of encryption, and be free of any defects or viruses. Copies of the documents relevant to this action are available for public inspection during normal business hours at the Air Protection Division, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103; and Virginia Department of Environmental Quality, 629 East Main Street, Richmond, Virginia 23219.

FOR FURTHER INFORMATION CONTACT: Betty Harris, (215) 814–2168, or by e-mail at *harris.betty@epa.gov*.

SUPPLEMENTARY INFORMATION: For further information, please see the information provided in the direct final action, Virginia's Approval of NO_X RACT Determinations for Prince William County Landfill, that is located in the ''Rules and Regulations'' section of this **Federal Register** publication.

Dated: August 26, 2004.

Richard J. Kampf,

Acting Regional Administrator, Region III.

[FR Doc. 04–20131 Filed 9–8–04; 8:45 am]

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DEPARTMENT OF THE INTERIOR

Office of the Secretary

43 CFR Part 25

RIN 1090–AA91

Procedures for Review of Mandatory Conditions and Prescriptions in FERC Hydropower Licenses

AGENCY: Office of the Secretary, Interior.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Department of the Interior (Department) proposes a public review process for conditions and prescriptions of the Department pursuant to its authority under the Federal Power Act. The Department also proposes to create an administrative appeals process for review of such measures. The Federal Power Act authorizes the Department to include in hydropower licenses issued by the Federal Energy Regulatory Commission conditions and prescriptions necessary to protect Federal and tribal lands and resources and to provide fishways when navigable waterways or Federal reservations are used for hydropower generation. The public review process will enable the public and the license applicant to comment on the Department's preliminary conditions and prescriptions, and to provide information to assist the Department in its formulation of modified conditions and prescriptions. The information obtained through this process will help the Department in refining and developing its conditions and prescriptions, which an applicant may appeal using the proposed appeals process to obtain an expeditious policy level review. These proposed processes are designed to coincide with and complement the Commission's overall licensing process. The Department recently worked with the Commission to develop a new integrated licensing process, see Federal Energy Regulatory Commission Order 2002, July 23, 2003, 104 FERC ¶ 61,109.

DATES: Comments should be received no later than November 8, 2004, late comments will be considered to the extent practicable.

ADDRESSES: You may submit comments, identified by RIN 1090–AA91, by any of the following methods:

- Federal eRulemaking Portal: *http://www.regulations.gov*. Follow the instructions for submitting comments.
- E-mail: *Larry_Finfer@ios.doi.gov.* Include RIN 1090–AA91 in the subject line of the message.
- Fax: 202–208–4867.
- Mail: Office of the Secretary, Office of Policy Analysis, MS 4426-MIB, U.S. Department of the Interior, 1849 C Street, NW., Washington, DC 20240.

Your comments on the information collection provisions of this rulemaking should be sent to the attention of the desk officer for the Department of the Interior at the Office of Management and Budget via facsimile (202–395–6566) or by e-mail (*OIRA_Docket@omb.eop.gov*). Please also send a copy of these comments to the Office of Policy Analysis, U.S. Department of the Interior, at the address provided above.

FOR FURTHER INFORMATION CONTACT: William Bettenberg, Office of Policy Analysis, MS4426–MIB, U.S. Department of the Interior, 1849 C St., NW., Washington, DC 20240; phone: 202–208–5978; fax: 202–208–4867; electronic mail address: *William_Bettenberg@ios.doi.gov.*

SUPPLEMENTARY INFORMATION:

I. Public Comment Procedures

Our practice is to make comments, including names and home addresses of respondents, available for public review during regular business hours. Individual respondents may request that we withhold their home address from the rulemaking record, which we will honor to the extent allowable by law. There also may be circumstances in which we would withhold from the rulemaking record a respondent's identity, as allowable by law. If you wish us to withhold your name and/or address, you must state this prominently at the beginning of your comment. However, we will not consider anonymous comments. We will make all submissions from organizations or businesses, and from individuals identifying themselves as representatives or officials of organizations or businesses, available for public inspection in their entirety.

II. Background

Federal Power Act

Subchapter I of the Federal Power Act (FPA), 16 U.S.C. 791–823c, vests in the Department of the Interior (Department), and other Federal resource agencies, the authority to include conditions and prescriptions in licenses for hydroelectric generating facilities issued by the Federal Energy Regulatory Commission (FERC or Commission) (see 18 CFR parts 4, 5, and 16). Under section 18 of the FPA, 16 U.S.C. 811, the U.S. Fish and Wildlife Service may prescribe fishways, and under section 4(e) of the FPA, 16 U.S.C. 797(e), the Secretary of the Interior may establish conditions necessary for the adequate protection and utilization of reservations. ''Reservations,'' as used in the FPA, include lands and certain facilities under the jurisdiction of the U.S. Fish and Wildlife Service, National Park Service, Bureau of Land Management, Bureau of Reclamation, or Bureau of Indian Affairs. Through these sections, the FPA authorizes the Department to set conditions for the protection of public and tribal resources that may be affected when navigable waterways or Federal reservations are used for hydropower generation licensed by FERC.

The Department's final conditions and prescriptions pursuant to sections 4(e) and 18 of the FPA are mandatory. Thus, once the Department has issued its conditions and prescriptions, the Commission must incorporate these measures into any hydropower license it issues under the FPA. This authority has been recognized and upheld by the Federal courts, including the Supreme Court. *See Escondido Mut. 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 Hydro-Electric Co.* v. *FERC,* 78 F.3d 659 (D.C. Cir. 1996). After a license has been issued, the license, including the Department's

conditions and prescriptions, is subject to rehearing before FERC and subsequent judicial review under the FPA's appeal procedures. The FPA gives the Federal appeals courts exclusive jurisdiction over such appeals. 16 U.S.C. 825*l*(b).

Mandatory Conditions Review Process (MCRP)

On January 19, 2001, in response to requests for a review and comment opportunity prior to the issuance of conditions and prescriptions, the Department of the Interior established, through an interagency policy with the Department of Commerce (collectively ''Departments''), the Mandatory Conditions Review Process (MCRP).[1] The MCRP provides license applicants and interested parties an opportunity to review and comment on the Departments' preliminary conditions and prescriptions for specific hydropower licenses. In addition, commenters are encouraged to provide any additional information regarding the Departments' conditions and prescriptions. The MCRP was carefully crafted to work within FERC's deadlines and its process under the National Environmental Policy Act (NEPA), while affording interested parties an opportunity to comment on the record on the Departments' conditions and prescriptions.

Prior to finalizing the MCRP, the Departments provided a public comment period on a draft MCRP. 65 FR 77889 (Dec. 13, 2000). The Departments received 18 sets of comments representing a broad range of interests. Many commenters proposed that the Departments provide, in addition to review and comment, an administrative appeals process. The Departments elected to forego the adoption of an appeals process at that time.

The MCRP has now been in effect for three years. Upon review, the Department of the Interior has concluded that the policy has provided valuable information to inform the Department's conditions and prescriptions and has created important opportunities for the Department to work with license applicants and other interested persons. These positive results support the Department's current proposal to codify, and in some instances clarify, the MCRP in a regulatory framework.

The proposed rule codifies the review process of the MCRP, but only as it relates to Interior authorities and actions, since it establishes the schedule, and underpins the proposed appeals process. At the same time, in a parallel proposed rule, the Department of Commerce is proposing to codify the existing MCRP policy, retaining the rehearing stage of the existing MCRP, while soliciting comments on the possible addition of an administrative review mechanism. In all other respects, the MCRP portions of the two proposed rules are essentially the same.

