

166 FERC ¶ 61,083
UNITED STATES OF AMERICA
Federal Energy Regulatory Commission

18 CFR Part 7

[Docket No. RM19-6-000]

Hydroelectric Licensing Regulations Under the
America's Water Infrastructure Act of 2018

(Issued January 31, 2019)

AGENCY: Federal Energy Regulatory Commission.

ACTION: Notice of proposed rulemaking.

SUMMARY: Pursuant to the America's Water Infrastructure Act, the Federal Energy Regulatory Commission (Commission) is proposing rules to establish an expedited process for issuing original licenses for qualifying facilities at existing nonpowered dams and closed-loop pumped storage projects. Under the expedited process, the Commission will seek to ensure a final decision will be issued no later than two years after the Commission receives a completed license application. The Commission proposes to codify the rules in a new part that will be added to the Commission's regulations.

DATES: Comments are due **[INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]**

ADDRESSES: You may send comments, identified by RM19-6-000, by either of the following methods:

- Agency web site: Electronic Filing through <http://www.ferc.gov>.

Documents created electronically using word processing software should be

filed in native applications or print-to-PDF format and not in a scanned format.

- Mail: Those unable to file electronically may mail or hand-deliver comments to: Federal Energy Regulatory Commission, Secretary of the Commission, 888 First Street NE, Washington, DC 20426.

Instructions: For detailed instructions on submitting comments and additional information on the rulemaking process, see the Comment Procedures section of this document.

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SUPPLEMENTARY INFORMATION:

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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NOTICE OF PROPOSED RULEMAKING

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1. On October 23, 2018, the America's Water Infrastructure Act of 2018¹ was signed into law. The AWIA, among other things, requires the Federal Energy Regulatory Commission (Commission or FERC) to establish an expedited process for issuing and amending licenses for qualifying facilities at existing nonpowered dams and closed-loop pumped storage projects. Under the expedited process, the Commission will seek to ensure that a final decision on a license application will be issued no later than two years after the Commission receives a completed application for a license.

2. To comply with the AWIA, the Commission proposes to amend its regulations governing hydroelectric licensing under the Federal Power Act (FPA) by establishing a new expedited licensing process for qualifying facilities at existing nonpowered dams and for closed-loop pumped storage projects. Under the proposal, a new part 7 will be added to Title 18 of the Code of Federal Regulations. The Commission's coordination and discussion with appropriate federal and state agencies and Indian Tribes, as part of an interagency task force (ITF), have informed these proposed regulations.

¹ Pub. L. No. 115-270, 132 Stat. 3765 (2018) (AWIA).

I. Background

3. Sections 3003 and 3004 of the AWIA amended the FPA by adding new sections 34 and 35. Section 34 of the FPA gives the Commission discretion to issue or amend licenses, as appropriate, for any facility that the Commission determines is a qualifying facility at an existing nonpowered dam. Section 35 of the FPA gives the Commission discretion to issue or amend licenses, as appropriate, for closed-loop pumped storage projects. Congress directed the Commission to issue a rule, no later than 180 days after October 23, 2018, establishing an expedited licensing process for issuing and amending licenses for qualifying facilities at nonpowered dams and for closed-loop pumped storage projects under sections 34 and 35. In establishing the expedited licensing process, Congress directed the Commission to convene an ITF, with appropriate Federal and State agencies and Indian Tribes represented, to coordinate the regulatory processes associated with the authorizations required to construct and operate qualifying facilities at nonpowered dams and closed-loop pumped storage projects.

4. On November 13, 2018, the Commission issued a notice inviting federal agencies, state agencies, and Indian Tribes to participate on the ITF.² The notice directed interested agencies and Tribes to file a statement of interest with the Commission by November 29, 2018. On December 6, 2018, the Commission issued a notice identifying 28 federal agencies, state agencies, and Tribes as ITF participants.³

² See Notice Inviting Federal and State Agencies and Indian Tribes to Request Participation in the Interagency Task Force Pursuant to America's Water Infrastructure Act of 2018, 83 FR 58,245 (Nov. 19, 2018).

5. On December 12, 2018, the Commission convened a coordination session with the ITF participants at the Commission's headquarters to discuss the Commission's preliminary proposal to coordinate the regulatory processes associated with the authorizations required to construct and operate qualifying facilities at nonpowered dams and closed-loop pumped storage projects. At the session, Commission staff presented for the ITF participants' consideration and comment a flowchart illustrating a draft expedited licensing process.⁴ In addition to soliciting comments at the coordination session, Commission staff invited ITF participants to file comments on the process in Docket No. RM19-6-000 by December 26, 2018. Seven post-session comments were filed.

II. Discussion

6. The Commission's current regulations provide three prefiling process alternatives for hydropower developers to use in preparing license applications: (i) the integrated licensing process (ILP), which is the default process, as described in part 5; (ii) the traditional licensing process (TLP), as described in part 4, subparts D to H; and (iii) the alternative procedures (i.e., the alternative licensing process (ALP)), as described in § 4.34(i) of part 4. The Commission does not propose to alter these existing licensing processes. Instead, these proposed regulations establish procedures for the Commission to determine, on a case-by-case basis, whether applications for an original license at qualifying hydropower projects at nonpowered dams or closed-loop pumped storage

³ See Notice of Interagency Task Force (Dec. 6, 2018); *see also* FERC, Office of Energy Projects, Summary of Interagency Task Force Activities (Jan. 10, 2019) (Appendix A identifies the ITF participants).

⁴ See Commission staff's Letter to ITF Participants, Summary of Interagency Task Force Activities (Jan. 10, 2019).

projects, as defined in sections 34 and 35 of the FPA and the eligibility criteria below, qualify to participate in the Commission's new expedited licensing process.

7. To be considered under the expedited process, applicants for original licenses at qualifying hydropower projects at nonpowered dams or closed-loop pumped storage projects must include with their application a request for authorization to use the expedited licensing process. The Commission may grant the request if the applicant demonstrates compliance with the procedures set forth in the proposed regulations. The use of the expedited licensing process is voluntary. The proposed expedited licensing process would only apply to original license applications; it would not apply to applications for a new or subsequent license. However, the Commission seeks comments on whether the expedited licensing process should apply to applications for a new or subsequent license for a project that was originally licensed under the expedited licensing process. The expedited licensing process would begin with the filing of a license application, that is, the prefiling process is not included in the two-year time frame governed by the expedited process. For the purposes of prefiling activities, any applicant interested in pursuing authorization to use the expedited licensing process must use the default ILP, or request authorization to the use TLP or ALP, as required under the current regulations. Therefore, the focus of this Notice of Proposed Rulemaking (NOPR) is solely on the process milestones and necessary authorizations that occur after an applicant files a license application.

