studies, or construction; and procedures for requests for project amendments to the license. The letter also identifies how and where the licensee can seek assistance to ensure compliance with the license terms and conditions. The letter also may reference standard filings that are required; the need to pay annual charges; and, potentially, the need to pay annual headwater benefits charges.

DHAC monitors the licensee's progress toward commencing construction and works closely with the Commission's Division of Dam Safety and Inspections (D2SI). For projects where the time needed to fabricate the generating units is the first milestone that must occur and the time to construct the on-site civic works is less, start of construction pursuant to Section 13 is established by the start of manufacture of the turbine/generating units. In that case, DHAC requires the licensee or exemptee to file quarterly progress reports until any civil work associated with the project is begun. At that point, D2SI takes over and oversees the remainder of the construction of the project. For projects where start of construction is established by start of physical site construction of major project features, D2SI will visually inspect the site on or about the deadline for start of construction to determine if construction has begun.

D2SI is responsible for determining if physical site construction has, in fact, commenced. Once construction has commenced, D2SI is responsible for overseeing the construction of the project through to completion and start-up. The D2SI regional offices (New York, Atlanta, Chicago, Portland, and San Francisco) include engineers and inspectors who visit the sites and interface regularly with the licensees and exemptees.

4.2.4 Penalty Assessments

While our primary goal is to achieve compliance, Congress has provided the Commission with the authority to penalize licensees, exemptees, and permittees for

their failure to comply with the FPA; our implementing regulations; or the conditions of licenses, exemptions, or permits (**Section 31 of the FPA**). This authority includes assessing civil penalties of up to \$10,000 per day for each violation relating to **Part I of the FPA** and occurring on or after October 16, 1986. These matters are assigned to teams that include DHAC staff and staff of the Office of General Counsel's Enforcement Section. More than 95 percent of these cases are settled through informal negotiations without the issuance of a notice of proposed penalty or the Commission convening an administrative hearing. See **18 CFR 385.1501**.

5.0 Amendments to Licenses and Exemptions

Modifications to a project, including changes in project structures, locations, or operations, are often necessary to ensure that the project can continue to operate effectively, while providing a measure of environmental protection. Appropriate staff with related expertise are assigned to each amendment application. A licensee or exemptee wishing to voluntarily modify some aspect of its project must first obtain authorization from the Commission. The Commission normally authorizes such changes by issuing license amendments or letter orders in the case of exemptions. See **18 CFR 4.200**.

A holder of an exemption may file an application to amend its exemption, but changes can be made in some cases without an application and the Commission's approval. The exemption holder may implement the changes without the Commission's approval if:

- after being notified in writing by the exemption holder of its intended changes, the appropriate fish and wildlife agencies determine that the proposed changes would not cause the project to violate the terms and conditions imposed by the agencies; and
- the changes would not materially alter the design, location, or method of construction or operation. See **18 CFR 4.96**.

In the absence of these two conditions, the exemption holder may not make changes without first obtaining the Commission's authorization.

5.1 Defining the Need for an Amendment

Typical modifications that require an amendment to a license or exemption include capacity changes, design changes, operational changes, land status changes, and time extensions.

Capacity Changes: The Commission defines a capacity-related modification as one that would: (1) increase the project's actual or proposed total **installed capacity**, increase the project's maximum hydraulic capacity by 15 percent or more, *and* increase the project's nameplate capacity by 2 megawatts or more; or (2) entail significant construction or modifications as specified at **18 CFR 4.38(a)(4)(v)**. The Commission's regulations at **18 CFR 4.201** and the *Hydroelectric Project Licensing Handbook* (April 2001) describe the responsibilities of licensees regarding capacity-related amendments. Project modifications not meeting either of these criteria are considered non-capacity amendments. Non-capacity amendments are not subject to the three-stage consultation requirements that apply to capacity amendments. See **18 CFR 4.38(a)(5)**.

Design Changes: Significant changes in the physical features of a project, such as new structures, relocation of transmission lines, or alterations of existing structures, may occur

during construction or operation. Common design changes include increases in dam height, modifications to transmission lines or routes, installation of fish ladders or fishery enhancement structures, construction of afterbays, and the addition of flashboards to a spillway.

Operational or Other Features Changes: After a facility is completed, a licensee or exemptee may wish to change the way the project is operated, such as increase the operating level in the reservoir (generally for licensees), modify the minimum flow requirement, revise the ramping rate, or modify recreational or other project features. These changes may result from the need to resolve resource issues or from negotiations with stakeholders.

Land Status Changes: Changes in the status of project lands are frequently requested by licensees. These changes generally include altered use of United States lands, changes in land rights, non-project use of project lands and waters, or changes in the recreational use of the site. Unless already provided for as an article in the existing license, an amendment of this type is required when: (1) the actual acreage of federal lands within the project boundary differs from the licensed amount; (2) there is a sale of project land, or an exchange, transfer, or leasing of project property; (3) a request is made for water withdrawals from a project reservoir; (4) a request is made for road, bridge, or other utility rights-of-way on project lands; or (5) dredging of project lands is proposed. See section 5.4.3 for a discussion of non-project uses of project lands and waters.

Time Extensions: When licenses and exemptions are issued, time limits are generally placed on the construction of the project and on various conditions (articles) in the license or exemption. Frequently, the licensee or exemptee needs more time to comply with the conditions or to start or complete construction of a facility. In such instances, it is possible to seek modification of the time limits specified by the Commission.

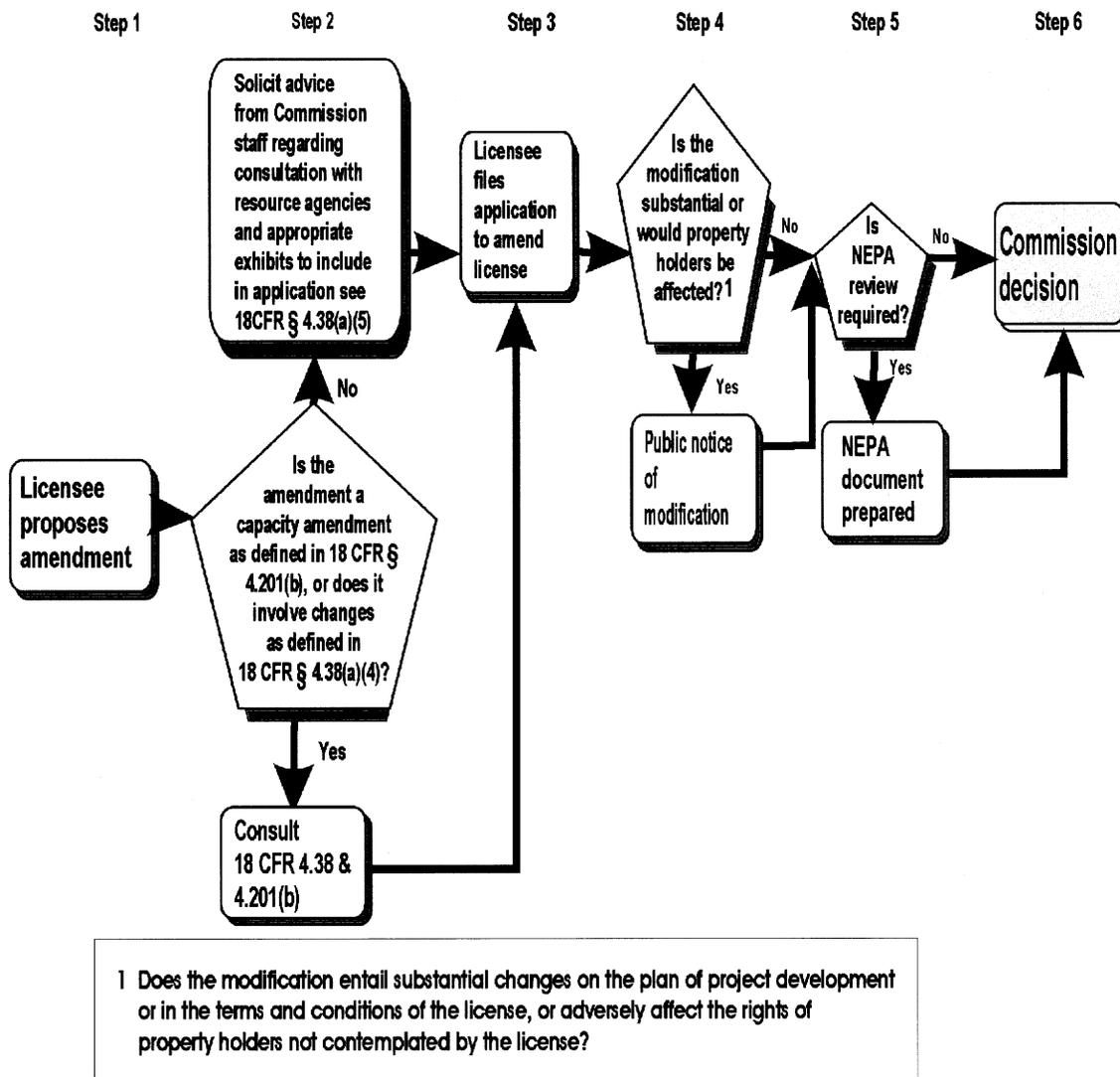
If a licensee is unsure whether an amendment to its license or exemption is required, it may ask for guidance from Commission staff. The request should include a detailed description of the proposed change, the anticipated environmental impacts on the surrounding areas, comments from the affected resource agencies, revisions of affected exhibits, and any other information that it may deem pertinent. DHAC will notify the licensee or exemptee of its determination in writing. More informally, a licensee or exemptee may discuss its preliminary proposal with DHAC staff over the phone (see section 1.3 for staff telephone numbers).

5.2 Procedural Steps and Contents of Applications for Amendments to Licenses and Exemptions

Once the licensee or exemptee determines the need for an amendment (see section 5.1), the licensee or exemptee consults with resource agencies. The extent of agency consultation depends on whether it is a capacity-related or non-capacity-related amendment (see Appendices D and E). After pre-filing consultation is completed, the licensee or exemptee files

the amendment application. DHAC staff then determine if a public notice is warranted and whether National Environmental Policy Act (NEPA) review is required. NEPA review entails preparing an environmental assessment and/or environmental impact statement. Figure 5-1 provides a diagram of the license amendment process.

**Figure 5-1
License Amendment Process**



The procedures for applying and the contents of applications for capacity-related amendments, non-capacity-related amendments, and amendments to an exemption are provided in Appendix D, Appendix E, and Appendix F, respectively. This guidance is also found in *Hydroelectric Project Handbook for Filings other than Licenses and Exemptions*.

The number of requests for amendments has increased steadily over the past several years. This growth is expected to continue as licensees seek to increase project capacity and efficiency. DHAC makes every effort to ensure that the amendment process is as efficient as possible. Requesting an amendment does not necessarily trigger a re-examination of the entire project, and we concentrate on the proposed modification to determine whether it is consistent with the project as licensed.

5.3 Compliance with National Environmental Policy Act

Some of the compliance program responsibilities performed by DHAC are categorically excluded from NEPA requirements under the Commission's regulations at **18 CFR 380.4**. These activities include:

- actions concerning the reservation and classification of United States lands as water power sites and others under **Section 24 of the FPA**;
- transfers of hydropower project licenses and transfers of exemptions;
- issuance of preliminary permits for hydropower projects;
- actions concerning headwater benefit assessments;
- approval for hydropower projects of "as-built" or revised drawings or exhibits that propose no changes to the project structures or operations or that reflect changes that have previously been approved or required by the Commission;
- surrender and amendment of preliminary permits and surrender of hydropower licenses and exemptions where no project facilities exist, or no ground-disturbing activity has occurred, and amendments to hydropower licenses that do not require ground-disturbing activity or changes to project facilities or operations;
- exemptions for small conduit hydroelectric facilities as defined in **18 CFR 4.30(b)(26)**; and
- approval of changes in land rights for hydropower projects, if no construction or change in land use is proposed.

There are exceptions to these categorical exclusions from NEPA that require DHAC to determine if an environmental assessment or environmental impact statement is required. DHAC, after reviewing the application for an action and public comments, may determine that an environmental assessment is warranted. This may occur if the action could affect Indian lands; wilderness areas; wild and scenic rivers; wetlands; units of the National Park System, National Refuges, or National fish hatcheries; anadromous fish or endangered species; or where the environmental effects are uncertain. None of these criteria, however, would automatically trigger the preparation of environmental documents.

5.4 Typical Reasons for Requests for Amendments

This section includes several common modifications to project operations or project lands and waters that would require an amendment of a project license.

5.4.1 Minimum Flow Variances

Licenses for hydropower projects frequently incorporate requirements for minimum flow releases. These requirements are usually designed to protect fish and their habitats downstream from projects or in bypassed reaches. Other reasons for incorporating minimum flow requirements include maintaining water quality, aesthetics, riparian vegetation, and recreational uses.

A minimum flow release requirement usually means the project must release some minimum quantity of water from a specific location, such as immediately below the project's dam. In some cases, licenses may specify different minimum flows for different seasons to reflect, for example, different water requirements by fish during different life stages. In other cases, the requirements may include a provision that the project release a specific minimum flow unless the specified amount (outflow) is greater than the amount of water entering the project from upstream sources (inflow). When minimum flows are required, the licensee is usually required to monitor its flow releases and to report to the Commission any instances when the minimum flow requirements are not met.

Compliance with minimum flow requirements at jurisdictional projects has been very good overall. However, for a variety of reasons, the required minimum flows are not always released. If a licensee finds that compliance with minimum flow requirements is difficult, it should contact DHAC to discuss a means for improving compliance. Under certain circumstances, the Commission will approve a temporary variance or amend a project's license by modifying minimum flow release requirements. The temporary modifications, called **variances**, may prescribe a range of acceptable flows (instead of one specific flow), or may change the schedule for reporting flows. In general, the Commission will grant temporary minimum flow variances when the applicant can demonstrate that such an action would not jeopardize the protection of resources, and

can supply the Commission with relevant comments from the federal or state resource agencies that were involved in determining the original requirement.

Implementing minimum flow variances (including changes in reporting requirements) means that a project's operations or design will be different than specified in its license. Therefore, to implement such variances, a project's license must be amended. See **18 CFR 4.200** and **4.201**.

5.4.2 Efficiency Upgrades

DHAC reviews proposed modifications to hydropower projects that would allow the project to produce energy more efficiently. Reviews are completed through the Efficiency Upgrade Program, which was designed to encourage the hydropower industry to evaluate options for increasing efficiency. To help meet this objective, DHAC assists licensees who want to improve their project's efficiency. Methods with the greatest potential for increasing efficiency include:

- upgrading generators/turbines;
- adding units;
- computerizing project controls;
- optimizing flow regulation;
- increasing upstream/downstream plant coordination;
- reducing excess spill volumes; and
- raising the level of a project's reservoir.

Efficiency upgrades at hydropower projects are generally non-capacity modifications except for adding units, because they usually do not significantly change a plant's capacity (see section 5.1).

DHAC staff are available to discuss efficiency upgrades with licensees prior to filing an amendment application. To ensure that licensees are able to make efficiency improvements at their projects as quickly as possible, DHAC places a high priority on reviewing requests for these kinds of project amendments.

5.4.3 Non-Project Use of Project Lands

Under **Standard Article 5** (see Appendix G) of any license issued by the Commission, a licensee must acquire and retain sufficient control over all property and/or rights necessary or appropriate to construct, operate, and maintain a project, and may not dispose of interests in project property without prior Commission approval, except as specifically permitted under the license. A licensee of a hydropower project may receive requests from neighboring landowners, government agencies, or private organizations to use project land for a variety of purposes unrelated to operating the

project. These uses may include, but are not limited to, land for boat docks, marinas, bridges, pipelines, and utility lines.

To provide the licensee with flexibility in responding to such requests, most project licenses contain a condition called a standard land use article (see Appendix H). This article allows licensees to convey interests in project lands and waters (through leases, rights-of-way, or fee title conveyances) for certain non-project uses without obtaining prior Commission approval. A non-project use of project lands is a third-party use and occupancy of project property authorized by the licensee through the conveyance of a specific interest in project lands and waters. In many cases, the licensee is required to file an annual report that summarizes the conveyances it has granted under the standard land use article or file written notifications when it intends to grant a conveyance covered by the article.

Conveyances allowed under the standard land use article must be consistent with the scenic, recreational, and other environmental values of the project. In addition, the entity requesting the conveyance must fulfill specific requirements before the licensee can convey an interest in project lands or waters. The requirements are based on the characteristics of the proposed use and the type of conveyance. The licensee must also consult with the appropriate federal and state agencies to assure that the proposed use is compatible with the project's recreation plan and resources, and that the instrument of conveyance includes appropriate covenants to protect the scenic, recreational, and other environmental values. If a proposed use does not meet the criteria of the standard land use article, the licensee must then obtain Commission approval prior to issuing the conveyance. The licensee requests Commission approval by filing an application for a non-project use of project lands.

DHAC treats an application for non-project use of project lands as a request for an amendment of the project license. Non-project use amendment applications should include descriptions of the proposed use and type of conveyance, the affected environment, and the anticipated effects on the affected environment, as well as documentation of consultation with resource agencies and interested parties, including licensee responses to any comments and recommendations. Appendix I contains a detailed description of the suggested contents of an application for amendment of license for non-project uses and occupancies of project lands and waters.

DHAC reviews the application and may request additional information from the licensee and will determine whether a public notice on the application is needed. DHAC will also determine if an environmental assessment is warranted. Determinations on whether to prepare an environmental assessment are made on a case-by-case basis,

in accordance with Part 380 of the Commission's regulations. See **Part 380.4**. We discuss compliance with NEPA in sections 5.2 and 5.3 of this handbook.

Based on the results of the Commission's technical and environmental analysis, including a review of the license requirements, comment letters, and other information in the Commission record (public file), the Commission may approve, approve with conditions, or disapprove an application for a non-project use of project lands.

Just as the Commission must ensure that licensees meet the requirements of their licenses, licensees must ensure that the non-project use is constructed and operated in substantial conformity with the approved application. DHAC encourages licensees to develop and implement plans or programs to supervise and control authorized use of project lands. When a non-project use substantially differs from the approved application, the licensee must take appropriate enforcement actions to bring the non-project use into compliance. The licensee may require that facilities be modified to conform to the approved application. If the licensee agrees with the modifications, it may file with the Commission an application seeking approval of the proposed changes.

Conflicts involving non-project uses are best resolved among the licensee, the owner, and the interested stakeholders. However, DHAC may become involved in a licensee's administration of project lands and waters when such administration fails to ensure compliance with license requirements and project purposes.

5.4.4 Removing Lands from Project Boundary

As discussed in section 5.4.3, DHAC may authorize a project licensee to permit the use and occupancy of project lands for non-project purposes and to convey interests in project lands for non-project uses and occupancies. However, approval of such permits and conveyances does not in itself change the project boundary. Nor are such permit and conveyance approvals a necessary prerequisite for changes to a project's boundary. A licensee may propose changes to a project boundary either in a separate application or as part of an application for non-project use of project lands or other relevant filing.

Project boundaries may be changed to either exclude land from or include land in the project only upon DHAC's approval of revised Exhibit G or K drawings (project boundary maps) reflecting the exclusion or inclusion of that land. Such changes are approved only upon a determination that the lands are either needed or not needed for project purposes, including operation and maintenance of the project, recreation, public access, protection of environmental resources, and shoreline control.

Project lands that are conveyed for a non-project use may still be needed to serve various project purposes. For example, project lands transferred for the development of private recreation facilities also may be needed for public access, resource protection, and shoreline control. In such cases, the conveyed lands (or the portion thereof that is determined to be needed for a project purpose) would be retained within the project boundary. The licensee would be expected to retain sufficient interests in the retained project lands, consistent with the project purpose(s) served (e.g., public access rights, a conservation easement, or reservations of authority to monitor a grantee's compliance with certain project-related covenants and to take any lawful action necessary to ensure such compliance).

Occasionally, lands outside a project boundary must be used to serve a particular project need or to satisfy a particular license requirement. In some of these cases, the licensee must apply for a change to the project boundary to add those lands to the project. For example, if certain non-project lands were determined to be necessary to accommodate the recreation facilities and activities included in a project's approved recreation plan, proposed changes to the project boundary would be approved to include those lands in the project. Likewise, if it were determined that a project licensee had ongoing license responsibilities in connection with lands not currently within the project (e.g., facility operation and maintenance or resource management requirements), those lands would be brought into the project through approved changes to the project boundary.

6.0 Surrender, Transfer, and Termination of Licenses and Exemptions

6.1 Surrender

A licensee or exemptee may decide to relinquish its license or exemption. This procedure is called a surrender (see **18 CFR 6.1**). Project owners may not simply abandon a hydropower project. Commission jurisdiction over licensees and exemptees continues until an agreement is reached with the Commission on the terms and conditions of the surrender, and after public noticing of the surrender application (see **18 CFR 6.2**). Appendix J describes the procedural steps for surrender of a license or an exemption.

6.2 Transfer

When a license is issued, the Commission approves both the hydropower project and the licensee. Licensees may decide to transfer a hydropower license to another entity or entities for a variety of reasons. Deregulation of the energy industry has resulted in numerous transfers of licenses to qualified transferees. A license may be transferred only with Commission approval.

An application for a transfer of license must be filed jointly by the existing licensee and the potential transferee. See **18 CFR 9.1**. A licensee who wants to transfer a license must file an application that includes: (1) a statement consistent with **Section 131.20 18 CFR Subchapter D**; (2) a verification statement; (3) a description of the qualifications of the transferee to hold the license; (4) a statement providing evidence of compliance by the transferee with all applicable state laws or how the transferee proposes to comply; and (5) four originals plus one copy for each interested State Commission. See **18 CFR 9.2**.

Since issuance of the Commission's Decommissioning Policy Statement in 1994, DHAC is charged with the obligation to scrutinize license transfers to ensure that a transferor with a poor compliance record is not trying to escape that record and give a transferee an advantage in relicensing, or handing off an increasingly marginal project to a new licensee that lacks the financial resources to maintain the project. We make a determination concerning the proposed transferee's fitness under the FPA.

DHAC will issue a public notice of the application prior to acting on the request.

Approval of the transfer is contingent upon: (1) transfer of title to the properties under license; (2) acknowledgment of acceptance by the transferee filed in triplicate within 60 days of the order approving the transfer; (3) delivery of all license instruments within 60 days of the order approving the transfer; and (4) a showing that the transfer is in the public interest. See **18 CFR 9.3**.

A transferee is subject to all the conditions of the license and to all the provisions and conditions of the FPA, as though the transferee were the original licensee, and shall be responsible for the payment of annual charges that accrue prior to the date of transfer.

6.3 Termination

The Commission can terminate a license for two reasons: (1) the licensee fails to begin construction of the project within the prescribed time (see **18 CFR 6.3**); or (2) the licensee fails to make a good faith effort to maintain and operate the project (see **18 CFR 6.4**).

In both cases, the Commission provides prior notice before it acts, as follows: (1) 90-day prior notice to the licensee where there is a failure to commence construction; and (2) 90-day public notice in the case of project abandonment.

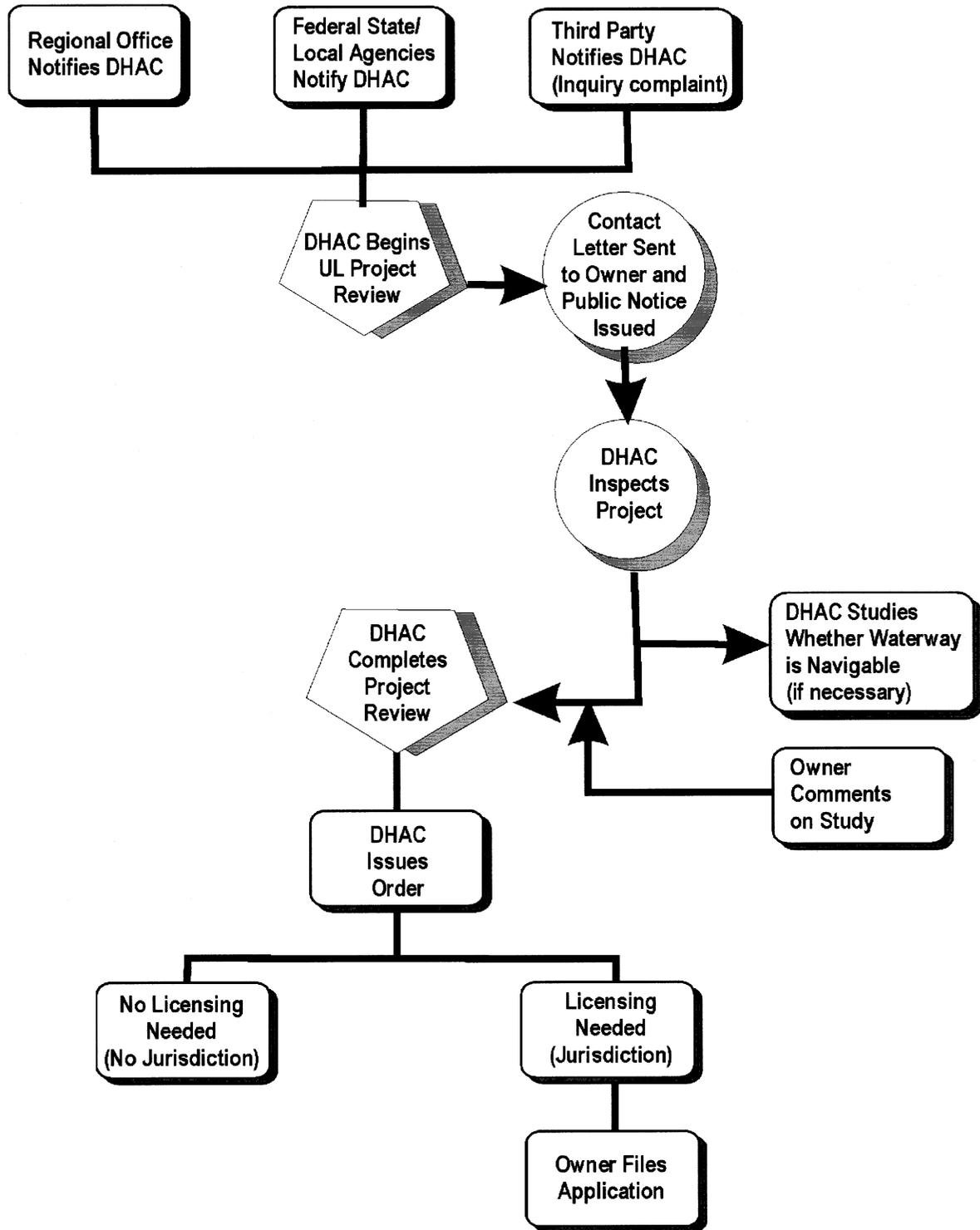
7.0 Jurisdictional Determinations for Declarations of Intentions and Unlicensed Projects

Section 23(b)(1) of the FPA requires that each non-federal hydroelectric project, except those with pre-1920 federal permits that are still valid, must be licensed if it: (1) is located on navigable waters of the United States; (2) occupies lands of the United States; (3) uses surplus water or water power from a government dam; or (4) is located on a body of water over which Congress has Commerce Clause jurisdiction, was constructed or modified after August 25, 1935, and affects interstate or foreign commerce. An owner of a proposed hydroelectric project must file a Declaration of Intention with the Commission to determine if the proposed project requires licensing. The owner of an unlicensed operating hydroelectric project would file a Petition for Declaratory Order. If the owner of a potential project does not want a jurisdictional determination, he must either file an application for a preliminary permit or file an application for a license or exemption. Section 8.0 provides information on the process to obtain a preliminary permit.