After reviewing the public comments, the Department will determine if further revision is warranted and publish a final rule. The existing MCRP policy remains in effect until revised or superseded by the final rule.

Administrative Appeals Process

In addition, the Department has determined that an administrative appeals process, that follows review and comment under the MCRP, would further benefit the Department's development of conditions and prescriptions in the licensing process. During the original comment period on the MCRP in 2000, some commenters requested that the Departments implement a more elaborate appeals process than is being proposed in this notice, including employing the use of administrative law judges and evidentiary hearings. That concept was again considered in development of the appeals process in this proposed rule, but rejected because of issues of timeliness. Both the current FERC licensing schedule and FERC's new hydropower licensing process barely provide time for the expedited appeals process being proposed by the Department in this proposed rulemaking. Additionally, the President's National Energy Policy criticized the current licensing process as too prolonged and costly, and called for making the process more clear and efficient. The Department uses a variety of processes for considering appeals under other programs and authorities. Those which include the use of administrative law judges and evidentiary hearings are managed by the Department's Office of Hearings and Appeals (OHA), which employs administrative law judges and is staffed to manage evidentiary hearings. That office, however, has substantial backlogs in appeal cases, and the average case currently takes approximately one and a half years from the date of receipt to resolution. While OHA is making progress in reducing its backlog, there appear to be no prospects that hydropower appeals cases could be processed by that office in the three-month period that appears to fit with FERC's decision schedule and is contemplated by this proposed rule. Prolonging the current licensing process by up to two years is considered untenable.

The proposed appeals process would allow a license applicant to appeal mandatory conditions and prescriptions directly to the Department. The mechanics of the proposed appeals process are designed to accommodate the specific structure of the Department of the Interior, with five bureaus and five assistant secretaries involved in relicensing. The Department believes it is natural and appropriate for the Departments of Agriculture and Commerce to develop hydropower licensing conditions and prescriptions through different institutional processes given that each of those Departments have a single bureau with licensing responsibilities, as long as conditions and prescriptions are timely and consistent. The Department is mindful that if multiple agencies exercise conditions in the same proceeding, the applicant may need to participate in two or more different institutional processes. The Department notes, however, that it is rare for multiple agencies to exercise conditions in the same proceeding. In the 108 license orders issued between 2001 and 2003, 78 did not contain mandatory conditions, 24 contained conditions from one agency, and 6 contained conditions from 2 or more agencies.

National Energy Policy

Interior's proposed rule is consistent with the National Energy Policy Development Group's Recommendation in the National Energy Policy. This proposed rule will codify Interior's Federal Power Act processes as regulations. These regulations, which will be established subject to notice and comment, will be more clear to applicants and the public than Interior's existing guidance and policies. In addition, the proposed rule will help to make the FERC licensing process as a whole more efficient, by integrating the MCRP and appeals process into FERC's process. The Department is of the view that an administrative appeals process will advance efforts to streamline the overall licensing process while also expediting the implementation of effective license conditions. Therefore, in addition to the proposed MCRP regulations, the Department has developed an administrative appeals process that works in concert with the MCRP. These proposals are discussed below.

[1] *See http://www.doi.gov/hydro/final_mcrp_policy.htm.*

III. Discussion of the Proposed Rule

The decision on whether to issue a license for a hydropower facility is solely under the jurisdiction of FERC. The general purpose of the Department's proposed rulemaking is to assure open and careful consideration of mandatory conditions and prescriptions developed by the Department in the licensing of hydropower generating facilities. To that end, the Department is proposing to codify, and in some instances clarify, the existing MCRP (section A, below), and to provide an opportunity for appeal by license applicants of mandatory conditions and prescriptions (section B, below). As discussed below, this proposed framework advances the hydropower licensing goals expressed in the President's National Energy Policy and further harmonizes the Department's processes with existing Commission regulations.

A. The Mandatory Conditions Review Process

Proposed section 25.3 describes the MCRP as a process that allows the public to review and comment on preliminary conditions and prescriptions submitted by the Department for inclusion in hydropower licenses issued by FERC pursuant to the FPA. The process as proposed is open to all, but is limited to conditions and prescriptions issued by the Department under the authority of sections 4(e) and 18 of the FPA. Recommendations filed under sections 10(a) and 10(j) of the FPA, 16 U.S.C. 803(a) and (j), are outside the scope of the MCRP.

The MCRP is triggered when FERC issues a notice that a license application is ready for environmental analysis (REA). Proposed section 25.5 makes clear that the Department will file its preliminary conditions and prescriptions within 60 days after FERC issues its REA notice. It is possible that this 60-day deadline may not be met if the Department lacks sufficient information, such as completed reports on required studies or information on technical feasibility, to support the need for conditions and prescriptions. In such event, the Department may exercise its authority under sections 4(e) and 18 of the FPA by reserving the authority to submit conditions and prescriptions at a later date.

The MCRP ensures that preliminary conditions and prescriptions are publicly reviewed and can be modified if necessary by providing, at proposed sections 25.6(a) and (b), an initial 45-day review and comment period on preliminary conditions and prescriptions and an additional review and comment period in conjunction with review of FERC's draft NEPA document.

As proposed at section 25.6(a), the first review and comment opportunity follows the Department's filing of preliminary conditions and prescriptions with FERC. In addition to filing with FERC, the Department sends its preliminary conditions and reference to supporting information to parties on FERC's service list. By letter to both the parties and FERC, the Department provides 45 days for comments and solicits new supporting evidence regarding the preliminary conditions or prescriptions. At this point in the licensing process, the Department has often worked with the applicant and other interested parties for well over two years through prefiling consultation. The Department notes that the existing MCRP provides 60 days for comments at this stage. In this rulemaking, 45 days has been selected to conform to the reply comments time period in FERC's integrated licensing process.[2]

As proposed at section 25.6(b), a second review and comment opportunity coincides with the development of FERC's NEPA analysis. As part of the licensing process, FERC includes the Department's preliminary conditions and prescriptions in its draft NEPA document. Through the NEPA process, all interested parties—not only those on FERC's service list—have an opportunity to comment on the preliminary conditions and prescriptions.[3] Following the close of the comment period on the NEPA document, the Department will respond to all comments received. By waiting until the close of the draft NEPA comment period, the Department is provided the opportunity to consider additional information developed in the NEPA process.

Any modification of the Department's preliminary conditions and prescriptions occurs after the close of FERC's NEPA comment period. When considering whether to modify a preliminary condition or prescription, the Department coordinates with all of its bureaus, State and Federal resource agencies, and Indian tribes. Proposed section 25.7(b) states that if commenters provide evidence indicating that the Department's preliminary conditions and prescriptions warrant modification, the Department will modify the conditions and prescriptions as necessary and file them with FERC within 60 days of the close of the NEPA comment period. Significantly, the MCRP provides for a higher level of internal review at the modification stage; modified conditions and prescriptions are reviewed and signed at a level at least as high as the State Director or Regional Director, depending on the bureau involved.

The Department notes that the existing MCRP offers one additional opportunity after license issuance for parties to the FERC proceeding to obtain review of the Department's modified conditions and prescriptions. That additional review opportunity would be supplanted by the proposed administrative appeal process and is therefore not included in the proposed rule.

