

166 FERC ¶ 61,143
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

18 CFR Parts 4 and 11

[Docket No. RM19-13-000; Order No. 857]

Revisions and Technical Corrections to Conform the Commission's Regulations to the
America's Water Infrastructure Act of 2018

(Issued February 22, 2019)

AGENCY: Federal Energy Regulatory Commission.

ACTION: Final Rule

SUMMARY: The Federal Energy Regulatory Commission (Commission) issues this Final Rule to amend its regulations to conform to the enacted America's Water Infrastructure Act of 2018 (Water Infrastructure Act). This Final Rule revises regulations on preliminary permits, qualifying conduit hydropower facilities, and commencement for payment of annual charges. All revisions in this Final Rule are ministerial in nature.

EFFECTIVE DATE: This rule will become effective **[INSERT DATE (30) days after date of publication in the FEDERAL REGISTER]**.

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SUPPLEMENTARY INFORMATION:

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FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Neil Chatterjee, Chairman;
Cheryl A. LaFleur, Richard Glick,
and Bernard L. McNamee.

Revisions and Technical Corrections to Conform the Commission's Regulations to the America's Water Infrastructure Act of 2018 Docket No. RM19-13-000

ORDER NO. 857

FINAL RULE

(Issued February 22, 2019)

Background and Discussion

1. By this Final Rule, the Commission is amending Parts 4 and 11 of its regulations to conform to the America's Water Infrastructure Act of 2018 (Water Infrastructure Act or Act),¹ enacted on October 23, 2018. Among other things, the Water Infrastructure Act amends sections of the Federal Power Act (FPA) pertaining to preliminary permits, qualifying conduit hydropower facilities, and commencement for payment of annual charges.

¹ Pub. L. 115-270, 132 Stat. 3765 (2018).

A. Amendment Pertaining to Preliminary Permits

2. Under section 5 of the FPA,² the Commission issues preliminary permits, which preserve the right of the permit holder to have the first priority in applying for a license or exemption for the project site. During the preliminary permit term, permittees conduct investigations and secure necessary data to determine the feasibility of a proposed project and to prepare a development (i.e., license or exemption) application.
3. Prior to passage of the Water Infrastructure Act, the maximum permit term was three years. Additionally, the Commission could extend the term of a preliminary permit once, for not more than two additional years.
4. The Water Infrastructure Act amends section 5 of the FPA to give the Commission the authority to issue preliminary permits with maximum terms of four years. The Act also gives the Commission the authority to extend a preliminary permit term once for not more than an additional four years, if the Commission finds that the permittee has carried out activities under the permit in good faith and with reasonable diligence. And the Act authorizes the Commission to issue an additional permit following the end of an extension period, if the Commission determines that there are extraordinary circumstances warranting such an action. The Commission is revising its regulations at 18 CFR 4.82 to reflect the statutory changes regarding preliminary permits.

² 16 U.S.C. 798 (2012), *amended by*, America's Water Infrastructure Act of 2018, Pub. L. No. 115-270, § 3001, 132 Stat. 3765, 3862 (2018).

B. Amendments Pertaining to Qualifying Conduit Hydropower Facilities

5. Qualifying conduit hydropower facilities are a subset of hydropower projects that are not required to be licensed under Part I of the FPA. Prior to enactment of the Act, section 30 of the FPA³ provided that a qualifying conduit hydropower facility could not have an installed capacity greater than five megawatts (MW).

6. The Water Infrastructure Act amends section 30 to increase the maximum installed capacity for qualifying conduit exemptions to 40 MW.

7. Section 30 previously established a 45-day period for entities to contest whether a project as to which qualifying conduit hydropower facility status is sought meets the requisite statutory definition. The Water Infrastructure Act shortens this period to 30 days.

8. The Commission is revising its regulations at 18 CFR 4.30 to reflect these statutory changes.

C. Amendment Pertaining to Obligation for Payment of Annual Charges

9. Licensees and exemptees pay annual charges to the Commission to reimburse the United States for the costs of administration of the Commission's hydropower regulatory program.⁴ For unconstructed projects, the payment of annual charges starts on the date by which the licensee or exemptee is required to commence project construction, which is

³ 16 U.S.C. 823a (2012), *amended by*, Hydropower Regulatory Efficiency Act of 2013, Pub. L. No. 113-23, § 4, 127 Stat. 493, 494 (2013).