DHAC determines jurisdiction for unlicensed projects. Figure 7-1 shows the process DHAC uses to make this determination. Appendix K provides guidance to assist in the preparation of the filing for either a Declaration of Intention or Petition for Declaratory Order.

DHAC also reviews the jurisdictional status and makes jurisdictional determinations for all licensed projects that have license expiration dates within 5 years. This review is conducted to determine whether the new license will be issued under the voluntary licensing provisions of **Section 4(e)** or the mandatory provisions of **Section 4(g) of the FPA**.

**Figure 7-1
Jurisdictional Determination**



8.0 Preliminary Permits

DHAC authorizes applications for preliminary permits. A preliminary permit secures priority of application for license (vs. competitor), and it provides the prospective developer with time to evaluate the feasibility of the proposed project and to complete the studies required to support a development application. A preliminary permit, however, is *not* a prerequisite to filing a license application. See **18 CFR 4.80**.

Having a preliminary permit offers certain advantages when there may be multiple entities wanting to file license applications for the same project (see *Hydroelectric Project Licensing Handbook*, chapter 9.0), and it precludes the acceptance of another party's permit or development application during the term of the permit (usually 3 years), or until the permittee files its developmental application.

Any citizen, association of citizens, domestic corporation, municipality, or state can file an application for preliminary permit. See **18 CFR 4.31(a)**.

The Commission will not accept a preliminary permit application, however, for a proposed project that:

- would develop the same water resources that would be developed by a project for which there already is a preliminary permit in effect (see **18 CFR 4.33[a][1]**);
- would develop the same water resources that would be developed by a project for which there has already been filed and accepted an application for license (see **18 CFR 4.33[a][2]**); or
- would be precluded by law (e.g., the project is already licensed or would be located on a wild and scenic river) (see **18 CFR 4.32[e]**).

Detailed information about the procedures to secure a preliminary permit is included in Appendix L. The content of a preliminary permit application is discussed in Appendix M.

9.0 Conduit Exemptions

DHAC authorizes applications for exemptions of small conduit hydroelectric facilities pursuant to **Section 30 of the FPA**. The Commission defines a small conduit hydroelectric facility as one that has an installed capacity of less than 15 megawatts (40 megawatts in the case of a facility constructed, operated, and maintained by an agency or instrumentality of a state or local government solely for water supply for municipal purposes), is located on non-federal lands, and uses only the hydroelectric potential of a manmade conduit, which is operated for the distribution of water for agricultural, municipal, or industrial consumption and not primarily for the generation of electricity. See **18 CFR 4.30(b)(28)**.

DHAC determines if the applicant meets the eligibility requirements, and if it does, publishes the notice of application in the Federal Register and a local newspaper. DHAC also coordinates with federal and state fish and wildlife agencies as required by the **Fish and Wildlife Coordination Act** (see 16 U.S.C. 661, et seq.) and includes in any exemption any terms and conditions provided by these agencies. Typically DHAC will attach the agency letters to the exemption order. DHAC may determine that other terms and conditions are appropriate for the protection of water resources, to protect health and safety, or to avoid or mitigate other adverse environmental impacts including impacts on historic properties.

Appendix N provides more detail on the procedural steps for securing a small conduit exemption and the content of an application for this exemption.

10.0 Federal Lands Review

DHAC processes applications to vacate the withdrawal (restore public entry to) of federal lands reserved for waterpower purposes under **Section 24 of the FPA**. DHAC issues a public notice and may conduct a hearing. See **18 CFR Part 25**.

An application for a vacation of a reservation of federal lands resulting from the filing of an application for a preliminary permit or license must be filed with the Bureau of Land Management, Department of the Interior. If the lands included in the application are National Forest lands, then the application also must be filed with the USDA Forest Service. An application for an exemption does not create a land withdrawal under Section 24.

An applicant must provide the following information in its application: (1) full name of applicant; (2) post office address; (3) description of land by legal subdivision, including section, township, range, meridian, county, state, and river basin (both main and tributary); (4) public land act under which entry is intended to be made if land is restored to entry; (5) the use to which it is proposed to put the land; and (6) a statement as to its suitability for the intended use. DHAC evaluates the non-waterpower interest in the federal lands that have been reserved and makes a determination on whether to approve the revocation of power sites and classifications. DHAC also processes applications for the sale or lease of power site reserves and classifications under **Section 24 of the FPA**.

Section 24 provides for the automatic withdrawal of federal lands within proposed projects and confers no rights whatsoever to applicants by such action. A withdrawal may remain in effect long after the application for the project has been rejected. The Commission's power to authorize the use of public lands and reservations for hydroelectric projects is contained in **Section 4(e) and 15 of the FPA**. This authority is independent of Section 24 and would not be diminished if Section 24 were repealed in its entirety. Withdrawals are automatically vacated if there becomes no pending, or in effect, preliminary permit or license.

Licensees may seek to lower their annual charges for federal land use by proposing to exchange lands, thereby reducing federal acreage within project boundaries. However, any federal lands that the Commission allows to be exchanged within project boundaries would be subject to the provisions of Section 24, so that, even though licensees may own the lands after the exchange, the lands are subject to a Section 24 reservation and the annual charges continue. The only way out of the annual charges at that point is by an act of Congress.

11.0 Compliance History for Relicense

As part of the relicensing process, DHAC evaluates how well a licensee has complied with any conditions included in its license. This is called the licensee's compliance history and is required by **Section 15(a)(3)(A) of the FPA**.

For each project, the evaluation includes a review of prior compliance activities, annual charge payments, and the status of any headwater benefits charges. It also includes, if applicable, a review of the discussion in Exhibit H of the relicense application. To complete our evaluation, we contact the appropriate Commission Regional Office for information on the project that would be useful in completing the relicensing process.

To help ensure compliance with license conditions, DHAC may require some licensees to develop Hydropower Compliance Management Programs (HCMPs). The requirement to develop an HCMP is usually included in a license as Article 501. When included, Article 501 typically requires a new licensee to submit to DHAC for approval an HCMP within 4 months of license issuance. An HCMP must contain the following information:

- a list of all actions necessary to meet the license requirements and a schedule clearly showing when each action will be completed;
- for each action necessary to complete the license requirements, a schedule showing the start and completion of the consultation process with each resource agency to be consulted; and
- for each action necessary to complete the license requirements, the names of the specific individuals from each resource agency who must be consulted.

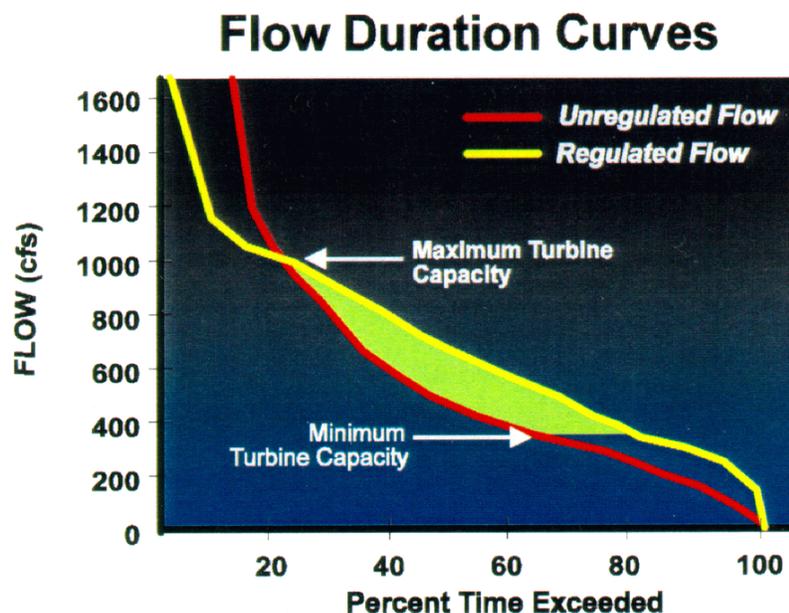
12.0 Headwater Benefits Assessments

DHAC implements the Headwater Benefits Program pursuant to **Section 10(f) of the FPA**. Headwater refers to the water that flows into a project from upstream sources. An increase in headwater means that more water is available to a project to generate power. Headwater benefits are the additional energy production possible at a downstream hydropower project resulting from the regulation of river flows by an upstream storage reservoir. Section 10(f) requires that owners of hydropower projects reimburse upstream headwater project owners for an equitable part of the benefits they receive.

We review and update headwater benefit studies on a regular cycle. DHAC may also initiate a headwater benefits investigation when it believes changes at an upstream power plant, such as increasing the frequency of water released downstream of the project, benefit a downstream power plant by, for example, allowing the downstream plant to increase its energy production.

DHAC determines headwater benefits using the energy gains methodology described in **Part II of the FPA** (see **18 CFR 11.11**). The controlled retention and release of water by a storage reservoir alters the downstream river flow. When the regulation of flows increases the percent of time the river flow falls within the turbine capacity range in which a downstream hydropower project can generate energy, the project can generate more energy than it could without the regulation. The difference between the kilowatt-hours of energy produced at a downstream hydropower project with and without storage regulation by a headwater project is called energy gains. See **18 CFR 11.10(c)(1)**.

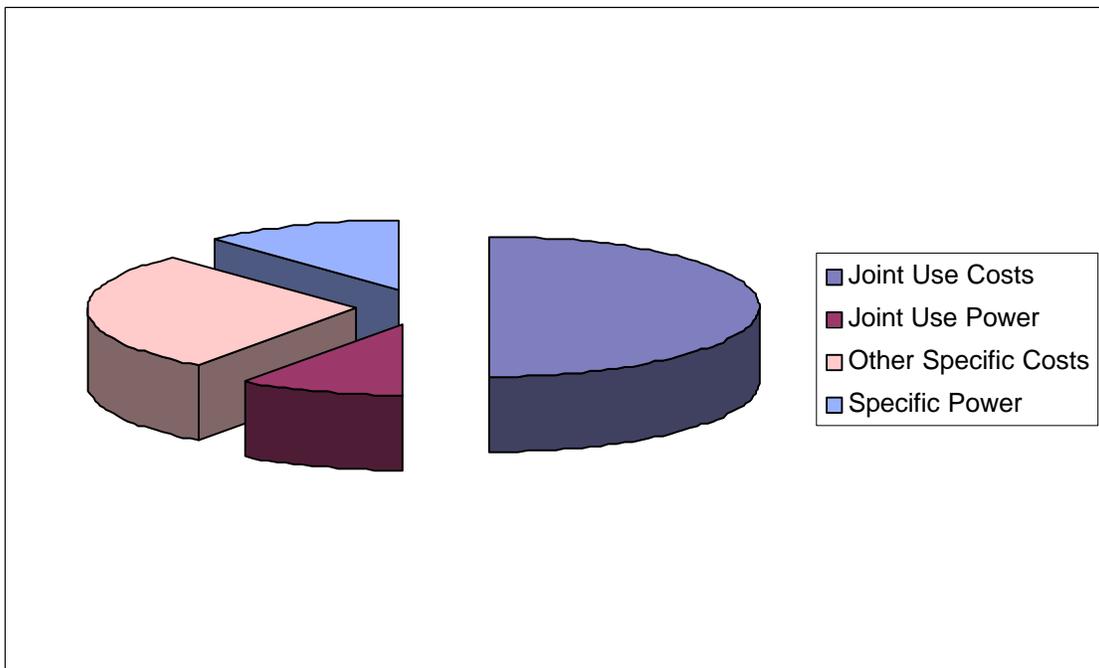
Figure 12-1
Flow Duration Curves Showing Unregulated vs. Regulated Flows



Energy gains are determined by DHAC using various analytical methods. The method chosen depends upon the complexity of the river basin and the potential headwater benefits. Complex river basins that include a large number of headwater and downstream projects often require a detailed computer analysis using our Headwater Benefits Energy Gains (HWBEG) computer model, which requires large amounts of input data. This high-speed Fortran model can quickly simulate power generation potentials under a variety of scenarios, which DHAC can study and compare to complete its evaluation. Using the data gathered by DHAC on the project's operating history, installed capacities of all downstream projects, operational data from the headwater projects, the hydrology of the river basin, and hydraulic data, the HWBEG model determines the energy gains realized. River basins that are not complex or in which the headwater benefits are expected to be small may be studied using a flow duration methodology to determine energy gains.

Section 10(f) costs consist of the annual interest, depreciation, and maintenance costs of the headwater project facilities. These costs and allocations for the headwater projects are generally provided by a federal operating agency, such as the U.S. Army Corps of Engineers or Bureau of Reclamation. DHAC uses these costs in conjunction with the energy gains received at downstream projects to determine the Section 10(f) costs, which will be apportioned among the beneficiaries. Figure 12-2 shows a typical distribution of headwater project costs. Only those costs identified as attributable to the joint-use power facilities are included in the allocation formula. Section 10(f) costs are apportioned among the headwater project and downstream beneficiaries in proportion to the energy gains each receives.

Figure 12-2
Typical Allocation of Section 10(f) Costs



Following the completion of the headwater benefits investigation, we notify project owners of the results. Project owners are provided a draft investigation report and an opportunity to provide comments. The Commission considers all comments it receives in preparing the final report. Based on the report's findings, the Commission issues a bill to downstream operators for all headwater benefits accumulated in the past, and then issues annual bills based on the project energy gains. The charge assessed by the Commission is called the **Headwater Benefits Assessment**. No final charge assessed by the Commission may exceed 85 percent of the value of the energy gains. See **18 CFR 11.11**. The owner of a downstream project with an installed generating capacity of 1.5 megawatts or less or for which the Commission has granted an exemption from Section 10(f) is not required to pay headwater benefit charges. See **18 CFR 11.10(b)**.

The HWBEG computer model may be run on desktop computers. A copy of the model, which requires a Fortran compiler, can be obtained by requesting in writing document PB94-501020GEI from the National Technical Information Service, 5285 Port Royal Road, Springfield, VA 22161 or by calling 1-800-553-6847.

SECTION III: PREVENTIVE STRATEGIES

DHAC's prevention strategies primarily take the form of monitoring and pre-filing consultation with licensees and exemptees. Monitoring can identify problems common to licensed or exempted projects and can lead to proactive activities to help licensees and exemptees identify and correct common problems.

13.0 Monitoring

DHAC monitors and investigates compliance with licenses, permits, and exemptions. See **Section 31 of the FPA**. Monitoring activities include environmental and public use inspections, compliance monitoring, and monitoring compliance with recreational requirements. Licensee assistance efforts and site visits provide opportunities for face-to-face communication with licensees and exemptees and help to foster better working relationships. Through these site visits, DHAC reviews and observes the licensee's or exemptee's compliance with license and exemption conditions. Potential problems are often identified during the site visits, and potential strategies to prevent the problems from occurring are discussed. These monitoring activities help to reduce non-compliance circumstances and complaints.

13.1 Environmental Inspections

DHAC conducts environmental inspections of licensed projects to evaluate and assess compliance with the environmental and public use requirements of the licenses. Environmental inspections look specifically at a licensee's or exemptee's compliance with license or exemption requirements for the protection and enhancement of environmental resources at the project.

Environmental inspections also allow DHAC staff to identify common problem areas and to share information with licensees and exemptees, while reminding them of their responsibilities for maintaining compliance with license or exemption requirements.

DHAC will conduct environmental inspections for projects with on-going non-compliance issues, or for projects where resource issues have been identified. Generally, DHAC also will conduct an environmental inspection for projects with significant environmental and/or public use license requirements, such as high recreational use, fish passage facilities, wildlife mitigation areas, etc. Other projects are monitored periodically. Annual inspections may be necessary, regardless of the magnitude of license requirements, when a particular environmental or public use controversy, special problem, or other issue is under consideration.

The nature and frequency of environmental inspections at exempted projects depends on the type of exemption, the hazard potential of the projects, and the environmental impacts. Article

1 of exemption orders reserves the Commission's right to conduct investigations with respect to any acts, complaints, facts, conditions, practices, or other matters related to the construction, operation, and maintenance of the exempt project, and allows the Commission to revoke the exemption if any term or condition of the exemption is violated. See **18 CFR 4.106**.

13.2 Licensee Assistance Program

Public concern about the environmental effects of hydropower operations is increasing, resulting in many additional terms and conditions in new licenses and myriad compliance and voluntary amendment filings. As more issues are left for resolution until after licensing, DHAC's responsibility to ensure and improve compliance effectiveness increases.

DHAC's overall compliance program combines three fundamentally intertwined strategies: preventive, proactive, and reactive. Our Licensee Assistance Program is a key part of our preventive strategy. As an example, as part of this program, staff meet with licensees and their representatives at project locations or Commission offices to discuss compliance-related issues ranging from providing an answer to one license article question to having an on-site conference with licensees and interested resource agencies to provide explanations and guidance concerning settlement agreements, operation matters, filing requirements, and other compliance-related matters.

Compliance staff maintain regular contact with licensees, exemptees, federal and state agencies, and environmental organizations, improving communication and ensuring better compliance. Another ongoing effort is collecting data to gauge effectiveness of our license terms and conditions. This effort allows us to foster open communication among licensees, the public, and the Commission regarding not only increasingly difficult shoreline management issues but other relevant issues. The goal is to ensure that our licensees and exemptees understand their responsibilities under their license or exemption and the steps necessary to achieve compliance and ultimately lower their regulatory and administrative burdens.

We also prepare publications to assist licensees, including this compliance handbook, which describes our programs, gives helpful compliance hints, and identifies staff and their area of expertise; *The Hydroelectric Project Licensing Handbook*, which provides guidance on obtaining a license or exemption; *The Guide to License and Exemption Amendments*, which provides a step-by-step procedure to amend a license or exemption; *Recreation Development at Licensed Hydroelectric Projects*, which helps licensees understand their responsibilities under the FPA to provide recreation opportunities at their hydro projects; *Safety Signage at Hydropower Projects*, which provides examples of appropriate safety and signage measures at hydropower projects; and *Guidance for Shoreline Management Planning at Hydropower Projects*, which helps licensees to prepare shoreline management plans.

Our Licensee Assistance Program allows us to assist our licensees to remain in compliance by anticipating and correcting compliance problems, ranging from individual project issues to issues of national concerns. Other components of this strategy are the traditional environmental inspection of projects on a regularly scheduled basis to provide a thorough inspection of the public use, cultural, and fish and wildlife resources of projects and monitoring of filing deadlines to alert and assist our licensees who may be late with their license-required filings. Increasingly staff use monitoring data from licensees, pertaining to environmental resources of particular concern, to anticipate and correct problems.

13.3 Recreation Monitoring

13.3.1 Form 80 Report

In accordance with the FPA, the Commission requires owners of licensed projects to allow reasonable public access and use of project lands and waters for recreation. To evaluate recreational resources at these projects, the Commission requires most licensees to prepare and submit a FERC Form 80 (Licensed Hydropower Development Recreation Report). See **18 CFR 8.11**. Project owners must submit a Form 80 report every 6 years. Each Form 80 must describe a project's recreation facilities and the level of public use of these facilities. The Commission uses the information from these forms to:

- inventory the recreational facilities located at licensed projects;
- ascertain whether projects are meeting the public's recreation needs; and
- identify where additional efforts should be made to meet future needs.

DHAC compiles data from Form 80s using a computer database. The database is an additional tool staff can use to prepare environmental assessments, monitor recreational activity, and access trends in recreational activity at licensed projects. For example, DHAC produced *Recreational Opportunities at Federal Energy Regulatory Commission Licensed Hydropower Projects*, a map showing the project names, locations, rivers, nearest large communities, total surface areas of each reservoir, and the types of recreational facilities at the projects using data from the 1990 Form 80s.

13.3.2 FERC's Fishing Net

Under the directive of **Executive Order 12962** (June 7, 1992), the Commission established FERC's Fishing Net. The Executive Order established the National Recreational Fisheries Coordination Council (NRFCC), which consists of seven members representing the Departments of Interior, Commerce, Agriculture, Energy, and Transportation, and the Environmental Protection Agency. The NRFCC issued the

first part of a Conservation Plan in 1996, containing national goals, including the provision of increased recreational opportunities. The Commission actions in issuing licenses typically result in enhanced recreational opportunities for anglers either through higher reservoir levels for boating or increased minimum flows that enhance downstream fisheries.

DHAC supports this effort through a database that tracks: (1) licenses issued with minimum flow requirements for the protection of aquatic resources and river miles associated with the minimum flows, (2) river miles re-established for fish migration/habitat through the installation of fishways, (3) licenses issued requiring stream habitat improvement structures that have been completed, (4) approved water quality monitoring plans, and (5) approved recreation plans that incorporate additional recreational fishing facilities. This information is provided in all annual reports prepared by the Commission pursuant to the Conservation Plan.

SECTION IV: PROACTIVE STRATEGIES

Proactive strategies are initiatives developed by DHAC staff, or jointly with other Commission staff, to deal with problems or issues of broad application to DHAC's program responsibilities. The intention is to modify the behavior of licensees and exemptees in a manner that would reduce or eliminate non-compliance circumstances. Stakeholders play a large role in this strategy, and DHAC will continue to look for ways of involving stakeholders.

14.0 Proactive Activities

DHAC's current activities focus on shoreline management, the effectiveness of license conditions, re-evaluating headwater benefit assessments, and giving better definition to the start of construction. Pursuit of proactive activities can strongly aid in DHAC's reactive activities (i.e., DHAC's approval process is more efficient if the Commission provides clear guidelines to licensees and exemptees in preparing plans or complying with license conditions).

14.1 Shoreline Management Workshops

In recent years, FERC has received numerous applications for shoreline development activities at licensed projects located primarily in the southeastern United States. Often these applications involve complex issues related to commercial marina construction, water withdrawals, dredging, or shoreline stabilization. The development pressure on shorelines for non-project uses and occupancies is fueled largely by increasing demand for water-oriented recreation and waterfront property.

Licensees have a responsibility to ensure that shoreline development activities within project boundaries are consistent with project license requirements, purposes, and operations. As development and multiple uses of the shoreline grow, licensees will face more and more challenges related to the effects of such development on project lands and waters, including public recreation use and environmental resources.

As development pressure on lands adjacent to or near project lands increases, a wider range of stakeholders is becoming involved in the FERC review process. Stakeholders such as federal, state, and local agencies, along with homeowners associations, environmental groups, hunting and fishing clubs, water-based recreation groups, real estate interests, and the general public are now frequently participating in project review. Other groups are concerned about public safety, watercraft traffic, and even commercial navigation.

A comprehensive plan, such as a shoreline management plan (SMP), can assist the licensee in meeting its responsibilities throughout the term of its license. An SMP is a comprehensive plan to manage the multiple resources and uses of the project's shorelines in a manner that is

consistent with license requirements and project purposes, while addressing the needs of the public.

The SMP planning process allows project stakeholders to work together during the development of an SMP and strike a balance between local economic interests, environmental interests, and the public who wish to enjoy project resources. This balance is vital for the long-term success of an SMP. The Commission believes that, by including various stakeholders in the development of the SMP, the resulting plan will be stronger and more acceptable to the parties.

To facilitate discussion among licensees and stakeholders about shoreline uses, the Commission conducted an outreach meeting in 1999, in Columbia, South Carolina. Commission staff chose to begin discussions about shoreline management planning in the south because of the common shoreline use issues that the projects share in this region, including the extensive development pressure around the projects and the corresponding number of developmental applications filed with the Commission. Over 150 people, about half from agencies and non-governmental organizations, participated in this forum. In addition, to increase one-to-one communication with and among licensees dealing with increased shoreline development, the Commission met with representatives from a dozen licensees on July 20, 2000, in Charleston, South Carolina. Future sessions are in the planning stages.