The existing MCRP provides that if, after license issuance, a request to FERC for rehearing identifies substantial issues with the Department's conditions or prescriptions and provides supporting information, the Department would review the conditions or prescriptions and provide a written response within 30 days or within an established schedule. As discussed in more detail below, the proposed rule provides an administrative appeal directly to the Assistant Secretary with authority over the bureau imposing the conditions or prescriptions at issue. Such appeals are intended to be resolved in advance of license issuance. The proposed rule therefore eliminates the need for additional Departmental review at the FERC rehearing stage. Parties remain free to raise issues relating to the Department's conditions and prescriptions in their requests for rehearing.

Proposed section 25.8 addresses how the Department will apply the MCRP in situations in which it is involved in settlement negotiations. Because settlements can occur at any stage during a license proceeding, the MCRP's application depends largely on the stage of the proceeding in which an offer of settlement is made, and on whether the Department files conditions and prescriptions that are part of an offer of settlement. Generally, the provisions of sections 25.6 and 25.7 apply if the Department files preliminary conditions or prescriptions that are not part of an offer of settlement. If, on the other hand, the Department files conditions that are part of an offer of settlement, the Department will follow the special provisions of section 25.8(b). If the Department is involved in ongoing settlement negotiations at the time FERC issues its REA Notice the Department may suspend the negotiations to prepare and file its preliminary conditions and prescriptions within 60 days of the REA

[2] *See* 18 CFR 5.23.

[3] *See* 18 CFR 4.34, and 18 CFR 5.24 and 5.25.

Notice. Similarly, the Department may enter into settlement negotiations after it has already filed preliminary or even modified conditions and prescriptions. If, in either of these situations, negotiations do not result in an offer of settlement, section 25.8(a) will apply. If, on the other hand, either of the above situations results in settlement, the Department will determine, depending on the stage of the proceeding and on a case-by-case basis, the best way to ensure adequate review and comment.

B. The Administrative Appeal

Consistent with the National Energy Policy's goals of streamlining and improving the hydropower licensing process, the Department is proposing to create an expeditious appeals process for review of mandatory conditions and prescriptions. This process will ensure that high standards for resource conservation and economic efficiency are maintained. In the appeals process, the applicant is afforded the opportunity to appeal the conditions or prescriptions and propose alternative conditions or prescriptions. The information provided by the applicant, as well as any additional information that a State, Indian tribe, Federal agency, or the public may provide, will help to ensure that both the impacts and benefits of a hydropower generating facility are appropriately addressed in the licensing process.

The appeals process is proposed to be available to applicants for a hydropower license in proceedings in which the Department establishes one or more mandatory conditions or prescriptions. The Department invites comments on whether the appeals process should be open to others as well.

The appeal is limited by proposed section 25.53 to those issues raised by the applicant during the MCRP and in the FERC record, or issues resulting from the Department's modification of conditions and prescriptions based on new information that was not available for review by the applicant during the MCRP. The Department anticipates that these procedural limits will encourage interested parties to provide early and full information regarding the environmental, economic, and social issues and opportunities that accompany hydropower licensing. The proposed process will ensure that issues are fully briefed and considered, prior to the release of modified conditions, and could possibly reduce the number of appeals. Moreover, if an appeal is filed, the proposed process ensures that issues are well-developed for an Assistant Secretary's timely consideration.

An efficient process is necessary given the multiple agencies with authorities and responsibilities under the Federal Power Act. The Department considers it important to adhere strictly to applicable FERC filing deadlines and schedules. Proposed section 25.54 therefore provides that an appeal must be received within 30 calendar days of the date the Department files its modified conditions and prescriptions with FERC. No extensions of this deadline will be granted, and untimely appeals will be dismissed.

A 21-day period is provided to Indian tribes, States, Federal agencies, and the public to comment on an appeal. These requirements will help to ensure that the appeals process will be completed within 60 days of receipt of the appeal.

The Assistant Secretary (or Assistant Secretaries) with supervisory authority over the bureau establishing the conditions or prescriptions will review the appeal. Proposed section 25.59 states that the Assistant Secretary's review is to be *de novo, i.e.*, nondeferential. In deciding the appeal, the Assistant Secretary will consider, among other things, comments submitted by States, Indian tribes, Federal agencies, and the public, materials submitted by the applicant in support of the appeal, and pertinent portions of the administrative record supporting the conditions or prescriptions, including, as appropriate, comments and information received during the MCRP. Proposed section 25.59 makes this clear.

Materials submitted by the applicant in support of the appeal must include sufficient information consistent with a substantial evidence standard. The Supreme Court has held that mandatory conditions and prescriptions must be supported by substantial evidence in order to withstand judicial review. *Escondido Mut. Water Co.* v. *La Jolla Band of Mission Indians*, 466 U.S. 765, 778 (1984); *see also* 16 U.S.C. 825*l*(b). Proposed section 25.56 therefore provides that the applicant must include, for each condition or prescription appealed, the following:

(a) A concise statement of the reasons for appeal;

(b) A demonstration that the specific issues on appeal were raised with the Department during the Mandatory Conditions Review Process and in the FERC record;

(c) A summary of consultation with the Department, including a statement of disagreements regarding studies, resource impacts, or proposed protection, mitigation, or enhancement measures, as appropriate to the matter or matters being appealed;

(d) A proposed alternative for the appealed condition or prescription which is supported by substantial evidence in the record, is set forth in the same level of detail as the appealed condition or prescription, and is reasonably related to alternatives raised during the MCRP and in the FERC record;

(e) An assessment of how the proposed alternative would affect fish, wildlife, and Indian trust resources; and

(f) Supplementary information, as applicable, such as Form 1 or Form 412 filings, or system load data.

The Assistant Secretary will use this information along with other available information, to assess whether the applicant has demonstrated that the appeal meets one or more of the three criteria set forth in proposed section 25.59(c):

(a) The modified conditions or prescriptions conflict with conditions or prescriptions of another Department, or conflict with those of another bureau (or bureaus); or

(b) An alternative mitigation measure, preferred by the applicant, is as effective as that of the Department, (*i.e.*, the applicant's proposed alternative meets or exceeds the result that would be obtained by the modified condition or prescription filed by the Department);

(c) The modified conditions or prescriptions are not reasonably related to the impacts of the project because they mandate a level of mitigation that is inappropriate given the level of impacts attributable to the project.

In addition, before the Assistant Secretary adopts an alternative condition or prescription, he or she must also find that the alternative meets standards set forth in proposed section 25.59. Any proposed alternative must be:

(a) Supported by the technical and scientific record submitted with the appeal or compiled in the FERC proceeding;

(b) Consistent with the Department's trustee responsibilities for Indian trust resources;

(c) Consistent with the Department's responsibilities for fish, wildlife, and cultural resources; and

(d) Not in conflict with conditions of another Department or with those of another bureau (or bureaus).

Upon receipt of the appeal, proposed section 25.55 states that a review team will be designated to prepare, as appropriate, a substantive assessment of the appeal for the reviewing Assistant Secretary (or Assistant Secretaries). As proposed, the professional review team will not include individuals who developed or approved the mandatory

conditions or prescriptions that are under appeal, although the review team may consult with those individuals or any others. The review team is directed to conduct a threshold evaluation to determine whether the appeal is appropriate for review. As proposed in section 25.55(c), the review team will determine whether the appeal is properly filed and contains the required documentation as set forth in section 25.56, and whether the Secretary has authority to issue the remedy requested by the appeal. For example, the review team will dismiss those appeals that are not timely filed.

