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DEPARTMENT OF THE INTERIOR

Office of the Secretary

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[Docket Number 001 206 343-1018-02 and I.D. 011801A]

Policy for Review of Mandatory Conditions Developed by the Departments of the Interior and
Commerce in the Context of Hydropower Licensing

AGENCIES: Office of the Secretary, Interior; National Oceanic and Atmospheric Administration
(NOAA), National Marine Fisheries Service (NMFS), Commerce.

ACTION: Notice of interagency policy.

SUMMARY: The Department of the Interior and the Department of Commerce (Departments) have formalized a process for public review of and comment on mandatory conditions and prescriptions the Departments develop for inclusion in hydropower licenses issued by the Federal Energy Regulatory Commission pursuant to Part I of the Federal Power Act. This policy provides an opportunity for public comment on the Departments' mandatory conditions and prescriptions for both the traditional licensing process and the alternative licensing process.

EFFECTIVE DATE: This policy is effective January 19, 2001.

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SUPPLEMENTARY INFORMATION:

I. Background

Pursuant to Part I of the Federal Power Act (Act), 16 U.S.C. 791a et seq., the Department of the Interior and the Department of Commerce (Departments) were granted certain authorities in the process for licensing non-federal hydroelectric generating facilities. The Departments provide input to the Federal Energy Regulatory Commission (Commission) on a number of issues related to the license application. Among others, the Departments' authorities include the U.S. Fish and Wildlife Service's and National Marine Fisheries Service's authority to prescribe fishways pursuant to section 18 of the Act, 16 U.S.C. 811, and the Secretary of the Interior's authority pursuant to section 4(e) of the Act, 16 U.S.C. 797(e), to establish conditions necessary for the adequate protection and utilization of reservations. The affected reservations may include lands managed by the U.S. Fish and Wildlife Service, the National Park Service, the Bureau of Land Management, the Bureau of Reclamation, or the Bureau of Indian Affairs.

The Act requires that both section 4(e) conditions and section 18 prescriptions be included in any license issued by the Commission. The mandatory nature of these prescriptions and conditions has been upheld by Federal courts, including the Supreme Court. Escondido Mutual Water Co. v. La Jolla Band of Mission Indians, 466 U.S. 765 (1984); American Rivers v. FERC, 201 F.3d 1186 (9th Cir. 1999); American Rivers v. FERC, 129 F.3d 99 (2d Cir. 1997); Bangor Hydroelectric Company v. FERC, 78 F.3d 659 (D.C. Cir.1996). After incorporation into a license, the prescriptions and conditions are subject to judicial review under the Act's appeal procedures, which place exclusive jurisdiction in the Federal courts of appeals, 16 U.S.C. 8251(b).

The Departments' practice has been to try to work closely with license applicants in developing conditions and prescriptions. However, licensees and others have expressed interest in having the Departments consider outside input and comments on these conditions and prescriptions through a standardized review process. Such a standardized process would provide an opportunity for interested parties to provide comment on the conditions and prescriptions.

The Departments published two *Federal Register* notices while developing this review process. First, on May 26, 2000, the Departments published a *Federal Register* notice soliciting public comments on the Departments' establishment of a review process for their conditions and prescriptions, and asking six specific questions regarding a review process. 65 FR 34151 (May 26, 2000). Second, the Departments solicited public comments on a draft review process. 65 FR 77889 (December 13, 2000). Refer to the December 13, 2000, *Federal Register* publication for a summary of the significant comments submitted in response to the May 26, 2000 notice, and the Departments' responses. In response to the December 13, 2000 notice, the Departments received 18 sets of

comments representing a broad range of interests. The Departments thoroughly reviewed and considered all comments and have modified the policy accordingly.

The Mandatory Conditions Review Process (MCRP) is limited to sections 4(e) and 18 conditions and prescriptions. The recommendations filed by the Departments under sections 10(a) and 10(j) of the Act are subject to review by the Commission under Commission procedures, and are not governed by the MCRP.

The MCRP is effective immediately, but implementation of the MCRP depends on the licensing stage of the application. For applications in the initial consultation stage, the review procedures will apply in full and will be implemented within 30 days of the adoption of this policy. For applications in between the initial consultation stage and the Ready for Environmental Analysis (REA) notice, the Departments will discuss implementation with the applicant, the Commission, and other interested parties. Implementation of the MCRP will depend on the license application's timing within the licensing process and whether critical milestones have been reached. For applications where the Commission has already issued an REA notice, this MCRP will not apply. However, to the extent that notice and comment has been provided on a specific license application, it will continue. The Departments' phased implementation is based upon practical project specific considerations and the desire to minimize delay.

This policy is in effect until revised or revoked. However, the Departments intend to evaluate this review policy after a two-year trial period. Such a trial period will allow for meaningful evaluation based on experience gained in the review policy's implementation.

Finally, the Departments have removed Section VI, Mandatory Conditions Review Process

Step-by-Step, because it was redundant and could be confused with the narrative.

II. Commission Coordination

The Departments have coordinated with the Commission staff regarding harmonizing the MCRP with the Commission's licensing process. The most significant issue raised by the Commission staff was their concern that the review process would cause delay or give that appearance. They were also concerned that it was unclear when this policy would apply, and that the Commission might be unsure about when the Departments reached closure. Commission staff also were concerned about the Departments' use of reservations of authority and potential conflicts with the Commission's regulations. The Departments discussed possible ways to alleviate those concerns with Commission staff, and believe that the Departments addressed their concerns through modifications to the MCRP. These modifications facilitate the licensing process by tightening deadlines to minimize delay and any potential for conflict with the Commission's regulations. The Departments clarified that this policy will be applicable to all hydropower licensing proceedings, and clarified the language on reservation of authority. The Departments will assess whether this policy needs any further modifications in the evaluation of the review policy after the two-year trial period based on the Commission's concerns.