A. Eligibility Criteria

8. An applicant interested in requesting authorization to use the expedited licensing process must demonstrate that its proposed project design meets the statutory criteria for qualifying facilities that Congress enumerated in sections 34 and 35 of the FPA. In addition, the applicant must demonstrate compliance with the FERC-defined criteria to use the expedited process, which include providing documentation of consultation at the time of application filing, verifying that the applicant has engaged in consultation with agencies, Indian Tribes, and, if applicable, the existing dam owner, sufficient to facilitate Commission action on the application within two years. The statutory criteria for qualifying facilities and the FERC-defined documentation requirements for the expedited process are described below.

1. Statutory Criteria for Qualifying Facilities

9. Section 34(e) of the FPA sets forth the qualifying criteria for a facility to be located at an existing nonpowered dam, and defines the term “qualifying nonpowered dam.” Section 35(g) of the FPA, as amended by the AWIA, directs the Commission to establish qualifying criteria for closed-loop pumped storage projects that will be eligible for the expedited licensing process. The statutory criteria for qualifying facilities are further described below.

a. Qualifying Facilities at Nonpowered Dams

10. Section 34(e)(1) of the FPA provides that “qualifying criteria,” with respect to a facility, are: (A) as of the October 23, 2018, the facility is not licensed under, or exempted from, the license requirements contained in Part I of the FPA; (B) the facility is

associated with a qualifying nonpowered dam; (C) the facility will be constructed, operated, and maintained for the generation of electric power; (D) the facility will generate electricity by using any withdrawals, diversions, releases, or flows from the associated qualifying nonpowered dam, including its associated impoundment or other infrastructure; and (E) the operation of the facility will not result in any material change to the storage, release, or flow operations of the associated qualifying nonpowered dam.

11. Section 34(e)(2) defines “qualifying facility” as any facility that is determined to meet the “qualifying criteria” under section 34(e)(1).

12. Section 34(e)(3) defines “qualifying nonpowered dam” as any dam, dike, embankment, or other barrier, constructed on or before October 23, 2018, that is or was operated for the control, release, or distribution of water for agricultural, municipal, navigational, industrial, commercial, environmental, recreational, aesthetic, drinking water, or flood control purposes, and that, as of October 23, 2018, is not generating electricity with hydropower generating works licensed under, or exempted from, the license requirements of Part I of the FPA.

b. Closed-loop Pumped Storage Projects

13. Section 35(g)(1) mandates that the Commission establish criteria that a pumped storage project must meet in order to qualify as a closed-loop pumped storage project eligible for the expedited process. In defining the criteria to qualify as an eligible closed-loop pumped storage project, section 35(g)(2) requires that the Commission include criteria that the pumped storage project cause little to no change to existing surface and groundwater flows and uses, and is unlikely to adversely affect species listed as a

threatened species or endangered species under the Endangered Species Act of 1973 (ESA).⁵

2. **FERC-defined Criteria for Expedited Process**

14. In addition to complying with the license application requirements set forth in part 4, subparts D to H and part 5 of the Commission's regulations, an application filed with a request for authorization to use the expedited licensing process must include documentation of consultation. Through experience and the implementation of the pilot two-year licensing process,⁶ Commission staff has determined that this consultation, and documentation thereof, will best ensure that the Commission will be able to act on a completed license application within two years from the date it is received. As described below, this documentation of consultation must be filed concurrently with the license application and the request for authorization to use the expedited licensing process.

a. **Clean Water Act**

15. Under section 401(a)(1) of the Clean Water Act (CWA), the Commission may not issue a license authorizing the construction or operation of a hydroelectric project that results in a discharge into the navigable waters of the United States unless the state water quality certifying agency either has issued water quality certification for the project or has waived certification by failing to act on a request for certification within a reasonable

⁵ 16 U.S.C. §§ 1531-1544 (2012).

⁶ See FERC, Report on the Pilot Two-Year Pilot Hydroelectric Licensing Process For Non-Powered Dams and Closed-Loop Pumped Storage Projects and Recommendations Pursuant to Section 6 of the Hydropower Regulatory Efficiency Act of 2013 (May 31, 2017), <https://www.ferc.gov/legal/staff-reports/2017/final-2-year-process.pdf> (Pilot Two-Year Licensing Report).

period of time, not to exceed one year.⁷ Section 401(d) of the CWA provides that the water quality certification shall become a condition of the license.⁸

16. Under the Commission's existing licensing processes, an applicant must file a copy of the water quality certification; a copy of the request for certification, including proof of the date on which the certifying agency received the request; or evidence of waiver of water quality certification no later than 60 days from the date that the Commission issues public notice accepting an application for filing and finding it ready for environmental analysis.⁹ The Commission's Pilot Two-Year Licensing Report noted that all projects licensed within two years either received a water quality certification or a waiver within one year of the applicant's request.¹⁰

17. To increase the likelihood that a license application can be acted on within two years, the Commission proposes to require an applicant to submit, at the time of application filing, a copy of the applicant's request for certification under section 401(a) (1) of the CWA, including proof of the date on which the certifying agency received the request, and: (i) a copy of the water quality certification, (ii) evidence of waiver of water

⁷ See 33 U.S.C. § 1341(a)(1) (2012).

⁸ *Id.* § 1341(d).

⁹ See 18 CFR 4.34(b)(5) and 5.23(b) (2018).

¹⁰ Pilot Two-Year Licensing Report at 42. As part of the Pilot Two-Year Licensing Report, Commission staff examined the processing times for 83 projects that completed pre-filing activities and were issued original licenses or small hydropower exemptions between 2003 and 2016. During this period, 23 projects (i.e., 28 percent) were licensed within two years from the filing of a Notice of Intent to file a license application and a pre-application document.

quality certification, or (iii) documentation from the state certifying agency that no additional information is needed to complete the water quality certification application.

b. ESA

18. Section 7(a)(2) of the ESA requires the Commission to ensure that its actions are not likely to jeopardize the continued existence of federally-listed threatened or endangered species, or result in the destruction or adverse modification of designated critical habitat of such species.¹¹ The Commission, in determining what protective measures to incorporate into a license, must consult with the U.S. Fish and Wildlife Service (FWS) or the National Marine Fisheries Service (NMFS), as applicable. The length of this consultation process varies based on the Commission's determination of effect on a federally-listed species or its critical habitat.¹²

19. Under the Commission's current licensing processes, the Commission issues its effect determination as part of the National Environmental Policy Act of 1969 (NEPA)¹³ document prepared on the license application. The NEPA document is used as the Commission's biological assessment on listed species for ESA consultation purposes.