With respect to appeals that are reviewed, the Assistant Secretary (or Assistant Secretaries) will have several options pursuant to proposed section 25.59, including: substituting the applicant's proposed remedy for the condition or prescription previously submitted to FERC by the Department; not changing the modified condition or prescription; revision of a modified condition or prescription; or, in the case of appeals asserting a conflict between or among proposed conditions or prescriptions, initiating action to reconcile the conflict. In the unlikely event that a modified condition or prescription has the potential to conflict with the conditions or prescriptions of another Department or Interior bureau, the Assistant Secretary (or Assistant Secretaries) will take action to assure that such a conflict does not occur. This can take many forms but section 25.59(d)(4) would ultimately require eliminating the conflict, either through conforming the modified conditions or prescriptions to the conditions or prescriptions of the other agencies, or the other agency choosing to modify its conditions or prescriptions so that no conflict would occur.

The results of the review will be made public through the FERC docket system. Section 25.59(e) requires the Assistant Secretary to file the new conditions, or a notice that the conditions are unchanged, with FERC within 60 days of receipt of the appeal. Section 25.60(b) requires the Assistant Secretary to file additional findings and supporting information with FERC in another 15 days. By requiring these items to be filed with FERC the rule is providing public notification—the parties to the FERC proceeding will get copies of the filing, and other members of the public will be able to access the filing through FERC electronic eLibrary (*http://www.ferc.gov/docs-filing/elibrary.asp*). This is the same means of publication as all other filings with FERC, including publication of the preliminary and modified conditions. FERC filing requirements are outlined in 18 CFR 385.2001.

In sum, the Department is of the view that this framework will ensure an expeditious, cost-effective, and informed process that advances the National Energy Policy's streamlining goals. The MCRP and the appeals components of the review process build from the same record. This ensures consistency and reduces the need for rehearing or judicial review of FERC licensing decisions. Also, by utilizing the record developed through the MCRP, the proposed appeals process imposes only specific, minimal burdens on applicants and other parties. Such efficiency helps to ensure that the process will be completed within 60 days from the Department's receipt of an appeal. To ensure that the process is cost-effective and well-informed, the Department has developed appeal criteria that encourage innovation by license applicants, and ensure careful development of mandatory conditions and prescriptions. Also, the process provides for policy level review of mandatory conditions and prescriptions in a forum that is consistent with FERC's substantial evidence requirements and comports with the Department's statutory and Indian trust responsibilities. All of these mechanisms will benefit the Department's exercise of its Federal Power Act authorities as well as improve coordination with FERC's licensing process.

C. Pending Legislation

The Department is aware of a proposal for amending the Federal Power Act that is currently being considered by Congress.[4] The Department invites comment about whether elements of the legislative proposal should be incorporated into this rulemaking, specifically:

(1) Should the Department include a provision for an on-the-record, trial-type hearing on disputed issues of material fact? If not, why, and if so, why? If a respondent indicates support for a trial-type hearing on disputed issues of material fact, the Department requests that it provide specific examples of disputed material facts from past or present proceedings, and describe in detail how such a process would work in light of FERC schedules for the three hydropower licensing processes it has established;

(2) The provisions of sections 25.56 *et seq*. cover the substantive requirements for appeals and standards by which appeals will be resolved. The record will document the basis for resolving the appeal. Are there other criteria that should be weighed, and are there tests that respondents suggest be considered in how to weigh such criteria? In the consideration of conditions and prescriptions should the Department give equal consideration to energy supply, distribution, cost and use; flood control; navigation; water supply; and air quality (in addition to the preservation of other aspects of environmental quality)? Should the Department consider other factors? How would the Department demonstrate that equal consideration was given to these factors? What would be the implications of providing equal consideration to such factors for the Department's duties to protect tribal resources, fish, wildlife, and cultural resources if this standard were applied?

(3) Should the Department be required to accept an alternative condition proposed by a license applicant if it provides adequate protection and utilization of the reservation, costs less to implement, and results in improved operation of the project works for electricity production? Please provide the reasons for your response.

(4) Should the Department be required to accept an alternative prescription proposed by a license applicant if it is no less protective than the fishway prescribed by the Department, costs less to implement, and results in improved operation of the project works for electricity production? Please provide the reasons for your response.

(5) In questions (3) and (4) above, an element of the criteria required is that the alternative proposed by the applicant ''costs less to implement.'' If the applicant, for whatever reason, such as improved operations, favors an alternative that is more expensive than that in the Department's modified condition or prescription, is there any reason it should be rejected so long as it is ''equally effective?''

IV. Commission Coordination

The Commission is on record supporting the MCRP and an appeals process. In comments on the MCRP dated June 26, 2000, Commission staff stated: ''Because decisions regarding mandatory conditions are essentially reserved to the Departments, public process before the Commission on these

[4] The above discussion centers on the hydropower title passed by the House in H.R. 6 and by the Senate in S. 14 in the 108th Congress. The same language also appears in S. 2095 which was introduced in the Senate on February 12, 2004. Language regarding alternative hydropower conditions was also included in bills that reached conference in the 107th Congress.

issues is of very limited value. Creating a public process conducted by the Departments on draft mandatory conditions will ensure that public input is available to the Departments, and will help build an administrative record to support reasoned decision-making. Commission staff encourages the Departments to establish formal procedures, preferably in the form of a procedural rule that is codified in the Departments' regulations, for making draft mandatory conditions available to the public, and considering public comment received on those draft conditions.''

The Commission has also encouraged the Department's establishment of an appeals process. In a February 20, 2003, Notice of Proposed Rulemaking, 102 FERC ¶ 61,185, FERC stated the following: ''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.''

FERC's current schedule calls for initiating work on the final NEPA document upon the filing of modified conditions and prescriptions by resource agencies, and completing that document within 90 days. The Department is of the view that appeals of mandatory conditions and prescriptions should follow filing of modified conditions. This will provide regional officials with a full opportunity to consider comments filed during the MCRP comment period and on FERC's draft NEPA document. The regional officials can thus address various issues and concerns at the modified stage, thereby reducing disputes over conditions and prescriptions. This should cut down significantly on the number of licenses being appealed to assistant secretaries, and the number of requests for rehearing before FERC and subsequent litigation.

The Department recognizes that the timing of the appeals process as proposed potentially could stretch FERC's schedule for completing final NEPA documents by up to 90 days in some cases. The Department's proposed process for filing of appeals and comments on them, and their consideration and resolution by assistant secretaries or other officials is a 90-day process which the Department considers to be the minimum amount of time in which appeals can be realistically managed given the flood of other business before assistant secretaries. The Department also notes that the new FERC integrated licensing process is scheduled to be conducted within a 17-month period of the two years allowed for timely consideration of license applications without requiring resort to license extensions, and that there are at least four options for dealing with the apparent timing conflict between the proposed appeals process and FERC's NEPA schedule. Those four final NEPA timing options are: (1) Continue with the current FERC schedule since, historically, only about 25 percent of licenses have included mandatory conditions or prescriptions and an even smaller proportion of proceedings would likely include an appeal, much less one in which the resolution rendered the final NEPA document inadequate, resulting in the final NEPA document being within proper scope; (2) delay the NEPA preparation schedule until the Interior appeal deadline (30 days), or if an appeal is filed, consider adding an additional NEPA alternative to better assure that the final NEPA document will be properly scoped; (3) delay the NEPA preparation schedule for 90 days to assure that the results of the appeals process are fully considered in the final NEPA document; or (4) prepare a supplement to the final NEPA document if it turns out that resolution of the appeal would render the final NEPA document inadequate for the decision before the FERC commissioners. Using any of these four options, the licensing process could still be completed within the two year limit without resort to license extensions. The Department, however, is sensitive to the issue of potentially extending the duration of the licensing process, and invites comment on how best to fit the appeals process into existing FERC hydroelectric licensing processes and the seriousness of a potential 90-day delay in those processes compared to an opportunity for consideration of appeals and further public comment at the policy level within the Department.