In addition, staff prepared *Guidance for Shoreline Management Planning at Hydropower Projects* to assist both licensees and stakeholders. It provides general guidance on developing an SMP, including how to develop, implement, monitor, and enforce an SMP.

14.2 Evaluating the Effectiveness of Required Environmental Enhancement and Mitigation Measures

The Commission issues many licenses with requirements designed to protect or enhance the affected environment. Since the 1980's, licensees have been required to develop plans to monitor the results of the environmental resource protection conditions implemented at their projects. Using these monitoring results, DHAC staff will track the outcome of certain environmental measures required at licensed hydropower projects. These monitoring results will be evaluated to determine the effectiveness of the required measures. This information can then be used to decide ways to improve the effectiveness of environmental enhancement and mitigation measures.

Through outreach meetings and workshops, DHAC staff will distribute information on these evaluations to licensees, potential licensees, and stakeholders to assist in developing effective environmental resource protection plans. Outreach meetings and workshops will address such

topics as shoreline management programs, water quality protection, fish passage, and water-oriented recreation plans.

14.3 Re-evaluating Headwater Benefit Assessments

DHAC is continually reviewing its practices to simplify the way headwater benefits are determined. For example, we simplified procedures to determine energy gains at hydropower projects. Simplified procedures are reducing the study costs incurred by the downstream beneficiaries for basins that are not complex or where the benefits do not require an extensive analysis. We also have developed more efficient ways to manage the large amount of data required to run the HWBEG model.

DHAC reviews and updates headwater benefit studies for all river basins on a regular cycle, using simplified procedures, where appropriate.

14.4 Reviewing Compliance with Construction Start Dates

FERC is continually refining the criteria for determination of start of construction pursuant to **Section 13 of the FPA** to make it clear what is expected of the licensee or exemptee. DHAC encourages contact with the licensee or exemptee to ensure that the requirements for start of construction are clearly understood to avoid potential license violations for failure to commence or complete construction in accordance with the license terms. DHAC initiates this contact by sending licensees and exemptees a letter after the license is issued defining their responsibilities under the terms and conditions of the license, including those pertaining to start of construction.

APPENDIX A. FEDERAL POWER ACT

Be it enacted by the Senate and House of Representatives of the United States of America assembled, That a commission is created and established to be known as the Federal Power Commission (hereinafter referred to as the "commission") which shall be composed of five commissioners who shall be appointed by the President, by and with the advice and consent of the Senate, one of whom shall be designated by the President as chairman and shall be the principal executive officer of the commission. Each chairman, when so designated, shall act as such until the expiration of his term of office.

The commissioners first appointed under this section, as amended, shall continue in office for terms of one, two, three, four, and five years, respectively, from June 23, 1930, the term of each to be designated by the President at the time of nomination. Their successors shall be appointed each for a term of five years from the date of the expiration of the term for which his predecessor was appointed and until his successor is appointed and has qualified, except that he shall not so continue to serve beyond the expiration of the next session of Congress subsequent to the expiration of said fixed term of office, and except that any person appointed to fill a vacancy occurring prior to the expiration of the term for which his predecessor was appointed shall be appointed only for the unexpired term. Not more than three of the commissioners shall be appointed from the same political party. No person in the employ of or holding any official relation to any licensee or to any person, firm, association, or corporation engaged in the generation, transmission, distribution, or sale of power, or owning stock or bonds thereof, or who is in any manner pecuniarily interested therein, shall enter upon the duties of or hold the office of commissioners. Said commissioners shall not engage in any other business, vocation, or employment. No vacancy in the commission shall impair the right of the remaining commissioners to exercise all the powers of the commission. Three members of the commission shall constitute a quorum for the transaction of business, and the commission shall have an official seal of which judicial notice shall be taken. The commission shall annually elect a vice chairman to act in case of the absence or disability of the chairman or in case of a vacancy in the office of chairman.

Each commissioner shall receive necessary traveling and subsistence expenses, or per diem allowance in lieu thereof, within the limitation prescribed by law, while away from the seat of government upon official business.

The principal office of the commission shall be in the District of Columbia, where its general sessions shall be held; but whenever the convenience of the public or of the parties may be promoted or delay or expense prevented thereby, the commission may hold special sessions in any part of the United States.

Section 2. The commission shall have authority to appoint, prescribe the duties, and fix the salaries of, a secretary, a chief engineer, a general counsel, a solicitor, and a chief accountant; and may, subject to the civil service laws, appoint such other officers and employees as are necessary in the execution of its

functions and fix their salaries in accordance with the Classification Act. The commission may request the President to detail an officer or officers from the Corps of Engineers, or other branches of the United States Army, to serve the commission as engineer officer or officers, or in any other capacity, in field work outside the seat of government, their duties to be prescribed by the commission; and such detail is authorized. The President may also, at the request of the commission, detail, assign, or transfer to the commission, engineers in or under the Departments of the Interior or Agriculture for field work outside the seat of government under the direction of the commission.

The commission may make such expenditures (including expenditures for rent and personal services at the seat of government and elsewhere, for law books, periodicals, and books of reference, and for printing and binding) as are necessary to execute its functions. Expenditures by the commission shall be allowed and paid upon the presentation of itemized vouchers therefor, approved by the chairman of the commission or by such other member or officer as may be authorized by the commission for that purpose subject to applicable regulations under the

Federal Property and Administrative Services Act of 1949, as amended.

Section 3. The words defined in this section shall have the following meanings for purposes of this Act, to wit:

- (1) "public lands" means such lands and interest in lands owned by the United States as are subject to private appropriation and disposal under public land laws. It shall not include "reservations", as hereinafter defined;
- (2) "reservations" means national forests, tribal lands embraced within Indian reservations, military reservations, and other lands and interests in lands owned by the United States, and withdrawn, reserved, or withheld from private appropriation and disposal under the public land laws; also lands and interests in lands acquired and held for any public purposes; but shall not include national monuments or national parks;
- (3) "corporation" means any corporation, joint-stock company, partnership, association, business trust, organized group of persons, whether incorporated or not, or a receiver or receivers, trustee or trustees of any of the foregoing. It shall not include "municipalities" as hereinafter defined;
- (4) "person" means an individual or a corporation;
- (5) "licensee" means any person, State, or municipality licensed under the provisions of section 4 of this Act, and any assignee or successor in interest thereof;

- (6) "State" means a State admitted to the Union, the District of Columbia, and any organized Territory of the United States;
- (7) "municipality" means a city, county, irrigation district, drainage district, or other political subdivision or agency of a State competent under the laws thereof to carry on the business of developing, transmitting, utilizing, or distributing power;
- (8) "navigable waters" means those parts of streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States, and which either in their natural or improved condition notwithstanding interruptions between the navigable parts of such streams or waters by falls, shallows, or rapids compelling land carriage, are used or suitable for use for the transportation of persons or property in interstate or foreign commerce, including therein all such interrupting falls, shallows, or rapids, together with such other parts of streams as shall have been authorized by Congress for improvement by the United States or shall have been recommended to Congress for such improvement after investigation under its authority;
- (9) "municipal purposes" means and includes all purposes within municipal powers as defined by the constitution or laws of the State or by the charter of the municipality;
- (10) "Government dam" means a dam or other work constructed or owned by the United States for Government purposes with or without contribution from others;
- (11) "project" means complete unit of improvement or development, consisting of a power house, all water conduits, all dams and appurtenant works and structures (including navigation structures) which are a part of said unit, and all storage, diverting, or forebay reservoirs directly connected therewith, the primary line or lines transmitting power therefrom to the point of junction with the distribution system or with the interconnected primary transmission system, all miscellaneous structures used and useful in connection with said unit or any part thereof, and all water-rights, rights-of-way, ditches, dams, reservoirs, lands, or interest in lands the use and occupancy of which are necessary or appropriate in the maintenance and operation of such unit;
- (12) "project works" means the physical structures of a project;
- (13) "net investment" in a project means the actual legitimate original cost thereof as defined and interpreted in the "classification of investment in road and equipment of steam roads, issue of 1914, Interstate Commerce Commission", plus similar costs of additions thereto and betterments thereof, minus the sum of the following items properly allocated thereto, if and to the extent that such items have been accumulated during the period of the license from earnings in excess of a fair return on such investment: (a) Unappropriated surplus, (b) aggregate credit balances of

current depreciation accounts, and (c) aggregate appropriations of surplus or income held in amortization, sinking fund, or similar reserves, or expended for additions or betterments or used for the purposes for which such reserves were created. The term "cost" shall include, insofar as applicable, the elements thereof prescribed in said classification, but shall not include expenditures from funds obtained through donations by States, municipalities, individuals, or others, and said classification of investment of the Interstate Commerce Commission shall insofar as applicable be published and promulgated as a part of the rules and regulations of the Commission;

- (14) "Commission" and "Commissioner" means the Federal Power Commission, and a member thereof, respectively;
- (15) "State commission" means the regulatory body of the State or municipality having jurisdiction to regulate rates and charges for the sale of electric energy to consumers within the State or municipality;
- (16) "security" means any note, stock, treasury stock, bond, debenture, or other evidence of interest in or indebtedness of a corporation subject to the provisions of this Act;
- (17) (A) "small power production facility" means a facility which is an eligible solar, wind, waste, or geothermal facility, or a facility which -
- (i) produces electric energy solely by the use, as a primary energy source, of biomass, waste, renewable resources, geothermal resources, or any combination hereof; and
 - (ii) has a power production capacity which, together with any other facilities located at the same site (as determined by the Commission), is not greater than 80 megawatts;
- (B) "primary energy source" means the fuel or fuels used for the generation of electric energy, except that such term does not include, as determined under rules prescribed by the Commission, in consultation with the Secretary of Energy -
- (i) the minimum amounts of fuel required for ignition, startup, testing, flame stabilization, and control uses, and
 - (ii) the minimum amounts of fuel required to alleviate or prevent -
 - (I) unanticipated equipment outages, and
 - (II) emergencies, directly affecting the public health, safety, or welfare, which would result from electric power outages;
- (C) "qualifying small power production facility" means a small power production facility-
- (i) which the Commission determines, by rule, meets such requirements (including requirements respecting fuel use, fuel efficiency, and reliability) as the Commission may, by rule, prescribe; and

- (ii) which is owned by a person not primarily engaged in the generation or sale of electric power (other than electric power solely from cogeneration facilities or small power production facilities);
- (D) "qualifying small power producer" means the owner or operator of a qualifying small power production facility;
- (E) "eligible solar, wind, waste or geothermal facility" means a facility which produces electric energy solely by the use, as a primary energy source, of solar energy, wind energy, waste resources or geothermal resources; but only if -
 - (i) either of the following is submitted to the Commission not later than December 31, 1994:
 - (I) an application for certification of the facility as a qualifying small power production facility; or
 - (II) notice that the facility meets the requirements for qualification; and
 - (ii) construction of such facility commences not later than December 31, 1999, or, if not, reasonable diligence is exercised toward the completion of such facility taking into account all factors relevant to construction of the facility.
- (18) (A) "cogeneration facility" means a facility which produces -
 - (i) electric energy, and
 - (ii) steam or forms of useful energy (such as heat) which are used for industrial, commercial, heating, or cooling purposes;
- (B) "qualifying cogeneration facility" means a cogeneration facility which -
 - (i) the Commission determines, by rule, meets such requirements (including requirements respecting minimum size, fuel use, and fuel efficiency) as the Commission may, by rule, prescribe; and
 - (ii) is owned by a person not primarily engaged in the generation or sale of electric power (other than electric power solely from cogeneration facilities or small power production facilities);
- (C) "qualifying cogenerator" means the owner or operator of a qualifying cogeneration facility;
- (19) "Federal power marketing agency" means any agency or instrumentality of the United States (other than the Tennessee Valley Authority) which sells electric energy;
- (20) "evidentiary hearings" and "evidentiary proceeding" mean a proceeding conducted as provided in sections 554, 556, and 557 of title 5, United States Code;
- (21) "State regulatory authority" has the same meaning as the term "State commission", except that in the case of an electric utility with respect to which the Tennessee Valley Authority has ratemaking authority (as defined in section 3 of the Public Utility Regulatory policies Act of 1978), such term means the Tennessee Valley Authority;
- (22) "electric utility" means any person or State agency (including any municipality) which sells electric energy; such term includes the Tennessee Valley Authority, but does not include any Federal power marketing agency.

- (23) Transmitting utility. - The term "transmitting utility" means any electric utility, qualifying cogeneration facility, qualifying small power production facility, or Federal power marketing agency which owns or operates electric power transmission facilities which are used for the sale of electric energy at wholesale.
- (24) Wholesale transmission services. - The term "wholesale transmission services" means the transmission of electric energy sold, or to be sold, at wholesale in interstate commerce.
- (25) Exempt wholesale generator. - The term "exempt wholesale generator" shall have the meaning provided by section 32 of the Public Utility Holding Company Act of 1935.

Section 4. The Commission is hereby authorized and empowered

- (a) To make investigations and to collect and record data concerning the utilization of the water resources of any region to be developed, the water-power industry and its relation to other industries and to interstate or foreign commerce, and concerning the location, capacity, development costs, and relation to markets of power sites, and whether the power from Government dams can be advantageously used by the United States for its public purposes, and what is a fair value of such power, to the extent the Commission may deem necessary or useful for the purposes of this Act.
- (b) To determine the actual legitimate original cost of and the net investment in a licensed project, and to aid the Commission in such determinations, each licensee shall, upon oath, within a reasonable period of time to be fixed by the Commission, after the construction of the original project or any addition thereto or betterment thereof, file with the Commission in such detail as the Commission may require, a statement in duplicate showing the actual legitimate original cost of construction of such project addition, or betterment, and of the price paid for water rights, rights-of-way, lands, or interest in lands. The licensee shall grant to the Commission or to its duly authorized agent or agents, at all reasonable times, free access to such project, addition, or betterment, and to all maps, profiles, contracts, reports of engineers, accounts, books, records, and all other papers and documents relating thereto. The statement of actual legitimate original cost of said project, and revisions thereof as determined by the Commission, shall be filed with the Secretary of the Treasury.
- (c) To cooperate with the executive departments and other agencies of State or National Governments in such investigations; and for such purpose the several departments and agencies of the National Government are authorized and directed upon the request of the Commission, to furnish such records, papers, and information in their possession as may be requested by the Commission, and temporarily to detail to the Commission such officers or experts as may be necessary in such investigations.
- (d) To make public from time to time the information secured hereunder, and to provide for the publication of its reports and investigations in such form and manner as may be best adapted for public information and use. The Commission, on or before the 3d day of January of each year, shall submit to Congress for the fiscal year preceding a classified report showing the permits and licenses

issued under this Part, and in each case the parties thereto, the terms prescribed, and the moneys received if any, or account thereof.

- (e) To issue licenses to citizens of the United States, or to any association of such citizens, or to any corporation organized under the laws of the United States or any State thereof, or to any State or municipality for the purpose of constructing, operating, and maintaining dams, water conduits, reservoirs, power houses, transmission lines, or other project works necessary or convenient for the development and improvement of navigation and for the development, transmission, and utilization of power across, along, from, or in any of the streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States, or upon any part of the public lands and reservations of the United States (including the Territories), or for the purpose of utilizing the surplus water or water power from any Government dam, except as herein provided: Provided, That licenses shall be issued within any reservation only after a finding by the Commission that the license will not interfere or be inconsistent with the purpose for which such reservation was created or acquired, and shall be subject to and contain such conditions as the Secretary of the department under whose supervision such reservation falls shall deem necessary for the adequate protection and utilization of such reservations: Provided further, That no license affecting the navigable capacity of any navigable waters of the United States shall be issued until the plans of the dam or other structures affecting the navigation have been approved by the Chief of Engineers and the Secretary of the Army. Whenever the contemplated improvement is, in the judgment of the Commission, desirable and justified in the public interest for the purpose of improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, a finding to that effect shall be made by the Commission and shall become a part of the records of the Commission: Provided further, That in case the Commission shall find that any Government dam may be advantageously used by the United States for public purposes in addition to navigation, no license therefor shall be issued until two years after it shall have reported to Congress the facts and conditions relating thereto, except that this provision shall not apply to any Government dam constructed prior to June 10, 1920: And provided further, That upon the filing of any application for a license which has not been preceded by a preliminary permit under subsection (f) of this section, notice shall be given and published as required by the proviso of said subsection. In deciding whether to issue any license under this Part for any project, the Commission, in addition to the power and development purposes for which licenses are issued, shall give equal consideration to the purposes of energy conservation, the protection, mitigation of damage to, and enhancement of, fish and wildlife (including related spawning grounds and habitat), the protection of recreational opportunities, and the preservation of other aspects of environmental quality.
- (f) To issue preliminary permits for the purpose of enabling applicants for a license hereunder to secure the data and to perform the acts required by section 9 hereof: Provided, however, That upon the filing of any application for a preliminary permit by any person, association, or corporation the Commission, before granting such application, shall at once give notice of such application in writing to any State or municipality likely to be interested in or affected by such application; and shall also publish notice of such application once each week for four weeks in a daily or weekly newspaper

published in the county or counties in which the project or any part hereof or the lands affected thereby are situated.

- (g) Upon its own motion to order an investigation of any occupancy of, or evidenced intention to occupy, for the purpose of developing electric power, public lands, reservations, or streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States by any person, corporation, State, or municipality and to issue such order as it may find appropriate, expedient, and in the public interest to conserve and utilize the navigation and water-power resources of the region.

Section 5. Each preliminary permit issued under this Part shall be for the sole purpose of maintaining priority of application for a license under the terms of this Part for such period or periods, not exceeding a total of three years, as in the discretion of the Commission may be necessary for making examinations and surveys, for preparing maps, plans, specifications, and estimates, and for making financial arrangements. Each such permit shall set forth the conditions under which priority shall be maintained. Such permits shall not be transferable, and may be canceled by order of the Commission upon failure of permittees to comply with the conditions thereof or for other good cause shown after notice and opportunity for hearing.

Section 6. Licenses under this Part shall be issued for a period not exceeding fifty years. Each such license shall be conditioned upon acceptance by the licensee of all of the terms and conditions of this Act and such further conditions, if any, as the Commission shall prescribe in conformity with this Act, which said terms and conditions and the acceptance thereof shall be expressed in said license. Licenses may be revoked only for the reasons and in the manner prescribed under the provisions of this Act, and may be altered or surrendered only upon mutual agreement between the licensee and the Commission after thirty days' public notice.

Section 7.

- (a) In issuing preliminary permits hereunder or original licenses where no preliminary permit has been issued, the Commission shall give preference to applications therefor by States and municipalities, provided the plans for the same are deemed by the Commission equally well adapted, or shall within a reasonable time to be fixed by the Commission be made equally well adapted, to conserve and utilize in the public interest the water resources of the region; and as between other applicants, the Commission may give preference to the applicant the plans of which it finds and determines are best adapted to develop, conserve, and utilize in the public interest the water resources of the region, if it be satisfied as to the ability of the applicant to carry out such plans.
- (b) Whenever, in the judgment of the Commission, the development of any water resources for public purposes should be undertaken by the United States itself, the Commission shall not approve any application for any project affecting such development, but shall cause to be made such examinations, surveys, reports, plans, and estimates of the cost of the proposed development as it

may find necessary, and shall submit its findings to Congress with such recommendations as it may find appropriate concerning such development.

- (c) Whenever, after notice and opportunity for hearing, the Commission determines that the United States should exercise its right upon or after the expiration of any license to take over any project or projects for public purposes, the Commission shall not issue a new license to the original licensee or to a new licensee but shall submit its recommendation to Congress together with such information as it may consider appropriate.

Section 8. No voluntary transfer of any license, or of the rights thereunder granted, shall be made without the written approval of the commission; and any successor or assign of the rights of such licensee, whether by voluntary transfer, judicial sale, foreclosure sale, or otherwise, shall be subject to all the conditions of the license under which such rights are held by such licensee and also subject to all the provisions and conditions of this Act to the same extent as though such successor or assign were the original licensee hereunder: Provided, That a mortgage or trust deed or judicial sales made thereunder or under tax sales shall not be deemed voluntary transfers within the meaning of this section.

Section 9.

- (a) Each applicant for a license hereunder shall submit to the commission -
 - (1) Such maps, plans, specifications, and estimates of cost as may be required for a full understanding of the proposed project. Such maps, plans, and specifications when approved by the commission shall be made a part of the license; and thereafter no change shall be made in said maps, plans, or specifications until such changes shall have been approved and made a part of such license by the commission.
 - (2) Satisfactory evidence that the applicant has complied with the requirements of the laws of the State or States within which the proposed project is to be located with respect to bed and banks and to the appropriation, diversion, and use of water for power purposes and with respect to the right to engage in the business of developing, transmitting and distributing power, and in any other business necessary to effect the purposes of a license under this Act.
- (b) Upon the filing of any application for a license (other than a license under section 15) the applicant shall make a good faith effort to notify each of the following by certified mail:
 - (1) Any person who is an owner of record of any interest in the property within the bounds of the project.
 - (2) Any Federal, State, municipal or other local governmental agency likely to be interested in or affected by such application.
- (c) Such additional information as the commission may require.

Section 10. All licenses issued under this Part shall be on the following conditions:

- (a) (1) That the project adopted, including the maps, plans, and specifications, shall be such as in the judgment of the Commission will be best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the

improvement and utilization of water-power development, for the adequate protection, mitigation, and enhancement of fish and wildlife (including related spawning grounds and habitat), and for other beneficial public uses, including irrigation, flood control, water supply, and recreational and other purposes referred to in section 4(e); and if necessary in order to secure such plan the Commission shall have authority to require the modification of any project and of the plans and specifications of the project works before approval.

- (2) In order to ensure that the project adopted will be best adapted to the comprehensive plan described in paragraph (1), the Commission shall consider each of the following:
- (A) The extent to which the project is consistent with a comprehensive plan (where one exists) for improving, developing, or conserving a waterway or waterways affected by the project that is prepared by -
- (i) an agency established pursuant to Federal law that has the authority to prepare such a plan; or
 - (ii) the State in which the facility is or will be located.
- (B) The recommendations of Federal and State agencies exercising administration over flood control, navigation, irrigation, recreation, cultural and other relevant resources of the State in which the project is located, and the recommendations (including fish and wildlife recommendations) of Indian tribes affected by the project.
- (C) In the case of a State or municipal applicant, or an applicant which is primarily engaged in the generation or sale of electric power (other than electric power solely from cogeneration facilities or small power production facilities), the electricity consumption efficiency improvement program of the applicant, including its plans, performance and capabilities for encouraging or assisting its customers to conserve electricity cost-effectively, taking into account the published policies, restrictions, and requirements of relevant State regulatory authorities applicable to such applicant.
- (3) Upon receipt of an application for a license, the Commission shall solicit recommendations from the agencies and Indian tribes identified in subparagraphs (A) and (B) of paragraph (2) for proposed terms and conditions for the Commission's consideration for inclusion in the license.
- (b) That except when emergency shall require for the protection of navigation, life, health, or property, no substantial alteration or addition not in conformity with the approved plans shall be made to any dam or other project works constructed hereunder of an installed capacity in excess of two thousand horsepower without the prior approval of the Commission; and any emergency alteration or addition so made shall thereafter be subject to such modification and change as the Commission may direct.
- (c) That the licensee shall maintain the project works in a condition of repair adequate for the purposes of navigation and for the efficient operation of said works in the development and transmission of power, shall make all necessary renewals and replacements, shall establish and maintain adequate depreciation reserves for such purposes, shall so maintain, and operate said works as not to impair navigation, and shall conform to such rules and regulations as the Commission may from time to time prescribe for the protection of life, health, and property. Each licensee hereunder shall be liable for all damages occasioned to the property of others by the construction, maintenance, or operation of the project works or of the works appurtenant or accessory thereto, constructed under the license and in no event shall the United States be liable therefor.

(d) That after the first twenty years of operation, out of surplus earned thereafter, if any, accumulated in excess of a specified reasonable rate of return upon the net investment of a licensee in any project or projects under license, the licensee shall establish and maintain amortization reserves, which reserves shall, in the discretion of the Commission, be held until the termination of the license or be applied from time to time in reduction of the net investment. Such specified rate of return and the proportion of such surplus earnings to be paid into and held in such reserves shall be set forth in the license. For any new license issued under section 15, the amortization reserves under this subsection shall be maintained on and after the effective date of such new license.