In addition, Commission staff provided written comments on January 12, 2001, applauding our commitment to public notice and comment and stating that the MCRP provides a reasonable opportunity for public input on the Departments' mandatory conditions. Commission staff reiterated two general concerns with the draft policy as discussed in the paragraph above. The first concern was that the proposed policy could cause delay and not fit within the Commission's regulations because the

draft MCRP did not fit within Commission's regulatory deadlines for submitting mandatory conditions (or draft conditions and a schedule for finalizing them) within 60 days of their REA notice. As mentioned above, the Departments addressed this concern in the final policy by committing to meet the 60 day REA notice deadline. This change removes the open-ended timeframe, possible delays, and uncertainty. The second concern was that the Departments' response to issues raised on rehearing is not permitted by the Commission's regulations. The Departments addressed this concern in the final policy by stating that they will respond in the form of a brief, as provided in the Commission's regulations at 18 CFR 385.713(d)(2). This change to the MCRP brings the Departments' response in conformance with the Commission's regulations.

III. Response to Comments

In response to the December 13, 2000, *Federal Register* notice, the Departments received comments from a variety of stakeholders, including: Commission staff, Duke Power and Nantahala Power and Light; Southern California Edison Company; Kleinschmidt Associates; Penobscot Indian Nation; Troutman Sanders L.L.P.; National Hydropower Association; American Public Power Association; Hydropower Reform Coalition; Pacific Gas and Electric Company; Public Utility Districts of Chelan County, Douglas County and Grant County and the Sacramento Municipal Utility District; Shoshone-Paiute Tribes of the Duck Valley Reservation; Edison Electric Institute; Public Utility District No. 2 of Grant County; Eugene Water and Electric Board; Columbia River Inter-Tribal Fish Commission; Western Urban Water Coalition; and Idaho Power.

After thorough consideration of all of the comments received, the Departments provide the

summaries of general and specific comments received and the Departments' responses.

A. Response to General Comments

1. MCRP Could Cause a Delay in the Licensing Process

Numerous commenters expressed concern that the proposed MCRP would potentially or likely cause a delay in the licensing process. While the Departments disagree, they have made modifications that are responsive to this concern. The Departments are also concerned about avoiding delays because they have a fundamental interest in the licensing process moving efficiently as part of good government and in order to provide protection of their public and tribal resources as soon as possible. Delays in licensing result in delay of important environmental mitigation. The Departments carefully evaluated each step in the proposed MCRP to incorporate measures to reduce delay. Four significant changes were made to alleviate commenters' concerns. First, the Departments have committed to submitting preliminary conditions and prescriptions within 60 days of the REA notice. In order to ensure that this submission is as complete as possible and that the Departments can receive meaningful comments, the Departments need to receive all requested information from the applicant in a timely manner and accurate notification from the Commission of when the REA notice will be issued.¹ Second, when submitting the preliminary conditions and prescriptions, the Departments will provide a

¹In the Interagency Task Force (ITF) report on FERC Noticing Procedures in Hydroelectric Licensing, the Commission committed to provide a preliminary schedule in scoping document 1 and an updated schedule in scoping document 2 for issuance of the REA notice. In addition, in the ITF report on Improving the Studies Process in FERC licensing, the Departments committed to provide timely requests for studies needed to develop the conditions and prescriptions.

schedule for submitting the modified conditions and prescriptions. Third, the Departments have focused the comment period on the 60 days following submission of the preliminary conditions and prescriptions. To ensure timely development of the modified conditions and prescriptions, the Departments need all stakeholders to provide substantive comments during this period, rather than the draft NEPA comment period. Fourth, the Departments will respond to Requests for Rehearing only when substantive issues are raised that may not have been clearly addressed earlier. The Departments anticipate that this will occur infrequently. The issue of delay will be evaluated after the two-year trial period.

2. Uncertainty in Implementing the Policy

Some commenters were uncertain as to which projects the review process will apply. In addition, some commenters raised concerns that the six-month delay in implementing the policy was too long. The Departments agree. The MCRP is effective immediately, but the Departments will phase in implementation as described in the review policy.

3. Need to Consider and Address all Comments

Some commenters raised concerns that the Departments did not fully consider and address their concerns raised in response to the May 26, 2000, *Federal Register* notice. The Departments disagree. All comments received were carefully reviewed and evaluated. In the December 13, 2000, *Federal Register* notice, the Departments responded to comments, grouped by similar issues. Although all comments were considered, not all comments were accepted. Many comments were

rejected because their inclusion could lengthen the licensing process or were impracticable given the federal agencies' current regulations.

4. Length of Public Comment Period for the Proposed MCRP

Several commenters expressed concern that the public review time was too short, and was not consistent with the Administrative Procedures Act (APA). The Departments disagree. Because the MCRP is an agency policy, it is not subject to the notice and comment provisions of the APA. However, the Departments are of the view that the development of the review process would benefit from public input. As a result, two comment periods were initiated, one obtaining general ideas on possible frameworks and another specific comments on a proposed process. In addition, the Departments intend to seek public input as part of the evaluation after the two-year trial period.