V. Procedural Requirements

1. Regulatory Planning and Review (E.O. 12866)

This document is a significant rule. Though this rule will not have an adverse effect or an annual effect of $100 million or more on the economy, the preliminary assessment of the Office of Management and Budget (OMB) is that the provision for public participation through the MCRP process and the addition of an opportunity for an appeal under the rule may represent novel approaches to public input and review, may serve as a model for future rulemakings, and may have interagency implications. Therefore, the rule will be reviewed by the OMB under Executive Order 12866.

(1) This rule will not have an annual effect of $100 million or more on the economy. The review and comment procedures of the MCRP are already in place, and codifying these procedures as a rule will not impose new costs. The Department expects about two appeals per year under the proposed rule, requiring about 200 hours of additional work by the applicant. Staff costs for two applicants per year clearly fall well short of $100 million. This conclusion also holds in a worst-case analysis; if every applicant appealed modified conditions and prescriptions, that would represent about eight appeals per year. Furthermore, since the decision to appeal is entirely at the discretion of the applicant, that cost will only be incurred when an applicant decides the cost will be justified by the benefits of the process.

(2) This rule will not create a serious inconsistency or otherwise interfere with an action taken or planned by another agency. The proposed rule is designed to fit within the Commission's current and proposed rules for hydropower licensing. The Commission is on record supporting the MCRP and an appeals process (See part IV above).

(3) This rule will not alter the budgetary effects of entitlements, grants, user fees, or loan programs or the rights or obligations of their recipients. This proposed rule concerns only public review and administrative appeal procedures for the Department's hydropower licensing conditions and prescriptions. The rule merely streamlines and improves the Department's participation in the licensing of hydropower generating facilities.

(4) This rule does not raise novel legal issues. The preliminary assessment of the Office of Management and Budget (OMB) is that the rule may raise novel policy issues, in that it represents a potentially new approach to public input.

2. Regulatory Flexibility Act

The Department certifies that the proposed rule will not have a significant economic effect on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*).

The proposed rule will not affect a substantial number of small entities. According to the Small Business

Administration, for NAICS code 221111 hydroelectric power generation, a firm is small if, including its affiliates, its total electric output for the preceding fiscal year did not exceed 4 million megawatt hours. Over half of the Commission-licensed projects are less than 5 megawatts of capacity (542 of 1009). Over 80 percent of Commission licensees hold only one license (483 of 598). Despite the fact that the regulated community of Commission licensees does include a substantial number of small entities, the number of affected entities in a given year is likely to be small. During the period from 2001 to 2003, of 108 licenses issued by the Commission, 13 contained conditions or prescriptions from the Department of the Interior. Eight of these 13 affected small entities.

More important, the effect of the proposed rule will not be significant. The only action required of any entity under the proposed rule is the preparation and submission of an appeal. Applicants already prepare and submit comments on conditions pursuant to the MCRP, which is currently in effect as a policy.

To file an appeal, the applicant would simply collect information already in the record of the proceeding before the Commission, and put it together in the format described in the proposed rule. Since the decision to appeal is entirely at the discretion of the applicant, that cost will only be incurred when an applicant decides the cost will be justified by the benefits of the process. For these reasons, the proposed rule will not have a significant economic effect.

3. Small Business Regulatory Enforcement Fairness Act

This rule is not a major rule under 5 U.S.C. 804(2), the Small Business Regulatory Enforcement Fairness Act. This rule does not have an annual effect on the economy of $100 million or more. (See conclusion under Section 1 above.) This rule will not cause a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions. A public review process and administrative appeals process for the Department's hydropower conditions and prescriptions will not affect costs or prices. This rule will not have significant, adverse effects on competition, employment, investment, productivity, innovation, or the ability of United States based enterprises to compete with foreign-based enterprises.

4. Unfunded Mandates Reform Act

This rule does not impose an unfunded mandate on State, local, or tribal governments in the aggregate or on the private sector of more than $100 million per year. The rule does not have a significant or unique effect on State, local, or tribal governments or the private sector. State, local, and tribal governments routinely file comments on the Department's licensing conditions under the existing MCRP policy. The new appeal opportunity will only be available to the license applicant, and, as discussed above, the costs to the applicant will be small and the Department expects that there will be an improvement in ensuring consistency and transparency. Therefore, a statement containing the information required by the Unfunded Mandates Reform Act (2 U.S.C. 1531 *et seq.*) is not required.

5. Takings (E.O. 12630)

In accordance with Executive Order 12630, the rule does not have significant takings implications. The Departmental conditions and prescriptions included in hydropower licenses relate to operation of hydropower facilities on resources not owned by the applicant (public waterways and/or public lands). Therefore, this rule will not result in a taking of private property, and a takings implication assessment is not required.

6. Federalism (E.O. 13132)

In accordance with Executive Order 13132, the rule does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment. There is no foreseeable effect on States of codifying procedures for public review of Departmental conditions and prescriptions, or providing the applicant with an opportunity for an administrative appeal of such. The rule, which governs only the Department's responsibilities in hydropower licensing, does not have substantial direct effects on the States, on the relationship between the national government and the States, or in the distribution of power and responsibilities among the various levels of government. The rule does not preempt State law. Therefore, a Federalism Assessment is not required.

7. Civil Justice Reform (E.O. 12988)

In accordance with Executive Order 12988, the Office of the Solicitor has determined that this rule does not unduly burden the judicial system and meets the requirements of sections 3(a) and 3(b)(2) of the Order. The proposed rule has been reviewed and provides clear language as to what is allowed and what is prohibited. Litigation regarding Commission hydropower licenses currently begins with rehearing at the Commission, and then moves to Federal appeals court. By offering public review and an administrative appeal of conditions and prescriptions imposed by the Department, the rule will likely result in a decrease in the number of proceedings that are litigated. In addition, it is not anticipated that more than an average of two appeals will be filed in any given year.

8. Paperwork Reduction Act

The proposed rule contains provisions that would collect information from the public and therefore requires approval by the Office of Management and Budget (OMB) under the Paperwork Reduction Act (PRA) of 1995. According to the PRA, a Federal agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number that indicates OMB approval. For this approval, Form 83–I and supporting information have been submitted to OMB.

The purpose of the information collection in this rulemaking is to provide an opportunity for license applicants to appeal mandatory conditions and prescriptions before licenses are issued by the Commission. It is estimated that an average of six new licenses with mandatory conditions will be issued each year for the next few years, and that an average of two license applicants will appeal the mandatory conditions each year. It is estimated that the burden for filing an appeal under Subpart B of the proposed rulemaking is 200 hours; thus, the total information collection burden of this rulemaking would be about 400 hours per year.