(e) (1) That the licensee shall pay to the United States reasonable annual charges in an amount to be fixed by the Commission for the purpose of reimbursing the United States for the costs of the administration of this Part, including any reasonable and necessary costs incurred by Federal and State fish and wildlife agencies and other natural and cultural resource agencies in connection with studies or other reviews carried out by such agencies for purposes of administering their responsibilities under this Part; for recompensing it for the use, occupancy, and enjoyment of its lands or other property; and for the expropriation to the Government of excessive profits until the respective States shall make provision for preventing excessive profits or for the expropriation thereof to themselves, or until the period of amortization as herein provided is reached, and in fixing such charges the Commission shall seek to avoid increasing the price to the consumers of power by such charges, and any such charges may be adjusted from time to time by the Commission as conditions may require: Provided,

that, subject to annual appropriations Acts, the portion of such annual charges imposed by the Commission under this subsection to cover the reasonable and necessary costs of such agencies shall be available to such agencies (in addition to other funds appropriated for such purposes) solely for carrying out such studies and reviews and shall remain available until expended: Provided, That when licenses are issued involving the use of Government dams or other structures owned by the United States or tribal lands embraced within Indian reservations the Commission shall, subject to the approval of the Secretary of the Interior in the case of such dams or structures in reclamation projects and, in the case of such tribal lands, subject to the approval of the Indian tribe having jurisdiction of such lands as provided in section 16 of the Act of June 18, 1934 (48 Stat. 984), fix a reasonable annual charge for the use thereof, and such charges may with like approval be readjusted by the Commission at the end of twenty years after the project is available for service and at periods of not less than ten years thereafter upon notice and opportunity for hearing:

Provided further, That licenses for the development, transmission, or distribution of power by States or municipalities shall be issued and enjoyed without charge to the extent such power is sold to the public without profit or is used by such State or municipality for State or municipal purposes, except that as to projects constructed or to be constructed by States or municipalities primarily designed to provide or improve navigation, licenses therefor shall be issued without charge; and that licenses for the development, transmission, or distribution of power for domestic, mining, or other beneficial use in projects of not more than two thousand horsepower installed capacity may be issued without charge, except on tribal lands within Indian reservations; but in no case shall a license be issued free

of charge for the development and utilization of power created by any Government dam and that the amount charged therefor in any license shall be such as determined by the Commission: Provided however, That no charge shall be assessed for the use of any Government dam or structure by any licensee if, before January 1, 1985, the Secretary of the Interior has entered into a contract with such licensee that meets each of the following requirements:

- (A) The contract covers one or more projects for which a license was issued by the Commission before January 1, 1985.
- (B) The contract contains provisions specifically providing each of the following:
 - (i) A powerplant may be built by the licensee utilizing irrigation facilities constructed by the United States.
 - (ii) The powerplant shall remain in the exclusive control, possession, and ownership of the licensee concerned.
 - (iii) All revenue from the powerplant and from the use, sale, or disposal of electric energy from the powerplant shall be, and remain, the property of such licensee.
- (C) The contract is an amendatory, supplemental and replacement contract between the United States and: (i) the Quincy-Columbia Basin Irrigation District (Contract No. 14-06-100-6418); (ii) the East Columbia Basin Irrigation District (Contract No. 14-06-100-6419); or, (iii) the South Columbia Basin Irrigation District (Contract No. 14-06-100-6420).

This paragraph shall apply to any project covered by a contract referred to in this paragraph only during the term of such contract unless otherwise provided by subsequent Act of Congress. In the event an overpayment of any charge due under this section shall be made by a licensee, the Commission is authorized to allow a credit for such overpayment when charges are due for any subsequent period.

- (2) In the case of licenses involving the use of Government dams or other structures owned by the United States, the charges fixed (or readjusted) by the Commission under paragraph (1) for the use of such dams or structures shall not exceed 1 mill per kilowatt-hour for the first 40 gigawatt-hours of energy a project produces in any year, 1 ½ mills per kilowatt-hour for over 40 up to and including 80 gigawatt-hours in any year, and 2 mills per kilowatt-hour for any energy the project produces over 80 gigawatt-hours in any year. Except as provided in subsection (f) of this section, such charge shall be the only charge assessed by any agency of the United States for the use of such dams or structures.
- (3) The provisions of paragraph (2) shall apply with respect to -
 - (A) all licenses issued after the date of enactment of this paragraph; and
 - (B) all licenses issued before such date, which -
 - (i) did not fix a specific charge for the use of the Government dam or structure involved; and
 - (ii) did not specify that no charge would be fixed for the use of such dam or structure.
- (4) Every 5 years, the Commission shall review the appropriateness of the annual charge limitations provided for in this subsection and report to Congress concerning its recommendations thereon.
- (f) That whenever any licensee hereunder is directly benefited by the construction work of another licensee, a permittee, or of the United States of a storage reservoir or other headwater improvement,

the Commission shall require as a condition of the license that the licensee so benefited shall reimburse the owner of such reservoir or other improvements for such part of the annual charges for interest, maintenance, and depreciation thereon as the Commission may deem equitable. The proportion of such charges to be paid by any licensee shall be determined by the Commission. The licensees or permittees affected shall pay to the United States the cost of making such determination as fixed by the Commission.

Whenever such reservoir or other improvement is constructed by the United States the Commission shall assess similar charges against any licensee directly benefited thereby, and any amount so assessed shall be paid into the Treasury of the United States, to be reserved and appropriated as a part of the special fund for headwater improvements as provided in section 17 hereof.

Whenever any power project not under license is benefited by the construction work of a licensee or permittee, the United States or any agency thereof, the Commission, after notice to the owner or owners of such unlicensed project, shall determine and fix a reasonable and equitable annual charge to be paid to the licensee or permittee on account of such benefits, or to the United States if it be the owner of such headwater improvement.

(g) Such other conditions not inconsistent with the provisions of this Act as the commission may require.

(h) (1) Combinations, agreements, arrangements, or understandings, express or implied, to limit the output of electrical energy, to restrain trade, or to fix, maintain, or increase prices for electrical energy or service are hereby prohibited. (2) That conduct under the license that: (A) results in the contravention of the policies expressed in the antitrust laws; and (B) is not otherwise justified by the public interest considering regulatory policies expressed in other applicable law (including but not limited to those contained in Part II of this Act) shall be prevented or adequately minimized by means of conditions included in the license prior to its issuance. In the event it is impossible to prevent or adequately minimize the contravention, the Commission shall refuse to issue any license to the applicant for the project and, in the case of an existing project, shall take appropriate action to provide thereafter for the operation and maintenance of the affected project and for the issuing of a new license in accordance with section 15 of this Part.

(i) In issuing licenses for a minor part only of a complete project, or for a complete project of not more than two thousand horsepower installed capacity, the Commission may in its discretion waive such conditions, provisions, and requirements of this Part, except the license period of fifty years, as it may deem to be to the public interest to waive under the circumstances: Provided, That the provisions hereof shall not apply to annual charges for use of lands within Indian reservations.

(j)(1) That in order to adequately and equitably protect, mitigate damages to, and enhance, fish and wildlife (including related spawning grounds and habitat) affected by the development, operation, and management of the project, each license issued under this Part shall include conditions for such protection, mitigation, and enhancement. Subject to paragraph (2), such conditions shall be based on recommendations received pursuant to the Fish and Wildlife Coordination Act (16 U.S.C. 661 et seq.) from the National Marine Fisheries Service, the United States Fish and Wildlife Service, and State fish and wildlife agencies.

- (2) Whenever the Commission believes that any recommendation referred to in paragraph (1) may be inconsistent with the purposes and requirements of this Part or other applicable law, the Commission and the agencies referred to in paragraph (1) shall attempt to resolve any such inconsistency, giving due weight to the recommendations, expertise, and statutory responsibilities of such agencies. If, after such attempt, the Commission does not adopt in whole or in part a recommendation of any such agency, the Commission shall publish each of the following findings (together with a statement of the basis for each of the findings):
- (A) A finding that adoption of such recommendation is inconsistent with the purposes and requirements of this Part or with other applicable provisions of law.
 - (B) A finding that the conditions selected by the Commission comply with the requirements of paragraph (1). Subsection (i) of this section shall not apply to the conditions required under this subsection.

Section 11. That if the dam or other project works are to be constructed across, along, or in any of the navigable waters of the United States, the commission may, insofar as it deems the same reasonably necessary to promote the present and future needs of navigation and consistent with a reasonable investment cost to the licensee, include in the license any one or more of the following provisions or requirements:

- (a) That such licensee shall, to the extent necessary to preserve and improve navigation facilities, construct, in whole or in part, without expense to the United States, in connection with such dam, a lock or locks, booms, sluices, or other structures for navigation purposes, in accordance with plans and specifications approved by the Chief of Engineers and the Secretary of the Army and made part of such license.
- (b) That in case such structures for navigation purposes are not made a part of the original construction at the expense of the licensee, then whenever the United States shall desire to complete such navigation facilities the licensee shall convey to the United States, free of cost, such of its land and its rights-of-way and such right of passage through its dams or other structures, and permit such control of pools as may be required to complete such navigation facilities.
- (c) That such licensee shall furnish free of cost to the United States power for the operation of such navigation facilities, whether constructed by the licensee or by the United States.

Section 12. That whenever application is filed for a project hereunder involving navigable waters of the United States, and the commission shall find upon investigation that the needs of navigation require the construction of a lock or locks or other navigation structures, and that such structures cannot, consistent with a reasonable investment cost to the applicant, be provided in the manner specified in section 11, subsection (a) hereof, the commission may grant the application with the provision to be expressed in the license that the licensee will install the necessary navigation structures if the Government fails to make provision therefor within a time to be fixed in the license and cause a report upon such project to be prepared, with estimates of cost of the power development and of the navigation structures, and shall

submit such report to Congress with such recommendations as it deems appropriate concerning the participation of the United States in the cost of construction of such navigation structures.

Section 13. That the licensee shall commence the construction of the project works within the time fixed in the license, which shall not be more than two years from the date thereof, shall thereafter in good faith and with due diligence prosecute such construction, and shall within the time fixed in the license complete and put into operation such part of the ultimate development as the commission shall deem necessary to supply the reasonable needs of the then available market, and shall from time to time thereafter construct such portion of the balance of such development as the commission may direct, so as to supply adequately the reasonable market demands until such development shall have been completed. The periods for the commencement of construction may be extended once but not longer than two additional years and the period for the completion of construction carried on in good faith and with reasonable diligence may be extended by the commission when not incompatible with the public interests. In case the licensee shall not commence actual construction of the project works, or of any specified part thereof, within the time prescribed in the license or as extended by the commission, then, after due notice given, the license shall, as to such project works or part thereof, be terminated upon written order of the commission. In case the construction of the project works, or of any specified part thereof, has been begun but not completed within the time prescribed in the license, or as extended by the commission, then the Attorney General, upon the request of the commission, shall institute proceedings in equity in the district court of the United States for the district in which any part of the project is situated for the revocation of said license, the sale of the works constructed, and such other equitable relief as the case may demand, as provided for in section 26 hereof.

Section 14.

(a) Upon not less than two years' notice in writing from the commission the United States shall have the right upon or after the expiration of any license to take over and thereafter to maintain and operate any project or projects as defined in section 3 hereof, and covered in whole or in part by the license, or the right to take over upon mutual agreement with the licensee all property owned and held by the licensee then valuable and serviceable in the development, transmission, or distribution of power and which is then dependent for its usefulness upon the continuance of the license, together with any lock or locks or other aids to navigation constructed at the expense of the licensee, upon the condition that before taking possession it shall pay the net investment of the licensee in the project or projects taken, not to exceed the fair value of the property taken, plus such reasonable damages, if any, to property of the licensee valuable, serviceable, and dependent as above set forth but not taken, as may be caused by the severance therefrom of property taken, and shall assume all contracts entered into by the licensee with the approval of the Commission. The net investment of the licensee in the project or projects so taken and the amount of such severance damages, if any, shall be determined by the Commission after notice and opportunity for hearing. Such net investment shall not include or be affected by the value of any lands, rights-of-way, or other property of the United States licensed by the Commission under this Act, by the license or by good will, going value, or prospective revenues;

nor shall the values allowed for water rights, rights-of-way, lands, or interest in lands be in excess of the actual reasonable cost thereof at the time of acquisition by the licensee: Provided, That the right of the United States or any State or municipality to take over, maintain, and operate any project licensed under this Act at any time by condemnation proceedings upon payment of just compensation is expressly reserved.

- (b) In any relicensing proceeding before the Commission any Federal department or agency may timely recommend, pursuant to such rules as the Commission shall prescribe, that the United States exercise its right to take over any project or projects. Thereafter, the Commission, if it does not itself recommend such action pursuant to the provisions of section 7(c) of this part, shall upon motion of such department or agency stay the effective date of any order issuing a license, except an order issuing an annual license in accordance with the proviso of section 15(a), for two years after the date of issuance of such order, after which period the stay shall terminate, unless terminated earlier upon motion of the department or agency requesting the stay or by action of Congress. The Commission shall notify the Congress of any stay granted pursuant to this subsection.

Section 15.

(a) (1) If the United States does not, at the expiration of the existing license, exercise its right to take over, maintain, and operate any project or projects of the licensee, as provided in section 14 hereof, the commission is authorized to issue a new license to the existing licensee upon such terms and conditions as may be authorized or required under the then existing laws and regulations, or to issue a new license under said terms and conditions to a new licensee, which license may cover any project or projects covered by the existing license, and shall be issued on the condition that the new licensee shall, before taking possession of such project or projects, pay such amount, and assume such contracts as the United States is required to do in the manner specified in section 14 hereof: Provided, That in the event the United States does not exercise the right to take over or does not issue a license to a new licensee, or issue a new license to the existing licensee, upon reasonable terms, then the commission shall issue from year to year an annual license to the then licensee under the terms and conditions of the existing license until the property is taken over or a new license is issued as aforesaid.

(2) Any new license issued under this section shall be issued to the applicant having the final proposal which the Commission determines is best adapted to serve the public interest, except that in making this determination the Commission shall ensure that insignificant differences with regard to subparagraphs (A) through (G) of this paragraph between competing applications are not determinative and shall not result in the transfer of a project.

In making a determination under this section (whether or not more than one application is submitted for the project), the Commission shall, in addition to the requirements of section 10 of this Part, consider (and explain such consideration in writing) each of the following:

(A) The plans and abilities of the applicant to comply with (i) the articles, terms, and conditions of any license issued to it and (ii) other applicable provisions of this Part.

(B) The plans of the applicant to manage, operate, and maintain the project safely.

- (C) The plans and abilities of the applicant to operate and maintain the project in a manner most likely to provide efficient and reliable electric service.
 - (D) The need of the applicant over the short and long term for the electricity generated by the project or projects to serve its customers, including, among other relevant considerations, the reasonable costs and reasonable availability of alternative sources of power, taking into consideration conservation and other relevant factors and taking into consideration the effect on the provider (including its customers) of the alternative source of power, the effect on the applicant's operating and load characteristics, the effect on communities served or to be served by the project, and in the case of an applicant using power for the applicant's own industrial facility and related operations, the effect on the operation and efficiency of such facility or related operations, its workers, and the related community. In the case of an applicant that is an Indian tribe applying for a license for a project located on the tribal reservation, a statement of the need of such tribe for electricity generated by the project to foster the purposes of the reservation may be included.
 - (E) The existing and planned transmission services of the applicant, taking into consideration system reliability, costs, and other applicable economic and technical factors.
 - (F) Whether the plans of the applicant will be achieved, to the greatest extent possible, in a cost effective manner.
 - (G) Such other factors as the Commission may deem relevant, except that the terms and conditions in the license for the protection, mitigation, or enhancement of fish and wildlife resources affected by the development, operation, and management of the project shall be determined in accordance with section 10, and the plans of an applicant concerning fish and wildlife shall not be subject to a comparative evaluation under this subsection.
- (3) In the case of an application by the existing licensee, the Commission shall also take into consideration each of the following:
- (A) The existing licensee's record of compliance with the terms and conditions of the existing license.
 - (B) The actions taken by the existing licensee related to the project which affect the public.
- (b) (1) Each existing licensee shall notify the Commission whether the licensee intends to file an application for a new license or not. Such notice shall be submitted at least 5 years before the expiration of the existing license.
- (2) At the time notice is provided under paragraph (1), the existing licensee shall make each of the following reasonably available to the public for inspection at the offices of such licensee: current maps, drawings, data, and such other information as the Commission shall, by rule, require regarding the construction and operation of the licensed project. Such information shall include, to the greatest extent practicable pertinent energy conservation, recreation, fish and wildlife, and other environmental information. Copies of the information shall be made available at reasonable costs of reproduction. Within 180 days after the enactment of the Electric Consumers Protection Act of 1986, the Commission shall promulgate regulations regarding the information to be provided under this paragraph.

- (3) Promptly following receipt of notice under paragraph (1), the Commission shall provide public notice of whether an existing licensee intends to file or not to file an application for a new license. The Commission shall also promptly notify the National Marine Fisheries Service and the United States Fish and Wildlife Service, and the appropriate State fish and wildlife agencies.
- (4) The Commission shall require the applicant to identify any Federal or Indian lands included in the project boundary, together with a statement of the annual fees paid as required by this Part for such lands, and to provide such additional information as the Commission deems appropriate to carry out the Commission's responsibilities under this section.
- (c) (1) Each application for a new license pursuant to this section shall be filed with the Commission at least 24 months before the expiration of the term of the existing license. Each applicant shall consult with the fish and wildlife agencies referred to in subsection (b) of this section and, as appropriate, conduct studies with such agencies. Within 60 days after the statutory deadline for the submission of applications, the Commission shall issue a notice establishing expeditious procedures for relicensing and a deadline for submission of final amendments, if any, to the application.
- (2) The time periods specified in this subsection and in subsection (b) of this section shall be adjusted, in a manner that achieves the objectives of this section, by the Commission by rule or order with respect to existing licensees who, by reason of the expiration dates of their licenses, are unable to comply with a specified time period.
- (d) (1) In evaluating applications for new licenses pursuant to this section, the Commission shall not consider whether an applicant has adequate transmission facilities with regard to the project.
- (2) When the Commission issues a new license (pursuant to this section) to an applicant which is not the existing licensee of the project and finds that it is not feasible for the new licensee to utilize the energy from such project without provision by the existing licensee of reasonable services, including transmission services, the Commission shall give notice to the existing licensee and the new licensee to immediately enter into negotiations for such services and the costs demonstrated by the existing licensee as being related to the provision of such services. It is the intent of the Congress that such negotiations be carried out in good faith and that a timely agreement be reached between the parties in order to facilitate the transfer of the license by the date established when the Commission issued the new license. If such parties do not notify the Commission that within the time established by the Commission in such notice (and if appropriate, in the judgment of the Commission, one 45-day extension thereof), a mutually satisfactory arrangement for such services that is consistent with the provisions of this Act has been executed, the Commission shall order the existing licensee to file (pursuant to section 205 of this Act) with the Commission a tariff, subject to refund, ensuring such services beginning on the date of transfer of the project and including just and reasonable rates and reasonable terms and conditions. After notice and opportunity for a hearing, the Commission shall issue a final order adopting or modifying such tariff for such services at just and reasonable rates in accordance with section 205 of this Act and in accordance with reasonable terms and conditions. The Commission, in issuing such order, shall ensure the services necessary for the full and

efficient utilization and benefits for the license term of the electric energy from the project by the new licensee in accordance with the license and this Part, except that in issuing such order the Commission -

- (A) shall not compel the existing licensee to enlarge generating facilities, transmit electric energy other than to the distribution system (providing service to customers) of the new licensee identified as of the date one day preceding the date of license award, or require the acquisition of new facilities, including the upgrading of existing facilities other than any reasonable enhancement or improvement of existing facilities controlled by the existing licensee (including any acquisition related to such enhancement or improvement) necessary to carry out the purposes of this paragraph;
- (B) shall not adversely affect the continuity and reliability of service to the customers of the existing licensee;
- (C) shall not adversely affect the operational integrity of the transmission and electric systems of the existing licensee;
- (D) shall not cause any reasonably quantifiable increase in the jurisdictional rates of the existing licensee; and
- (E) shall not order any entity other than the existing licensee to provide transmission or other services.

Such order shall be for such period as the Commission deems appropriate, not to exceed the term of the license. At any time, the Commission, upon its own motion or upon a petition by the existing or new licensee and after notice and opportunity for a hearing, may modify, extend, or terminate such order.

- (e) Except for an annual license, any license issued by the Commission under this section shall be for a term which the Commission determines to be in the public interest but not less than 30 years, nor more than 50 years, from the date on which the license is issued.
- (f) In issuing any licenses under this section except an annual license, the Commission, on its own motion or upon application of any licensee, person, State, municipality, or State commission, after notice to each State commission and licensee affected, and after opportunity for hearing, whenever it finds that in conformity with a comprehensive plan for improving or developing a waterway or waterways for beneficial public uses all or part of any licensed project should no longer be used or adapted for use for power purposes, may license all or part of the project works for nonpower use. A license for nonpower use shall be issued to a new licensee only on the condition that the new licensee shall, before taking possession of the facilities encompassed thereunder, pay such amount and assume such contracts as the United States is required to do, in the manner specified in section 14 hereof. Any license for nonpower use shall be a temporary license. Whenever, in the judgment of the Commission, a State, municipality, interstate agency, or another Federal agency is authorized and willing to assume regulatory supervision of the lands and facilities included under the nonpower license and does so, the Commission shall thereupon terminate the license. Consistent with the provisions of the Act of August 15, 1953 (67 Stat; 16 U.S.C. 828-828c), every licensee for nonpower use shall keep such accounts and file such

annual and other periodic or special reports concerning the removal, alteration, nonpower use, or other disposition of any project works or parts thereof covered by the nonpower use license as the Commission may by rules and regulations or order prescribe as necessary or appropriate.

Section 16. When in the opinion of the President of the United States, evidenced by a written order addressed to the holder of any license hereunder, the safety of the United States demands it, the United States shall have the right to enter upon and take possession of any project or part thereof, constructed, maintained, or operated under said license, for the purpose of manufacturing nitrates, explosives, or munitions of war, or for any other purpose involving the safety of the United States, to retain possession, management, and control thereof for such length of time as may appear to the President to be necessary to accomplish said purposes, and then to restore possession and control to the party or parties entitled thereto; and in the event that the United States shall exercise such right it shall pay to the party or parties entitled thereto just and fair compensation for the use of said property as may be fixed by the commission upon the basis of a reasonable profit in time of peace, and the cost of restoring said property to as good condition as existed at the time of the taking over thereof, less the reasonable value of any improvements that may be made thereto by the United States and which are valuable and serviceable to the licensee.

Section 17.

- (a) All proceeds from any Indian reservation shall be placed to the credit of the Indians of such reservation. All other charges arising from licenses hereunder, except charges fixed by the Commission for the purpose of reimbursing the United States for the costs of administration of this Part, shall be paid into the Treasury of the United States, subject to the following distribution: 12 ½ per centum thereof is hereby appropriated to be paid into the Treasury of the United States and credited to "Miscellaneous receipts"; 50 per centum of the charges arising from licenses hereunder for the occupancy and use of public lands and national forests shall be paid into, reserved, and appropriated as a part of the reclamation fund created by the Act of Congress known as the Reclamation Act, approved June 17, 1902; and 37 ½ per centum of the charges arising from licenses hereunder for the occupancy and use of national forests and public lands from development within the boundaries of any State shall be paid by the Secretary of the Treasury to such State; and 50 per centum of the charges arising from all other licenses hereunder is reserved and appropriated as a special fund in the Treasury to be expended under the direction of the Secretary of the Army in the maintenance and operation of dams and other navigation structures owned by the United States or in the construction, maintenance, or operation of headwater or other improvements of navigable waters of the United States. The proceeds of charges made by the Commission for the purpose of reimbursing the United States for the costs of the administration of this Part shall be paid into the Treasury of the United States and credited to miscellaneous receipts.
- (b) In case of delinquency on the part of any licensee in the payment of annual charges a penalty of 5 per centum of the total amount so delinquent may be added to the total charges which shall

apply for the first month or part of month so delinquent with an additional penalty of 3 per centum for each subsequent month until the total of the charges and penalties are paid or until the license is canceled and the charges and penalties satisfied in accordance with law.

Section 18. The Commission shall require the construction, maintenance, and operation by a licensee at its own expense of such lights and signals as may be directed by the Secretary of the Department in which the Coast Guard is operating, and such fishways as may be prescribed by the Secretary of the Interior or the Secretary of Commerce, as appropriate. The operation of any navigation facilities which may be constructed as a part of or in connection with any dam or diversion structure built under the provisions of this Act, whether at the expense of a licensee hereunder or of the United States, shall at all times be controlled by such reasonable rules and regulations in the interest of navigation, including the control of the level of the pool caused by such dam or diversion structure as may be made from time to time by the Secretary of the Army; and for willful failure to comply with any such rule or regulation such licensee shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished as provided in section 316 hereof.

Section 19. That as a condition of the license, every licensee hereunder which is a public-service corporation, or a person, association, or corporation owning or operating any project and developing, transmitting, or distributing power for sale or use in public service, shall abide by such reasonable regulation of the services to be rendered to customers or consumers of power, and of rates and charges of payment therefor, as may from time to time be prescribed by any duly constituted agency of the State in which the service is rendered or the rate charged. That in case of the development, transmission, or distribution, or use in public service of power by any licensee hereunder or by its customer engaged in public service within a State which has not authorized and empowered a commission or other agency or agencies within said State to regulate and control the services to be rendered by such licensee or by its customer engaged in public service, or the rates and charges of payment therefor, or the amount or character of securities to be issued by any of said parties, it is agreed as a condition of such license that jurisdiction is conferred upon the commission, upon complaint of any person aggrieved or upon its own initiative, to exercise such regulation and control until such time as the State shall have provided a commission or other authority for such regulation and control: Provided, That the jurisdiction of the commission shall cease and determine as to each specific matter of regulation and control prescribed in this section as soon as the State shall have provided a commission or other authority for the regulation and control of that specific matter.

Section 20. That when said power or any part thereof shall enter into interstate or foreign commerce the rates charged and the service rendered by any such licensee, or by any subsidiary corporation, the stock of which is owned or controlled directly or indirectly by such licensee, or by any person, corporation, or association purchasing power from such licensee for sale and distribution or use in public service shall be reasonable, nondiscriminatory, and just to the customer and all unreasonable discriminatory and unjust rates or services are prohibited and declared to be unlawful; and whenever any of the States

directly concerned has not provided a commission or other authority to enforce the requirements of this section within such State or to regulate and control the amount and character of securities to be issued by any of such parties, or such States are unable to agree through their properly constituted authorities on the services to be rendered, or on the rates or charges of payment therefor, or on the amount or character of securities to be issued by any of said parties, jurisdiction is conferred upon the commission, upon complaint of any person, aggrieved, upon the request of any State concerned, or upon its own initiative to enforce the provisions of this section, to regulate and control so much of the services rendered, and of the rates and charges of payment therefor as constitute interstate or foreign commerce and to regulate the issuance of securities by the parties included within this section, and securities issued by the licensee subject to such regulations shall be allowed only for the bona fide purpose of financing and conducting the business of such licensee.