⁴ 18 CFR 11.1(a) (2018).

within two years of license issuance, or by any extension of that date. Prior to the Water Infrastructure Act, the Commission limited the start date for payment of annual charges to no later than four years after the issuance of the license or exemption,⁵ because section 13 of the FPA limited the Commission to issuing one extension of the commencement of construction deadline, for no more than two additional years.

10. The Act revised section 13 to authorize the Commission to issue extensions of the commencement of construction deadline for up to eight years. Accordingly, the Commission is revising its regulations at 18 CFR 11.1 to eliminate the maximum four-year period before the commencement of annual changes and will instead commence those charges at the end of two years after license issuance or the expiration of any extended deadline.

D. Revised Regulations

11. By this Final Rule, the Commission is conforming its regulations to the Water Infrastructure Act. The Commission revises language on preliminary permits, qualifying conduit hydropower facilities, and obligations of annual charges in Parts 4 and 11 of its regulations.

Information Collection Statement

12. The Paperwork Reduction Act⁶ requires each federal agency to seek and obtain Office of Management and Budget (OMB) approval before undertaking a collection

⁵ See 18 CFR 11.1(c)(5) (2018).

⁶ 44 U.S.C. §§ 3501-3520 (2012).

(including reporting, record keeping, and public disclosure requirements) of information directed to ten or more persons or contained in a rule of general applicability. OMB regulations require approval of certain information collection requirements imposed by agency rules.⁷ Upon approval of a collection of information, OMB will assign an OMB control number and an expiration date. Respondents subject to the filing requirements of an agency rule will not be penalized for failing to respond to the collection of information unless the collection of information displays a valid OMB control number.

13. The entities affected by this rule would be those with: (1) future preliminary permit applications, (2) pending requests for a preliminary permit, (3) existing preliminary permits as to which extensions or successive permits are sought, (4) proposals to construct qualifying conduit hydroelectric facilities, and (5) unconstructed licensed or exempted facilities that have not yet begun paying annual charges. The Commission will submit the information collection requirements in this Final Rule to OMB for its review. The information collection requirements are included in FERC-505, “Small Hydropower Projects and Conduit Facilities including License/Relicense, Exemption, and Qualifying Conduit Facility Determination.”

14. Overall the Final Rule reduces the current burden for affected entities. Those entities with qualifying conduit applications will incur less burden than before the Water Infrastructure Act; there will be no effect (neither an increase nor a decrease) on burden

⁷ See 5 CFR 1320.10 (2018).

imposed for entities with preliminary permit applications or seeking extension of a preliminary permit term.

Annual Changes Proposed by the Final Rule in Docket No. RM19-13-000						
	Number of Respondents (1)	Annual Number of Responses per Respondent (2)	Total Number of Responses (1)*(2)=(3)	Average Burden & Cost Per Response⁸ (4)	Total Annual Burden Hours & Total Annual Cost (3)*(4)=(5)	Cost per Respondent (\$) (5)÷(1)
FERC-505 (reduction)	1 ⁹	1	1	30 hrs.; \$2,370 (reduction)	30 hrs.; \$2,370 (reduction)	\$2,370 (reduction)

15. **Title:** FERC-505, “Small Hydropower Projects and Conduits including License/Relicense, Exemption, and Qualifying Conduit Facility Determination.”

16. **Action:** Revisions to the FERC-505 information collection.

17. **OMB Control Nos.:** 1902-0115 (FERC-505).

18. **Respondents:** Municipalities, businesses, private citizens, and for-profit and not-for-profit institutions.

⁸ The estimates for cost per response are derived using the following formula: Average Burden Hours per Response * \$79.00/hour = Average cost/response. The figure is the 2018 FERC average hourly cost (for wages and benefits) of \$79.00 (and an average annual salary of \$164,820/year). Commission staff is using the FERC average salary and benefits cost, because we consider any reporting requirements completed in response to the FERC-505 to be compensated at rates similar to the work of FERC employees.

