

# ELECTRONIC CODE OF FEDERAL REGULATIONS

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Title 18: Conservation of Power and Water Resources

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

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### **§7.1 Applicability and definitions.**

(a) *Applicability of the expedited licensing process.* 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(b) *Applicability of existing regulations.* Except where superseded by the expedited licensing process set forth in this part, the regulations governing license applications under parts 4 and 5 of this chapter, as applicable,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) *Qualifying criteria for closed-loop pumped storage projects* means criteria that a pumped storage project must meet in order to qualify as a closed-loop pumped storage project eligible for the expedited process established under this part. These criteria require that the pumped storage project:

(i) Cause little to no change to existing surface and groundwater flows and uses;

(ii) Is unlikely 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;

(iii) Utilize only reservoirs situated at locations other than natural waterways, lakes, wetlands, and other natural surface water features; and

(iv) Rely only on temporary withdrawals from surface waters or groundwater for the sole purposes of initial fill and periodic recharge needed for project operation.

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

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## §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 unlikely 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; or

(i) A copy of water quality certification; or

(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. If a certifying agency denies certification, the applicant must file a copy of the denial within 30 days after the applicant received 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 in the action area;

(ii) Documentation of concurrence from the U.S. Fish and Wildlife Service and the National Marine Fisheries Service (Service(s)), as necessary, that the action is not likely to adversely affect ESA-listed species or critical habitat; 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.

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### **§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.

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### **§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.

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### **§7.5 Decision on request to use expedited licensing process.**

When the Commission has determined that the original license application is complete insofar as it 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 make a decision on the request to use the expedited licensing process under this part no later than 180 days after receipt of a request for authorization to use the expedited process. If the Commission cannot deem the application complete within 180 days 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.

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## **§7.6 Notice of acceptance and ready for environmental analysis.**

If the Director deems the application complete and 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 180 days after application filing, that:

(a) Accepts the application for filing and specifies the date upon which the application was accepted for filing;

(b) Finds the application 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 the 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.

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## **§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).

(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 part or if the proposed amendment significantly amends the license application, 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 parts 4 and 5 of this chapter, 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.

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## **§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 the Director determines that late-filed recommendations, terms and conditions, or prescriptions are likely to prevent the Commission from issuing a final licensing decision within two years from application receipt, 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 prescribed by the Secretary of Commerce or the Secretary of the Interior, as appropriate, pursuant to section 18 of the Federal Power Act.

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### **§7.9 Transition provision.**

This part shall only apply to original license applications filed on or after July 23, 2019.

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