¹¹ See 16 U.S.C. § 1536 (2012).

¹² For example, if the Commission determines that its actions will have no effect on a listed species or habitat, no further consultation is required. If the Commission determines that its action is not likely to adversely affect a listed species or its habitat, Commission staff will seek concurrence from FWS or NMFS. If FWS or NMFS agrees with the Commission's determination, consultation is complete once the appropriate service provides a letter of concurrence. However, if FWS or NMFS does not agree with the Commission's finding that its action is not likely to adversely affect a federally listed species or its critical habitat or if the Commission determines its action is likely to adversely affect a federally-listed species or its critical habitat, formal consultation is required under section 7 of the ESA.

¹³ 42 U.S.C. § 4321 *et seq.* (2012).

The Commission's Pilot Two-Year Licensing Report found that seventy percent (i.e., 16 of 23) of projects licensed in two years or less required no consultation under the ESA.¹⁴ In addition, the report found that of the seven projects that required ESA consultation, all of the consultations were completed in less than 48 days.¹⁵

20. To increase the likelihood that an expedited license application may be acted on within two years, the Commission proposes to require that any application filed with a request for authorization to use the expedited licensing process include: (i) a no-effect determination that includes documentation that no listed species or critical habitat are present at the proposed project site; (ii) documentation of concurrence from FWS and NMFS, as necessary, on a not likely to adversely affect determination; or (iii) a draft biological assessment that includes documentation of consultation with FWS and NMFS, as necessary.

21. New FPA sections 34 and 35 do not refer to the critical habitat of listed species. However, if there were critical habitat that would likely be adversely affected by a proposed project, formal ESA consultation would be required, which may make it difficult to issue a license within a two-year period. Accordingly, the documentation referred to above must cover not only listed species but also their critical habitat.

22. Moreover, FPA section 35(g)(1) is silent on whether a closed-loop pumped storage project would be eligible for the expedited licensing process if it were to result in adverse effects to habitat designated as critical habitat under the ESA. Because the AWIA does

¹⁴ Pilot Two-Year Licensing Report at 43.

¹⁵ *Id.*

not alter the ESA and ESA section 7(a)(2) also requires the Commission to ensure that its actions are not likely to result in the destruction or adverse modification of designated critical habitat of such species,¹⁶ we propose to include in the qualifying criteria for closed-loop pumped storage projects the requirement that the proposed project is not likely to adversely affect threatened or endangered species, *or habitat designated as critical habitat*, under the ESA.

c. National Historic Preservation Act

23. Under section 106 of the National Historic Preservation Act (NHPA)¹⁷ and its implementing regulations,¹⁸ the Commission must take into account the effect of any proposed undertaking on properties listed or eligible for listing in the National Register of Historic Places and afford the Advisory Council on Historic Preservation a reasonable opportunity to comment on the undertaking.

24. To increase the likelihood that an expedited license application may be acted on within two years, the Commission proposes to require an applicant to provide, at the time of application filing, documentation that section 106 consultation has been initiated with the relevant State Historic Preservation Officer(s) and any Indian Tribes identified as having an interest in the proposed project. This requirement does not differ from requirements in our current regulations.

¹⁶ 16 U.S.C. § 1536(a)(2) (2012).

¹⁷ 54 U.S.C. § 306108 (2012).

¹⁸ 36 CFR pt. 800 (2018).

d. Dam Owner Documentation

25. For projects at existing nonpowered dams, the Commission proposes to require an applicant to provide, at the time of application filing, documentation verifying consultation with the owner of the dam and the results of the consultation. For a proposal at a non-federal nonpowered dam, the applicant would be required to provide documentation of consultation with the non-federal dam owner, including confirmation that the non-federal dam owner does not oppose the project development. For a proposal at a federal nonpowered dam, the applicant would be required to provide documentation from the federal dam owner confirming that non-federal hydropower is not precluded at the proposed location and that the federal owner does not oppose project development. This documentation and confirmation requirement seeks to ensure that applicants discuss the project proposal with dam owners early in the process to verify that there are no issues that would preclude the Commission from authorizing a hydropower project at the dam or would require an applicant to significantly amend its proposal. Substantial amendments to a license application, especially when made late in the licensing process, decrease the likelihood that the application could be acted on in two years.

e. Public Parks, Recreation Areas, and Wildlife Areas

26. Section 21 of the FPA, as amended by the Energy Policy Act of 1992,¹⁹ limits the use of eminent domain to acquire any lands included within any public park, recreation area, or wildlife refuge established under state or local law.²⁰ Waiting until after a license

¹⁹ Pub. L. No. 102-486, 106 Stat. 2776 (1992).

²⁰ 16 U.S.C. § 814 (2012).

application is filed to identify a proposal for a project that uses any public park, recreation area, or wildlife refuge in a manner that would be acceptable to the managing entity could extend the license application processing time and decrease the likelihood of meeting the two-year target. Therefore, if the proposed project would use any public park, recreation area, or wildlife refuge established under state or local law, the Commission proposes to require an applicant to provide, at the time of application filing, documentation from the managing entity demonstrating that it is not opposed to use of the park, recreation area, or wildlife refuge for hydropower development.

B. Expedited Licensing Process

27. As directed by FPA sections 34 and 35, the Commission is proposing an expedited licensing process for qualifying facilities at nonpowered dams and for closed-loop pumped storage projects. The proposed regulations, if enacted, will be codified as part 7 of the Commission's regulations.

1. Section 7.1 – Applicability and Definitions

28. Proposed § 7.1 explains that the expedited licensing process would be restricted to applicants that apply for and receive authorization to use the process. Unless superseded by the expedited licensing process regulations, the Commission's existing regulations governing license applications would also apply to license applications filed pursuant to part 7. This section also defines the following key terms used throughout this proposed part: "qualifying nonpowered dam," "qualifying facility," and "closed-loop pumped storage project." Finally, proposed § 7.1 explains that an applicant under part 7 may

elect to use any of the Commission's three licensing processes: the ILP,²¹ the TLP,²² or the ALP.²³

2. Section 7.2 – Use of Expedited Licensing Process

29. Proposed § 7.2 explains that an applicant must submit a request for authorization to use the expedited licensing process. Proposed § 7.2(b) identifies the information that must be included in any original license application that accompanies a request to use the expedited licensing process. The information pertains to the design and environmental criteria statutorily mandated by sections 34 and 35 of the FPA, as well as the early consultation documentation described above in section II.A (Eligibility Criteria).