The administration of the provisions of this section, so far as applicable, shall be according to the procedure and practice in fixing and regulating the rates, charges, and practices of railroad companies as provided in the Act to regulate commerce, approved February 4, 1887, as amended, and that the parties subject to such regulation shall have the same rights of hearing, defense, and review as said companies in such cases.

In any valuation of the property of any licensee hereunder for purposes of rate making, no value shall be claimed by the licensee or allowed by the commission for any project or projects under license in excess of the value or values prescribed in section 14 hereof for the purposes of purchase by the United States, but there shall be included the cost to such licensee of the construction of the lock or locks or other aids of navigation and all other capital expenditures required by the United States, and no value shall be claimed or allowed for the rights granted by the commission or by this Act.

Section 21. That when any licensee cannot acquire by contract or pledges an unimproved dam site or the right to use or damage the lands or property of others necessary to the construction, maintenance, or operation of any dam, reservoir, diversion structure, or the works appurtenant or accessory thereto, in conjunction with any improvement which in the judgment of the commission is desirable and justified in the public interest for the purpose of improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, it may acquire the same by the exercise of the right of eminent domain in the district court of the United States for the district in which such land or other property may be located, or in the State courts. The practice and procedure in any action or proceeding for that purpose in the district court of the United States shall conform as nearly as may be with the practice and procedure in similar action or proceeding in the courts of the State where the property is situated: Provided, That United States district courts shall only have jurisdiction of cases when the amount claimed by the owner of the property to be condemned exceeds \$3,000. Provided further, That no licensee may use the right of eminent domain under this section to acquire any lands or other property that, prior to October 24, 1992, were owned by a State or political subdivision thereof and were part of or included within any public park, recreation area or wildlife refuge established under State or local law. In the case

of lands or other property that are owned by a State or political subdivision and are part of or included within a public park, recreation area or wildlife refuge established under State or local law on or after October 24, 1992, no licensee may use the right of eminent domain under this section to acquire such lands or property unless there has been a public hearing held in the affected community and a finding by the Commission, after due consideration of expressed public views and the recommendations of the State or political subdivision that owns the lands or property, that the license will not interfere or be inconsistent with the purposes for which such lands or property are owned.

Section 22. That whenever the public interest requires or justifies the execution by the licensee of contracts for the sale and delivery of power for periods extending beyond the date of termination of the license, such contracts may be entered into upon the joint approval of the commission and of the public-service commission or other similar authority in the State in which the sale or delivery of power is made, or if sold or delivered in a State which has no such public-service commission, then upon the approval of the commission, and thereafter, in the event of failure to issue a new license to the original licensee at the termination of the license, the United States or the new licensee, as the case may be, shall assume and fulfill all such contracts.

Section 23.

(a) The provisions of this Part shall not be construed as affecting any permit or valid existing right-of-way heretofore granted or as confirming or otherwise affecting any claim, or as affecting any authority heretofore given pursuant to law, but any person, association, corporation, State, or municipality holding or possessing such permit, right-of-way or authority may apply for a license under this Act, and upon such application the Commission may issue to any such applicant a license in accordance with the provisions of this Part and in such case the provisions of this Act shall apply to such applicant as a licensee hereunder: Provided, That when application is made for a license under this section for a project or projects already constructed the fair value of said project or projects determined as provided in this section, shall for the purposes of this Part and of said license be deemed to be the amount to be allowed as the net investment of the applicant in such project or projects as of the date of such license, or as of the date of such determination, if license has not been issued. Such fair value shall be determined by the Commission after notice and opportunity for hearing.

(b)(1) 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. 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. If the Commission shall not so find, and if no public lands or reservations are affected, permission is granted to construct such dam or other project works in such stream upon compliance with State laws.

- (2) No person may commence any significant modification of any project licensed under, or exempted from, this Act unless such modification is authorized in accordance with terms and conditions of such license or exemption and the applicable requirements of this Part. As used in this paragraph, the term "commence" refers to the beginning of physical on-site activity other than surveys or testing.

Section 24. Any lands of the United States included in any proposed projection under the provisions of this Part shall from the date of filing of application therefor be reserved from entry, location, or other disposal under the laws of the United States until otherwise directed by the commission or by Congress. Notice that such application has been made, together with the date of filing thereof and a description of the lands of the United States affected thereby, shall be filed in the local land office for the district in which such lands are located. Whenever the commission shall determine that the value of any lands of the United States so applied for, or heretofore or hereafter reserved or classified as power sites, will not be injured or destroyed for the purposes of power development by location, entry, or selection under the public-land laws, the Secretary of the Interior, upon notice of such determination, shall declare such lands open to location, entry, or selection, for such purpose or purposes and under such restrictions as the Commission may determine, subject to and with a reservation of the right of the United States or its permittees or licensees to enter upon, occupy, and use any part or all of said lands necessary, in the judgment of the Commission, for the purposes of this Part, which right shall be expressly reserved in every patent issued for such lands; and no claim or right to compensation shall accrue from the occupation or use of any of said lands for said purposes. The United States or any licensee for any such lands hereunder may enter thereupon for the purposes of this Part, upon payment of any damages to crops, buildings, or other improvements caused thereby to the owner thereof, or upon giving a good and sufficient bond to the United States for the use and benefit of the owner to secure the payment of such damages as may be determined and fixed in an action brought upon the bond in a court of competent jurisdiction, said bond to be in the form prescribed by the Commission: Provided, That locations, entries, selections, or filings heretofore made for lands reserved as water-power sites, or in connection with water-power development, or electrical transmission may proceed to approval or patent under and

subject to the limitations and conditions in this section contained: Provided further, That before any lands applied for, or heretofore or hereafter reserved, or classified as power sites, are declared open to location, entry, or selection by the Secretary of the Interior, notice of intention to make such declaration shall be given to the Governor of the State within which such lands are located, and such State shall have ninety days from the date of such notice within which to file, under any statute or regulation applicable thereto, an application for the reservation to the State, or any political subdivision thereof, of any lands required as a right-of-way for a public highway or as a source of materials for the construction and maintenance of such highways, and a copy of such application shall be filed with the Federal Power Commission; and any location, entry, or selection of such lands, or subsequent patent thereof, shall be subject to any rights granted the State pursuant to such application.

Section 25. [Repealed August 26, 1935.]

Section 26. That the Attorney General may, on request of the commission or of the Secretary of the Army, institute proceedings in equity in the district court of the United States in the district in which any project or part thereof is situated for the purpose of revoking for violation of its terms any permit or license issued hereunder, or for the purpose of remedying or correcting by injunction, mandamus, or other process any act of commission or omission in violation of the provisions of this Act or of any lawful regulation or order promulgated hereunder. The district courts shall have jurisdiction over all of the above-mentioned proceedings and shall have power to issue and execute all necessary process and to make and enforce all writs, orders and decrees to compel compliance with the lawful orders and regulations of the commission and of the Secretary of the Army, and to compel the performance of any condition imposed under the provisions of this Act. In the event a decree revoking a license is entered, the court is empowered to sell the whole or any part of the project or projects under license, to wind up the business of such licensee conducted in connection with such project or projects, to distribute the proceeds to the parties entitled to the same, and to make and enforce such further orders and decrees as equity and justice may require. At such sale or sales the vendee shall take the rights and privileges belonging to the licensee and shall perform the duties of such licensee and assume all outstanding obligations and liabilities of the licensee which the court may deem equitable in the premises; and at such sale or sales the United States may become a purchaser, but it shall not be required to pay a greater amount than it would be required to pay under the provisions of section 14 hereof at the termination of the license.

Section 27. That nothing contained herein 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 right acquired therein.

Section 28. That the right to alter, amend, or repeal this Act is expressly reserved; but no such alteration, amendment, or repeal shall affect any license theretofore issued under the provisions of this Act or the rights of any licensee thereunder.

Section 29. That all Acts or parts of Acts inconsistent with this Act are repealed: Provided, That nothing contained herein shall be held or construed to modify or repeal any of the provisions of the Act of Congress approved December 19, 1913, granting certain rights-of-way to the city and county of San Francisco, in the State of California. Provided further, That section 18 of an Act making appropriations for the construction, repair and preservation, of certain public works on rivers and harbors, and for other purposes, approved August 8, 1917, is hereby repealed."

Section 30.

- (a) Except as provided in subsection (b) or (c), the Commission may grant an exemption in whole or in part, from the requirements of this part, including any license requirements contained in this part, to any facility (not including any dam or other impoundment) constructed, operated, or maintained for the generation of electric power which the Commission determines, by rule or order -
 - (1) is located on non-Federal lands, and
 - (2) utilizes for such generation only the hydroelectric potential of a manmade conduit, which is operated for the distribution of water for agricultural, municipal, or industrial consumption and not primarily for the generation of electricity.
- (b) The Commission may not grant any exemption under subsection (a) to any facility the installed capacity of which exceeds 15 megawatts (40 megawatts in the case of a facility constructed, operated, and maintained by an agency or instrumentality of a State or local government solely for water supply for municipal purposes).
- (c) In making the determination under subsection (a) of this section the Commission shall consult with the United States Fish and Wildlife Service, National Marine Fisheries 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, National Marine Fisheries 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.
- (d) Any violation of a term or condition of any exemption granted under subsection (a) shall be treated as a violation of a rule or order of the Commission under this Act.
- (e) The Commission, in addition to the requirements of section 10(e), shall establish fees which shall be paid by an applicant for a license or exemption for a project that is required to meet terms and conditions set by fish and wildlife agencies under subsection (c). Such fees shall be adequate to reimburse the fish and wildlife agencies referred to in subsection (c) for any reasonable costs incurred in connection with any studies or other reviews carried out by such agencies for purposes of compliance with this section. The fees shall, subject to annual appropriations Acts, be transferred to

such agencies by the Commission for use solely for purposes of carrying out such studies and shall remain available until expended.

Section 31. Enforcement

- (a) Monitoring and investigation.--The Commission shall monitor and investigate compliance with each license and permit issued under this Part and with each exemption granted from any requirement of this Part. The Commission shall conduct such investigations as may be necessary and proper in accordance with this Act. After notice and opportunity for public hearing, the Commission may issue such orders as necessary to require compliance with the terms and conditions of licenses and permits issued under this Part and with the terms and conditions of exemptions granted from any requirement of this Part.
- (b) Revocation orders.--After notice and opportunity for an evidentiary hearing, the Commission may also issue an order revoking any license issued under this Part or any exemption granted from any requirement of this Part where any licensee or exemptee is found by the Commission:
 - (1) to have knowingly violated a final order issued under subsection (a) after completion of judicial review (or the opportunity for judicial review); and
 - (2) to have been given reasonable time to comply fully with such order prior to commencing any revocation proceeding. In any such proceeding, the order issued under subsection (a) shall be subject to de novo review by the Commission. No order shall be issued under this subsection until after the Commission has taken into consideration the nature and seriousness of the violation and the efforts of the licensee to remedy the violation.
- (c) Civil penalty.--Any licensee, permittee, or exemptee who violates or fails or refuses to comply with any rule or regulation under this Part, any term, or condition of a license, permit, or exemption under this Part, or any order issued under subsection (a) shall be subject to a civil penalty in an amount not to exceed \$10,000 for each day that such violation or failure or refusal continues. Such penalty shall be assessed by the Commission after notice and opportunity for public hearing. In determining the amount of a proposed penalty, the Commission shall take into consideration the nature and seriousness of the violation, failure, or refusal and the efforts of the licensee to remedy the violation, failure, or refusal in a timely manner. No civil penalty shall be assessed where revocation is ordered.
- (d) Assessment.--(1) Before issuing an order assessing a civil penalty against any person under this section, the Commission shall provide to such person notice of the proposed penalty. Such notice shall, except in the case of a violation of a final order issued under subsection (a), inform such person of his opportunity to elect in writing within 30 days after the date of receipt of such notice to have the procedures of paragraph (3) (in lieu of those of paragraph (2)) apply with respect to such assessment.
 - (2)(A) In the case of the violation of a final order issued under subsection (a), or unless an election is made within 30 calendar days after receipt of notice under paragraph (1) to have paragraph (3) apply with respect to such penalty, the Commission shall assess the penalty, by order, after a determination of violation has been made on the record after an opportunity for an agency hearing pursuant to section 554 of title 5, United States Code, before an administrative law judge appointed

under section 3105 of such title 5. Such assessment order shall include the administrative law judge's findings and the basis for such assessment.

- (B) Any person against whom a penalty is assessed under this paragraph may, within 60 calendar days after the date of the order of the Commission assessing such penalty, institute an action in the United States court of appeals for the appropriate judicial circuit for judicial review of such order in accordance with Act 7 of title 5, United States Code. The court shall have jurisdiction to enter a judgment affirming, modifying, or setting aside in whole or in Part, the order of the Commission, or the court may remand the proceeding to the Commission for such further action as the court may direct.
- (3)(A) In the case of any civil penalty with respect to which the procedures of this paragraph have been elected, the Commission shall promptly assess such penalty, by order, after the date of the receipt of the notice under paragraph (1) of the proposed penalty.
- (B) If the civil penalty has not been paid within 60 calendar days after the assessment order has been made under subparagraph (A), the Commission shall institute an action in the appropriate district court of the United States for an order affirming the assessment of the civil penalty. The court shall have authority to review de novo the law and the facts involved, and shall have jurisdiction to enter a judgment enforcing, modifying, and enforcing as so modified, or setting aside in whole or in Part, such assessment.
- (C) Any election to have this paragraph apply may not be revoked except with the consent of the Commission.
- (4) The Commission may compromise, modify, or remit, with or without conditions, any civil penalty which may be imposed under this subsection, taking into consideration the nature and seriousness of the violation and the efforts of the licensee to remedy the violation in a timely manner at any time prior to a final decision by the court of appeals under paragraph (2) or by the district court under paragraph (3).
- (5) If any person fails to pay an assessment of a civil penalty after it has become a final and unappealable order under paragraph (2), or after the appropriate district court has entered final judgment in favor of the Commission under paragraph (3), the Commission shall institute an action to recover the amount of such penalty in any appropriate district court of the United States. In such action, the validity and appropriateness of such final assessment order or judgment shall not be subject to review.
- (6)(A) Notwithstanding the provisions of title 28, United States Code, or of this Act, the Commission may be represented by the general counsel of the Commission (or any attorney or attorneys within the Commission designated by the Chairman) who shall supervise, conduct, and argue any civil litigation to which paragraph (3) of this subsection applies (including any related collection action under paragraph (5)) in a court of the United States or in any other court, except the Supreme Court. However, the Commission or the general counsel shall consult with the Attorney General concerning such litigation, and the Attorney General shall provide, on request, such assistance in the conduct of such litigation as may be appropriate.

(B) The Commission shall be represented by the Attorney General, or the Solicitor General, as appropriate, in actions under this subsection, except to the extent provided in subparagraph (A) of this paragraph.

Section 32. Alaska State Jurisdiction over Small Hydroelectric Projects.

(a) DISCONTINUANCE OF REGULATION BY THE COMMISSION- Notwithstanding sections 4(e) and 23(b), the Commission shall discontinue exercising licensing and regulatory authority under this part over qualifying project works in the State of Alaska, effective on the date on which the Commission certifies that the State of Alaska has in place a regulatory program for water-power development that--

(1) protects the public interest, the purposes listed in paragraph (2), and the environment to the same extent provided by licensing and regulation by the Commission under this part and other applicable Federal laws, including the Endangered Species Act (16 U.S.C. 1531 et seq.) and the Fish and Wildlife Coordination Act (16 U.S.C. 661 et seq.);

(2) gives equal consideration to the purposes of--

(A) energy conservation;

(B) the protection, mitigation of damage to, and enhancement of, fish and wildlife (including related spawning grounds and habitat);

(C) the protection of recreational opportunities;

(D) the preservation of other aspects of environmental quality;

(E) the interests of Alaska Natives; and

(F) other beneficial public uses, including irrigation, flood control, water supply, and navigation; and

(3) requires, as a condition of a license for any project works--

(A) the construction, maintenance, and operation by a licensee at its own expense of such lights and signals as may be directed by the Secretary of the Department in which the Coast Guard is operating, and such fishways as may be prescribed by the Secretary of the Interior or the Secretary of Commerce, as appropriate;

(B) the operation of any navigation facilities which may be constructed as part of any project to be controlled at all times by such reasonable rules and regulations as may be made by the Secretary of the Army; and

(C) conditions for the protection, mitigation, and enhancement of fish and wildlife based on recommendations received pursuant to the Fish and Wildlife Coordination Act (16 U.S.C. 661 et seq.) from the National Marine Fisheries Service, the United States Fish and Wildlife Service, and State fish and wildlife agencies.

(b) DEFINITION OF 'QUALIFYING PROJECT WORKS'- For purposes of this section, the term 'qualifying project works' means project works--

(1) that are not part of a project licensed under this part or exempted from licensing under this part or section 405 of the Public Utility Regulatory Policies Act of 1978 prior to the date of the enactment of this section;

- (2) for which a preliminary permit, a license application, or an application for an exemption from licensing has not been accepted for filing by the Commission prior to the date of the enactment of subsection (c) (unless such application is withdrawn at the election of the applicant);
 - (3) that are part of a project that has a power production capacity of 5,000 kilowatts or less;
 - (4) that are located entirely within the boundaries of the State of Alaska; and
 - (5) that are not located in whole or in part on any Indian reservation, a conservation system unit (as defined in section 102(4) of the Alaska National Interest Lands Conservation Act (16 U.S.C. 3102(4))), or segment of a river designated for study for addition to the Wild and Scenic Rivers System.
- (c) ELECTION OF STATE LICENSING- In the case of nonqualifying project works that would be a qualifying project works but for the fact that the project has been licensed (or exempted from licensing) by the Commission prior to the enactment of this section, the licensee of such project may in its discretion elect to make the project subject to licensing and regulation by the State of Alaska under this section.
- (d) PROJECT WORKS ON FEDERAL LANDS- With respect to projects located in whole or in part on a reservation, a conservation system unit, or the public lands, a State license or exemption from licensing shall be subject to--
- (1) the approval of the Secretary having jurisdiction over such lands; and
 - (2) such conditions as the Secretary may prescribe.
- (e) CONSULTATION WITH AFFECTED AGENCIES- The Commission shall consult with the Secretary of the Interior, the Secretary of Agriculture, and the Secretary of Commerce before certifying the State of Alaska's regulatory program.
- (f) APPLICATION OF FEDERAL LAWS- Nothing in this section shall preempt the application of Federal environmental, natural resources, or cultural resources protection laws according to their terms.
- (g) OVERSIGHT BY THE COMMISSION- The State of Alaska shall notify the Commission not later than 30 days after making any significant modification to its regulatory program. The Commission shall periodically review the State's program to ensure compliance with the provisions of this section.
- (h) RESUMPTION OF COMMISSION AUTHORITY- Notwithstanding subsection (a), the Commission shall reassert its licensing and regulatory authority under this part if the Commission finds that the State of Alaska has not complied with one or more of the requirements of this section.
- (i) DETERMINATION BY THE COMMISSION- (1) Upon application by the Governor of the State of Alaska, the Commission shall within 30 days commence a review of the State of Alaska's regulatory program for water-power development to determine whether it complies with the requirements of subsection (a).
- (2) The Commission's review required by paragraph (1) shall be completed within 1 year of initiation, and the Commission shall within 30 days thereafter issue a final order determining whether or not the State of Alaska's regulatory program for water-power development complies with the requirements of subsection (a).

(3) If the Commission fails to issue a final order in accordance with paragraph (2) the State of Alaska's regulatory program for water-power development shall be deemed to be in compliance with subsection (a).

Appendix B. Selected Sections of 18 CFR

SUBCHAPTER A - GENERAL RULES

PART 2 - GENERAL POLICY AND INTERPRETATIONS

Sec. 2.7 Recreational development at licensed projects.

The Commission will evaluate the recreational resources of all projects under Federal license or applications therefor and seek, within its authority, the ultimate development of these resources, consistent with the needs of the area to the extent that such development is not inconsistent with the primary purpose of the project. Reasonable expenditures by a licensee for public recreational development pursuant to an approved plan, including the purchase of land, will be included as part of the project cost. The Commission will not object to licensees and operators of recreational facilities within the boundaries of a project charging reasonable fees to users of such facilities in order to help defray the cost of constructing, operating, and maintaining such facilities. The Commission expects the licensee to assume the following responsibilities:

- (a) To acquire in fee and include within the project boundary enough land to assure optimum development of the recreational resources afforded by the project. To the extent consistent with the other objectives of the license, such lands to be acquired in fee for recreational purposes shall include the lands adjacent to the exterior margin of any project reservoir plus all other project lands specified in any approved recreational use plan for the project.
- (b) To develop suitable public recreational facilities upon project lands and waters and to make provisions for adequate public access to such project facilities and waters and to include therein consideration of the needs of physically handicapped individuals in the design and construction of such project facilities and access.
- (c) To encourage and cooperate with appropriate local, State, and Federal agencies and other interested entities in the determination of public recreation needs and to cooperate in the preparation of plans to meet these needs, including those for sport fishing and hunting.
- (d) To encourage governmental agencies and private interests, such as operators of user-fee facilities, to assist in carrying out plans for recreation, including operation and adequate maintenance of recreational areas and facilities.
- (e) To cooperate with local, State, and Federal Government agencies in planning, providing, operating, and maintaining facilities for recreational use of public lands administered by those agencies adjacent to the project area.
- (f) (1) To comply with Federal, State and local regulations for health, sanitation, and public safety, and to cooperate with law enforcement authorities in the development of additional necessary regulations for such purposes.

- (2) To provide either by itself or through arrangement with others for facilities to process adequately sewage, litter, and other wastes from recreation facilities including wastes from watercraft, at recreation facilities maintained and operated by the licensee or its concessionaires.
- (g) To ensure public access and recreational use of project lands and waters without regard to race, color, sex, religious creed or national origin.
- (h) To inform the public of the opportunities for recreation at licensed projects, as well as of rules governing the accessibility and use of recreational facilities.

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.

- (a) This subpart applies to any application for preliminary permit, license, or exemption from licensing.
- (b) For the purposes of this part -
 - (26) *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.
 - (28) *Small conduit hydroelectric facility* means an existing or proposed hydroelectric facility that is constructed, operated, or maintained for the generation of electric power, and includes all structures, fixtures, equipment, and lands used and useful in the operation or maintenance of the hydroelectric facility, but excludes the conduit on which the hydroelectric facility is located or the transmission lines associated with the hydroelectric facility and which:

Sec. 4.31(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.

Sec. 4.32(e)

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

- (1) *Deficient applications.* (i) An application that in the judgment of the Director of the Office of Hydropower Licensing does not conform to the requirements of paragraphs (a), (b) and (c) of this section and of Sec. 4.38, may be considered deficient. An applicant having a deficient application will be afforded additional time to correct deficiencies, not to exceed 45 days from the date of notification in the case of an application for a preliminary permit or exemption from licensing or 90 days from the date of notification in the case of an application for license. Notification will be by letter or, in the case of minor deficiencies, by telephone. Any notification will specify the deficiencies to be corrected. Deficiencies must be corrected by submitting an original and the number of copies specified in paragraph (b) of this section of the specified materials or information to the Secretary within the time specified in the notification of deficiency.
- (ii) Upon submission of a conforming application, action will be taken in accordance with paragraph (d) of this section.
- (iii) If the revised application is found not to conform to the requirements of paragraphs (a), (b) and (c) of this section and of Sec. 4.38, or if the revisions are not timely submitted, the revised application will be rejected. Procedures for rejected applications are specified in paragraph (e)(2)(iii).
- (2) *Patently deficient applications.* (i) If, within 90 days of its filing date, the Director of the Office of Hydropower Licensing determines that an application patently fails to substantially comply with the requirements of paragraph (a), (b), and (c) of this section and of Sec. 4.38 of this part or Sec. 16.8 of this chapter, or is for a project that is precluded by law, the application will be rejected as patently deficient with the specification of the deficiencies that render the application patently deficient.
- (ii) If, after 90 days of its filing date, the Director of the Office of Hydropower Licensing determines that an application patently fails to substantially comply with the requirements of paragraphs (a), (b), and (c) of this section and of Sec. 4.38 of this part or Sec. 16.8 of this chapter, or is for a project that is precluded by law:
- (A) The application will be rejected by order of the Commission, if the Commission determines it is patently deficient; or
- (B) The application will be considered deficient under paragraph (e)(1) of this section, if the Commission determines it is not patently deficient.
- (iii) Any application that is rejected may be resubmitted if the deficiencies are corrected and if, in the case of a competing application, the resubmittal is timely. The date the rejected application is resubmitted will be considered the new filing date for purposes of determining its timeliness under Sec. 4.36 and the disposition of competing applications under Sec. 4.37.

Sec. 4.33(a)

The Commission will not accept an application for a preliminary permit for project works that:

- (1) Would develop, conserve, and utilize, in whole or in part, the same water resources that would be developed, conserved, and utilized by a project for which there is an unexpired preliminary permit.
- (2) Would develop, conserve, and utilize, in whole or in part, the same water resources that would be developed, conserved, and utilized by a project for which an initial development application has been filed unless the preliminary permit application is filed not later than the time allowed under Sec.