Several commenters also requested additional time to review the proposed MCRP in conjunction with their review of the proposed Section 18 Fishway Policy published in the *Federal Register*. 65 FR 80898 (December 22, 2000). The Departments disagree. These two documents are interrelated, but focus on different aspects of development of the fishway prescriptions. The proposed Fishway Policy focuses on developing prescriptions from beginning to end while the MCRP elaborates on review of prescriptions. Commenters will benefit by having the MCRP finalized while still providing comments on the proposed Fishway Policy. In addition, the Departments will ensure consistency between the MCRP and the proposed Fishway Policy.

5. Standards and Guidelines for Developing Conditions and Prescriptions

Several commenters requested that this policy provide clear standards and guidelines for exercising mandatory authority such as identification of goals and objectives. The Departments disagree. This policy addresses the opportunity for public review of conditions and prescriptions, not their formulation. These commenters' issues are addressed in the Interagency Task Force to Improve Hydroelectric Licensing Processes (ITF) reports and the proposed Fishway Policy.

Some commenters requested that specific guidelines be incorporated into the MCRP to provide details on the definitions and development of an administrative record. The Departments disagree. As mentioned above, the scope of this policy does not include development of conditions and prescriptions, and their administrative record.

6. Consistency with Ongoing Hydropower Licensing Activities

Several commenters stated that the proposed MCRP was inconsistent with commitments the Departments made to Congress during hearings and during their participation in the ITF. The Departments disagree. The Departments specifically committed to the development of a public review process for conditions and prescriptions through the ITF process. The Departments have informed Congress of this commitment.

Some commenters suggested that the proposed MCRP is inconsistent with the ongoing Section 603 study identified in the Energy Policy Act of 2000 and the hydropower investigation currently underway by the General Accounting Office (GAO). The Departments disagree. Finalizing the review policy prior to completion of these two ongoing initiatives allows the Commission's Section 603 report

and GAO's study to assess this review policy as part of their analysis and recommendations. In addition, the Departments made every effort to avoid delay in the Commission's process, which is a primary focus of both the Section 603 and GAO studies. In the two-year trial period, the Departments will consider relevant findings and recommendations of the Section 603 and GAO reports.

7. Equal Consideration and Public Interest Standards Need to be Considered

Some commenters suggested that the Departments utilize equal consideration and public interest standards when developing and implementing the MCRP. The Departments disagree. Equal consideration and public interest determinations are made by the Commission in its licensing decisions. Analyses conducted by the Departments would be duplicative of the Commission's process and could result in delay and confusion.

8. Need for Regulatory Change or an Amendment to the Federal Power Act (Act)

Commenters identified several steps in the proposed MCRP that will likely require either an amendment to the Act or modification to the Commission's regulations. The Departments disagree that the MCRP is inconsistent with the Act. The Departments modified the policy to better fit the MCRP within the Commission's regulations. This issue will be evaluate after the two-year trial period.

9. Trial Period

Many commenters expressed support for the trial period and evaluation after two years. Several commenters suggested that the Departments, with stakeholders, develop criteria to evaluate this

policy after the two-year trial period. The Departments have not developed specific criteria, but rather identified areas that may need to be evaluated to determine the usefulness of steps within the policy and to identify what areas may need changes. Some of the issues to be evaluated after the two-year trial period include: (1) whether the Departments are receiving all needed information from applicants in time to be incorporated in the preliminary conditions and prescriptions at the REA notice; (2) whether the Departments are receiving adequate notification of issuance of the REA notice; (3) whether the Departments are able to meet the 60 day deadline for submission of the preliminary conditions and prescription; (4) how many and what type of comments are received at the draft NEPA stage; (5) does this policy contribute to delays in the completion of the Commission's final NEPA document; (6) does the response to substantive issues during the Request for Rehearing stage provide a useful review; (7) has the review of conditions and prescriptions developed as part of a settlement agreement been successful; (8) does the process allow stakeholders a meaningful review of the Departments' conditions and prescriptions; (9) should the MCRP be developed into a regulation; and (10) are there conflicts between the MCRP and the Commission's regulations. The Departments are committed to providing an opportunity for public input during this evaluation but have not yet determined how public input will be provided.

10. Appeal Mechanism

Numerous commenters requested that the Departments again consider implementing an appeals process, including Administrative Law Judges (ALJ) and full evidentiary hearings, such as those used by the Forest Service. However, one commenter did not support an ALJ process because it would

significantly increase delay. The Departments disagree with the idea of an appeals process such as was suggested by the commenters for the following reasons. In developing the MCRP, the Departments focused on two fundamental principles. The first principle is to provide an opportunity for meaningful comment. The best time to provide meaningful comment is as early in the development of the conditions and prescriptions as possible. This time occurs when the Departments provide their preliminary conditions and prescriptions to the Commission in response to the Commission's REA notice. At this point, the Departments have worked with the applicant and other interested parties, and provided their preliminary conditions and prescriptions. These preliminary conditions and prescriptions are still in a formative stage, as is the Commission's decision on licensing, allowing the Departments to make changes relatively easily. The second fundamental principle guiding the Department's decision is to provide a meaningful review within the Commission's regulatory process to avoid delay and allow this process to work efficiently. The Departments will have the most time to consider comments when they are provided during the period when the Commission is preparing its NEPA document. Additionally, choice of this time period also allows the Departments to give commenters as long as 60 days to provide comments. Therefore, both commenters have sufficient time to provide comments, and the Departments have sufficient time to consider the comments. This allows the Departments to have a meaningful review without causing any delays in the Commission's licensing process. Additionally, no changes to the Commission's regulations are needed to accommodate this review. Therefore, the Departments are providing the time for further consideration of their preliminary conditions and prescriptions at the REA notice stage rather than through an appeals mechanism that would occur late in the licensing process.