⁹ Based on applications we have received since 2013 for conduit hydropower facilities with an installed capacity between five and 40 MW that would now meet the qualifying conduit hydropower facilities criteria, we anticipate one respondent per year.

19. **Necessity of Information:** The revised regulations implement the Water Infrastructure Act's amendments to preliminary permits, qualifying conduit hydroelectric facilities, and obligations of annual charges. The revised regulations for the most part affect only the frequency that entities would file permit extensions with the Commission in addition to the number of entities that would file applications with the Commission. Thus, the Water Infrastructure Act does not require new information from applicants, licensees, or exemptees. The Commission will continue to use its existing regulations and procedures to accept requests for preliminary permits, permit extensions or successive permits, notices of intent to construct qualifying conduit hydropower facilities, and determining the start date for charging of annual payments.

20. **Internal Review:** The Commission has reviewed the revisions and has determined that they are necessary. These requirements conform to the Commission's need for efficient information collection, communication, and management within the energy industry. The Commission has assured itself, by means of internal review, that there is specific, objective support for the burden estimates associated with the information collection requirements.

21. **Comments:** The revised information collection requirements will not be effective or enforceable until OMB approves the information collection changes described in this order.

22. The Commission solicits comments on the Commission's need for this information; whether the information will have practical utility; the accuracy of provided burden estimates; ways to enhance the quality, utility, and clarity of the information to be

collected; and any suggested methods for minimizing the respondent's burden, including the use of automated information techniques. Comments are due within 30 days of the date this order is published in the *Federal Register*. After receipt and analysis of public comments, the Commission will submit the reporting requirements to OMB for approval.

23. Interested persons may obtain information on the reporting requirements by contacting the Federal Energy Regulatory Commission, 888 First Street, NE, Washington, DC 20426 [Attention: Ellen Brown, Office of the Executive Director], by phone (202) 502-8663, or by email to DataClearance@ferc.gov.

24. Comments concerning the information collections in this Final Rule and the associated burden estimates should be sent to: Office of Information and Regulatory Affairs, Office of Management and Budget, 725 17th Street, NW, Washington, DC 20503 [Attention: Desk Officer for the Federal Energy Regulatory Commission]. Due to security concerns, comments should be sent electronically to the following e-mail address: oira_submission@omb.eop.gov. Additionally, the Commission encourages comments to be filed electronically via the eFiling link on the Commission's website at <http://www.ferc.gov>. Commenters that are not able to file comments electronically should send an original of their comments to: Federal Energy Regulatory Commission, Secretary of the Commission, 888 First Street NE, Washington, DC 20426.

Environmental Analysis

25. The Commission is required to prepare an Environmental Assessment or an Environmental Impact Statement for any action that may have a significant adverse effect

on the human environment.¹⁰ Excluded from this requirement are rules that are clarifying, corrective, or procedural, or that do not substantially change the effect of legislation or the regulations being amended.¹¹ This Final Rule amends the Commission's regulations to conform to recent legislation and does not substantially change the effect of the underlying legislation or regulations being revised.

Regulatory Flexibility Act

26. The Regulatory Flexibility Act of 1980 (RFA)¹² generally requires a description and analysis of final rules that will have significant economic impact on a substantial number of small entities.

27. However, final rules promulgated without the publication of a general notice of proposed rulemaking under section 553 of the Administrative Procedure Act (APA)¹³ are exempt from the RFA's requirements.¹⁴ Section 553(b)(3)(A) of the APA states that final rules that are interpretive rules may be published without general notice of proposed rulemaking. Interpretive rules are defined as rules that "generally interpret the intent expressed by Congress" where an agency "does not insert its own judgments in

¹⁰ *Regulations Implementing the National Environmental Policy Act of 1969*, Order No. 486, 41 FERC ¶ 61,284 (1987).

¹¹ 18 CFR 380.4(a)(2)(ii) (2018).

¹² 5 U.S.C. 601-612 (2012).

¹³ 5 U.S.C. 553 (2012).