3. Section 7.3 – Adequacy Review of Application

30. Proposed § 7.3 describes how Commission staff will conduct an adequacy review of an application submitted under part 7. Commission staff will review a license application that is accompanied by a request to use the expedited licensing process under part 4 (TLP or ALP) or part 5 (ILP) of the Commission's regulations, depending on the applicant's elected licensing process. If the application is deemed deficient and rejected under part 4 or 5, the request to use the expedited licensing process will likewise be rejected.

4. Section 7.4 – Additional Information

31. Proposed § 7.4 states that an applicant under part 7 may be required to submit additional information or documentation to the Commission in the form and time frame

²¹ 18 CFR pt. 5 (2018).

²² *Id.* pt. 4, subpts. D-H.

²³ *Id.* 4.34(i).

prescribed by the Commission. The Commission may also require the applicant to submit copies of the application or other filed materials to any person, agency, Indian Tribe, or other entity specified by the Commission. Failure to provide the requested information or documentation as specified may result in dismissal of the license application.

5. **Section 7.5 – Decision on Request to Use Expedited Licensing Process**

32. Proposed § 7.5 explains that the Director of the Office of Energy Projects (Director) will act on the request to use the expedited licensing process within six months from the date of application filing. If Commission staff is unable to find that the application meets the requirements of parts 4, 5, and 7, all deficiencies have been cured, and no additional information is required, the Director will deny the request to use the expedited licensing process. If the expedited licensing request is denied, proposed § 7.5 explains that the license application will be processed pursuant to a standard processing schedule under parts 4 or 5 of the Commission’s regulations, as appropriate.

6. **Section 7.6 – Notice of Acceptance and Ready for Environmental Analysis**

33. If the Director approves the request to use the expedited licensing process, proposed § 7.6 describes the components of the public notice that the Commission will issue no later than six months after the date of application filing. The notice will accept the application and confirm the acceptance date as the application filing date; find the application ready for environmental analysis; request comments, protests, and interventions; request recommendations, preliminary terms and conditions, and

preliminary fishway prescriptions; and establish a schedule for the application's expedited processing.

34. The expedited licensing process schedule will include the estimated dates for: (i) the filing of recommendations, preliminary terms and conditions, and fishway prescriptions; (ii) issuance of the draft NEPA document, or an environmental assessment not preceded by a draft; (iii) filing of responses, if applicable, to Commission staff's request for ESA concurrence or request for formal consultation under ESA, or to other Commission staff requests to federal and state agencies, or Indian Tribes under other federal laws, including the Magnuson-Stevens Fishery Conservation and Management Act²⁴ and the NHPA; (iv) filing of comments on a draft NEPA document, if applicable; (v) filing of modified recommendations, mandatory terms and conditions, and fishway prescriptions in response to a draft NEPA document or, if no draft NEPA document is issued, to an environmental assessment; and (vi) issuance of a final NEPA document, if applicable.

7. Section 7.7 – Amendment of Application

35. Proposed § 7.7 prescribes the requirements for an application that proposes to amend a pending application filed under the expedited licensing process, after the Commission has already issued a notice of acceptance and ready for environmental analysis for the application. This section also explains the right of an agency, Indian Tribe, and member of the public to modify its previously-submitted recommendations or terms and conditions or prescriptions if an applicant files, and the Commission accepts,

²⁴ 16 U.S.C. §§ 1801 *et seq.* (2012).

an amendment to the application that would materially change the proposed project's plans of development.

8. Section 7.8 – Other Provisions

36. Proposed § 7.8 authorizes the Director to waive or modify provisions of this part for good cause. The Commission may consider late-filed recommendations by authorized fish and wildlife agencies under the Fish and Wildlife Coordination Act²⁵ and FPA section 10(j),²⁶ and late-filed FPA section 4(e)²⁷ terms and conditions or FPA section 18²⁸ prescriptions as cause to remove the application from the expedited licensing process under this part.

9. Section 7.9 – Transition Provision

37. Proposed § 7.9 provides that this part only applies to original license applications filed on or after the effective date of the final rule.

C. Key Issues and Goals for an Expedited Licensing Process

38. In addition to the structure and information requirements of the expedited licensing process, the Commission requests comments on certain issues, discussed below.

1. Definition of Closed-Loop Pumped Storage

39. Absent the inclusion requirement in FPA section 35(g)(2), FPA section 35 does not define the term “closed-loop pumped storage project.” The Commission's existing

²⁵ 16 U.S.C. §§ 661-666c (2012).

²⁶ *Id.* § 803(j).

²⁷ *Id.* § 797(e).

²⁸ *Id.* § 811.

regulations also do not provide a definition. In the past, the Commission or Commission staff has defined closed-loop pumped storage projects as pumped storage projects that are “not continuously connected to a naturally-flowing water feature.”²⁹ The Commission has also licensed five projects with proposed operational features that could be considered to be closed-loop pumped storage projects, depending on how the term is defined:

- The Eagle Mountain Pumped Storage Hydroelectric Project No. 13123: a closed-loop pumped storage project that will rely on groundwater wells to provide the project’s initial reservoir fill and future replenishment.³⁰ Construction of the project has not commenced.
- The Gordon Butte Pumped Storage Project No. 13642: a closed-loop pumped storage project that will use an existing, privately-owned irrigation system connected to Cottonwood Creek to supply initial reservoir fill and future replenishment due to evaporation loss.³¹ Construction of the project has not commenced.
- The Summit Pumped Storage Hydroelectric Project No. 9423: a pumped storage facility that would have used off-stream reservoirs filled by a municipal water

²⁹ See *Wyco Power and Water, Inc.*, 139 FERC ¶ 61,124, at n.11 (2012) (providing the definition in an order denying rehearing of a dismissed preliminary permit). See generally FERC, Pumped Storage Projects, <https://www.ferc.gov/industries/hydropower/gen-info/licensing/pump-storage.asp>. See also Pilot Two-Year Licensing Report at 7.

³⁰ See *Eagle Crest Energy Co.*, 147 FERC ¶ 61,220 (2014).