As required by OMB regulations at 5 CFR 1320.8(d)(1), on behalf of OMB, the Department is requesting your comments on this information collection. In particular, your comments to OMB should address: (1) Whether the proposed collection of information is necessary and appropriate for its intended purpose; (2) the accuracy of our estimate of the burden; (3) ways to enhance the quality, utility, and clarity of the information collected; and (4) ways to minimize the burden on the respondents of the collection of information, including the possible use of automated collection techniques or other forms of information technology.

OMB must make a decision concerning approval of this collection of information no sooner than 30 days, but no later than 60 days, after the proposed rule is published in the **Federal**

Register. Therefore, your comments on the information collection are best assured of having their maximum effect if OMB receives them within 30 days of publication. Your comments should be directed to OMB via facsimile or e-mail as indicated in the **ADDRESSES** section of this rulemaking. Please also send a copy of your comments to us at the address indicated in the **ADDRESSES** section.

If you wish to obtain a copy of our full submission to OMB requesting approval of this information collection, which includes the OMB form 83–I and supporting statement, please contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section. A copy will be sent to you at no charge.

9. National Environmental Policy Act

This rule does not constitute a major Federal action significantly affecting the quality of the human environment. The Department has determined that the proposed rule is categorically excluded from review under section 102(2)(C) of NEPA (42 U.S.C. 4332(2)(C)). The Department has made this determination pursuant to 516 Departmental Manual (DM), Chapter 2, Appendix 1, Item 1.10, which excludes ''policies, directives, regulations and guidelines of an administrative, financial, legal, technical or procedural nature; or the environmental effects of which are too broad, speculative or conjectural to lend themselves to meaningful analysis and will be subject later to the NEPA process, either collectively or case-by-case.'' In addition, the Department found that the proposed rule would not significantly affect the 10 criteria for exceptions to categorical exclusion listed in 516 DM 2, Appendix 2. Therefore, a detailed statement under NEPA is not required.

10. Government-to-Government Relationship With Indian Tribes

In accordance with the President's 1994 Executive Memorandum, Government-to-Government Relations with Native American Tribal Governments, 59 FR 22951 (April 29, 1994), supplemented by Executive Order No. 13,175, Consultation and Coordination with Indian Tribal Governments, 65 FR 67249 (November 6, 2000), and 512 DM 2, the Department has assessed the impact of the proposed rule on tribal trust resources and has determined that it does not directly affect tribal resources. The proposed rule is of a procedural and administrative nature. It should be clear, however, that individual Departmental 4(e) conditions and section 18 fishways may directly affect tribal resources, and the Department will consult with tribal governments when developing conditions and prescriptions that directly affect those tribal trust resources. The Department will consult with Indian tribes during the MCRP and at appropriate times during the appeal process.

11. Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use

In accordance with Executive Order 13211, the Department has determined that the proposed rule will not have substantial direct effects on energy supply, distribution, or use, including shortfall in supply or price increase. Recent analysis by the Commission has found that on average installed capacity increased through licensing by 4.06 percent, and the average annual generation loss, attributable largely to increased flows to protect aquatic resources, was 1.59 percent.[5] Since the licensing process itself has such a modest energy impact, this proposed rule, which affects only the Department's review and appeal policies, is not expected to have a significant impact (*i.e.*, reductions in electricity production in excess of 1 billion kilowatt-hours per year or in excess of 500 megawatts of installed capacity).

12. Clarity of This Regulation

Executive Order 12866 requires each agency to write regulations that are easy to understand. The Department invites your comments on how to make this rule easier to understand, including answers to questions such as the following: (1) Are the requirements in the rule clearly stated? (2) Does the rule contain technical language or jargon that interferes with its clarity? (3) Does the format of the rule (grouping and order of sections, use of headings, paragraphing, etc.) aid or reduce its clarity? (4) Would the rule be easier to understand if it were divided into more (but shorter) sections? (5) Is the description of the rule in the **SUPPLEMENTARY INFORMATION** section of the preamble helpful in understanding the proposed rule? (6) What else could we do to make the rule easier to understand?

Send a copy of any comments that concern how we could make this rule easier to understand to: Office of Regulatory Affairs, Mail Stop 7229, Department of the Interior, 1849 C Street, NW., Washington, DC 20240. You may also e-mail the comments to this address: *Exsec@ios.doi.gov*.

[5] Report on Hydroelectric Licensing Policies, Procedures, and Regulations, Comprehensive Review and Recommendations Pursuant to Section 603 of the Energy Act of 2000, prepared by the staff of the Federal Energy Regulatory Commission, May 2001.

List of Subjects in 43 CFR Part 25

Administrative practice and procedure, Indians—lands; National parks, Public land, Water resources, Wildlife.

Dated: September 2, 2004.

P. Lynn Scarlett,

Assistant Secretary—Policy, Management and Budget, U.S. Department of the Interior.

For the reasons set forth in the Preamble, part 25 of Title 43 of the Code of Federal Regulations is proposed to be added, as set forth below.

PART 25—HYDROPOWER LICENSING; CONDITIONS AND PRESCRIPTIONS

Subpart A—Mandatory Conditions Review Process

Subpart B—Procedures for Appeal of Mandatory Conditions and Prescriptions in FERC Hydropower Licensing

Authority: 5 U.S.C. 301; 16 U.S.C. 3, 668 dd(d)(1); 25 U.S.C. 2, 9; 43 U.S.C. 1201, 1740.

Subpart A—Mandatory Conditions Review Process

§ 25.1 What is the purpose of this subpart?

This subpart describes the process for the public to review and comment on mandatory conditions and prescriptions

developed by the Department of the Interior for inclusion in a hydropower license issued under subchapter I of the Federal Power Act, 16 U.S.C. 791–823c. The authority to develop these conditions and prescriptions is granted by sections 4(e) and 18 of the Federal Power Act, 16 U.S.C. 797(e) and 811, which authorize the Secretary to condition hydropower licenses issued by the Federal Energy Regulatory Commission and to prescribe fishways.

§ 25.2 What terms are used in this subpart?

As used in this subpart:

Bureau means the U.S. Fish and Wildlife Service, National Park Service, Bureau of Land Management, Bureau of Reclamation, or the Bureau of Indian Affairs.

Department means the U.S. Department of the Interior or one or more of its constituent bureaus.

FERC means the Federal Energy Regulatory Commission.

FPA means the Federal Power Act, 16 U.S.C. 791–823c.

REA Notice means a notice issued by FERC that states that a license application is Ready for Environmental Analysis.

§ 25.3 What is the Mandatory Conditions Review Process?

The Mandatory Conditions Review Process is a process that allows the public to review and comment on preliminary conditions and prescriptions that the Department of the Interior submits for inclusion in a hydropower license issued under subchapter I of the FPA. The process is open to the license applicant, all participants in the licensing process, and the public generally, and is limited to conditions and prescriptions submitted pursuant to sections 4(e) and 18 of the FPA, 16 U.S.C. 797(e) and 811. It does not apply to recommendations filed under sections 10(a) and 10(j) of the FPA, 16 U.S.C. 803(a) and (j).

§ 25.4 When is the Mandatory Conditions Review Process triggered?

The Mandatory Conditions Review Process is triggered when FERC issues a notice indicating that a license application filed pursuant to subchapter I of the FPA, is ready for environmental analysis (REA Notice).