11. Consultation with the Tribes

A few commenters expressed concerns that the tribes may not be adequately consulted, are often brought into the process late, and should be consulted for both sections 4(e) and 18 conditions and prescriptions. The Departments agree. Both sections 4(e) and 18 may be of significant importance to tribes and trigger government-to-government consultation. The Departments will work with the tribes to improve coordination when exercising these authorities on project specific situations early in the process. This policy now reflects the tribes' broader interest in both sections 4(e) and 18 and the Departments' commitment to consultation on both issues. The Departments will also include interested tribes during the evaluation after the two-year trial period.

12. Will the MCRP Weaken the Conditions and Prescriptions

A few commenters expressed concern that this policy will weaken the conditions and prescriptions. While acknowledging these concerns, the Departments believe that their conditions and prescriptions will be stronger and more effective if developed through a public process that is well documented in an administrative record. The MCRP allows all stakeholders to provide input into the development of the conditions and prescriptions. The Departments believe that this is good government. In addition, commenters are requested to provide supporting information that can help the Departments assess whether or not potential change to the conditions and prescriptions will still provide protection of the public and tribal resources.

B. Response to Process Specific Comments

1. Level of Review

Several commenters raised the concern that a higher level/meaningful review of the conditions and prescriptions would not take place under the MCRP. The Departments disagree and clarified the policy language. Modified conditions and prescriptions will be reviewed and submitted at a level at least as high as the regional director, regional administrator, or state director. Responses to Requests for Rehearing that raise substantive issues with conditions and prescriptions are submitted by the Solicitor's Office for Interior and General Counsel's Office for Commerce. Additionally, individual issues needing higher level review may be given that review by the appropriate office in the Department.

2. Participation

A few commenters expressly supported the Departments' decision to have the review process open to all stakeholders, while others disagreed and suggested that the review process be limited to license applicants. As stated in the December 13, 2000, *Federal Register* notice, the Departments agree that all participants in the process may have a significant interest in the conditions and prescriptions; therefore, all participants in the licensing process may take part in the review process without adding delay. Consequently, the MCRP allows review opportunity for the license applicant, all participants in the licensing process, and the general public.

3. Alternatives Analysis

One commenter suggested that the MCRP should discuss how the Departments will review and

evaluate alternatives. The Departments are committed to reviewing and considering all comments, including alternatives and supporting information received. When submitting the modified conditions and prescriptions, the Departments will provide a response to comments that includes a discussion of alternatives provided by the commenters. The Departments encourage interested participants to provide information on alternatives that meet the resource management goals and objectives.

Several commenters requested that the Departments fully evaluate economics when developing conditions and prescriptions. While the Departments will not conduct a full economic evaluation of the proposed project, they will consider least cost options that meet resource management goals and objectives. The Departments encourage interested parties to provide least cost options and supporting information during the comment period for consideration by the Departments. Where such information has been provided, the Departments have committed, through the ITF reports and proposed Fishway Policy, to consider these alternatives and select the least cost option that meets the stated resource management goals and objectives.

4. Preliminary Conditions and Prescriptions

Several commenters suggested that the Departments provide preliminary conditions and prescriptions during the draft application stage; however one commenter disagreed with this option. The Departments disagree with providing preliminary conditions and prescriptions during the draft application stage. However, the Departments are committed to working closely with the applicant and other interested parties whenever possible during this pre-filing consultation process. For example, in the proposed Fishway Policy, the Departments point out that formulation of fishways is an iterative

process resulting from work with the applicant and others. To the extent practicable, the Departments will discuss with parties resource management goals and objectives, and ways to meet those goals, including conditions and prescriptions. Moreover, significant studies may not be completed until after the draft application stage. Without requested information the conditions and prescriptions would likely to be more protective than necessary to meet goals and objectives, speculative, and potentially misleading. The Departments question the usefulness of receiving comments on something that is going to change, potentially significantly. The proposed project could change significantly between draft and final applications. The Departments will work with parties throughout the pre-filing stage, when practicable, but the formal review process will not be initiated until after the application is filed.

Numerous commenters, including the Commission in its initial comments, requested that the Departments commit to submitting at least preliminary conditions in response to the REA notice. One commenter also disagreed with the Departments' concern that they will not have all needed information before the REA notice. Another commenter wanted the Departments to emphasize that timely submissions can only occur if the necessary studies are completed on time. Despite significant concerns, the Departments are committing to submitting preliminary conditions and prescriptions in response to the REA notice. For a more detailed discussion of these changes to the review policy see General Comment #1 "MCRP Could Cause Delay in Licensing." The Departments also modified the provisions of the MCRP related to the administrative record, allowing more streamlined filing of preliminary conditions and prescriptions. The submission of the preliminary conditions and prescriptions will include a rationale and reference relevant information that is already filed with the Commission. However, the Departments will not provide a complete administrative record or index at the time of

submitting preliminary conditions and prescriptions. A complete administrative record and index will be submitted with the modified conditions and prescriptions.

There will be situations that are unpredictable or out of the Departments' control that could prevent the Departments from making the REA notice deadline. Those exceptional circumstances (such as competing applications) should be unusual, and in these situations the MCRP will need to be implemented on a case-by-case basis, working with the Commission, applicant, and other parties. The Departments have the incentive to participate in timely and efficient licensing processes both as a matter of good government and to help protect the public and tribal resources. Accordingly, this modified approach will be used only when justified.