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.

Sec. 4.38

Consultation requirements.

(a) *Requirement to consult.*

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

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

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

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

(i) Original license;

(ii) Exemption;

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

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

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

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

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

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

(5) Before it files a non-capacity related amendment as defined in Sec. 4.201(c), an applicant must consult with the resource agencies and Indian tribes listed in paragraph (a)(1) of this section to the extent that the proposed amendment would affect the interests of the agencies or tribes. When

consultation is necessary, the applicant must, at a minimum, provide the resource agencies and Indian tribes with copies of the draft application and allow them at least 60 days to comment on the proposed amendment. The amendment as filed with the Commission must summarize the consultation with the resource agencies and Indian tribes on the proposed amendment, propose reasonable protection, mitigation, or enhancement measures to respond to impacts identified as being caused by the proposed amendment, and respond to any objections, recommendations, or conditions submitted by the agencies or Indian tribes. Copies of all written correspondence between the applicant, the agencies, and the tribes must be attached to the application.

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

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

(b) *First stage of consultation.*

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

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

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

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

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

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

(vi)(A) A statement (with a copy to the Commission) of whether or not the applicant will seek benefits under section 210 of PURPA by satisfying the requirements for qualifying hydroelectric small power production facilities in Sec. 292.203 of this chapter; (B) If benefits under section 210 of PURPA are sought, a statement on whether or not the applicant believes the project is located at a new dam or

- diversion (as that term is defined in Sec. 292.202(p) of this chapter) and a request for the agencies' view on that belief, if any;
- (vii) Detailed descriptions of any proposed studies and the proposed methodologies to be employed; and
 - (viii) Any statement required by Sec. 4.301(a).
- (2) No earlier than 30 days, but no later than 60 days, from the date of the potential applicant's letter transmitting the information to the agencies and Indian tribes under paragraph (b)(1) of this section, the potential applicant must:
- (i) Hold a joint meeting at a convenient place and time, including an opportunity for a site visit, with all pertinent agencies and Indian tribes to explain the applicant's proposal and its potential environmental impact, to review the information provided, and to discuss the data to be obtained and studies to be conducted by the potential applicant as part of the consultation process;
 - (ii) Consult with the resource agencies and Indian tribes on the scheduling and agenda of the joint meeting; and
 - (iii) No later than 15 days in advance of the joint meeting, provide the Commission with written notice of the time and place of the meeting and a written agenda of the issues to be discussed at the meeting.
- (3) Members of the public must be informed of and invited to attend the joint meeting held pursuant to paragraph (b)(2)(i) of this section by means of the public notice published in accordance with paragraph (g) of this section. Members of the public attending the meeting are entitled to participate in the meeting and to express their views regarding resource issues that should be addressed in any application for license or exemption that may be filed by the potential applicant. Attendance of the public at any site visit held pursuant to paragraph (b)(2)(i) of this section will be at the discretion of the potential applicant. The potential applicant must make either audio recordings or written transcripts of the joint meeting, and must promptly provide copies of these recordings or transcripts to the Commission and, upon request, to any resource agency and Indian tribe.
- (4) Not later than 60 days after the joint meeting held under paragraph (b)(2) of this section (unless extended within this time period by a resource agency or Indian tribe for an additional 60 days by sending written notice to the applicant and the Director of OHL within the first 60 day period, with an explanation of the basis for the extension), each interested resource agency and Indian tribe must provide a potential applicant with written comments:
- (i) Identifying its determination of necessary studies to be performed or information to be provided by the potential applicant;
 - (ii) Identifying the basis for its determination;
 - (iii) Discussing its understanding of the resource issues and its goals and objectives for these resources;
 - (iv) Explaining why each study methodology recommended by it is more appropriate than other available methodology alternatives, including those identified by the potential applicant pursuant to paragraph (b)(1)(vii) of this section;
 - (v) Documenting that the use of each study methodology recommended by it is a generally accepted practice; and

- (vi) Explaining how the studies and information requested will be useful to the agency or Indian tribe in furthering its resource goals and objectives that are affected by the proposed project.
- (5)(i) If a potential applicant and a resource agency or Indian tribe disagree as to any matter arising during the first stage of consultation or as to the need to conduct a study or gather information referenced in paragraph (c)(2) of this section, the potential applicant or resource agency or Indian tribe may refer the dispute in writing to the Director of the Office of Hydropower Licensing (Director) for resolution.
- (ii) At the same time as the request for dispute resolution is submitted to the Director, the entity referring the dispute must serve a copy of its written request for resolution on the disagreeing party and any affected resource agency or Indian tribe, which may submit to the Director a written response to the referral within 15 days of the referral's submittal to the Director.
- (iii) Written referrals to the Director and written responses thereto pursuant to paragraphs (b)(5)(i) or (b)(5)(ii) of this section must be filed with the Secretary of the Commission in accordance with the Commission's Rules of Practice and Procedure, and must indicate that they are for the attention of the Director pursuant to Sec. 4.38(b)(5).
- (iv) The Director will resolve disputes by letter provided to the potential applicant and all affected resource agencies and Indian tribes.
- (v) If a potential applicant does not refer a dispute regarding a request for information (other than a dispute regarding the information specified in paragraph (b)(1) of this section) or a study to the Director under paragraph (b)(5)(i) of this section, or if a potential applicant disagrees with the Director's resolution of a dispute regarding a request for information (other than a dispute regarding the information specified in paragraph (b)(1) of this section) or a study, and if the potential applicant does not provide the requested information or conduct the requested study, the potential applicant must fully explain the basis for its disagreement in its application.
- (vi) Filing and acceptance of an application will not be delayed, and an application will not be considered deficient or patently deficient pursuant to Secs. 4.32 (e)(1) or (e)(2), merely because the application does not include a particular study or particular information if the Director had previously found, under paragraph (b)(5)(iv) of this section, that such study or information is unreasonable or unnecessary for an informed decision by the Commission on the merits of the application or use of the study methodology requested is not a generally accepted practice.
- (6) The first stage of consultation ends when all participating agencies and Indian tribes provide the written comments required under paragraph (b)(4) of this section or 60 days after the joint meeting held under paragraph (b)(2) of this section, whichever occurs first, unless a resource agency or Indian tribe timely notifies the applicant and the Director of OHL of its need for more time to provide written comments under paragraph (b)(4) of this section, in which case the first stage of consultation ends when all the participating agencies and Indian tribes provide the written comments required under paragraph (b)(4) of this section or 120 days after the joint meeting held under paragraph (b)(2) of this section, whichever occurs first.
- (c) *Second stage of consultation.*

- (1) Unless determined to be unnecessary by the Director pursuant to paragraph (b)(5) of this section, a potential applicant must diligently conduct all reasonable studies and obtain all reasonable information requested by resource agencies and Indian tribes under paragraph (b) of this section that are necessary for the Commission to make an informed decision regarding the merits of the application. These studies must be completed and the information obtained:
 - (i) Prior to filing the application, if the results:
 - (A) Would influence the financial (e.g., instream flow study) or technical feasibility of the project (e.g., study of potential mass soil movement); or
 - (B) Are needed to determine the design or location of project features, reasonable alternatives to the project, the impact of the project on important natural or cultural resources (e.g., resource surveys), or suitable mitigation or enhancement measures, or to minimize impact on significant resources (e.g., wild and scenic river, anadromous fish, endangered species, caribou migration routes);
 - (ii) After filing the application but before issuance of a license or exemption, if the applicant otherwise complied with the provisions of paragraph (b)(1) of this section and the study or information gathering would take longer to conduct and evaluate than the time between the conclusion of the first stage of consultation and the expiration of the applicant's preliminary permit or the application filing deadline set by the Commission;
 - (iii) After a new license or exemption is issued, if the studies can be conducted or the information obtained only after construction or operation of proposed facilities, would determine the success of protection, mitigation, or enhancement measures (e.g., post-construction monitoring studies), or would be used to refine project operation or modify project facilities.
- (2) If, after the end of the first stage of consultation as defined in paragraph (b)(6) of this section, a resource agency or Indian tribe requests that the potential applicant conduct a study or gather information not previously identified and specifies the basis and reasoning for its request, under paragraphs (b)(4) (i)-(vi) of this section, the potential applicant must promptly initiate the study or gather the information, unless the study or information is unreasonable or unnecessary for an informed decision by the Commission on the merits of the application or use of the methodology requested by a resource agency or Indian tribe for conducting the study is not a generally accepted practice. The applicant may refer any such request to the Director of the Office of Hydropower Licensing for dispute resolution under the procedures set forth in paragraph (b)(5) of this section and need not conduct prior to filing any study determined by the Director to be unreasonable or unnecessary or to employ a methodology that is not generally accepted.
- (3)
 - (i) The results of studies and information-gathering referenced in paragraphs (c)(1)(ii) and (c)(2) of this section will be treated as additional information; and
 - (ii) Filing and acceptance of an application will not be delayed and an application will not be considered deficient or patently deficient pursuant to Sec. 4.32 (e)(1) or (e)(2) merely because the study or information gathering is not complete before the application is filed.
- (4) A potential applicant must provide each resource agency and Indian tribe with:
 - (i) A copy of its draft application that:
 - (A) Indicates the type of application the potential applicant expects to file with the Commission; and

- (B) Responds to any comments and recommendations made by any resource agency and Indian tribe either during the first stage of consultation or under paragraph (c)(2) of this section;
- (ii) The results of all studies and information-gathering either requested by that resource agency or Indian tribe in the first stage of consultation (or under paragraph (c)(2) of this section if available) or which pertain to resources of interest to that resource agency or Indian tribe and which were identified by the potential applicant pursuant to paragraph (b)(1)(vii) of this section, including a discussion of the results and any proposed protection, mitigation, or enhancement measures; and
 - (iii) A written request for review and comment.
- (5) A resource agency or Indian tribe will have 90 days from the date of the potential applicant's letter transmitting the paragraph (c)(4) information to it to provide written comments on the information submitted by a potential applicant under paragraph (c)(4) of this section.
- (6) If the written comments provided under paragraph (c)(5) of this section indicate that a resource agency or Indian tribe has a substantive disagreement with a potential applicant's conclusions regarding resource impacts or its proposed protection, mitigation, or enhancement measures, the potential applicant will:
- (i) Hold a joint meeting with the disagreeing resource agency or Indian tribe and other agencies with similar or related areas of interest, expertise, or responsibility not later than 60 days from the date of the written comments of the disagreeing agency or Indian tribe to discuss and to attempt to reach agreement on its plan for environmental protection, mitigation, or enhancement measures;
 - (ii) Consult with the disagreeing agency or Indian tribe and other agencies with similar or related areas of interest, expertise, or responsibility on the scheduling of the joint meeting; and
 - (iii) At least 15 days in advance of the meeting, provide the Commission with written notice of the time and place of the meeting and a written agenda of the issues to be discussed at the meeting.
- (7) The potential applicant and any disagreeing resource agency or Indian tribe may conclude a joint meeting with a document embodying any agreement among them regarding environmental protection, mitigation, or enhancement measures and any issues that are unresolved.
- (8) The potential applicant must describe all disagreements with a resource agency or Indian tribe on technical or environmental protection, mitigation, or enhancement measures in its application, including an explanation of the basis for the applicant's disagreement with the resource agency or Indian tribe, and must include in its application any document developed pursuant to paragraph (c)(7) of this section.
- (9) A potential applicant may file an application with the Commission if:
- (i) It has complied with paragraph (c)(4) of this section and no resource agency or Indian tribe has responded with substantive disagreements by the deadline specified in paragraph (c)(5) of this section; or
 - (ii) It has complied with paragraph (c)(6) of this section and a resource agency or Indian tribe has responded with substantive disagreements.
- (10) The second stage of consultation ends:
- (i) Ninety days after the submittal of information pursuant to paragraph (c)(4) of this section in cases where no resource agency or Indian tribe has responded with substantive disagreements; or

- (ii) At the conclusion of the last joint meeting held pursuant to paragraph (c)(6) of this section in cases where a resource agency or Indian tribe has responded with substantive disagreements.
- (d) *Third stage of consultation.*
 - (1) The third stage of consultation is initiated by the filing of an application for a license or exemption, accompanied by a transmittal letter certifying that at the same time copies of the application are being mailed to the resource agencies, Indian tribes, and other government offices specified in paragraph (d)(2) of this section.
 - (2) As soon as an applicant files such application documents with the Commission, or promptly after receipt in the case of documents described in paragraph (d)(2)(iii) of this section, as the Commission may direct the applicant must serve on every resource agency and Indian tribe consulted and on other government offices copies of:
 - (i) Its application for a license or an exemption from licensing;
 - (ii) Any deficiency correction, revision, supplement, response to additional information request, or amendment to the application; and
 - (iii) Any written correspondence from the Commission requesting the correction of deficiencies or the submittal of additional information.
- (e) *Waiver of compliance with consultation requirements.*
 - (1) If a resource agency or Indian tribe waives in writing compliance with any requirement of this section, a potential applicant does not have to comply with that requirement as to that agency or tribe.
 - (2) If a resource agency or Indian tribe fails to timely comply with a provision regarding a requirement of this section, a potential applicant may proceed to the next sequential requirement of this section without waiting for the resource agency or Indian tribe to comply.
 - (3) The failure of a resource agency or Indian tribe to timely comply with a provision regarding a requirement of this section does not preclude its participation in subsequent stages of the consultation process.
- (f) *Application requirements documenting consultation and any disagreements with resource agencies.*

An applicant must show in Exhibit E of its application that it has met the requirements of paragraphs (b) through (d) and paragraphs (g) and (h) of this section, and must include a summary of the consultation process and:

 - (1) Any resource agency's or Indian tribe's letters containing comments, recommendations, and proposed terms and conditions;
 - (2) Any letters from the public containing comments and recommendations;
 - (3) Notice of any remaining disagreement with a resource agency or Indian tribe on:
 - (i) The need for a study or the manner in which a study should be conducted and the applicant's reasons for disagreement, and
 - (ii) Information on any environmental protection, mitigation, or enhancement measure, including the basis for the applicant's disagreement with the resource agency or Indian tribe;
 - (4) Evidence of any waivers under paragraph (e) of this section;

- (5) Evidence of all attempts to consult with a resource agency or Indian tribe, copies of related documents showing the attempts, and documents showing the conclusion of the second stage of consultation;
- (6) An explanation of how and why the project would, would not, or should not, comply with any relevant comprehensive plan as defined in Sec. 2.19 of this chapter and a description of any relevant resource agency or Indian tribe determination regarding the consistency of the project with any such comprehensive plan;
- (7)(i) With regard to certification requirements for a license applicant under section 401(a)(1) of the Federal Water Pollution Control Act (Clean Water Act):
 - (A) A copy of the water quality certification;
 - (B) A copy of the request for certification, including proof of the date on which the certifying agency received the request; or
 - (C) Evidence of waiver of water quality certification as described in paragraph (f)(7)(ii) of this section.
- (ii) A certifying agency is deemed to have waived the certification requirements of section 401(a)(1) of the Clean Water Act if the certifying agency has not denied or granted certification by one year after the date the certifying agency received a written request for certification. If a certifying agency denies certification, the applicant must file a copy of the denial within 30 days after the applicant received it.
- (iii) Notwithstanding any other provision in title 18, chapter I, subpart B, any application to amend an existing license, and any amendment to a pending application for a license, requires a new request for water quality certification pursuant to paragraph (f)(7)(i) of this section if the amendment would have a material adverse impact on the water quality in the discharge from the project or proposed project.
- (8) A description of how the applicant's proposal addresses the significant resource issues raised at the joint meeting held pursuant to paragraph (b)(2) of this section; and
- (9) A list containing the name and address of every federal, state, and interstate resource agency and Indian tribe with which the applicant consulted pursuant to paragraph (a)(1) of this section.
- (g) *Public participation.*
 - (1) At least 14 days in advance of the joint meeting held pursuant to paragraph (b)(2) of this section, the potential applicant must publish notice, at least once, of the purpose, location, and timing of the joint meeting, in a daily or weekly newspaper published in each county in which the proposed project or any part thereof is situated. The notice shall include a summary of the major issues to be discussed at the joint meeting.
 - (2)(i) A potential applicant must make available to the public for inspection and reproduction the information specified in paragraph (b)(1) of this section from the date on which the notice required by paragraph (g)(1) of this section is first published until the date of the joint meeting required by paragraph (b)(2) of this section.
 - (ii) The provisions of Sec. 4.32(b) will govern the form and manner in which the information is to be made available for public inspection and reproduction.

- (iii) A potential applicant must make available to the public for inspection at the joint meeting required by paragraph (b)(2) of this section at least two copies of the information specified in paragraph (b)(1) of this section.
- (h) *Transition provisions.* (1) The provisions of this section are not applicable to applications filed before June 19, 1991.
- (2) The provisions of paragraphs (a) and (b) of this section are not applicable to potential applicants that complied with the provisions of paragraphs (a) and (b)(1) of this section prior to June 19, 1991.
- (3) The provisions of paragraph (c) of this section are not applicable to potential applicants that complied with the provisions of paragraph (b)(2) of this section prior to June 19, 1991.
- (4)(i) Any applicant that files its application on or after June 19, 1991, and that complied with the provisions of paragraphs (a) and (b)(1) of this section prior to June 19, 1991, must hold a public meeting, within 90 days from June 19, 1991, at or near the site of the proposed project, to generally explain the potential applicant's proposal for the site and to obtain the views of the public regarding resource issues that should be addressed in any application for license or exemption that may be filed by the potential applicant. The public meeting must include both day and evening sessions, and the potential applicant must make either audio recordings or written transcripts of both sessions.
- (ii)(A) At least 15 days in advance of the meeting, the potential applicant must provide all affected resource agencies, Indian tribes, and the Commission with written notice of the time and place of the meeting and a written agenda of the issues to be discussed at the meeting.
- (B) At least 14 days in advance of the meeting, the potential applicant must publish notice, at least once, of the purpose, location, and timing of the meeting, in a daily or weekly newspaper published in each county in which the proposed project or any part thereof is situated.
- (iii)(A) A potential applicant must make available to the public for inspection and reproduction information comparable to that specified in paragraph (b)(1) of this section from the date on which the notice required by paragraph (h)(4)(ii) of this section is first published until the date of the public meeting required by paragraph (h)(4)(i) of this section.
- (B) The provisions of Sec. 4.32(b) will govern the form and manner in which the information is to be made available for public inspection and reproduction.
- (C) A potential applicant must make available to the public for inspection at both sessions of the public meeting required by paragraph (h)(4)(i) of this section at least two copies of the information specified in paragraph (h)(4)(iii)(A) of this section.
- (D) A potential applicant must promptly provide copies of the audio recordings or written transcripts of the sessions of the public meeting to the Commission and, upon request, to any resource agency or Indian tribe consulted.
- (iv) Any applicant holding a public meeting pursuant to paragraph (h)(4)(i) of this section must include in its filed application a description of how the applicant's proposal addresses the significant resource issues raised during the public meeting.

[Order 533, 56 FR 23153, May 20, 1991, as amended at 56 FR 61155, Dec. 2, 1991]

Sec. 4.39 Specifications for maps and drawings.

All required maps and drawings must conform to the following specifications, except as otherwise prescribed in this chapter:

- (a) Each original map or drawing must consist of a print on silver or gelatin 35mm microfilm mounted on Type D (3\1/4' by 7\3/8') aperture cards. Two duplicates must be made of each original. Full-sized prints of maps and drawings must be on sheets no smaller than 24 by 36 inches and no larger than 28 by 40 inches. A space five inches high by seven inches wide must be provided in the lower right corner of each sheet. The upper half of this space must bear the title, numerical and graphical scale, and other pertinent information concerning the map or drawing. The lower half of the space must be left clear. If the drawing size specified in this paragraph limits the scale of drawings described in paragraph (c) of this section, a smaller scale may be used for those drawings.
- (b) Each map must have a scale in full-sized prints no smaller than one inch equals 0.5 miles for transmission lines, roads, and similar linear features and no smaller than one inch equals 1,000 feet for other project features. Where maps at these scales do not show sufficient detail, larger scale maps may be required under Sec. 4.31(f). Each map must show:
 - (1) True and magnetic meridians;
 - (2) State, county, and town lines; and
 - (3) Boundaries of public lands and reservations of the United States [see 16 U.S.C. 796 (1) and (2)], if any. If a public land survey is available, the maps must show all lines of that survey crossing the project area and all official subdivisions of sections for the public lands and reservations, including lots and irregular tracts, as designated on the official plats of survey that may be obtained from the Bureau of Land Management, Washington, DC, or examined in the local land survey office; to the extent that a public land survey is not available for public lands and reservations of the United States, the maps must show the protractions of townships and section lines, which, if possible, must be those recognized by the Federal agency administering those lands.
- (c) Drawings depicting details of project structures must have a scale in full-sized prints no smaller than:
 - (1) One inch equals 50 feet for plans, elevations, and profiles; and
 - (2) One inch equals 10 feet for sections.
- (d) Each map or drawing must be drawn and lettered to be legible when it is reduced to a print that is 11 inches on its shorter side. Following notification to the applicant that the application has been accepted for filing [see Sec. 4.31(c)], prints reduced to that size must be bound in each copy of the application which is required to be submitted to the Commission or provided to any person, agency, or other entity.

Sec. 4.80 Applicability.

Sections 4.80 through 4.83 pertain to preliminary permits under Part I of the Federal Power Act. The sole purpose of a preliminary permit is to secure priority of application for a license for a water power project

under Part I of the Federal Power Act while the permittee obtains the data and performs the acts required to determine the feasibility of the project and to support an application for a license.

Sec. 4.96 Amendment of exemption.

- (a) An exemption holder must construct and operate its project as described in the exemption application approved by the Commission or its delegate.
- (b) If an exemption holder desires to change the design, location, method of construction or operation of its project, it must first notify the appropriate Federal and state fish and wildlife agencies and inform them in writing of the changes it intends to implement. If these agencies determine that the changes would not cause the project to violate the terms and conditions imposed by the agencies, and if the changes would not materially alter the design, location, method of construction or operation of the project, the exemption holder may implement the changes. If any of these agencies determines that the changes would cause the project to violate the terms and conditions imposed by the agencies, or if the changes would materially alter the design, location, method of construction or the operation of the project works, the exemption holder may not implement the changes without first acquiring authorization from the Commission to amend its exemption, or acquiring a license that authorizes the project, as changed.
- (c) An application to amend an exemption may be filed only by the holder of the exemption. An application to amend an exemption will be governed by the Commission's regulations governing applications for exemption. The Commission will not accept applications in competition with an application to amend an exemption, unless the Director of the Office of Hydropower Licensing determines that it is in the public interest to do so.

Subpart L - Application for Amendment of License

Sec. 4.200 Applicability.

This part applies to any application for amendment of a license, if the applicant seeks to:

- (a) Make a change in the physical features of the project or its boundary, or make an addition, betterment, abandonment, or conversion, of such character as to constitute an alteration of the license;
- (b) Make a change in the plans for the project under license; or
- (c) Extend the time fixed on the license for commencement or completion of project works.

[Order 184, 46 FR 55943, Nov. 13, 1981]

Sec. 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.

- (a) *Initial statement.*

BEFORE THE FEDERAL ENERGY REGULATORY COMMISSION

Application for Amendment of License

(1) [Name of applicant] applies to the Federal Energy Regulatory Commission for an amendment of license for the [name of project] water power project.

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

(3) 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], licensee for the water power project, designated as Project No. ___ in the records of the Federal Energy Regulatory Commission, issued on the ___ day of ___ 19__.

(4) The amendments of license proposed and the reason(s) why the proposed changes are necessary, are: [Give a statement or description]

(5)(i) The statutory or regulatory requirements of the state(s) in which the project would be located that affect the project as proposed with respect to bed and banks and to the appropriation, diversion, and use of water for power purposes are: [provide citation and brief identification of the nature of each requirement.]

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

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

(1) For amendment of a license for a water power project that, at the time the application is filed, is not constructed and is proposed to have a total installed generating capacity of more than 5 MW - Exhibits A, B, C, D, E, F, and G under Sec. 4.41 of this chapter;

(2) For amendment of a license for a water power project that, at the time the application is filed, is not constructed and is proposed to have a total installed generating capacity of 1.5 MW or less - Exhibits E, F, and G under Sec. 4.61 of this chapter;

(3) For amendment of a license for a water power project that, at the time the application is filed, is not constructed and is proposed to have a total installed generating capacity of 5 MW or less, but more than 1.5 MW - Exhibits F and G under Sec. 4.61 of this chapter, and Exhibit E under Sec. 4.41 of this chapter;

(4) For amendment of a license for a water power project that, at the time the application for amendment is filed, has been constructed, and is proposed to have a total installed generating capacity of 5 MW or less - Exhibit E, F and G under Sec. 4.61 of this chapter;

(5) For amendment of a license for a water power project that, at the time the application is filed, has been constructed and is proposed to have a total installed generating capacity of more than 5 MW - Exhibits A, B, C, D, E, F, and G under Sec. 4.51 of this chapter.

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

(d) *Consultation and waiver.*

(1) If an applicant for license under this subpart believes that any exhibit required under paragraph (b) of this section is inappropriate with respect to the particular amendment of license sought by the applicant, a petition for waiver of the requirement to submit such exhibit may be submitted to the Commission under Sec. 385.207(c)(4) of this chapter, after consultation with the Commission's Division of Hydropower Licensing.

(2) A licensee wishing to file an application for amendment of license under this section may seek advice from the Commission staff regarding which exhibits(s) must be submitted and whether the proposed amendment is consistent with the scope of the existing licensed project.