³¹ See *GB Energy Park, LLC*, 157 FERC ¶ 62,196 (2016).

supply.³² The license was terminated for failure to commence timely construction.³³

- The Mount Hope Pumped Storage Project Nos. 9401, 8595, 9105: a pumped storage facility that was to be located at a rock quarry site, with fill water supplied by water from an abandoned iron mine.³⁴ The license was terminated for failure to commence timely construction.³⁵
- The Blue Diamond Pumped Storage Project No. 10756: a pumped storage facility with off-stream reservoirs that were dependent on the local water district for the initial fill and future replenishment.³⁶ The license was terminated for failure to commence timely construction.³⁷

40. In addition, the Commission is currently reviewing an application for an original license for the Mineville Energy Storage Project No. 12635, a pumped storage project that would include facilities located in a decommissioned mine, and an application for an original license for the Swan Lake North Pumped Storage Project No. 13318, a pumped

³² *Summit Energy Storage, Inc.*, 55 FERC ¶ 62,026 (1991).

³³ *Summit Energy Storage, Inc.*, 95 FERC ¶ 62,035 (2001).

³⁴ *Halecrest Co.*, 60 FERC ¶ 61,121 (1992).

³⁵ *Mt. Hope Waterpower Project, LLP*, 113 FERC ¶ 61,258 (2005).

³⁶ *Blue Diamond South Pumped Storage Power Co., Inc.*, 79 FERC ¶ 62,184 (1997).

³⁷ *Blue Diamond South Pumped Storage Power Co., Inc.*, 112 FERC ¶ 62,110 (2005).

storage project near Klamath Falls, Oregon. Both proposals would rely on groundwater for initial reservoir fill.³⁸

41. Based on a review of these licenses and related applications, the Commission proposes to retain the Commission's previous definition of a closed-loop pumped storage project (i.e., a pumped storage project that is not continuously connected to a naturally-flowing water feature). We encourage comments on the proposed definition, including proposals for alternative definitions and discussion of how terms in the definition, such as "continuously connected," should be construed.

2. License Amendments

42. FPA sections 34(a)(1) and 35(a)(1) give the Commission discretion to amend licenses, as appropriate, for any facility that the Commission determines is a qualifying facility. As part of this rulemaking, the Commission is required to establish an expedited process for amending licenses for qualifying facilities. FPA sections 34(a)(4) and 35(a)(4) specifically define the expedited process for license applications as a two-year process for the Commission to issue a final decision on a license application once it receives a completed license application. The amended statute, however, is silent on the length of time to process applications to amend licenses.

43. Any change to an issued license is considered a license amendment, and proposed amendments can vary greatly in type and complexity. A simple amendment might consist of changing the frequency of fish passage monitoring, whereas a complex

³⁸ See Moriah Hydro Corporation's February 13, 2015 Application at 17-18; Exhibit A of Swan Lake North Hydro LLC's October 28, 2015 Application at A-19.

amendment might include building a new dam or powerhouse or changing a project's basic mode of operation.

44. Over the last five fiscal years, Commission staff has reviewed and processed over 18,000 post-license related filings, approximately 7,500 of which were considered amendment-related filings. Ninety-eight percent of these 7,500 filings resulted in the issuance of a Commission final decision within two years from receipt of the filing. Because the Commission already processes the vast majority of amendments within two years, the Commission proposes to process applications to amend licenses for

projects located at qualifying nonpowered dam and for closed-loop pumped storage projects under the Commission's existing regulations for amendments in 18 CFR part 4, subpart L.

3. Projects that Require the Preparation of an EIS

45. When the Commission believes a proposed project may not be a major federal action significantly affecting the quality of the human environment, the Commission may first prepare an environmental assessment to determine whether an EIS needs to be prepared.³⁹ However, § 380.6(a)(4) of the Commission's regulations identifies licenses of any unconstructed water power project as a category of project that will normally require the preparation of an EIS.⁴⁰

46. Because the preparation of an EIS typically involves projects that are more complex, thereby requiring more resources from all involved stakeholders and Commission staff, the Commission requests comment on whether the two-year expedited licensing process should be available to proposed projects that would require the Commission to prepare an EIS.

47. Additionally, then FERC Chairman McIntyre signed a Memorandum of Understanding Implementing One Federal Decision Under Executive Order 13807,⁴¹ in which the Commission committed to completing within an average of two years all

³⁹ 18 CFR 380.6(b) (2018).

⁴⁰ *Id.* 380.6(a)(4).

⁴¹ Establishing Discipline and Accountability in the Environmental Review and Permitting Process for Infrastructure Projects, Exec. Order No. 13,807, 82 FR 40,463 (Aug. 15, 2017).

environmental reviews and authorization decisions for “major infrastructure projects,”⁴² starting from the date the Commission publishes a Notice of Intent to prepare an EIS and ending with the issuance of a final order.⁴³ Projects that are authorized for expedited processing and qualify as “major infrastructure projects,” will be designated under both programs.

III. Regulatory Requirements

A. Information Collection Statement

48. The Paperwork Reduction Act⁴⁴ requires each federal agency to seek and obtain the Office of Management and Budget’s (OMB) approval before undertaking a collection 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 contemplated by proposed rules.⁴⁵ 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 a rule will not be penalized for failing

⁴² A major infrastructure project is defined as an infrastructure project for which multiple authorizations by Federal agencies will be required to proceed with construction, the lead Federal agency has determined that it will prepare an EIS, and the project sponsor has identified the reasonable availability of funds sufficient to complete the project. *Id.* § 3(e).

⁴³ Memorandum of Understanding Implementing the One Federal Decision under Executive Order 13807, <https://www.ferc.gov/legal/mou/2018/MOU-One-Federal-Decision.pdf>.

⁴⁴ 44 U.S.C. §§ 3501-3521 (2012).

⁴⁵ *See* 5 CFR 1320.11 (2018).

to respond to the collection of information unless the collection of information displays a valid OMB control number.

49. **Public Reporting Burden:** In this NOPR, the Commission proposes to establish an expedited process for issuing original licenses for qualifying facilities at nonpowered dams and for closed-loop pumped storage projects, as directed by Congress in the AWIA.

50. This proposed rule would modify certain reporting and recordkeeping requirements included in FERC-500A⁴⁶ (OMB Control No. TBD)⁴⁷ and FERC-505 (OMB Control No. 1902-0115).⁴⁸

51. The proposed revisions to the Commission's regulations, associated with the FERC-500A and FERC-505 information collections, are intended to comply with the requirements of the AWIA. While the information to be included in the license application and the required federal and state authorizations would remain the same under the expedited licensing process, consultation documentation regarding these authorizations will need to be submitted to the Commission at an earlier point in the licensing process. Therefore, preparing the request to use the expedited licensing process

⁴⁶ The new reporting requirements and burden that would normally be submitted to OMB under FERC-500 (OMB Control No 1902-0058) will be submitted under a "placeholder" information collection number (FERC-500A). FERC-500 is currently under OMB review for an unrelated FERC activity.