Commenters expressed concern that the 45-day comment period to review the preliminary conditions and prescriptions is not sufficient. The Departments agree, and expanded the time frame from 45 days to 60 days.

5. Reservation of Authority

Several commenters suggested that the use of a reservation of authority to be exercised before the license is issued is too wide-open and has too much uncertainty. Upon consideration, the Departments limited use of reservation of authority language.

Commenters expressed concern that a reservation of authority can not be exercised within the term of the license. Other commenters asked how the MCRP will apply for conditions developed when the reservation of authority is exercised. Licenses are issued for terms of 30 to 50 years. Consequently, even with the most thorough pre-licensing analysis, it is not possible to predict relevant

events during the term of a license. Reservations of authority to submit conditions and prescriptions during the term of a license have been legally upheld (Wisconsin Public Service Corp. v FERC 32 F.3d 1165 (7th Cir. 1994)) and are included in Commission's licenses. In response to the second comment, it is hard to predict how the MCRP will apply because the reservation of authority has rarely been used. However, the Departments will work with all interested parties, if and when this happens, to determine how to apply the MCRP.

6. Review of an Agency's Lack of Action

A commenter requested that the Departments reconsider providing a comment opportunity for times when the Departments are not submitting conditions and prescriptions or are not reserving authority during a licensing process. The Departments agree that they will consider comments when they have not submitted conditions and prescriptions or are not reserving authority. However, it must be noted that procedural limitations may make it difficult for the Departments to become involved late in the process. These issues should be raised to the Departments in the initial consultation phase or as early as possible in the licensing process to allow the Departments the opportunity to enter the licensing process at a meaningful stage.

7. Submission of Modified Conditions and Prescriptions

Some commenters raised concerns that there is too much time between the receipt of comments on the preliminary conditions and prescriptions and the submission of the modified conditions

and prescriptions. The Departments will use this time to take any actions needed to adequately consider the comments and address the concerns raised.

Some commenters suggested submitting the modified conditions and prescriptions before the issuance of the draft NEPA document. The Departments concluded that this is not workable and could lead to confusion. If the Departments modify their conditions before reviewing and analyzing the information in the NEPA document then the Departments would need to further modify the conditions and prescriptions after the NEPA analysis, further complicating the process.

Several commenters were concerned that submitting the modified conditions and prescriptions after the close of the NEPA comment period will delay the licensing process. The Departments appreciate the dilemma. In order to facilitate a timely submission of the modified conditions and prescriptions, the Departments need substantive comments during the public comment period after the submission of the preliminary conditions and prescriptions. If commenters wait to submit substantive comments until the NEPA comment period, then delays in the licensing process may occur. The Departments will reconsider this issue during evaluation of the two-year trial period.

Several commenters requested that the Departments explore ways to include a full review of modified conditions and prescriptions before the Commission licensing decision, especially if they significantly differ from the preliminary conditions and prescriptions. The Departments were concerned that an additional review step would delay the Commission's completion of its final NEPA document. The Departments will revisit the modified conditions and prescriptions by reviewing and responding to significant issues raised in Requests for Rehearing.

8. Requests for Rehearing

Numerous commenters raised concerns on the proposal to respond to Requests for Rehearing on issues regarding the Departments' conditions and prescriptions. Commenters stated that this step (1) will cause delay and uncertainty in the process, (2) is too late in the process, (3) will lead to endless answers and requests, (4) does not state the level of Departmental review, and (5) relies on the Commission issuing tolling orders. In order to address these concerns, the Departments re-worked and clarified this step so that they will respond, in the form of a brief according to the Commissions' regulations, only to requests that raise substantive issues relative to their conditions and prescriptions. These responses will only occur when significant issues are raised that were not clearly addressed earlier. In addition, the Departments, as government agencies with public and tribal resource responsibilities, need to evaluate new information that could impact the agency decisions, regardless of how late in the process it occurs just as the Commission is required to do. The Departmental office actually conducting the review will depend on the issue raised in the request for rehearing, however, the response will be filed by the Solicitors or General Counsel offices. In addition, this response will not rely on tolling orders because it will be sent to the Commission if they issue a tolling order, or will be sent to the requester and filed with the Commission if the Commission does not issue a tolling order.

9. Settlement Agreements

One commenter raised the issue that settlement agreements can be developed through both the traditional and hybrid licensing processes, not just the Alternative Licensing Process (ALP). The Departments clarified language to state that the MCRP applies to all settlement agreements, not just

those developed under the ALP. In addition, a review process for all settlement agreements will be implemented through a modified process compared to the traditional process, because of the delicate balance established by these agreements.

A few commenters expressed concern that the Departments are going to make changes to the conditions and prescriptions without consultation with the settlement parties. The Departments revised the language to emphasize that they will negotiate with participants, based on the communications protocols, on any changes to the agreed-upon conditions and prescriptions that may be needed due to comments received.

One commenter expressed concern that the Departments were “double-dipping” the settlement agreement by separately submitting conditions and prescriptions to the Commission. The Departments clarified language to state that they are not “double-dipping” the settlement agreement but are separately filing their agreed-upon conditions and prescriptions to be certain they are properly included in the license and enforced. These conditions and prescriptions filed with the Commission will be consistent with the conditions and prescriptions negotiated and incorporated in the settlement agreement.

10. Ceded Lands

One commenter requested that ceded lands be incorporated into this review process. Interested tribes are welcome to raise any issues about ceded lands to the Departments during the comment period outlined in this policy.