¹⁴ 5 U.S.C. 604(a) (2012).

implementing a rule, and simply regurgitates statutory language.”¹⁵ They are an “agency’s reading of a statute” that do not “intend to create new rights or duties, but only remind affected parties of existing duties.”¹⁶

28. This Final Rule is an interpretive rule because it modifies the Commission’s regulations to conform to the Water Infrastructure Act. It does not create new rights or duties. Rather, it reminds affected parties of existing duties required by the Water Infrastructure Act, with which the Commission and non-agency entities have complied since the Act’s enactment.

Document Availability

29. In addition to publishing the full text of this document in the *Federal Register*, the Commission provides all interested persons an opportunity to view and/or print the contents of this document via the Internet through FERC's Home Page (<http://www.ferc.gov>) and in FERC's Public Reference Room during normal business hours (8:30 a.m. to 5:00 p.m. Eastern time) at 888 First Street, NE, Room 2A, Washington DC 20426.

30. From FERC's Home Page on the Internet, this information is available on eLibrary. The full text of this document is available on eLibrary in PDF and Microsoft Word format for viewing, printing, and/or downloading. To access this document in

¹⁵ Small Business Administration, Office of Advocacy, *A Guide for Government Agencies: How to Comply with the Regulatory Flexibility Act* (May 2012), http://www.sba.gov/sites/default/files/rfaguide_0512_0.pdf.

¹⁶ *Orengo Caraballo v. Reich*, 11 F.3d 186, 195 (D.C. Cir. 1993).

eLibrary, type the docket number excluding the last three digits of this document in the docket number field.

31. User assistance is available for eLibrary and the FERC's website during normal business hours from FERC Online Support at 202-502-6652 (toll free at 1-866-208-3676) or email at ferconlinesupport@ferc.gov, or the Public Reference Room at (202) 502-8371, TTY (202)502-8659. E-mail the Public Reference Room at public.referenceroom@ferc.gov.

Effective Date and Congressional Notification

32. These regulations are effective **[INSERT DATE (30) days after date of publication in the FEDERAL REGISTER]**. The Commission has determined, with the concurrence of the Administrator of the Office of Information and Regulatory Affairs of OMB, that this rule is not a "major rule" as defined in section 351 of the Small Business Regulatory Enforcement Fairness Act of 1996.

List of subjects

18 CFR Part 4

Administrative practice and procedure, Electric power, Reporting and recordkeeping requirements

18 CFR Part 11

Dams, Electric power, Indians-lands, Public lands, Reporting and recordkeeping requirements

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

In consideration of the foregoing, the Commission is amending Parts 4 and 11, Chapter I, Title 18, *Code of Federal Regulations*, as follows:

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

33. The authority citation for Part 4 is revised to read:

Authority: 16 U.S.C. §§ 791a-825r; 42 U.S.C. §§ 7101-7352.

§ 4.30 [Amended]

34. In § 4.30(b)(26)(ii), remove the number “5” and add, in its place, the number “40”.

§ 4.81 [Amended]

35. In § 4.81(a)(5), remove the number “36” and add, in its place, the number “48”.

§ 4.82 [Amended]

36. In § 4.82(a), remove “five” and add, in its place, “eight”.

37. In § 4.82(c), remove “five” and add, in its place, “eight”.

38. Add § 4.82(d) to read as follows:

§ 4.82 Amendments.

* * * * *

(d) At the end of the extension period granted under paragraph (a) of this section, the Commission may issue an additional permit to the permittee if the Commission determines that there are extraordinary circumstances that warrant the issuance of the additional permit.

§ 4.400 [Amended]

39. Remove “by the Hydropower Regulatory Efficiency Act of 2013”.

§ 4.401 [Amended]

40. In § 4.401(a)(3), remove “the date of enactment of the Hydropower Regulatory Efficiency Act,”.

41. In § 4.401(b), remove “by section 4 of the Hydropower Regulatory Efficiency Act of 2013”.

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

42. The authority citation for Part 11 is revised to read:

Authority: 16 U.S.C. §§ 791a-825r; 42 U.S.C. §§ 7101-7352.

§ 11.1 [Amended]

43. In § 11.1(c)(5), remove “, but in no case longer than four years after the issuance date of the license or exemption”.