PART 6 - SURRENDER OR TERMINATION OF LICENSE

Sec. 6.1 Application for surrender.

Every application for surrender of a license shall state the reason therefor; and, except in the case of an application for surrender of a license for a minor project, or for a transmission line only, shall be executed by the licensee and filed in the same form and manner as the application for license, and shall be accompanied by the license and all amendments thereof. Public notice of such application shall be given at least 30 days prior to action upon the application.

Sec. 6.2 Surrender of license.

Licenses may be surrendered only upon the fulfillment by the licensee of such obligations under the license as the Commission may prescribe, and, if the project works authorized under the license have been constructed in whole or in part, upon such conditions with respect to the disposition of such works as may be determined by the Commission. Where project works have been constructed on lands of the United States, the licensee will be required to restore the lands to a condition satisfactory to the Department having supervision over such lands and annual charges will continue until such restoration has been satisfactorily completed.

Sec. 6.3 Termination of license.

Licenses may be terminated by written order of the Commission not less than 90 days after notice thereof shall have been mailed to the licensee by certified mail to the last address whereof the Commission has been notified by the licensee, if there is failure to commence actual construction of the project works within the time prescribed in the license, or as extended by the Commission. Upon like notice, the authority granted under a license with respect to any separable part of the project works may be terminated if there is failure to begin construction of such separable part within the time prescribed or as extended by the Commission.

Sec. 6.4 Termination by implied surrender.

If any licensee holding a license subject to the provisions of section 10(i) of the Act shall cause or suffer essential project property to be removed or destroyed, or become unfit for use, without replacement, or shall abandon, or shall discontinue good faith operation of the project for a period of three years, the Commission will deem it to be the intent of the licensee to surrender the license; and not less than 90 days after public notice may in its discretion terminate the license.

PART 8 - RECREATIONAL OPPORTUNITIES AND DEVELOPMENT AT LICENSED PROJECTS

Sec. 8.11 Information respecting use and development of public recreational opportunities.

- (a) *Applicability.* (1) Except as provided in paragraph (b) of this section, each licensee of a project under major or minor Commission license shall prepare with respect to each development within such project an original and two conformed copies of FERC Form No. 80 prescribed by §141.14 of this chapter and submit them to a Commission Regional Office pursuant to the requirements in the General Information portion of the form.
- (2) FERC Form No. 80 is due on April 1, 1991, for data compiled during the calendar year ending December 31, 1990. Thereafter, FERC Form No. 80 is due on April 1 of every sixth year for data compiled during the previous calendar year.
- (3) The Form No. 80 shall be completed in its entirety for each initial filing of the report. Filings of Form No. 80 made subsequent to an initial filing of the report shall be completed only to the extent necessary to change, delete or add to the information supplied in a previously-filed form.
- (4) A copy of the Form No. 80 should be retained by the respondent licensee in its file.

- (b) *Initial Form No. 80 filings.* Each licensee of an unconstructed project shall file an initial Form No. 80 after such project has been in operation for a full calendar year prior to the filing deadline. Each licensee of an existing (constructed) project shall file an initial Form No. 80 after such project has been licensed for a full calendar year prior to the filing deadline.
- (c) *Exemptions.* A licensee who has filed a Form No. 80 may request an exemption from any further filing of the form for any development that has no existing or potential recreational use or only a minor existing or potential recreational use (as indicated by fewer than 100 recreation days of use during the previous calendar year) by submitting a statement not later than 6 months prior to the due date for the next filing, stating that Form No. 80 has been filed previously for such development and setting out the basis for believing that the development has no existing or potential recreational use or a minor existing or potential recreational use.

PART 9 - TRANSFER OF LICENSE OR LEASE OF PROJECT PROPERTY

Sec. 9.1 Filing.

Any licensee desiring to transfer a license or rights thereunder granted, and the person, association, corporation, State, or municipality desiring to acquire the same, shall jointly or severally file an application for approval of such transfer and acquisition. Such application shall be verified, shall conform to section 131.20 of this chapter, and shall be filed in accordance with section 4.31 of this chapter.

Sec. 9.2 Contents of application.

Every application for approval of such transfer and acquisition by the proposed transferee shall set forth in appropriate detail the qualifications of the transferee to hold such license and to operate the property under license, which qualifications shall be the same as those required of applicants for license.

Sec. 9.3 Transfer.

- (a) Approval by the Commission of transfer of a license is contingent upon the transfer of title to the properties under license, delivery of all license instruments, and a showing that such transfer is in the public interest. The transferee shall be subject to all the conditions of the license and to all the provisions and conditions of the act, as though such transferee were the original licensee and shall be responsible for the payment of annual charges which accrue prior to the date of transfer.
- (b) When the Commission shall have approved the transfer of the license, its order of approval shall be forwarded to the transferee for acknowledgment of acceptance. Unless application for rehearing is filed, or unless the order is stayed by the Commission, the order shall become final thirty (30) days from date of issuance and the acknowledgment of acceptance shall be filed in triplicate with the Commission within sixty (60) days from date of issuance accompanied by a certified copy of the deed of conveyance or other instrument evidencing transfer of the property under license, together with evidence of the recording thereof.

PART 11 - ANNUAL CHARGES UNDER PART I OF THE FEDERAL POWER ACT

Subpart B - Charges for Headwater Benefits

Sec. 11.10

(b) *Waiver and exemptions.* The owner of a downstream project with installed generating capacity of 1.5 MW (2000 horsepower) or less or for which the Commission has granted an exemption from section 10(f) is not required to pay headwater benefits charges.

(c) *Definitions.* For purposes of this subpart:

(1) *Energy gains* means the difference between the number of kilowatt-hours of energy produced at a downstream project with the headwater project and that which would be produced without the headwater project.

Sec. 11.11 Energy gains method of determining headwater benefits charges.

(a) *Applicability.* This section applies to any determination of headwater benefits charges, unless:

(1) The Commission has approved headwater benefits charges pursuant to an existing coordination agreement among the parties;

(2) The parties reach, and the Commission approves, a settlement with respect to headwater benefits charges, pursuant to §11.14(a) of this subpart; or

(3) Charges may be assessed under §11.14(b).

(b) *General rule—(1) Summary.* Except as provided in paragraph (b)(3) of this section, a headwater benefits charge for a downstream project is determined under this subpart by apportioning the section 10(f) costs of the headwater project among the headwater project and all downstream projects that are not exempt from or waived from headwater benefits charges under §11.10(b) of this chapter, according to each project's share of the total energy benefits to those projects resulting from the headwater project.

(2) *Calculation; headwater benefits formula.* The annual headwater benefits charge for a downstream project is derived by multiplying the section 10(f) cost by the ratio of the energy gains received by the downstream project to the sum of total energy gains received by all downstream projects (except those projects specified in §11.10(b) of this chapter) plus the energy generated at the headwater project that is assigned to the joint-use power cost, as follows:

$$P = C_p \times \frac{E_n}{E_j + E_d}$$

In which:

P=annual payment to be made for headwater benefits received by a downstream project,

C_p=annual section 10(f) cost of the headwater project,

E_n=annual energy gains received at a downstream project, or group of projects if owned by one entity,

E_d=annual energy gains received at all downstream projects (except those specified in §11.10(b) of this chapter), and

E_j=portion of the annual energy generated at the headwater project assigned to the joint-use power cost.

- (3) If power generation is not a function of the headwater project, section 10(f) costs will be apportioned only among the downstream projects.
- (4) If the headwater project is constructed after the downstream project, liability for headwater benefits charges will accrue beginning on the day on which any energy losses at the downstream project due to filling the headwater reservoir have been offset by subsequent energy gains. If the headwater project is constructed prior to the downstream project, liability for headwater benefits charges will accrue beginning on the day on which benefits are first realized by the downstream project.
- (5) No final charge assessed by the Commission under this subpart may exceed 85 percent of the value of the energy gains. If a party demonstrates, within the time specified in §11.17(b)(3) for response to a preliminary assessment, that any final charge assessed under this subpart, not including the cost of the investigation assessed under §11.17(c), exceeds 85 percent of the value of the energy gains provided to the downstream project for the period for which the charge is assessed, the Commission will reduce the charge to not more than 85 percent of the value. For purposes of this paragraph, the *value of the energy gains* is the cost of obtaining an equivalent amount of electricity from the most likely alternative source during the period for which the charge is assessed.

PART 25 - APPLICATION FOR VACATION OF WITHDRAWAL AND FOR DETERMINATION PERMITTING RESTORATION TO ENTRY

Sec. 25.1 Contents of application.

Any application for vacation of a reservation effected by the filing of an application for preliminary permit or license, or for a determination under the provisions of section 24 of the Act permitting restoration for location, entry, or selection under the public lands laws, or such lands reserved or classified as power sites shall, unless the subject lands are National Forest Lands, be filed with the Bureau of Land Management, Department of the Interior, at the Bureau's office in Washington, DC or at the appropriate regional or field office of the Bureau. Of the lands included in such application are National Forest Lands, the application shall be filed with the U.S. Forest Service, Department of Agriculture at the Forest Service's office in Washington, DC, or at the appropriate regional office of the U.S. Forest Service. Such application shall contain the following data: (a) Full name of applicant; (b) post-office address; (c) description of land by legal subdivisions, including section, township, range, meridian, county, State, and river basin (both main and tributary) in which the land is located; (d) public land act under which entry is intended to be made if land is restored to entry; (e) the use to which it is proposed to put the land, and a statement as to its suitability for the intended use.

Sec. 25.2 Hearings.

A hearing upon such an application may be ordered by the Commission in its discretion and shall be in accordance with the provisions of subpart E of part 385 of this chapter.

PART 380 - REGULATIONS IMPLEMENTING THE NATIONAL ENVIRONMENTAL POLICY ACT

Sec. 380.4 Projects or actions categorically excluded.

- (a) *General rule.* Except as stated in paragraph (b) of this section, neither an environmental assessment nor an environmental impact statement will be prepared for the following projects or actions:
- (1) Procedural, ministerial, or internal administrative and management actions, programs, or decisions, including procurement, contracting, personnel actions, correction or clarification or filings or orders, and acceptance, rejection and dismissal of filings;
 - (2) (i) Reports or recommendations on legislation not initiated by the Commission, and
(ii) Proposals for legislation and promulgation of rules that are clarifying, corrective, or procedural, or that do not substantially change the effect of legislation or regulations being amended;
 - (3) Compliance and review actions, including investigations (jurisdictional or otherwise), conferences, hearings, notice of probable violation, show cause orders, and adjustments under section 502(c) of the Natural Gas Policy Act of 1978 (NGPA);
 - (4) Review of grants or denials by the Department of Energy (DOE) of any adjustment request, and review of contested remedial orders issued by DOE;
 - (5) Information gathering, analysis, and dissemination;
 - (6) Conceptual or feasibility studies;
 - (7) Actions concerning the reservation and classification of United States lands as water power sites and other actions under section 24 of the Federal Power Act;
 - (8) Transfers of water power project licenses and transfers of exemptions under Part I of the Federal Power Act and Part 9 of this chapter;
 - (9) Issuance of preliminary permits for water power projects under Part I of the Federal Power Act and Part 4 of this chapter;
 - (10) Withdrawals of applications for certificates under the Natural Gas Act, or for water power project preliminary permits, exemption, or licenses under Part I of the Federal Power Act and Part 4 of this chapter;
 - (11) Actions concerning annual charges or headwater benefits, charges for water power projects under Parts 11 and 13 of this chapter and establishment of fees to be paid by an applicant for a license or exemption required to meet the terms and conditions of section 30(c) of the Federal Power Act;
 - (12) Approval for water power projects under Part I of the Federal Power Act, of “as Built” or revised drawings or exhibits that propose no changes to project works or operations or that reflect changes that have previously been approved or required by the Commission;
 - (13) Surrender and amendment of preliminary permits, and surrender of water power licenses and exemptions where no project works exist or ground disturbing activity has occurred and amendments to water power licenses and exemptions that do not require ground disturbing activity or changes to project works or operation;
 - (14) Exemptions for small conduit hydroelectric facilities as defined in §4.30(b)(26) of this chapter under Part I of the Federal Power Act and Part 4 of this chapter;
 - (15) Electric rate filings submitted by public utilities under sections 205 and 206 of the Federal Power Act, the establishment of just and reasonable rates, and confirmation, approval, and disapproval of rate filings submitted by Federal power marketing agencies under the Pacific Northwest Electric

Power Planning and Conservation Act, the Department of Energy Organization Act, and DOE Delegation Order No. 0204-108.

- (16) Approval of actions under sections 4(b), 203, 204, 301, 304, and 305 of the Federal Power Act relating to issuance and purchase of securities, acquisition or disposition of property, merger, interlocking directorates, jurisdictional determinations and accounting orders;
- (17) Approval of electrical interconnections and wheeling under sections 202(b), 210, 211, and 212 of the Federal Power Act, that would not entail:
 - (i) Construction of a new substation or expansion of the boundaries of an existing substation;
 - (ii) Construction of any transmission line that operates at more than 115 kilovolts (KV) and occupies more than ten miles of an existing right-of-way; or
 - (iii) Construction of any transmission line more than one mile long if located on a new right-of-way;
- (18) Approval of changes in land rights for water power projects under Part I of the Federal Power Act and Part 4 of this chapter, if no construction or change in land use is either proposed or known by the Commission to be contemplated for the land affected;
- (19) Approval of proposals under Part I of the Federal Power Act and Part 4 of this chapter to authorize use of water power project lands or waters for gas or electric utility distribution lines, radial (sub-transmission) lines, communications lines and cables, storm drains, sewer lines not discharging into project waters, water mains, piers, landings, boat docks, or similar structures and facilities, landscaping or embankments, bulkheads, retaining walls or similar shoreline erosion control structures;
- (20) Action on applications for exemption under section 1(c) of the Natural Gas Act;
- (21) Approvals of blanket certificate applications and prior notice filings under §§157.204 and §§157.209 through 157.218 of this chapter;
- (22) Approvals of blanket certificate applications under §§284.221 through 284.224 of this chapter;
- (23) Producers' applications for the sale of gas filed under §§157.23 through 157.29 of this chapter;
- (24) Approval under section 7 of the Natural Gas Act of taps, meters, and regulating facilities located completely within an existing natural gas pipeline right-of-way or compressor station if company records show the land use of the vicinity has not changed since the original facilities were installed, and no significant nonjurisdictional facilities would be constructed in association with construction of the interconnection facilities;
- (25) Review of natural gas rate filings, including any curtailment plans other than those specified in §380.5(b)(5), and establishment of rates for transportation and sale of natural gas under sections 4 and 5 of the Natural Gas Act and sections 311 and 401 through 404 of the Natural Gas Policy Act of 1978;
- (26) Review of approval of oil pipeline rate filings under Parts 340 and 341 of this chapter;
- (27) Sale, exchange, and transportation of natural gas under sections 4, 5 and 7 of the Natural Gas Act that requires no construction of facilities;
- (28) Abandonment in place of a minor natural gas pipeline (short segments of buried pipe of 6-inch inside diameter or less), or abandonment by removal of minor surface facilities such as metering

stations, valves, and tops under section 7 of the Natural Gas Act so long as appropriate erosion control and site restoration takes place;

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

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

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

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

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

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

(i) Indian lands;

(ii) Wilderness areas;

(iii) Wild and scenic rivers;

(iv) Wetlands;

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

(vi) Anadromous fish or endangered species; or

(vii) Where the environmental effects are uncertain.

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

Appendix C. List of Forms and Publications Available from the Commission

These documents may be obtained by writing to the Federal Energy Regulatory Commission, Public Reference Room, Room 2-A, 888 First Street, NE, Washington, D.C. 20426, by calling (202) 208-1371, or by e-mailing PublicReferenceRoom@ferc.gov.us.

Guidance for Shoreline Management Planning at Hydropower Projects. Office of Energy Projects, Federal Energy Regulatory Commission. April 2001. Available on FERC's website at www.ferc.fed.us.

Hydroelectric Project Handbook for Filings other than Licenses and Exemptions. Office of Energy Projects, Federal Energy Regulatory Commission. April 2001. Available on FERC's website at www.ferc.fed.us.

Hydroelectric Project Licensing Handbook. Office of Energy Projects, Federal Energy Regulatory Commission. April 2001. Available on FERC's website at www.ferc.fed.us.

Hydropower Licensing and Endangered Species - Procedures for Complying with the Endangered Species Act.

Improving Coordination of ESA Section 7 Consultation with the FERC Licensing Process. Interagency Task Force Work Group on the Coordination of Federal Mandates. December 8, 2000.

Recreational Opportunities at Federal Energy Regulatory Commission Licensed Hydropower Project. Office of Hydropower Licensing, Division of Project Compliance and Administration. 1996.

Appendix D. Capacity-Related Amendments: Procedural Steps and Content

Procedural Steps for Securing a Capacity-Related Amendment

The capacity-related amendment process has six major steps (see **18 CFR 4.38[a][4]**):

Step 1 - First Stage Consultation or Alternative Pre-filing Consultation Process if using an alternative licensing process

Step 2 - Studies and Draft Application Preparation or Preliminary Draft Environmental Assessment if using an alternative licensing process

Step 3 - Completion of Second Stage Consultation or Pre-filing Consultation Process of an alternative licensing process

Step 4 - Application Filing and Acceptance by the Commission

Step 5 - Filing of Comments, Terms and Conditions, Prescriptions, and NEPA Compliance Activities

Step 6 - Completion of the Section 10(j) Process and Granting or Denying a License Amendment

The rules governing these six steps, including pre-filing consultation (see **18 CFR 4.38**) and the 10(j) process (see **18 CFR 4.34**), are the same as those that govern applications for license using either the traditional or an alternative licensing process. Refer to the Commission's *Hydroelectric Project Licensing Handbook* (chapters 4 and 5) for procedural guidance.

Content of an Application for a Capacity-Related Amendment

A capacity-related amendment is a project modification for additional capacity not previously authorized, which would (see **18 CFR 4.201[b]**):

- increase the project's actual or proposed total installed capacity;
- result in an increase in the project's maximum hydraulic capacity by 15 percent or more; and
- result in an increase in the installed nameplate capacity of 2 MW or more.

Amendments that do not meet the foregoing criteria are called non-capacity-related amendments.

An application for a license amendment must contain an initial statement; certain specified exhibits; pre-filing consultation; and, in some cases, evidence of a new request for water quality certification. The licensee must provide the following information (see **18 CFR 4.201[b]**):

- The number and type of exhibits required for a capacity-related amendment, which depend on:
 - the installed capacity of the project proposed for modification, and
 - the current stage of the project's development.

- The content of the required exhibits is governed by the same rules as those that apply to original licenses (**18 CFR 4.41, 4.51, or 4.61**).

Construction Status (at the time the amendment application is filed)

Installed Capacity	Not Constructed	Constructed
>5 MW	A, B, C, D, E, F, G [18 CFR 4.41]	A, B, C, D, E, F, G [18 CFR 4.51]
≤5 MW but >1.5 MW	F, G, [18 CFR 4.61] E [18 CFR 4.41]	E, F, G [18 CFR 4.61]
≤ 1.5 MW	E, F, G [18 CFR 4.61]	E, F, G [18 CFR 4.61]

- The pre-filing consultation requirements of **18 CFR 4.38** (or **4.3.4[i]** if using an alternative licensing process) must be completed.

- Evidence of a new request for water quality certification is only required if the amendment would result in a material adverse effect on the water quality in the discharge from the project or proposed project.

If a licensee wanting to file an application for amendment wants information on the appropriate exhibits, the licensee may seek advice from Commission staff.

Appendix E. Non-Capacity-Related Amendments: Procedural Steps and Content

An application for a license amendment must contain an initial statement; certain specified exhibits; pre-filing consultation; and, in some cases, evidence of a new request for water quality certification.

If only one of the criteria discussed in section 5.2.2 applies, the amendment is considered a non-capacity-related amendment.

If the proposed change is not a capacity-related amendment, the licensee must consult with any appropriate resource agencies and discuss the results of such consultation in the application (**18 CFR 4.38[a][5]**). Licensees are encouraged to contact DHAC if they need help identifying the appropriate resource agencies or the appropriate exhibits, or revisions or additions to any exhibits on file, to include in the amendment application.

The three-stage agency consultation process (**18 CFR 4.38**) does not apply to non-capacity-related amendments, except for those changes identified in **18 CFR 4.38(a)(4)(v)**. These changes involve:

- the construction of a new dam or diversion in a location where there is no existing dam or diversion;
- any repair, modification, or reconstruction of an existing dam that would result in a significant change in the normal maximum surface area or elevation of an existing impoundment; or
- the addition of new water power turbines other than to replace existing turbines.

For non-capacity-related amendments, the nature of the proposed change, the type of project (based on proposed capacity), and the construction status of the project determine which exhibits to include in the amendment application.

All exhibits that require revision because of the nature of the proposed amendments must be filed. However, only revisions to appropriate portions of exhibits on file with the Commission are required. For example, if an amendment would affect only a portion of the environmental resources under the Exhibit E on file, such as water quality and fish, the amendment application should contain a revised Exhibit E addressing water quality and fish. The revised exhibit should also contain a statement of effect for the remaining resources not adversely affected by the amendment (e.g., wildlife and terrestrial resources, historic and archeological resources, or recreational resources).

The revised exhibits are governed by regulations contained in **18 CFR 4.41, 4.51, or 4.61**. (**18 CFR 4.41** regulations apply to a major unconstructed or major modified project; **18 CFR 4.51** regulations apply to a

major project-existing dam; and **18 CFR 4.61** regulations apply to a minor water power project or a major water power project of 5 MW or less.)

Content of an Application for a Non-Capacity-Related Amendment

A non-capacity-related amendment is a project modification involving:

- design changes in the physical features of a project such as new structures, relocation of transmission lines, or alterations of existing structures;
- operational changes such as modifications to operating levels, minimum instream flows, revised ramping rates and other changes affecting environmental resources;
- land status changes including altered use of lands of the United States, changes in land rights, non-project use of project lands, or changes in the recreational use of the site;
- compliance filings (filings pursuant to license articles or other Commission orders) such as filing of study results, mitigation plans, study plans, or schedules ordered in the license articles;
- as-built exhibits and time extensions.

Depending on the type of amendment, the level of detail may vary from a one-page letter to a comprehensive, multi-volume amendment application.

Non-capacity-related amendments must be filed with the Commission at the address provided in section 1.3 of this handbook. The filing must provide reasons for the amendment, and include relevant resource agency letters of comment, exhibits, and applicable drawings.

Appendix F. Content of an Application for Amendment of Exemption

The Commission requires much of the same information for exemption amendment applications as it does for capacity-related amendment applications. Exemption amendments can be for: (1) capacity changes; (2) compliance filings; and (3) time extensions (see previous discussion of licensed projects). The notable exceptions are for commencing and completing construction of a new project. Whereas a licensee can receive only a one-time extension, the Commission may grant exemptees more than one extension for a good cause. Generally, construction of exempt facilities should be completed within 4 years from the effective date of the exemption. However, the Commission may grant multiple extensions for completion of specific construction.

The following paragraph describes more detailed amendments of exemption for operational changes. However, regulations at **18 CFR 4.96** and **18 CFR 4.104** should always be relied on before submitting an application. The exemptee also may contact the Commission staff for advice in preparing exhibits.

An application for amendment to an exempted project follows the same format as the original exemption application. The primary difference is that the exemptee must provide only the information for exhibits requiring revisions. The application should start with an introductory statement that includes:

- the project number and name;
- the name of the applicant;
- the location of the project;
- business address of the applicant;
- names and business addresses of all the applicant's agents; and
- the applicant's status (e.g., private citizen, corporation, or municipality).

In Exhibit A, the exemptee should describe proposed repairs or modifications planned for any dam, impoundment, conduit, or appurtenant facilities used by the project; the number and capacity of existing and proposed generating units; the type of each hydraulic turbine; the proposed power plant operations (run-of-river or peaking); the estimated average annual electric generation; average and design head of the plant; hydraulic capacity for each turbine; size of any impoundment used for electric generation (at normal maximum elevation); and the dates for beginning and completing construction.

Exhibit B, a general location map of the project, should be revised to reflect changes to existing and proposed structure locations, or property ownership.

Exhibit E, the environmental report, or draft EA if using an ALP, must discuss expected environmental effects from any proposed changes to operation or construction of the project. Measures to protect and enhance affected environmental resources and values, mitigation measures for adverse project effects, and any additional information deemed important by the applicant should be provided. The level of detail for the environmental report should match the scope of the project. Exhibit E also must include resource agency letters.

Exhibit G, drawings showing the structures and equipment, must be revised to reflect proposed modifications to the structures and project equipment.

Appendix G. Standard Article 5. (L Series of Standard Articles)

The Licensee, within five years from the date of issuance of the license, shall acquire title in fee or the right to use in perpetuity all lands, other than lands of the United States, necessary or appropriate for the construction, maintenance, and operation of the project. The Licensee or its successors and assigns shall, during the period of the license, retain the possession of all project property covered by the license as issued or as later amended, including the project area, the project works, and all franchises, easements, water rights, and rights or occupancy and use; and none of such properties shall be voluntarily sold, leased, transferred, abandoned, or otherwise disposed of without the prior written approval of the Commission, except that the Licensee may lease or otherwise dispose of interests in project lands or property without specific written approval of the Commission pursuant to the then current regulations of the Commission. The provisions of this article are not intended to prevent the abandonment or the retirement from service of structures, equipment, or other project works in connection with replacements thereof when they become obsolete, inadequate, or inefficient for further service due to wear and tear; and mortgage or trust deeds or judicial sales made thereunder, or tax sales, shall not be deemed voluntary transfers within the meaning of this article.