IV. Procedural Requirements

A. Regulatory Planning and Review

Under Executive Order 12866 (58 FR 51735 (October 4, 1993)), it has been determined that the action (implementation of a policy) is not a ‘significant regulatory action.’ This policy describes an opportunity for public review of and comment on conditions and prescriptions that the Departments develop as part of the Commission’s existing hydropower licensing process. Thus, the policy would not impose a compliance burden on the economy generally.

B. Administrative Procedures Act

This policy is not subject to prior notice and an opportunity to comment because it is a general statement of policy (5 U.S.C. 553(b)(A)). However, the Departments received public comments twice during the development of the MCRP, even though there was not a statutory requirement to do so.

C. Regulatory Flexibility Act

This policy is not subject to notice and comment under the Administrative Procedure Act or any other law, and therefore not subject to the analytical requirements of the Regulatory Flexibility Act (5 U.S.C. 601 et seq.). Furthermore, the Departments have determined that this policy will not have a significant economic effect on a substantial number of small entities as defined under the Regulatory Flexibility Act (5 U.S.C. 601 et seq.). This policy is guidance and does not compel any party to conduct any action. This policy would provide a standardized opportunity for public comment on the Departments’ conditions and prescriptions. Therefore, the Departments believe that no economic effects on small entities will result from compliance with the criteria in this policy.

D. Small Business Regulatory Enforcement Fairness Act

This policy is not a major rule under 5 U.S.C. 804(2), the Small Business Regulatory Enforcement Fairness Act. This policy:

1. Will not have an annual effect on the economy of \$100 million or more and is expected to have no significant economic impacts.

2. Will not cause a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions and will impose no additional regulatory restraints in addition to those already in operation.

3. Does not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises. The intent of the policy is to provide a standardized opportunity for public comment on the Departments' conditions and prescriptions. It will impose no additional regulatory restraints to those entities already in operation. The Departments have, therefore, determined that the policy will not have a significant economic effect on a substantial number of small entities as defined in the Regulatory Flexibility Act (5 U.S.C. 601 et seq.).

E. Unfunded Mandates Reform Act

In accordance with the Unfunded Mandates Reform Act (2 U.S.C. 1501, et seq.):

1. This policy will not “significantly or uniquely” affect small governments. A Small Government Agency Plan is not required. The policy does not require any additional management responsibilities. The Departments expect that this policy will not result in any significant additional expenditures by entities that participate in the Commission’s hydropower licensing process.

2. This policy will not produce a Federal mandate of \$100 million or greater in any year, that is, it is not a "significant regulatory action" under the Unfunded Mandates Reform Act. This rule is not expected to have significant economic impacts nor will it impose any unfunded mandates on other Federal, State, or local governments agencies to carry out specific activities.

F. Federalism

In accordance with Executive Order 13132, this policy does not have significant Federalism effects; therefore, a Federalism assessment is not required. This policy will not have substantial direct effects on the States, on the relationship between the Federal Government and the States, or on the distribution of power and responsibilities among the various levels of government. No intrusion on State policy or administration is expected, roles or responsibilities of Federal or State governments will not change, and fiscal capacity will not be substantially directly affected. Therefore, the policy does not have significant effects or implications on Federalism.

G. Paperwork Reduction Act

This policy does not require an information collection under the Paperwork Reduction Act. Therefore, this policy does not constitute a new information collection requiring Office of Management and Budget (OMB) approval under the Paperwork Reduction Act, 44 U.S.C. 3501 et seq.

H. National Environmental Policy Act

The Departments have analyzed this policy in accordance with the criteria of the National Environmental Policy Act (NEPA). This policy does not constitute a major Federal action significantly affecting the quality of the human environment because it only provides notice and comment on conditions and prescriptions. The conditions and prescriptions will be part of the Commission's NEPA

analysis. Issuance of the policy is categorically excluded under the Department of the Interior's NEPA procedures in 516 DM 2, Appendix 1.10. The National Oceanic and Atmospheric Administration (NOAA) has determined that the issuance of this policy qualifies for a categorical exclusion as defined by NOAA 216-6 Administrative Order, Environmental Review Procedure.

I. Essential Fish Habitat.

The Departments have analyzed this policy in accordance with section 305(b) of the Magnuson-Stevens Fishery Conservation and Management Act and determined that issuance of this policy may not adversely affect the essential fish habitat of federally managed species, and, therefore, an essential fish habitat consultation on this policy is not required.

J. Government-to-Government Relationship With Tribes

In accordance with the President's 1994 Executive Memorandum, Government-to-Government Relations with Native American Tribal Governments, supplemented by the November 6, 2000, Executive Order, Consultation and Coordination with Indian Tribal Governments, and 512 DM 2, the Departments have assessed the impact of the policy on tribal trust resources and have determined that it does not directly affect tribal resources. Because the policy will standardize a review process of section 4(e) conditions and section 18 fishways, which do directly affect tribal resources, the Departments will consult with Tribal governments when reviewing and responding to comments or Requests for Rehearing that directly relate to conditions and prescriptions that affect tribal resources.

POLICY:

Mandatory Conditions Review Process - Narrative

A. Traditional Licensing Process

The following describes a process for the Departments to receive and respond to comments regarding the mandatory conditions and prescriptions submitted to the Commission through the traditional licensing process. The Departments view this as an iterative, cooperative process. The Departments already have informal policies and practices for maintaining communications with licensees and others throughout development of conditions and prescriptions during pre-filing consultation (See also proposed Fishway Policy (65 FR 80898 (December 22, 2000)) and Interagency Task Force for Hydropower Licensing Reforms (ITF) reports). However, the Departments have not until now had a standardized process for receiving public comments on the conditions and prescriptions developed during the licensing process. This review policy is designed to work within the Commission's licensing process to efficiently allow meaningful public input without unduly delaying licensing proceedings.