⁴⁷ FERC-500A includes the reporting and recordkeeping requirements for "Application for License/Relicense for Water Projects with More than 5 Megawatt (MW) Capacity."

⁴⁸ FERC-505 includes the reporting and recordkeeping requirements for "Small Hydropower Projects and Conduit Facilities including License/Relicense, Exemption, and Qualifying Conduit Facility Determination."

would represent a slight increase in the reporting requirements and burden information for FERC-500A and FERC-505.

52. The estimated burden and cost for the requirements contained in this NOPR follow.

Annual Changes Proposed by the NOPR in Docket No. RM19-6-000					
	No. of Respondents (1)	No. of Responses ⁴⁹ per Respondent (2)	Total No. of Responses (1)X(2)=(3)	Avg. Burden Hrs. & Cost Per Response ⁵⁰ (4)	Total Annual Burden Hours & Total Annual Cost (3)X(4)=5
FERC-500A	5 ⁵¹	1	5	40 \$3,160	200 hrs.; \$15,800
FERC-505	5 ⁵²	1	5	40 hrs.; \$3,160	200 hrs.; \$15,800
TOTAL			10		400 hrs.; \$31,600

53. **Titles:** FERC-500A (Application for License/Relicense for Water Projects with More than 5 Megawatt (MW) Capacity) and FERC-505 (Small Hydropower Projects and Conduit Facilities including License/Relicense, Exemption, and Qualifying Conduit Facility Determination).

54. **Action:** Revisions to information collections FERC-500A and FERC-505.

⁴⁹ We consider the filing of an application to be a “response.”

⁵⁰ The estimates for cost per response are derived using the following formula: Average Burden Hours per Response * \$79 per Hour = Average Cost per Response. The hourly cost figure of \$79 is the 2018 average FERC employee wage plus benefits. Commission staff assumes that respondents earn at a similar rate to FERC employees.

⁵¹ After implementation of this rule, we estimate five applications for closed-loop pumped storage projects will be filed, alongside a request to use the expedited licensing process, per year. We estimate that all of these applications will be for projects with more than 5 MW capacity.

⁵² After implementation of this rule, we estimate five applications for qualifying facilities at existing nonpowered dams will be filed, alongside a request to use the expedited licensing process, per year. We estimate that all of these applications will be for projects with 5 MW or less capacity.

55. **OMB Control Nos.:** TBD (FERC-500A) and 1902-0115 (FERC-505).
56. **Respondents:** Municipalities, businesses, private citizens, and for-profit and not-for-profit institutions.
57. **Frequency of Information:** Ongoing.
58. **Necessity of Information:** The revised regulations implement the AWIA's directive to establish an expedited licensing process for two types of hydropower projects – qualifying facilities at existing nonpowered dams and closed-loop pumped storage projects. The revised regulations would affect only the number of entities that would file applications with the Commission for these two project types, and would impose a new, albeit slight, information collection requirement.
59. The new requirement for an applicant interested in using the expedited process to file a request for authorization to use the expedited process concurrently with its license application is necessary for the Commission to carry out its responsibilities under the FPA, as amended by the AWIA. The information provided to the Commission enables the Commission to review the features of the proposed project and make a determination on whether the proposed project meets the statutory criteria enumerated in the AWIA, as well as the early consultation requirements that the Commission has determined will help it seek to ensure that the proposed project's license application will be acted on no later than two years after the date of application filing.
60. **Internal Review:** The Commission has reviewed the proposed 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.

61. 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 email to DataClearance@ferc.gov, by phone (202) 502-8663, or by fax (202) 273-0873.

62. Comments concerning the collections of information and the associated burden estimates may also 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 email address:

oir_submission@omb.eop.gov. Comments submitted to OMB should refer to FERC-500A (OMB Control No. TBD) and FERC-505 (OMB Control No. 1902-0115).

B. Environmental Analysis

63. The Commission is required to prepare an environmental assessment or an EIS for any action that may have a significant adverse effect on the human environment.⁵³ The Commission has categorically excluded certain actions from this requirement as not having a significant effect on the human environment. Excluded from this requirement are rules that are clarifying, corrective, or procedural, or that do not substantially change

⁵³ *Regulations Implementing the National Environmental Policy Act*, Order No. 486, FERC Stats. & Regs. ¶ 30,783 (1987) (cross-referenced at FERC ¶ 61,284).

the effect of legislation or the regulations being amended.⁵⁴ This proposed rule proposes to establish an expedited licensing process for qualifying facilities at nonpowered dams and for closed-loop pumped storage projects, as directed by Congress in the AWIA. Because this proposed rule is procedural in nature and does not substantially change the effect of the underlying legislation, preparation of an environmental assessment or EIS is not required.

C. Regulatory Flexibility Act

64. The Regulatory Flexibility Act of 1980 (RFA)⁵⁵ generally requires a description and analysis of proposed rules that will have significant economic impact on a substantial number of small entities. The RFA mandates consideration of regulatory alternatives that accomplish the stated objectives of a proposed rule and minimize any significant economic impact on a substantial number of small entities.⁵⁶ In lieu of preparing a regulatory flexibility analysis, an agency may certify that a proposed rule will not have a significant economic impact on a substantial number of small entities.⁵⁷

65. The Small Business Administration's (SBA) Office of Size Standards develops the numerical definition of a small business.⁵⁸ The SBA size standard for electric utilities is

⁵⁴ 18 CFR 380.4(a)(2)(ii) (2018).

⁵⁵ 5 U.S.C. §§ 601-612 (2012).

⁵⁶ *Id.* § 603(c).

⁵⁷ *Id.* § 605(b).

⁵⁸ 13 CFR 121.101 (2018).

based on the number of employees, including affiliates.⁵⁹ Under SBA's current size standards, a hydroelectric power generator (NAICS code 221111)⁶⁰ is small if it, including its affiliates, employs 500 or fewer people.⁶¹

66. If enacted, this proposed rule would directly affect only those entities that file an application for a qualifying facility at a nonpowered dam or for a closed-loop pumped storage project, and a request to use the expedited licensing process. While the information to be included in the licensing application and the required federal and state authorizations would remain the same, documentation regarding these authorizations will need to be submitted at an earlier point in the licensing process. Therefore, preparing a request to use the expedited licensing process would represent a slight increase (40 hours of reporting burden and corresponding wage costs of \$3,160 per entity on an annual basis) in the information collection reporting requirements and burden for FERC-500A and FERC-505. However, we do not anticipate the impact of the proposed rule on affected entities, regardless of their status as a small entity or not, to be significant.

