

shall apply in the form in which it was promulgated prior to that date.

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(k) *Transition provisions.* (1) This section shall apply to license applications for which the deadline for filing a notification of intent to seek a new or subsequent license, or for filing a notification of intent to file an original license application required by § 5.3 of this chapter, is [insert date three months following issuance date of final rule] or later.

(2) Applications for which the deadline date for filing a notification of intent to seek a new or subsequent license is prior to [insert date three months following issuance date of final rule], and potential applications for original license for which the potential applicant commenced first stage pre-filing consultation pursuant to § 4.38(b) prior to [insert date three months following issuance date of final rule], are subject to the Commission's regulations in § 4.32 as promulgated prior to [insert date three months following issuance date of final rule].

(3) This section shall apply to exemption applications filed on or after [insert date three months following issuance date of final rule]. For exemption applications filed prior to [insert date three months following issuance date of final rule], this section shall apply in the form in which it was promulgated prior to that date.

4. Amend § 4.34 as follows:

a. In paragraph (b)(1), add at the beginning of the third sentence which begins "If ongoing agency proceedings * * *" the phrase "In the case of an application prepared other than pursuant to part 5 of this chapter,".

b. Paragraph (b)(5) is added.

c. Paragraph (e) is revised.

d. Paragraph (i)(5) is removed.

e. Paragraph (i)(9) is removed.

f. Paragraph (j) is added.

The revised and added text reads as follows:

§ 4.34 Hearings on applications; consultation on terms and conditions; motions to intervene; alternative procedures

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(b) * * *

(5)(i) With regard to certification requirements for a license applicant under section 401(a)(1) of the Federal Water Pollution Control Act (Clean Water Act), an applicant shall file within 60 days from the date of issuance of the notice of ready for environmental analysis:

(A) A copy of the water quality certification;

(B) A copy of the request for certification, including proof of the date

on which the certifying agency received the request; or

(C) Evidence of waiver of water quality certification as described in paragraph (f)(5)(ii) of this section.

(ii) A certifying agency is deemed to have waived the certification requirements of section 401(a)(1) of the Clean Water Act if the certifying agency has not denied or granted certification by one year after the date the certifying agency received a written request for certification. If a certifying agency denies certification, the applicant must file a copy of the denial within 30 days after the applicant received it.

(iii) Notwithstanding any other provision in Title 18, Chapter I, subchapter B, part 4, any application to amend an existing license, and any application to amend a pending application for a license, requires a new request for water quality certification pursuant to paragraph (b)(5)(i) of this section if the amendment would have a material adverse impact on the water quality in the discharge from the project or proposed project.

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(e) Consultation on recommended fish and wildlife conditions; section 10(j) process.

(1) In connection with its environmental review of an application for license, the Commission will analyze all terms and conditions timely recommended by fish and wildlife agencies pursuant to the Fish and Wildlife Coordination Act for the protection, mitigation of damages to, and enhancement of fish and wildlife (including related spawning grounds and habitat) affected by the development, operation, and management of the proposed project. Submission of such recommendations marks the beginning of the process under section 10(j) of the Federal Power Act.

(2) The Commission may seek clarification of any recommendation from the appropriate fish and wildlife agency. If the Commission's request for clarification is communicated in writing, copies of the request will be sent by the Commission to all parties, affected resource agencies, and Indian tribes, which may file a response to the request for clarification within the time period specified by the Commission.

(3) If the Commission believes any fish and wildlife recommendation may be inconsistent with the Federal Power Act or other applicable law, the Commission will make a preliminary determination of inconsistency in the draft environmental document or, if none, the environmental analysis. The

preliminary determination, for those recommendations believed to be inconsistent, shall include:

(i) An explanation why the Commission believes the recommendation is inconsistent with the Federal Power Act or other applicable law, including any supporting analysis and conclusions, and

(ii) An explanation of how the measures recommended in the environmental document would equitably protect, mitigate damages to, and enhance, fish and wildlife (including related spawning grounds and habitat) affected by the development, operation, and management of the project.

(4) Any party, affected resource agency, or Indian tribe may file comments in response to the preliminary determination of inconsistency within the time frame allotted for comments on the draft environmental document or, if none, the time frame for comments on the environmental analysis. In this filing, the fish and wildlife agency concerned may also request a meeting, telephone or video conference or other additional procedure to attempt to resolve any preliminary determination of inconsistency.

(5) The Commission shall attempt, with the agencies, to reach a mutually acceptable resolution of any such inconsistency, giving due weight to the recommendations, expertise, and statutory responsibilities of the fish and wildlife agency. If the Commission decides, or an affected resource agency requests, the Commission will conduct a meeting, telephone, or video conference, or other procedures to address issues raised by its preliminary determination of inconsistency and comments thereon. The Commission will give at least 15 days' advance notice to each party, affected resource agency, or Indian tribe, which may participate in the meeting or conference. Any meeting, conference, or additional procedure to address these issues will be scheduled to take place within 90 days of the date the Commission issues a preliminary determination of inconsistency. The Commission will prepare a written summary of any meeting held under this subsection to discuss 10(j) issues, including any proposed resolutions and supporting analysis, and a copy of the summary will be sent to all parties, affected resource agencies, and Indian tribes.

(6) The section 10(j) process ends when the Commission issues an order