1. Notice and Comment on Preliminary Conditions and Prescriptions

a. Ready for Environmental Analysis. Even though the Departments will work with applicants during the pre-filing and post-filing stages, the Mandatory Conditions Review Process (MCRP) is triggered when the Commission issues a notice indicating the license application is Ready for Environmental Analysis (REA). Comments, recommendations, terms and conditions, and prescriptions concerning the license application will typically be filed with the Commission within 60 days from the date of the REA notice. The MCRP relates only to the mandatory conditions and prescriptions (not comments or recommendations). The information that is filed in response to the REA notice is generally incorporated into the Commission's National Environmental Policy Act (NEPA) analysis that

establishes the framework for license conditions.

b. Filing of Preliminary Conditions and Prescriptions. The Departments will file preliminary conditions and prescriptions within the Commission's 60-day REA comment period.² In order to ensure that this submission is as complete as possible and that the Departments can receive meaningful comments, the Departments need to receive all requested information from the applicant in a timely manner and accurate notification from the Commission of when the REA notice will be issued.³ When filing the preliminary conditions and prescriptions, the Departments will include a rationale for the conditions and prescriptions, reference relevant documents already filed with the Commission, and provide a schedule of when the preliminary conditions and prescriptions will be modified. The schedule should indicate that the Departments should submit modified conditions and prescriptions within 60 days after the close of the Draft NEPA comment period.

There will be situations that are unpredictable or out of the Departments' control that could prevent the Departments from making the REA notice deadline. Those exceptional circumstances (such as competing applications) should be unusual, and in these situations the MCRP will need to be implemented on a case-by-case basis, working with the Commission, applicant, and other parties. The Departments have the incentive to participate in timely and efficient licensing processes both as a matter of good government and to help protect the public and tribal resources. Accordingly, this modified

² If settlement negotiations are on-going at the time the Commission issues the REA notice, the Departments will suspend these negotiations in order to prepare their preliminary conditions and prescriptions to meet the Commission's deadline.

³ In the ITF report on FERC Noticing Procedures, the Commission committed to provide a preliminary schedule in scoping document 1 and an updated schedule in scoping document 2 for issuance of the REA notice.

approach will be used only when justified.

If the Departments determine at the time of the REA notice that they do not have sufficient information (such as a need for conditions and prescriptions or technical feasibility) to support the filing of conditions and prescriptions, the Departments may exercise their statutory authority by reserving that authority to submit conditions and prescriptions after the license is issued. The Departments may eventually exercise this authority during the term of the license when there is sufficient evidence. The participating Departments will provide the reservation of authority during the 60-day REA comment period. This submission will also include the rationale for the Department's action.

The review and signature level for preliminary conditions and prescriptions will vary depending on the signature authority within each Department. The Departments will file an original and eight copies of the preliminary conditions and prescriptions, the schedule for modification, and reference to supporting information with the Commission. The Departments also will provide this information to the Commission's Service List, including the applicant.

c. Comment Opportunity. The MCRP will provide a primary opportunity for notice and comment during the 60 days immediately following the submission of preliminary conditions and prescriptions. The Departments will begin reviewing comments when received; however, no response will be made until after review of the draft NEPA document.⁴

The Departments' preliminary submission to the Commission, which is served on the

⁴ If the Departments receive comments that may require modification to the conditions and prescriptions included in a settlement agreement, they will discuss these with the participants consistent with any communications protocol.

Commission's Service List, will invite comments and new supporting evidence on the preliminary conditions and prescriptions within a 60-day time period. Participants on the Service List and other interested stakeholders are encouraged to comment at this time. All comments on the Departments' preliminary conditions and prescriptions should be specifically identified as such and include supporting evidence.

In addition, to be responsive to persons with an interest in the preliminary conditions and prescriptions, but who have not been previously involved in the licensing process, the Departments will consider public comments provided during the draft NEPA comment period. The Commission's draft NEPA document includes the Departments' preliminary conditions and prescriptions. The Commission is encouraged to inform the public that if they want to comment, they must provide a copy of specific comments and supporting evidence to the Departments within the comment period for the draft NEPA document. All comments submitted to the Departments will be considered. In order to give the comments the full and thorough consideration necessary to efficiently provide the Commission with the modified conditions and prescriptions, the Departments strongly encourage participants in the licensing process to submit comments during the primary notice and comment period, rather than wait until the NEPA comment period. Comments submitted on the preliminary conditions and prescriptions during the 60-day comment period need not be resubmitted during the draft NEPA comment period.

If the Departments reserve authority, they will accept comments on this decision during the comment period. If and when the reservation of authority is invoked during the term of the license, the Departments will work with all interested parties to determine how to apply the MCRP. Because this reservation of authority has rarely been invoked, it is hard to predict how the MCRP will apply. In

addition, the Departments will accept comments when they have not been involved at all in the proceedings. However, it must be noted that procedural limitations may make it difficult for the Departments to become involved late in the process. Therefore, these issues should be raised to the Departments in the initial consultation phase or as early as possible in the licensing process to allow the Departments the opportunity to enter the licensing process at a meaningful stage.

d. Filing Modified Conditions and Prescriptions. The Departments will review the draft NEPA document and all comments received on the preliminary conditions and prescriptions. Based on this review, the Departments will modify the conditions and prescriptions, as needed, and respond to comments. Even if the actual language of the conditions and prescriptions does not change, the process of comment and review provides relevant information for the administrative record. Within 60 days of the close of the draft NEPA comment period, the Departments will submit modified conditions and prescriptions, unless substantial or new information is provided during the NEPA comment period requiring additional review time. In those infrequent situations when additional time is needed, the Departments will submit to the Commission, and serve upon the Service List and all commenters, a letter providing an explanation of the need for additional time and a schedule for preparing the modified conditions and prescriptions.