67. Accordingly, pursuant to section 605(b) of the RFA, the Commission certifies that this proposed rule will not have a significant economic impact on a substantial number of small entities.

⁵⁹ *Id.* § 121.201.

⁶⁰ The North American Industry Classification System (NAICS) is an industry classification system that Federal statistical agencies use to categorize businesses for the purpose of collecting, analyzing, and publishing statistical data related to the U.S. economy. United States Census Bureau, *North American Industry Classification System*, <https://www.census.gov/eos/www/naics/>.

⁶¹ 13 CFR 121.201 (2018) (Sector 22 - Utilities).

D. Comment Procedures

68. The Commission invites interested persons to submit comments on the matters and issues proposed in this notice to be adopted, including any related matters or alternative proposals that commenters may wish to discuss. Comments are due [**INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL***

REGISTER]. Comments must refer to Docket No. RM19-6-000, and must include the commenters' name, the organization they represent, if applicable, and their address.

69. The Commission encourages comments to be filed electronically via the eFiling link on the Commission's web site at <http://www.ferc.gov>. The Commission accepts most standard word processing formats. Documents created electronically using word processing software should be filed in native applications or print-to-PDF format and not in a scanned format. Commenters filing electronically do not need to make a paper filing.

70. Commenters that are not able to file comments electronically must send an original of their comments to: Federal Energy Regulatory Commission, Secretary of the Commission, 888 First Street NE, Washington, DC 20426.

71. All comments will be placed in the Commission's public files and may be viewed, printed, or downloaded remotely as described in the Document Availability section below. Commenters on this proposal are not required to serve copies of their comments on other commenters.

E. Document Availability

72. 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 the Commission's Home Page (<http://www.ferc.gov>) and in the Commission'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.

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

74. User assistance is available for eLibrary and the Commission's website during normal business hours from the Commission's 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. Email the Public Reference Room at public.referenceroom@ferc.gov.

List of Subjects in 18 CFR Part 7

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

By direction of the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

In consideration of the foregoing, the Commission proposes to add Part 7, Chapter I, Title 18, Code of Federal Regulations, as follows:

PART 7 – EXPEDITED LICENSING PROCESS FOR QUALIFYING NON-FEDERAL HYDROPOWER PROJECTS AT EXISTING NONPOWERED DAMS AND FOR CLOSED-LOOP PUMPED STORAGE PROJECTS

Sec.

7.1 Applicability and Definitions.

7.2 Use of Expedited Licensing Process.

7.3 Adequacy Review of Application.

7.4 Additional Information.

7.5 Decision on Request to Use Expedited Licensing Process.

7.6 Notice of Acceptance and Ready for Environmental Analysis.

7.7 Amendment of Application.

7.8 Other Provisions.

7.9 Transition Provision.

Authority: 16 U.S.C. 791a-825r; Pub. L. No. 115-270, 132 Stat. 3765.

§ 7.1 Applicability and definitions.

(a) This part applies to the processing of applications for original licenses for qualifying non-federal hydropower projects at existing nonpowered dams and for closed-loop pumped storage projects pursuant to sections 34 and 35 of the Federal Power Act.

(b) *Applicability of Existing Regulations.* Except where superseded by the expedited licensing process set forth in this part, the regulations governing license applications under parts 4 and 5 of this chapter, as applicable, also apply to license applications filed under this part.

(c) *Definitions.* The definitions in § 4.30(b) of this chapter apply to this part. In addition, for the purposes of this part –

(1) *Qualifying nonpowered dam* means any dam, dike, embankment, or other barrier –

- (i) the construction of which was completed on or before October 23, 2018;
- (ii) that is or was operated for the control, release, or distribution of water for agricultural, municipal, navigational, industrial, commercial, environmental, recreational, aesthetic, drinking water, or flood control purposes; and
- (iii) that, as of October 23, 2018, was not generating electricity with hydropower generating works that were licensed under, or exempted from the license requirements contained in, Part I of the Federal Power Act.

(2) *Qualifying facility* means a facility that is determined under section 34 of the Federal Power Act to meet the qualifying criteria for non-federal hydropower projects at existing nonpowered dams.

(3) *Closed-loop pumped storage project* means a pumped storage project that is not continually connected to a naturally-flowing water feature.

(d) *Who may file*. Any citizen, association of citizens, domestic corporation, municipality, or state that develops and files a license application under 18 CFR parts 4 and 5, as applicable, may request expedited processing under this part.

(e) *Use of expedited licensing process*. An applicant wishing to use this expedited licensing process must apply for and receive authorization from the Commission under this part. An applicant under this part may elect to use the licensing process provided for in 18 CFR part 5 (i.e., integrated license application process), or as provided under 18 CFR § 5.1:

- (1) 18 CFR part 4, subparts D-H (i.e., traditional process); or
- (2) § 4.34(i) of this chapter, *Alternative procedures*.

§ 7.2 Use of Expedited Licensing Process.

(a) In order to pursue the expedited licensing process, an applicant must request authorization for the expedited process, as provided for in paragraph (b) of this section. The licensing procedures in this part do not apply to an application for a new or subsequent license.

(b) An application that accompanies a request for authorization to use the expedited licensing process must include the information specified below.

(1) *Section 34 of the Federal Power Act Qualification – Projects at Nonpowered Dams.* The application must demonstrate that the proposed facility meets the following qualifications pursuant to section 34(e) of the Federal Power Act:

(i) as of October 23, 2018, the proposed hydropower facility was not licensed under or exempted from the license requirements contained in Part I of the Federal Power Act;

(ii) the facility will be associated with a qualifying nonpowered dam;

(iii) the facility will be constructed, operated, and maintained for the generation of electric power;

(iv) the facility will use for such generation any withdrawals, diversions, releases, or flows from the associated qualifying nonpowered dam, including its associated impoundment or other infrastructure; and

(v) the operation of the facility will not result in any material change to the storage, release, or flow operations of the associated qualifying nonpowered dam.

(2) *Section 35 of the Federal Power Act Qualification – Closed-Loop Pumped Storage Projects.* The application must demonstrate that the proposed closed-loop pumped storage project meets the following qualifications pursuant to section 35(g)(2) of the Federal Power Act:

(i) the project will cause little to no change to existing surface and groundwater flows and uses, and

(ii) the project is not likely to adversely affect species listed as a threatened species or endangered species, or designated critical habitat of such species, under the Endangered Species Act of 1973.