§ 25.5 When will the Department file its preliminary conditions or prescriptions?

(a) Unless the circumstances in paragraphs (b) or (c) of this section apply, the Department will file its preliminary conditions and prescriptions with FERC within 60 days after FERC issues its REA Notice. The Department will include a rationale for the conditions and prescriptions, reference relevant documents already filed with FERC, and provide a schedule of when the preliminary conditions and prescriptions will be modified. The Department's submission to FERC will enable the public to submit comments and new supporting evidence on the preliminary conditions and prescriptions within the comment period provided in §25.6(a).

(b) Exceptional circumstances, such as the filing of competing applications for a hydropower license, may preclude the Department from filing preliminary conditions and prescriptions within 60 days after FERC issues its REA Notice. When exceptional circumstances occur, the Department will work with FERC and the applicant(s) on a case-by-case basis to ensure that an opportunity for public review and comment is provided.

(c) If the Department determines that it does not have sufficient information, such as completed reports on required studies or information on technical feasibility, to support the filing of preliminary conditions and prescriptions, it may exercise its authority under sections 4(e) and 18 of the FPA by reserving the authority to submit conditions and prescriptions at a later date. In these situations, instead of filing preliminary conditions and prescriptions, the Department will file with FERC its reservation of authority within 60 days after FERC issues its REA Notice and will provide the reasons for this action. The Department will accept comments on its reservation of authority.

§ 25.6 When may the public review and comment on the Department's preliminary conditions and prescriptions?

(a) The first opportunity for the public to review and comment on the Department's preliminary conditions and prescriptions is the 45-day period immediately following the Department's submission of preliminary conditions and prescriptions to FERC.

(b) A second opportunity for public review and comment on the Department's preliminary conditions and prescriptions can occur during the period(s) provided by FERC for public comment under the National Environmental Policy Act (NEPA), 42 U.S.C. 4321 *et seq.*, on FERC's draft NEPA document for the license. All comments on the Department's preliminary conditions and prescriptions that are submitted along with comments on the draft NEPA document (or environmental assessment if no draft NEPA document is prepared) should be identified as such.

(c) Comments, which should include supporting evidence, submitted under either paragraph (a) or (b) of this section should be sent directly to the office identified in the Department's submission of preliminary conditions and prescriptions.

(d) Comments submitted during the comment period set forth in paragraph (a) of this section need not be resubmitted during the comment period set forth in paragraph (b) of this section.

§ 25.7 When will the Department submit modified conditions and prescriptions to FERC?

(a) After reviewing FERC's draft NEPA document (or environmental assessment if no draft NEPA document is prepared) and all comments timely received on the Department's preliminary conditions and prescriptions, and after coordinating with Indian tribes and other resource agencies, the Department will modify its preliminary conditions and prescriptions, as needed, and respond to comments.

(b) Based on this review, the Department will submit modified conditions and prescriptions to FERC within 60 days after the close of the comment period in § 25.6(b) unless substantial or new information is received during this comment period that requires additional time for review. In those infrequent situations, the Department will inform FERC, all commenters, and all persons on the FERC service list for the proceeding why such additional time is needed and when it will submit the modified conditions and prescriptions.

(c) The submission described in § 25.7(b) will include the Department's response to comments, an index of the Department's administrative record, and a schedule for filing its administrative record with FERC.

§ 25.8 What process will be used to review conditions and prescriptions submitted as part of an offer of settlement, whether in an alternative licensing process or otherwise?

(a) If the Department submits to FERC preliminary or modified conditions and prescriptions that are not part of an offer of settlement, the procedures in §§25.6 and 25.7 respectively will apply.

(b) If the Department submits to FERC conditions and prescriptions that are part of an offer of settlement, the following procedures will apply:

(1) The Department will review any comments and supporting evidence submitted in response to FERC's notice calling for comments on the offer of settlement that directly address the Department's agreed-upon mandatory conditions and prescriptions.

(2) If the comments are substantive, raise issues not previously identified, and may require changes to the agreed-upon mandatory conditions and prescriptions and/or the offer of settlement, the Department will, in accordance with any applicable settlement communications protocol, discuss the comments and their appropriate resolution with the other settlement participants. If the Department determines, after discussion with the other settlement participants, that the comments warrant a change in the agreed-upon mandatory conditions and prescriptions, the Department will modify the agreed-upon mandatory conditions and prescriptions.

(3) The Department will submit to FERC any changes to the agreed-upon mandatory conditions and prescriptions that are made as a result of comments received under paragraph (b)(2) of this section.

(4) The process described in this paragraph (b) will be the only opportunity for review of the Department's agreed-upon mandatory conditions and prescriptions submitted pursuant to an offer of settlement.

Subpart B—Procedures for Appeal of Mandatory Conditions and Prescriptions in FERC Hydropower Licensing

§ 25.50 What is the purpose of this subpart?

The purpose of this subpart is to describe the appeals process that an applicant for a hydropower license may use to obtain administrative review of modified conditions and prescriptions.

§ 25.51 What terms are used in this subpart?

Applicant means a person or legal entity applying to FERC for a hydropower license at a FERC jurisdictional facility under the Federal Power Act, 16 U.S.C. 791–823c.

Bureau means the U.S. Fish and Wildlife Service, National Park Service, Bureau of Land Management, Bureau of Reclamation, or the Bureau of Indian Affairs.

Department means the U.S. Department of the Interior or one or more of its constituent bureaus.

FERC means the Federal Energy Regulatory Commission.

Indian tribe means a federally recognized Indian tribe.

Mandatory Conditions Review Process (MCRP) means the process described in 43 CFR Part 25, Subpart A.

Modified conditions and prescriptions means mandatory conditions and prescriptions developed for inclusion in a hydropower license pursuant to sections 4(e) and 18 of the Federal Power Act, 16 U.S.C. 797(e) and 811, as modified through the MCRP and filed with FERC after the close of the comment period on the draft National Environmental Policy Act (NEPA) document (or environmental assessment if no draft NEPA document is prepared).

§ 25.52 Who may appeal?

This appeals process is available to applicants for a hydropower license in proceedings in which the Department establishes one or more modified conditions or prescriptions.

§ 25.53 What limits are there to raising an issue on appeal?

The Department's issuance of one or more modified conditions or prescriptions for inclusion in a hydropower license pursuant to sections 4(e) and 18 of the Federal Power Act, 16 U.S.C. 797(e) and 811, may be appealed if the specific issue was previously raised during the MCRP and in the FERC record, or if the modified condition or prescription was primarily based on new information, including technical and scientific data not available when the applicant commented on the Department's preliminary conditions and prescriptions. Modified conditions or prescriptions issued by the Bureau of Reclamation specifically concerning dam safety or security may not be appealed. Modified conditions or prescriptions agreed to in a settlement agreement may not be appealed through this process. Appeals will be reviewed pursuant to the process set forth in §§ 25.55 and 25.59.

§ 25.54 When is an appeal timely?

(a) An appeal is timely if received by the Office of Environmental Policy and Compliance (OEPC) within 30 calendar days after the date the Department files its modified conditions and prescriptions with FERC. The date of the Department's filing with FERC is determined by the date stamp affixed by FERC to the modified conditions and prescriptions.

(b) No extensions of this deadline will be granted.

(c) An appeal not received in a timely manner will be dismissed.

