

not the regulations of any of the Federal or state agencies involved in hydropower licensing. Nevertheless, we believe that these proposed procedural changes will promote better-informed decision-making by everyone involved in the licensing process.

4. Moreover, we will continue to support the resource management agencies outside the context of this rulemaking as they explore ways of improving their own licensing-related processes. We appreciate the collegial spirit in which the Departments of Agriculture, Commerce, and the Interior, in particular, have worked with us during the development of this proposed rule. We applaud the announcement of Interior's Assistant Secretary-Policy, Management, and Budget, at our joint hearing on November 7, 2002 in this proceeding, that Interior is developing an administrative appeals process for its mandatory conditions. Agriculture has had such a process for several years, and we support that Department in examining ways of streamlining its existing process. The Commission is ready to assist these other agencies in this regard.

II. Background

5. Sections 4, 10, 14, 15, and 18 of the FPA,² as amended by the Electric Consumers Protection Act of 1986 (ECPA),³ provide the regulatory framework for the licensing of non-Federal hydroelectric projects.

6. Section 10(a)(1)⁴ provides that hydropower licenses issued must be best adapted to a comprehensive plan for the affected waterways for all beneficial public uses, and must include provisions for the protection of fish and wildlife and other beneficial public uses, and that the Commission must give environmental values, including fish and wildlife and recreation, equal consideration with hydropower development. Under section 4(e),⁵ licenses for projects located within Federal reservations must also include any timely conditions mandated by the department that manages the reservation, which in most cases is the Department of Agriculture or the Interior. Under section 18, licenses must also include fishways if they are timely prescribed by the Departments of Commerce or Interior.

7. In addition, section 401(a)(1) of the Clean Water Act⁶ requires a license applicant to obtain from the state in which any project discharge into navigable waters originates, certification that such discharge will comply with applicable water quality standards, or waiver of such certification. Section 401(d) requires state water quality certification conditions to be included in hydroelectric licenses.

8. Other Federal statutes may also apply to a license application. These include, among others, the Endangered Species Act (ESA),⁷ Coastal Zone Management Act (CZMA),⁸ and National Historic Preservation Act (NHPA).⁹

A. Current Licensing Procedures

9. The Commission staff processes license applications in hearings conducted by notice and comment procedures. Licensing procedures have evolved over time in response to changes in the statutory framework, increased public awareness of the need for increased environmental protection, and as a result of Commission efforts to make the process more efficient and effective.

10. Under the existing "traditional" process, prior to filing an application, applicants must consult with Federal and state resource agencies, affected land managing agencies, Indian tribes, state water quality agencies and, to some extent, the public, and must provide the consulted entities with information describing the proposed project. The applicant must also conduct studies necessary for the Commission staff to make an informed decision on the application. Under the Commission's detailed regulations concerning pre-filing consultation and processing of filed applications,¹⁰ the formal proceeding before the Commission does not begin until the license application is filed. Accordingly, the Commission staff do not generally participate in pre-filing consultation.

11. After an application is filed, the Federal agencies with responsibilities under the FPA and other statutes, the states, Indian tribes, and other participants have opportunities to request additional studies and provide comments and recommendations. Federal agencies with mandatory conditioning authority also provide their conditions. The Commission staff may ask for additional information that

it needs for its environmental analysis. All of this information is incorporated into the Commission staff's environmental review under the NEPA.

12. The Commission's regulations also provide for an alternative licensing process (ALP), which combines the pre-filing consultation process under the FPA with the environmental review process under NEPA.¹¹ Under this process, the parties work collaboratively prior to the filing of the application to develop the application and, in most cases, a preliminary draft NEPA document, and generally anticipate efforts to conclude a settlement agreement. Also, the Commission staff participate to a greater extent than under the traditional process.

B. Reform Efforts

13. There is widespread agreement that additional improvements are needed to further the goal of achieving a more efficient and timely licensing process without sacrificing environmental protection. The President's National Energy Policy report included recommendations in this regard,¹² and the Commission, the Federal agencies, and many hydropower program stakeholders are engaged in a variety of activities toward the same end.

14. The Commission staff's ongoing efforts include an Outreach Program in which interested persons meet with members of the licensing staff to learn about the licensing process and related laws and Commission regulations; various interagency training activities; encouragement of settlements through the use of Alternative Dispute Resolution (ADR); and issuance of guidance documents.¹³ In May 2001, the Commission staff prepared a comprehensive report on hydropower licensing, including recommendations designed to make the licensing process more efficient and timely.¹⁴ The Commission held in December 2001 and November 2002 Hydroelectric Licensing Status Workshops to identify and focus attention on long-pending license applications and find ways to bring

¹¹ 18 CFR 4.34(i).

¹² *Report of the National Energy Policy Group*, May 2001.

¹³ Staff guidance documents include the Licensing Handbook, Environmental Analysis Preparation, and ALP guidelines. All of these are posted on the Commission's Web site (<http://www.ferc.gov/hydro>).

¹⁴ *Report to Congress on Hydroelectric Licensing Policies, Procedures, and Regulations—Comprehensive Review and Recommendations Pursuant to Section 603 of the Energy Act of 2000*, Federal Energy Regulatory Commission, May 2001 (Section 603 Report). The report can be viewed at <http://www.ferc.gov/hydro/docs/section603.htm>.

² 16 U.S.C. 797, 803, 807, 808, and 811. Sections 4 and 10 apply to all licenses. Sections 14 and 15 are specific to the issuance of a new license following the expiration of an initial license.

³ Pub. L. 99-495, 100 Stat. 1243.

⁴ 16 U.S.C. 803(a)(1).

⁵ 16 U.S.C. 797e.

⁶ 33 U.S.C. 1341(a)(1).

⁷ 16 U.S.C. 1531–1543.

⁸ 16 U.S.C. 1451–1465.

⁹ 16 U.S.C. 470–470w-6.

¹⁰ See 18 CFR Parts 4 and 16.