(3) *Section 401 of the Clean Water Act.* The application must include a copy of a request for certification under section 401(a)(1) of the Clean Water Act, including proof of the date on which the certifying agency received the request; and

(i) A copy of the water quality certification;

(ii) Evidence of waiver of water quality certification. 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; or

(iii) Documentation from the state certifying agency that the water quality certification application is complete. If a certifying agency denies certification, the applicant must file a copy of the denial within 30 days after the applicant receives it.

(4) *Endangered Species Act (ESA)*. The application must include:

(i) A no-effect determination that includes documentation that no listed species or critical habitat are present at the proposed project site;

(ii) Documentation of concurrence from the U.S. Fish and Wildlife Service and the National Marine Fisheries Service (Service(s)), as necessary, on a not likely to adversely affect determination; or

(iii) A draft Biological Assessment that includes documentation of consultation with the Service(s).

(5) *Section 106 of the National Historic Preservation Act*. Documentation that section 106 consultation has been initiated with the state historic preservation officer(s) and any Indian Tribes identified as having an interest in the project.

(6) *Dam Owner Documentation*. For projects to be located at existing nonpowered dams:

(i) Documentation of consultation with any nonfederal owner of the nonpowered dam if the applicant is not the owner and confirmation that the owner is not opposed to a hydropower development at the location; or

(ii) Documentation from the federal entity that non-federal hydropower development is not precluded at the proposed location and confirmation that the federal entity is not opposed to a hydropower development at the location.

(7) *Public Parks, Recreation Areas, and Wildlife Refuges*. If the project would use any public park, recreation area, or wildlife refuge established under state or local law,

documentation from the managing entity indicating it is not opposed to the site's use for hydropower development.

§ 7.3 Adequacy Review of Application.

(a) *Adequacy Review of License Applications.* Review of the original license application for which expedited processing under this part is requested will be conducted pursuant to 18 CFR part 4 or 5, as applicable.

(b) *Deficient License Applications.* If an original license application for which expedited processing is requested under this part is rejected under 18 CFR parts 4 and 5, as applicable, the request for authorization for the expedited licensing process under this part is deemed rejected.

§ 7.4 Additional information.

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

§ 7.5 Decision on request to use expedited licensing process.

When the Commission has determined that the original license application meets the Commission's requirements as specified in 18 CFR parts 4, 5, and this part; any deficiencies have been cured; and no other additional information is needed, the Director will approve the request to use the expedited licensing process under this part. If the Commission cannot deem the application meets the Commission's requirements as specified in 18 CFR parts 4, 5, and this part; has deficiencies; or additional information is needed within 6 months of application filing, the Director will deny the request to use the expedited licensing process. If the Director denies the request to use the expedited licensing process, the original license application will be processed pursuant to a standard processing schedule under 18 CFR parts 4 and 5, as applicable.

§ 7.6 Notice of acceptance and ready for environmental analysis.

If the Director approves the request to use the expedited licensing process under § 7.5, the Commission will issue a public notice as required in the Federal Power Act, no later than 6 months after application filing, that:

- (a) Accepts the application for filing and specifies the date upon which the application was accepted for filing;
- (b) Finds that the application is ready for environmental analysis;
- (c) Requests comments, protests, and interventions;
- (d) Requests recommendations, preliminary terms and conditions, and preliminary fishway prescriptions, including all supporting documentation; and

(e) Establishes an expedited licensing process schedule, including estimated dates for:

(1) Filing of recommendations, preliminary terms and conditions, and fishway prescriptions;

(2) Issuance of a draft National Environmental Policy Act (NEPA) document, or an environmental assessment not preceded by a draft;

(3) Filing of a response, as applicable, to Commission staff's request for ESA concurrence or request for formal consultation under the ESA, or responding to other Commission staff requests to Federal and State agencies, or Indian Tribes pursuant to Federal law, including the Magnuson-Stevens Fishery Conservation and Management Act and National Historic Preservation Act;

(4) Filing of comments on the draft NEPA document, as applicable;

(5) Filing of modified recommendations, mandatory terms and conditions, and fishway prescriptions in response to a draft NEPA document or environmental assessment, if no draft NEPA document is issued; and

(6) Issuance of a final NEPA document, if any.

§ 7.7 Amendment of application.

(a) Any proposed amendments to the pending license application after issuance of the notice of acceptance and ready for environmental analysis under this section must include:

(1) an amended or new section 401 of the Clean Water Act water quality certification if the amendment would have a material adverse impact on the water quality in the discharge from the proposed project; and

(2) updates to all other material submitted under § 7.2(b)(1).

(b) If based on the information provided under paragraph (a) of this section, the proposed project under the amended license application no longer meets the requirements for expedited processing under § 7.2 of this chapter, the Director will notify the applicant that the application will no longer be processed under the expedited licensing process under this part and that further processing of the application will proceed under 18 CFR parts 4 and 5, as applicable.

(c) If the Director approves the continued processing of the amended application under this part and the amendment to the application would materially change the project's proposed plans of development, as provided in § 4.35 of this chapter, an agency, Indian Tribe, or member of the public may modify the recommendations or terms and conditions or prescriptions it previously submitted to the Commission pursuant to § 7.6. Such modified recommendations, terms and conditions, or prescriptions must be filed no later than the due date specified by the Commission for comments on the amendment.

(d) *Date of acceptance.* The date of acceptance of an amendment of application for an original license filed under this part is governed by the provisions of § 4.35 of this chapter.

§ 7.8 Other provisions.

(a) Except for provisions required by statute, the Director may waive or modify any of the provisions of this part for good cause.

(b) Late-filed recommendations by fish and wildlife agencies pursuant to the Fish and Wildlife Coordination Act and section 10(j) of the Federal Power Act for the protection, mitigation of damages to, and enhancement of fish and wildlife affected by the development, operation, and management of the proposed project and late-filed terms and conditions or prescriptions filed pursuant to sections 4(e) and 18 of the Federal Power Act, respectively, may be considered by the Commission as cause to remove the application from the expedited licensing process. If late-filed recommendations, terms and conditions, or prescriptions would delay or disrupt the expedited licensing proceeding, the Director will notify the applicant that the application will no longer be processed under the expedited licensing process under this part and that further processing of the application will proceed under 18 CFR parts 4 and 5, as applicable.

(c) *License conditions and required findings.* (1) All licenses shall be issued on the conditions specified in section 10 of the Federal Power Act and such other conditions as the Commission determines are lawful and in the public interest.

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

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

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

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

§ 7.9 Transition provision.

This part shall only apply to original license applications filed on or after
**[INSERT DATE 90 DAYS AFTER DATE OF PUBLICATION IN THE
FEDERAL REGISTER].**