(d) In computing the period of time for filing an appeal, the first day shall be the day after the date affixed by FERC to the modified conditions and prescriptions. The last day of the 30-day period is included in the time period, unless it is a Saturday, Sunday, Federal legal holiday designated at 5 U.S.C. 6103, or other nonbusiness day, in which event the period does not close until the end of the next day which is not a Saturday, Sunday, Federal legal holiday, or nonbusiness day.

§ 25.55 Where is the appeal filed?

(a) An appeal must be filed with the Office of Environmental Policy and Compliance (OEPC), U.S. Department of the Interior, MS 2342, 1849 C St., NW, Washington, DC 20240. The appeal is deemed filed when it is received by OEPC at this address. Upon receipt of the appeal, OEPC will date-stamp the appeal, forward it to the Assistant Secretary (or Assistant Secretaries) with supervisory responsibility over the bureau (or bureaus) that developed the modified conditions or prescriptions, and provide appropriate notice to FERC. The Assistant Secretary (or Secretaries) will designate a professional Departmental review team from a previously authorized, standing pool of Department hydropower professionals to prepare, as appropriate, a substantive assessment of the appeal. The professional review team cannot be comprised of individuals who developed or approved the preliminary or modified conditions or prescriptions that are under appeal, but may consult with Departmental staff.

(b) The applicant shall simultaneously file an information copy of the appeal with FERC. The applicant shall serve a copy of the appeal on parties included on FERC's service list for the license proceeding. The applicant shall certify this service in the appeal filed with OEPC.

(c)(1) The review team will conduct an initial evaluation to determine if the appeal:

(i) Is properly filed consistent with §§ 25.52, 25.53, 25.54, and this section; and

(ii) Contains the required documentation as set forth in § 25.56; and

(iii) Proposes a remedy that is within the Secretary's authority.

(2) If either paragraph (c)(1)(i), (ii), or (iii) is not the case, then the appeal shall be dismissed. Otherwise, the appeal shall be processed.

§ 25.56 What must the appeal include?

For each condition or prescription challenged, the appeal must include the following components. Appeals that do not provide the following information may be dismissed.

(a) A concise statement of the specific reasons for appeal, referencing and meeting at least one of the criteria in § 25.59(c);

(b) A demonstration that the specific issues on appeal were raised during the

MCRP and in the FERC record. If the Department's modified conditions were primarily based on new information that was not available when the applicant commented on the Department's preliminary conditions and prescriptions, a clear identification of the condition or prescription that was modified and the new information on which it was based;

(c) A summary of consultation with the Department, including a statement of disagreements regarding studies, resource impacts, or proposed protection, mitigation, or enhancement measures, as appropriate to the matter or matters being appealed;

(d) A proposed alternative for the appealed condition or prescription which is supported by substantial evidence in the record, is set forth in at least the same level of detail as the appealed condition or prescription, and is reasonably related to alternatives raised during the MCRP and in the FERC record;

(e) An assessment of the effects of the proposed alternative on fish, wildlife, and Indian trust resources; and

(f) Supplementary information that includes the following, as applicable:

(1) The most recent Form 1 filing (if investor-owned utility) or Form 412 filing (if publicly-owned applicant) filing; and if all or part of the basis of the appeal is adverse effect on electricity generation, power revenues, and/or the economic viability of the project,

(i) Data on the most recent five years of system load for the project, including an explanation of any anomalies attributable to a specific time frame or hydrologic condition; and

(ii) An analysis that demonstrates, using historic cost and load data and documented *pro forma* adjustments for future operations, the impacts of the Department's proposed condition or prescription on the cost and operational characteristics of the system, and which provides a comparison to the applicant's proposal.

(2) [Reserved]

§ 25.57 Who may comment on an appeal?

Indian tribes, States, Federal agencies, and the public may comment on an appeal. Comments shall be sent to OEPC at the address specified in § 25.55(a), and must be received by OEPC not later than 21 calendar days from the date on which the appeal was served, as documented in the certification of service submitted by the applicant pursuant to § 25.55(b).

§ 25.58 Who will review the appeal?

The Assistant Secretary (or Assistant Secretaries) with supervisory authority over the bureau establishing the modified condition or prescription will review the appeal. If an applicant appeals the modified conditions or prescriptions of more than one bureau in the same licensing project, then the Assistant Secretaries with supervisory authority over the bureaus shall coordinate their consideration of appeals to assure consistency. If more than one Assistant Secretary is involved and agreement among them is not reached, the appeal will be resolved by the Secretary or the Secretary's designee.

§ 25.59 How will the appeal be reviewed?

(a) The Assistant Secretary's review authority is *de novo.*

(b) The Assistant Secretary will resolve the appeal after considering, among other things, the materials submitted by the applicant pursuant to § 25.56, any substantive assessment prepared by the professional review team designated pursuant to § 25.55(a), any comments submitted pursuant to § 25.57, and any Federal, State, or tribal conditions, prescriptions, or water quality certifications, and pertinent portions of the administrative record filed with FERC in support of the modified conditions or prescriptions.

(c) The Assistant Secretary will assess whether the applicant has demonstrated that:

(1) The modified conditions or prescriptions conflict with conditions or prescriptions of another Department, or conflict with those of another bureau (or bureaus); or

(2) An alternative mitigation measure, preferred by the applicant, is as effective as that of the Department; or

(3) The modified conditions or prescriptions are not reasonably related to the impacts of the project because they mandate a level of mitigation that is inappropriate given the level of impacts attributable to the project.

(d) Before an Assistant Secretary adopts an alternative condition or prescription, he or she must also find that the alternative:

(1) Is supported by the technical and scientific record submitted with the appeal or compiled in the FERC proceeding;

(2) Provides protection consistent with the Department's trustee responsibilities for Indian trust resources;

(3) Provides protection consistent with the Department's responsibilities for fish, wildlife, and cultural resources; and

(4) Will not conflict with conditions or prescriptions of another Department, or conflict with those of another bureau (or bureaus).

(e) The Assistant Secretary will resolve the appeal and file new modified conditions or prescriptions or a notice that the previously filed conditions or prescriptions will not be changed with FERC within 60 days of receipt by OEPC of the appeal.

§ 25.60 How will results of the review be made available?

(a) Findings and results of the review of the Assistant Secretary will be collected and saved by OEPC in a retrievable format, and made available to the public.

(b) Applicants and FERC will be informed promptly by the Department of findings made by the Assistant Secretary (or Assistant Secretaries). All relevant supporting information, to the extent not already part of the FERC administrative record, will be filed with FERC within 15 calendar days of the Assistant Secretary's filing of the results of the review with FERC.

[FR Doc. 04–20392 Filed 9–8–04; 8:45 am]

BILLING CODE 4310–RK–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[DA 04–2672; MB Docket No. 04–338; RM–11061]

Radio Broadcasting Services; Nevada City, CA

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: This document requests comments on a petition for rulemaking filed by Dana J. Puopolo requesting the allotment of Channel 297A at Nevada City, California as that community's first FM commercial broadcast service. The coordinates for Channel 297A at Nevada City are 39–18–00 NL and 121–00–00 WL. There is a site restriction 4.5 kilometers (2.8 miles) north of the community.

DATES: Comments must be filed on or before October 18, 2004, and reply comments on or before November 2, 2004.

ADDRESSES: Secretary, Federal Communications Commission, 445 Twelfth Street, SW., Washington, DC 20554. In addition to filing comments with the FCC, interested parties should serve the petitioner as follows: Dana J.