Appendix H. Standard Land Use Article

Article . (a) In accordance with the provisions of this article, the licensee shall have the authority to grant permission for certain types of use and occupancy of project lands and waters and to convey certain interests in project lands and waters for certain types of use and occupancy, without prior Commission approval. The licensee may exercise the authority only if the proposed use and occupancy is consistent with the purposes of protecting and enhancing the scenic, recreational, and other environmental values of the project. For those purposes, the licensee shall also have continuing responsibility to supervise and control the use and occupancies for which it grants permission, and to monitor the use of, and ensure compliance with the covenants of the instrument of conveyance for, any interests that it has conveyed, under this article. If a permitted use and occupancy violates any condition of this article or any other condition imposed by the licensee for protection and enhancement of the project's scenic, recreational, or other environmental values, or if a covenant of a conveyance made under the authority of this article is violated, the licensee shall take any lawful action necessary to correct the violation. For a permitted use or occupancy, that action includes, if necessary, canceling the permission to use and occupy the project lands and waters and requiring the removal of any non-complying structures and facilities.

(b) The type of use and occupancy of project lands and water for which the licensee may grant permission without prior Commission approval are:

- (1) landscape plantings;
- (2) non-commercial piers, landings, boat docks, or similar structures and facilities that can accommodate no more than 10 watercraft at a time and where said facility is intended to serve single-family type dwellings;
- (3) embankments, bulkheads, retaining walls, or similar structures for erosion control to protect the existing shoreline; and
- (4) food plots and other wildlife enhancement.

To the extent feasible and desirable to protect and enhance the project's scenic, recreational, and other environmental values, the licensee shall require multiple use and occupancy of facilities for access to project lands or waters. The licensee shall also ensure, to the satisfaction of the Commission's authorized representative, that the use and occupancies for which it grants permission are maintained in good repair and comply with applicable state and local health and safety requirements.

Before granting permission for construction of bulkheads or retaining walls, the licensee shall:

- (1) inspect the site of the proposed construction;
- (2) consider whether the planting of vegetation or the use of riprap would be adequate to control erosion at the site; and
- (3) determine that the proposed construction is needed and would not change the basic contour of the reservoir shoreline.

To implement this paragraph (b), the licensee may, among other things, establish a program for issuing permits for the specified types of use and occupancy of project lands and waters, which may be subject to the payment of a reasonable fee to cover the licensee's costs of administering the permit program. The Commission reserves the right to require the licensee to file a description of its standards, guidelines, and procedures for implementing this paragraph (b) and to require modification of those standards, guidelines, or procedures.

(c) The licensee may convey easements or rights-of-way across, or leases of, project lands for:

- (1) replacement, expansion, realignment, or maintenance of bridges or roads where all necessary state and federal approvals have been obtained;
- (2) storm drains and water mains;
- (3) sewers that do not discharge into project waters;
- (4) minor access roads;
- (5) telephone, gas, and electric utility distribution lines;
- (6) non-project overhead electric transmission lines that do not require erection of support structures within the project boundary;
- (7) submarine, overhead, or underground major telephone distribution cables or major electric distribution lines (69-kV or less); and
- (8) water intake or pumping facilities that do not extract more than one million gallons per day from a project reservoir.

No later than January 31 of each year, the licensee shall file three copies of a report briefly describing for each conveyance made under this paragraph (c) during the prior calendar year, the type of interest

conveyed, the location of the lands subject to the conveyance, and the nature of the use for which the interest was conveyed.

(d) The licensee may convey fee title to, easements or rights-of-way across, or leases of project lands for:

- (1) construction of new bridges or roads for which all necessary state and federal approvals have been obtained;
- (2) sewer or effluent lines that discharge into project waters, for which all necessary federal and state water quality certification or permits have been obtained;
- (3) other pipelines that cross project lands or waters but do not discharge into project waters;
- (4) non-project overhead electric transmission lines that require erection of support structures within the project boundary, for which all necessary federal and state approvals have been obtained;
- (5) private or public marinas that can accommodate no more than 10 watercraft at a time and are located at least one-half mile (measured over project waters) from any other private or public marina;
- (6) recreational development consistent with an approved Exhibit R or approved report on recreational resources of an Exhibit E; and
- (7) other uses, if: (i) the amount of land conveyed for a particular use is five acres or less; (ii) all of the land conveyed is located at least 75 feet, measured horizontally, from project waters at normal surface elevation; and (iii) no more than 50 total acres of project lands for each project development are conveyed under this clause (d)(7) in any calendar year.

At least 60 days before conveying any interest in project lands under this paragraph (d), the licensee must submit a letter to the Director, Office of Energy Projects, stating its intent to convey the interest and briefly describing the type of interest and location of the lands to be conveyed (a marked exhibit G or K map may be used), the nature of the proposed use, the identity of any federal or state agency official consulted, and any federal or state approvals required for the proposed use. Unless the

Director, within 45 days from the filing date, requires the licensee to file an application for prior approval, the licensee may convey the intended interest at the end of that period.

(e) The following additional conditions apply to any intended conveyance under paragraph (c) or (d) of this article:

(1) Before conveying the interest, the licensee shall consult with federal and state fish and wildlife or recreation agencies, as appropriate, and the State Historic Preservation Officer.

(2) Before conveying the interest, the licensee shall determine that the proposed use of the lands to be conveyed is not inconsistent with any approved exhibit R or approved report on recreational resources of an exhibit E; or, if the project does not have an approved exhibit R or approved report on recreational resources, that the lands to be conveyed do not have recreational value.

(3) The instrument of conveyance must include the following covenants running with the land: (i) the use of the lands conveyed shall not endanger health, create a nuisance, or otherwise be incompatible with overall project recreational use; (ii) the grantee shall take all reasonable precautions to ensure that the construction, operation, and maintenance of structures or facilities on the conveyed lands will occur in a manner that will protect the scenic, recreational, and environmental values of the project; and (iii) the grantee shall not unduly restrict public access to project waters.

(4) The Commission reserves the right to require the licensee to take reasonable remedial action to correct any violation of the terms and conditions of this article, for the protection and enhancement of the project's scenic, recreational, and other environmental values.

(f) The conveyance of an interest in project lands under this article does not in itself change the project boundaries. The project boundaries may be changed to exclude land conveyed under this article only upon approval of revised exhibit G or K drawings (project boundary maps) reflecting exclusion of that land. Lands conveyed under this article will be excluded from the project only upon a determination that the lands are not necessary for project purposes, such as operation and maintenance, flowage, recreation, public access, protection of environmental resources, and shoreline control, including shoreline aesthetic values. Absent extraordinary circumstances, proposals to exclude lands conveyed under this article from the project shall be consolidated for consideration when revised exhibit G or K drawings would be filed for approval for other purposes.

(g) The authority granted to the licensee under this article shall not apply to any part of the public lands and reservations of the United States included within the project boundary.

Appendix I. Suggested Contents of Applications for Non-project Uses and Occupancies of Project Lands or Waters

The following is a general list of the information that should be included in applications for proposed non-project uses or facilities. Applications containing this information allow Commission staff to review and process them in a more efficient and timely manner, and are less likely to result in Commission requests for additional information in order to prepare environmental assessments on such proposals. While the information below applies to most applications, it is not an inclusive list, and not all the individual items may apply to every proposed facility or use. As necessary, please contact Commission staff if you have questions about the application contents or consultation needs for your specific proposal.

1) Description of proposed non-project use or facility

- location, quantity, type of conveyance (i.e., lease, right-of-way, easement, fee-title, etc.);
- major components, materials, and layout or design;
- construction and operation methods, construction duration, and approximate start and completion dates;
- purpose of proposed use;
- description of any federal, state, and local permits or approvals required or obtained for proposed use;
- if available, copies of any government agency permits or agency review documents obtained for the proposed use; and
- maps or drawings showing the location and/or layout of the proposed facility.

2) Description of Affected Environment (the immediate area surrounding the site of the proposed facility or use)

- common fish and wildlife species;
- threatened and endangered species;
- wetlands, critical habitats, or significant features;
- cultural resources;
- common vegetation and trees;
- soils and lakebed material;
- water quality and approximate depth;
- scenic quality;
- existing recreation facilities and uses; and
- existing land and water uses and structures.

3) Evaluation of how the proposed use is compatible with:

- Commission-approved management plans e.g., recreation, shoreline or land use, dredging, cultural resource, wildlife protection);
- project operations and purposes and applicable license requirements; and
- licensee's own project management guidelines or requirements.

4) Documentation of consultation (copies of correspondence) with appropriate federal, state, and local government agencies and interested non-governmental organizations (NGOs), including:

- government agencies or NGOs that own or manage lands or facilities in the immediate area;
- government agencies that would likely need to authorize or approve the proposed use;
- government agencies that have jurisdiction over resources that may be affected by the proposed use (e.g., threatened and endangered species or habitats, wetlands, dredging activities, cultural resources). These agencies typically include the U.S. Fish and Wildlife Service; the State Historic Preservation Officer; the U.S. Army Corps of Engineers; and state fish, wildlife, recreation, and environmental protection agencies.

In addition, please note the following:

- A minimum of 30 days should be provided for consulted parties to reply to requests for comments on a proposed use.
- If no reply is received, the filing should include a copy of written request for comments.
- Filing should include responses to any specific agency or NGO comments or recommendations. If recommendations are rejected, include site-specific reasons for the rejection.
- Following a Commission public notice period for the application, file responses to any specific comments or recommendations provided on the proposed use.
- If it is generally known that local property owners or entities are opposed to the proposed use, the filing should identify the nature of this opposition and include general responses to the concerns raised.

5) A description of the proposed use's potential impact on each resource area identified under item (2) above. For example, impacts may include:

- vegetation removal;
- shoreline erosion or turbidity;
- dredging and lakebed disturbance;

- disturbance of significant resources, species, or habitats;
- specific impacts on existing land uses or structures;
- cumulative effects on water quality or shoreline resources; and
- potential discharge of pollutants.

6) A description of any proposed construction, design, and/or operation practices or measures to minimize or mitigate for any specific impacts identified under item (5) above. For example, measures may include:

- erosion control measures;
- avoidance of affected resources;
- changes in design or location of a proposed facility; and
- close oversight to ensure compliance with licensee-mandated permitting programs or land use regulations, Commission-approved plans, or agency permit requirements.

Appendix J. Surrender of License or Exemption

Licensees and exemptees may decide to surrender their hydropower authorizations because a project is no longer economical, natural catastrophes have damaged or destroyed project facilities, or for a variety of other reasons. To protect the environment and the public, a license or exemption may be surrendered only upon agreement between the licensee or exemptee and the Commission. The surrender review process often can be complex because there are many environmental implications of ending Commission jurisdiction.

Surrender of License

If construction of a licensed project has commenced (see **18 CFR 6.2**):

- (1) The Commission must consult the resource agencies that provided the original terms and conditions. It seeks input from the public to ensure that local environmental issues are considered in the surrender proceeding.
- (2) The Commission also prepares an environmental assessment of any need for restoration for public safety and environmental integrity, which includes measures that may range from simply locking a perimeter gate to removing a dam.

Licenses may be surrendered if the licensee has satisfied all conditions imposed by the Commission to protect the public interest, including those related to disposition of constructed facilities. See **18 CFR 6.2**.

If an existing licensee elects not to file a relicense application (i.e., application for new license, nonpower license, subsequent license, or an exemption), and no other applicant files an application in a timely fashion, the existing licensee is responsible for:

- filing a schedule for the submittal of a surrender application;
- filing a surrender application according to the approved schedule; and
- providing for disposition of all project facilities.

Where project facilities have been constructed on federal lands, the licensee must:

- restore the project lands to a satisfactory condition; and
- continue paying annual charges until the effective date of the order accepting surrender.

A licensee wanting to surrender a license must file an application that:

- (1) states the reason for surrender;
- (2) is prepared by the licensee and filed in the same form and manner as the application for license; and
- (3) is accompanied by the license and any amendments.

At least 30 days before taking action on the surrender application, the Commission must issue a public notice to alert potentially affected parties.

Surrender of Exemption

An exemption holder can petition to voluntarily surrender its exemption. See **18 CFR 4.102**.

If construction has begun:

- the exemption holder must consult with interested fish and wildlife agencies on the plans for disposition of facilities and site restoration;
- where occupancy of federal lands or reservations has been permitted, the exemption holder must notify the affected federal land agency of the petition to surrender and of the steps to be taken to restore the affected lands;
- the Commission will issue a public notice of the surrender request and seek comments and terms and conditions for site restoration from relevant agencies and the public; and
- the exemption holder must fulfill any obligations imposed by the Commission and the fish and wildlife agencies for disposition of facilities and site restoration.

If no construction has begun:

- the exemption holder must fulfill any obligations under the exemption that the Commission may prescribe;
- the exemption will remain in effect for 30 days after the public notice of the petition is issued; and
- a new application involving the site may be filed on the next business day.

The rules governing amendments to exemptions for small hydroelectric projects 5 MW or less are identical to those for conduit exemptions. See **18 CFR 4.104**.

Appendix K. Jurisdictional Determination: Contents of Declaration of Intention or Petition for Declaratory Order

Company Name
Address
City, State, Zip Code
Telephone Number
Fax Number
E-Mail Address:

Date:

Secretary
Federal Energy Regulatory Commission
888 First Street, NE. (PJ-12.2)
Washington, D.C. 20426

Re: Name of Project
Declaration of Intention (*Proposed Project*) or
Petition for Declaratory Order (*Operating Project*)

Dear Sir:

Enclosed please find an original and eight copies of the Declaration of Intention (or Petition for Declaratory Order) for the (Project Name) for your consideration.

Thank you for your consideration in this matter.

Sincerely,

(Your Name & Signature)

Company Name

Declaration of Intention
for the
(Project Name)

Submitted to

Federal Energy Regulatory Commission

(Date)

Declaration of Intention

The location of the project:

State:
Town:
Street:
County:
Stream:
River Basin Name:
Township, Range, and Meridian:

The exact name, business address, telephone number, FAX number, and E-Mail address of the applicant are:

The exact name, business address, telephone number, FAX number, and E-Mail address of the person authorized to act as agent for the applicant is:

The exact name, business address, telephone number, FAX number, and E-Mail address of the existing dam owner is: (for Petition for Declaratory Order, if applicable)

The exact name, business address, telephone number, FAX number, and E-Mail address of the existing powerhouse owner is: (for Petition for Declaratory Order, if applicable)

The exact name, business address, telephone number, FAX number, and E-Mail address of the local electric utility company is:

PROJECT DESCRIPTION (proposed or existing)

A brief description of the project, including intakes, penstocks, primary transmission lines (to the point of interconnection), age of facilities (including generators), and the project's purposes (including such data as maximum height of the dams), a storage capacity curve of the reservoir or reservoirs showing the maximum average, and minimum operating pool levels, proposed mode of operation (peak or run-of-river), and initial and ultimate installed capacity of the project, the rated kilowatt and head on the turbines, and a curve of turbine discharge versus output at average and minimum operating heads.

PROJECT HISTORY:

A description of the project's history, if applicable.

JURISDICTIONAL ANALYSIS

1. Navigability of the stream, including current and historical uses.
2. Land status (private, state owned, federally owned):
3. State whether the project will use surplus water or waterpower from a government dam:
4. Affects Interstate Commerce:

State which power company will be used. Include dates of construction or modifications to the project (if existing), any increase in generation and dates of such increases, if applicable.

Profile of the River Duration Curve and Hydrograph

Show a profile of the river within the vicinity of the project showing the location of the proposed project and any existing improvements in the river.

Show a duration curve and hydrograph for the natural and proposed regulated flows at the dam site. Furnish references to the published stream flow records used and submit copies of any unpublished records used in preparation of these curves.

Include a definite statement of the proposed method of utilizing storage or pondage seasonally, weekly, and daily, during periods of low and normal flows after the plant is in operation and the system load has ground to the extent that the capacity of the plant is required to meet the load. For example, furnish:

(1) Hydrographs covering a 10-day low water period showing the natural flow of the stream and the effect thereon caused by operations of the proposed power plant;

(2) Similar hydrographs covering a 10-day period during which the discharge of the stream approximates average recorded yearly flow; and

(3) Similar hydrographs covering a low water year using average monthly flows.

A system load curve, both daily and monthly, and the position on the load curve that the proposed project would have occupied had it been in operation.

A proposed annual rule of operation for the storage reservoir or reservoirs.

Maps

Attach the following maps:

A general map of any convenient size and scale, showing the stream or streams to be utilized and the approximate location (showing the nearest town or city) and the general plan of the project (see attached sample).

Also, a detailed map of the proposed or existing project, including the reservoir, intake or dam, penstocks, powerhouse, and primary transmission lines. Show all federal lands, and lands owned by states, if any occupied by the project (see attached sample).

Appendix L. Procedures for Securing a Preliminary Permit

The first formal step in the preliminary permit process is filing the application.

18 CFR 4.32(b)(1)

The applicant must file an original application and 8 copies with the **Secretary, FERC, 888 First Street, NE, Washington, DC 20426**. It is recommended that another copy be provided to the Division of Hydropower Administration and Compliance at the same address.

The Commission staff reviews the application for adequacy. The application must be complete, and omission of any required information must be justified. After its review, the Commission makes one of three determinations: **18 CFR 4.32(e)**

1. The application is adequate. The Commission sends the applicant a letter of acceptance. The notification of acceptance will specify the project number assigned to the applicant's project and will confirm the filing date.
2. The application is deficient. If the application is found deficient, but not patently deficient, the Commission will issue a deficiency letter. An applicant notified of a deficient application is allowed up to 45 days from the date of the letter to correct the deficiencies. Deficiencies must be corrected by submitting an original and eight copies of the materials specified in the deficiency letter.
3. The application is rejected. The Commission can reject the application as patently deficient if it determines that the application substantially fails to comply with the requirements of application content (**18 CFR 4.32 and 4.81**) or determines that the proposed project is precluded by law. An application that is rejected can be resubmitted if the inadequacies are corrected, but the date of re-submission will be considered the official filing date.

There is a possibility for rehearing if an applicant wishes to contest the Commission's decision on the preliminary permit application. Under Rule 713 (section 385.713), an applicant may request a rehearing on the decision to reject the preliminary permit application provided that the order rejecting the preliminary permit allows rehearing and the rehearing request is filed within 30 days of the date of the decision. Rehearing requests must state concisely the alleged error in the final decision or order.

18 CFR 385.713

Upon acceptance, the Commission notifies the public of the application in the following three ways: **18 CFR 4.32(d)**

- Publication in the Federal Register.

- Publication in a local newspaper (four separate times).
- Mailing notice directly to the project mailing list, which includes resource agencies and affected Indian tribes.

If the project affects lands of the United States, the Commission also must notify the responsible federal agency.

If the preliminary permit application is the first application filed for a particular site, the public notice will set an *intervention deadline* for filing protests and motions to intervene, comments, prescriptions, terms and conditions, competing applications, and notices of intent.

At this stage of the process, other parties have an opportunity to file a competing application to develop the same water resource. The competing application can be for a preliminary permit or for a development application (i.e., license or exemption). A competing application must meet the following criteria: **18 CFR 4.36**

- a competing preliminary permit application must conform to all the requirements of an initial preliminary permit application;
- a competing development application must conform to all the requirements of an initial development application; and
- proof must be included that a copy of the competing application was served on the persons designated in the public notice of the initial application.

A potential applicant that intends to file a competing application and needs additional time to prepare the competing application may file a notice of intent to file the competing application. A competing applicant that files a notice of intent is given extra time to file a competing application.

- A competing preliminary permit application not preceded by a notice of intent must be filed by the set intervention deadline.
- A competing preliminary permit application filed with a notice of intent must be submitted not later than 30 days after the set intervention deadline.

A competing development application filed with a notice of intent must be submitted not later than 120 days after the established intervention deadline.

If two or more acceptable applications are filed for a preliminary permit to develop the same water resource, the Commission will select between or among the applicants on the basis of established criteria. The factors for determining preference of selection between competing preliminary permit applications include: **18 CFR 4.37**

- whether the applications are for preliminary permits (not developmental stage) or exemptions and licenses (developmental stage);
- filing date (order of time in filing the applications);
- whether applicants are private entities or municipalities or states (municipalities and states have preference); and
- for development applications (exemptions and licenses), the best adapted plan.

These factors are generally applied as follows:

- if application for a preliminary permit proposes to use the same water resource as an accepted application for a license the Commission would take action on the license application first;
- If both of the applicants for a preliminary permit 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, the Commission will favor the applicant with the earliest filing date;
- if one of the two applicants is a municipality or a state and the other is not, and the plans are both well adapted to develop, conserve, and utilize the water resource, the Commission will favor the municipality or the state.

Other Rules Relevant to Preliminary Permits

- The term of the permit cannot be extended beyond 3 years. **FPA Section 5**
- Permits are prohibited from being transferred. **FPA Section 5**
- A request for a material change in the proposed project will trigger issuance of a public notice of the application , which may allow further competition for the site.

If a permittee fails to file an acceptable license application during the term of the permit, the permittee's priority of application for a license is lost, but the permittee can still file a license application.

The Commission may cancel a preliminary permit if the permittee fails to comply with the terms and conditions of the permit or for other good cause. **18 CFR 4.83**

- Prior to cancellation, notice and an opportunity for hearing is given.
- Permit cancellation will result in the loss of the permittee's priority of application for a license for the proposed project, but it does not preclude the permittee from filing a license application.

A permittee can voluntarily surrender its permit but only by submitting a petition to the Commission requesting the surrender. **18 CFR 4.84**

Appendix M. Content of a Preliminary Permit Application

Once a prospective applicant identifies a proposed project, the project must be characterized in sufficient detail to prepare a preliminary permit application.

An application for preliminary permit must include an initial statement, a verification statement, and four numbered exhibits. **18 CFR 4.32 and 4.81**

The **initial statement** must contain information about the applicant, the project, the requested term of the permit, affected political jurisdictions, and a verification of the facts presented. **18 CFR 4.32 and 4.81(a)**

The **verification statement** contains the signature of a Notary Public or other authorized official verifying that the information contained in the application is true. **18 CFR 4.32 (a)(4)**

Exhibit 1 must describe the proposed project. The description contains four items: (1) a characterization of the project structures, reservoir, and transmission facilities; (2) estimates of energy and capacity; (3) identification of affected United States lands; and (4) other information demonstrating how the proposed development of the water resource would be in the public interest. **18 CFR 4.81(b)**

Exhibit 2 must describe project studies, either completed or planned, for assessing project feasibility, determining environmental impacts, and preparing the application. When the proposed project involves constructing a new dam, additional detail must be included about proposed test pits, borings or other foundation explorations, with particular regard to reducing adverse environmental impact during the explorations. **18 CFR 4.81(c)**

Exhibit 3 is a statement of costs and financing that must provide an estimate of the costs of doing the project studies described in Exhibit 2, the source of funding for these studies, and a description of the anticipated market for the power to be generated by the proposed project. **18 CFR 4.81(d)**

Exhibit 4 must include maps that clearly show the location of the project, the location and relationship of the principal project features, a proposed boundary for the project, and any areas with special protected status under the National Wild and Scenic River System or Wilderness Act. **18 CFR 4.81(e)**

Appendix N. Conduit Exemptions: Procedural Steps and Contents

Procedures for Securing a Conduit Exemption

The procedural steps for a conduit exemption application are essentially the same as for a license application, including the three-stage consultation process. See the *Hydroelectric Project Licensing Handbook* for a discussion of the procedures, from initial actions through the public notice accepting the application, which also requests the filing of terms and conditions. After comments and fish and wildlife recommendations are filed, the procedural steps differ for a conduit exemption than from those applicable to either a license or a 5 MW or less exemption application.

The Commission must include those terms and conditions that fish and wildlife agencies determine, in a timely manner, are appropriate to prevent loss of, or damage to, fish and wildlife resources. See 18 CFR 4.34(f)(2).

The Commission staff then does its environmental analysis based upon the record, but does not prepare an EA. Conduit exemptions are categorically exempt from the preparation of an EA under **380.4(a)(14)**. The Commission then decides whether an exemption is to be granted. In granting an exemption from licensing, the Commission will set certain standard terms and conditions **18 CFR 4.94** and may set additional terms and conditions. See **18 CFR 4.93(c)**.

If an application for a conduit exemption is denied, the applicant is given a chance to convert the exemption application into an application for license.

If conversion is sought, the applicant must:

- provide the Commission written notification within 30 days of the order denying the exemption; and
- provide any additional information necessary to make the exemption application conform to the requirements of a license application.

If a timely notification for conversion is not received, application processing is terminated.

Content of Application for a Conduit Exemption

An application for a conduit exemption must include: See **18 CFR 4.92(a) and 4.92(b)**.

- Introductory statement.
- Exhibit A, describing the small conduit hydroelectric facility and proposed mode of operation.
- Exhibit B, a general location map that shows the physical structures, the proposed project boundary, and land ownership by parcel.

- Exhibit E, an environmental report that must reflect pre-filing consultation requirements. Commensurate with the scope and degree of environmental impact, it must include a description of the project's environmental setting, the expected environmental impacts, and a description of alternative means of obtaining an equivalent amount of power.
- Exhibit G, a set of drawings showing the project structures and equipment, including plan, elevation, profile, and section views of the power plant and other principal structures.
- Appendix containing evidence that the applicant has the necessary real property interests in the lands to develop and operate the project.

Identification of all potentially affected Indian tribes.

- Fish and wildlife agency reimbursement fees must accompany filed applications. See **18 CFR 4.301**.