The Departments will coordinate among themselves, other resource agencies, and tribes the review and response to comments, as appropriate. The format of the response to comments may vary depending on the nature, substance and extent of the comments received, inter-agency and intra-bureau involvement, time frame, and Departments' practice. Review and signature authority will vary between the Departments; however, submission of the modified conditions and prescriptions will be signed at a

level at least as high as the State Director, Regional Director, or Regional Administrator level.

The Departments will submit to the Commission an original and eight copies of the modified conditions and prescriptions, a response to comments, and an index of the Departments' administrative record. These materials will also be provided to the Commission's Service List and additional commenters. In their submission, the Departments will identify the schedule for filing their administrative record. The Departments will file an original and three copies of their administrative records with the Commission. A copy of the administrative record will be provided to the applicant and, for section 4(e) conditions mandated for the protection and utilization of an Indian Reservation, to the Indian Tribe of that Reservation. Any party on the Service List may request copies of the administrative record, in whole or in part. Finally, the Departments intend that modified conditions and prescriptions will be provided to the Commission in advance of issuance of the final NEPA document.

2. Reconsideration of Modified Conditions and Prescriptions - Requests for Rehearing

After the Commission issues the license, if any intervenor⁵ submits a Request for Rehearing that clearly identifies substantial issues with the Departments' modified conditions and prescriptions and includes supporting evidence, the Departments will review those concerns. For substantive issues raised regarding the Departments' conditions and prescriptions, the Departments will submit a written response, in the form of a brief pursuant to 18 CFR 385.713(d)(2), to the Commission (in those cases when the Commission issues a tolling order), or to the commenter, and file a copy with the Commission

⁵ Only interveners, as defined by Commission regulations at 18 CFR 385.713, can submit a Request for Rehearing.

(in those situations when the Commission does not issue a tolling order) within 30 days, if possible. In those unusual situations when more than 30 days is required for response because of significant or new information, the Departments will, within 30 days, submit their reason for needing this time and a reasonable schedule for the written response. The Departments may choose to file consolidated responses to more than one Request for Rehearing.

B. Alternative Licensing Process

The following process describes an opportunity for the Departments to receive and respond to comments regarding the mandatory conditions and prescriptions submitted to the Commission through the alternative licensing process. The form of the review process will depend on whether the Departments submit conditions and prescriptions as part of a settlement agreement. If the Departments submit conditions and prescriptions that are not part of a settlement agreement, then the process described for the traditional licensing process applies, as detailed herein.

If negotiations in the alternative licensing process result in an agreement as to the Departments' conditions and prescriptions, then a modified review process applies. Under the alternative licensing process, the license applicant files a license application, including any settlement offer, which may include the Departments' agreement as to their conditions and prescriptions, and a Draft Applicant Prepared NEPA document with the Commission. The Commission then publishes a notice calling for comments on the license application, including the settlement offer and any conditions and prescriptions included in the settlement offer. In response to the Commission's notice, interested parties are provided an opportunity to comment on the license application, the settlement offer, and the

Departments' agreed upon conditions and prescriptions.

If comments and supporting evidence are submitted directly addressing the Departments' agreed upon mandatory conditions and prescriptions, then the Departments will review the comments. If comments are substantive and raise issues not previously identified and possibly require changes to the conditions and prescriptions and/or settlement agreement, the Departments will discuss the comments and their appropriate resolution with participants, based on the parties' communications protocol. If the Departments determine, after discussion with the participants, that the comments warrant a change in the conditions and prescriptions, the Departments will modify conditions and prescriptions. This process will be the only review of the Departments' agreed-upon conditions and prescriptions submitted through the alternative licensing process.

As part of the alternative licensing process, the Commission also publishes a notice indicating that it is proceeding with the environmental review. In response to this Notice, the Departments, pursuant to their statutory authority under sections 4(e) and 18, will submit to the Commission, as a separate filing, their agreed-upon conditions and prescriptions, so that, regardless of Commission action on the settlement agreement, the Departments' agreed-upon conditions and prescriptions will become mandatory license conditions. Any changes that may have been made to the settlement conditions and prescriptions as a result of comments received will be included in this submission.

C. Implementation

The MCRP is effective immediately, but implementation of the MCRP depends on the licensing stage of the application. For applications in the initial consultation stage, the review procedures will

apply in full and will be implemented within 30 days of the adoption of this policy. For applications in between the initial consultation stage and the REA notice, the Departments will discuss implementation with the applicant, the Commission, and other interested parties. Implementation of the MCRP will depend on the license application's timing within the licensing process and whether critical milestones have been reached. For applications where the Commission has already issued an REA notice, the MCRP will not apply. However, to the extent that notice and comment has been provided on a specific license application, it will continue. The Departments' phased implementation is based upon practical project specific considerations and the desire to minimize delay.

This policy is in effect until revised or revoked. However, the Departments intend to evaluate this review policy after a two-year trial period. Such a trial period will allow for meaningful evaluation based on experience gained in the review policy's implementation.

January 18, 2001

January 19, 2001

David J. Hayes, Deputy Secretary

Penelope D. Dalton

U.S. Department of the Interior

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